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LAWYERS REPORTS ANNOTATED

NEW SERIES.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES MORECRAFT
v.
JANE ALLEN, Plff. in Err.

(78 N. J. L. 729, 75 Atl. 920.)

Contract — novation of existing contract — validity.

1. Where the parties to an existing agreement found themselves unable to agree upon the amount due thereunder, it was competent for them to adjust their differences by another contract, whereby the one obligated herself to pay to the other a fixed sum of money in settlement of mutual accounts. Held, that the later contract, under the doctrine of novation, was substituted for the earlier contract, and the rights of the parties were controlled by its terms; the earlier contract being thereby extinguished.

Same — question for jury.

2. Whether such a contract of novation was made was, where the facts were in dispute, a question for the jury.

(Parker, Vroom, Gray, and Congdon, JJ., dissent.)

Headnotes by MINTURN, J.

(February 28, 1910.)

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I. Introduction.

The work of past and contemporary annotators in the first and current series of these reports has materially lightened the labor of the writer of this note by the presentation and discussion of divers special classes of secondary contracts and their consideration.

In studying the subject of this note the reader may be recommended to reperuse the related notes heretofore published in this and the earlier series of L.R.A.

Of these notes attention is particularly directed to the following:

1. The note to Jaffray v. Davis, 11 L.R.A. 710, on debtor and creditor, payment of

ERROR to the Circuit Court for Hudson County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due under a certain contract of novation. Affirmed.

The facts are stated in the opinion.

Messrs. H. K. Gaston and Nelson Y. Dungan, for plaintiff in error:

Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side.

Angell, Limitations, p. 136, ¶ 149; Weatherwax v. Cosumnes Valley Mill Co. 17 Cal. 351; Vaughn v. Hankinson, 35 N. J. L. 83; Rogers v. Newton, 71 N. J. L. 469, 58 Atl. 1100.

The transactions did not constitute either a "mutual account" or an "open account" between the parties.

25 Cyc. 1125.

The oral promise or acknowledgments did not operate to take the case out of the statute of limitation.

Chace v. Trafford, 116 Mass. 529, 17 Am. Rep. 171; Sperry v. Moore, 42 Mich. 359, 4 N. W. 13; Moore v. Blackman, 109 Wis. 528, 85 N. W. 429; Clark v. Alexander, 8 Jur. 496, 8 Scott, N. R. 147, 13 L. J. C. P. N. S. 133; Emery v. Day, 4 Tyrw. 695, 1 Cromp. M. & R. 245, 3 L. J. Exch. N. S. 307; Belchertown v. Bridgman, 118 Mass. 486; Custy v. Donlan, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360; Wood, Limitations, 3d ed. ¶ 280; Angell, Limitations, 5th ed. ¶ 274; 25 Cyc. 1350, and

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part of debt not a bar to collection of balance.

2. The note to Lukens's Appeal, 13 L.R.A. 581, on what is not sufficient consideration for new contract.

3. The note to Fuller v. Kemp, 20 L.R.A. 785, on accord and satisfaction by part payment.

4. The note to Frederick Town Sav. Inst. v. Michael, 33 L.R.A. 628, on the liability of obligors on an original contract as affected by a renewal or substituted contract which is void.

5. The note to Abbott v. Doane, 34 L.R.A. 33, on performance of an existing obligation as consideration for new promise.

6. The note to Trimble v. Rudy, 53 L.R.A. 353, on moral obligation as a consideration for a promise.

7. The note to Brown v. Jennett, 5 L.R.A. (N.S.) 725, on cancelation of invalid contract as consideration for a promise.

8. The note to Linz v. Schuck, 11 L.R.A. (N.S.) 789, and Shriner v. Craft, 28 L.R.A. (N.S.) 450, on the promise of additional compensation for completing an executory contract other than for the payment of money.

9. The note to Bandman v. Finn, 12 L.R.A. (N.S.) 1134, on the distinction between novation and accord executory.

10. The note to Headley v. Cavileer, 48 L.R.A. (N.S.) 504, on the effect of stipulation in building contract that alterations must be ordered in writing.

11. The note to Jobst v. Hayden Bros. 50 L.R.A. (N.S.) 501, on the effect of waiver without new consideration, of time clause in building contract.

There have not been included in this note the cases involving the payment or tender of a less sum of money in discharge of a claim or debt for a larger amount; nor the cases passing on the validity of oral changes of written contracts containing stipulations against any alterations not agreed to in writing; nor, except by the way of incidental references necessary to make plain the distinctions between them and pertinent cases, the cases in which one party to a contract had refused to proceed with its performance unless he should first be paid or promised more money than he would be entitled to receive by the terms of the contract.

The cases involving the consideration of a new agreement extending the time for the payment of a money obligation have been collated and commented upon in a note to Lahn v. Koep, 52 L.R.A. (N.S.) 327, which should be read in connection with this note, since the work is not here duplicated.

And there has been included in this note none of that long line of cases in which has been recognized and applied the doctrine laid down in Stapilton v. Stapilton, 1 Atk. 2, by Lord Hardwicke, when he said: An agreement entered into upon the supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation for an agreement. Or, as that doctrine was stated in Cann v. Cann, 1 P. Wms. 727, by Lord Macclesfield, when he said: Where two parties are contending before this court and one releases his pretensions to the other, there can be no color to set aside this compromise because the man that made it had a right: for by the same reason there can be no such thing as compromising a suit nor room for any accommodation. Every release supposes the party making it to have a right, but this can be no reason for its being set aside, for then every release might be avoided.

Notwithstanding these eliminations, the field of research is both a wide and difficult one to cover. Two reasons have influenced the writer to set out rather fully the many cases in which the validity of secondary contracts was involved, because it seemed to be the most effective way of serving the student of this subject. The first of these may be best understood by the following extract from an opinion of the Kentucky court of appeals in a recent decision: It is sometimes difficult, according to that

note; Magarity v. Shipman, 93 Va. 64, 24 S. E. 466; Burns v. Harvell, 32 Ga. 602; Price v. Price, 34 Iowa, 404; Adams v. Mills, 49 La. Ann. 775, 22 So. 257; Chevalier v. Hyams, 9 La. Ann. 484; Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829; Floyd v. Pearce, 57 Miss. 143; Parker v. Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407; Auzerais v. Naglee, 74 Cal. 67, 15 Pac. 371; Ludlow v. Van Camp, 7 N. J. L. 113, 11 Am. Dec. 529; Marsdon v. Seabury, 3 N. J. L. 702, 4 Am. Dec. 409; Van Dike v. Van Dike, 15 N. J. L. 298; Estes v. Hamilton-Brown Shoe Co. 54 Mo. App. 543; Sloan v. Sloan, 11 Ark. 32.

Messrs. **Roberson & Demarest**, for defendant in error:

If, in the account stated, the defendant agreed to pay for services rendered more than six years previously to the promise, the statute of limitations runs from the date of the account stated, and not from the date when the services were rendered.

1 Cyc. 364, 451; McClelland v. West, 70 Pa. 183; Porter v. Chicago, I. & D. R. Co. 99 Iowa, 351, 68 N. W. 724.

The plaintiff, during the continuance of the first contract, would have had no right to bring an action, and his right to action first began when the original contract of the defendant to compensate in real estate was terminated by the new agreement.

Campbell v. Culver, 56 App. Div. 501, 67 N. Y. Supp. 469; East India Co. v. Paul, 14 Jur. 253, 7 Moore, P. C. 85; Campbell v. Boggs, 48 Pa. 524; Bonesteel v. Van

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tribunal, to determine, when a change in a written contract has been accomplished by a parol agreement of the parties, whether the result is a mere modification of the original written agreement or the substitution of a new contract operating to discharge the original one. The weight of authority, however, seems to be that when the change so agreed upon goes to a material provision of the original contract, a new contract operating to discharge it results. Homire v. Stratton & T. Co. 157 Ky. 822, 164 S. W. 67.

Although none of the cases expressly so hold, a scrutiny of all will disclose that more of a consideration is requisite to support a secondary contract that replaces a primary one than is required to uphold a new agreement that leaves the original intact except as modified. In the one case some new consideration, however slight, must appear, in the other the original consideration suffices.

A second reason for setting forth the individual cases in point was found in a paper by Dean Ashley of the faculty of New York University, recently published (26 Harvard L. Rev. 429), advocating the abolition of the whole doctrine of consideration. In the course of his article, Prof. Ashley said: With such importance attached to a technical requirement of the law, it is not unreasonable for the lay public to ask for a scientifically accurate definition of the term "consideration." It is believed, however, that no satisfactory definition can be given. Deplorable as this may be, it seems nevertheless true. It is due to a lack of legal terminology, which causes confusion when any form of words is used which attempts to explain. A definition to be of value should indicate within its confines just what it describes, otherwise it is certainly inaccurate and may lead to erroneous conclusions. . . . After all the years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration. There is not even a full agreement as to what it is.

Finally, there have been taken out of their logical places in the body of the note secondary agreements of landlords and tenants altering the terms of existing leases in sundry particulars, the chief of which are reductions of rents. Their transposition fortunately does not impair the value of the groups from which they have been lifted, the other material being too abundant, and, while it must be admitted that their separate presentation is not philosophical, they are likely to be of more service to the reader presented alone.

II. Necessity of consideration for secondary agreements.

As is the case with all other contracts, a new agreement by the parties to an older one, altering, canceling, supplementing, or supplanting their former compact, in order to be valid, requires some consideration to support it.

U. S.—Baltimore Refrigerating & Heating Co. v. Wetzel, 89 C. C. A. 117, 162 Fed. 117; Empire State Surety Co. v. Hanson, 107 C. C. A. 1, 184 Fed. 58.

Ala.—Burkham v. Mastin, 54 Ala. 122; Maness v. Henry, 96 Ala. 454, 11 So. 410; Shriner v. Craft, 166 Ala. 146, 28 L.R.A. (N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

Ark.—Thompson v. Robinson, 34 Ark. 44; First Nat. Bank. v. Nakdimen, 111 Ark. 223, 163 S. W. 785; Feldman v. Fox, — Ark. —, 164 S. W. 766; Capitol Food Co. v. Mode, — Ark. —, 165 S. W. 637.

Cal.—Adler v. Friedman, 16 Cal. 139; Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937; Re McDougald, 146 Cal. 196, 79 Pac. 875.

Colo.—Cofield v. Clark, 2 Colo. 101; Leonard v. Hallett, — Colo. —, 141 Pac. 481.

D. C.—Littlepage v. Neale Pub. Co. 34 App. D. C. 257.

Fla.—Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346.

Ga.—Mills v. Mercer, Dudley (Ga.) 158; Austell v. Rice, 5 Ga. 472; C. H. Davis & Co. v. Morgan, 117 Ga. 504, 61

Etten, 20 Hun, 468; Shimmins v. United States, 10 Ct. Cl. 465.

A continuance of mutual transactions to a running contract is a bar to the action as proved, unless there is a breach.

Baxter v. Gay, 14 Conn. 119; Barnes v. Ryan, 66 Hun, 170, 21 N. Y. Supp. 127; Wittersheim v. Carlisle, 1 H. Bl. 631.

Where an account has been settled and stated and a balance agreed upon, a new cause of action is thereby created, and the statute runs from the date of settlement.

25 Cyc. 1132, note 52.

If the defendant was indebted to the plaintiff and agreed to pay a certain amount in liquidation of the debt, she was bound by her agreement no matter how harsh it might be.

Consolidated Traction Co. v. Chenowith, 58 N. J. L. 416, 34 Atl. 817; Freeman v. Bartlett, 47 N. J. L. 33; Humphreys v. Woodstown, 48 N. J. L. 588, 7 Atl. 301; Enstice v. Courtwright, 61 N. J. L. 653, 40 Atl. 676.

Minturn, J., delivered the opinion of the court:

The declaration, which was upon the common counts, contained this bill of particulars: "To board of defendant with plaintiff from 1889 to 1894 intermittently, and board from 1894 to 1904 as per agreement between plaintiff and defendant, whereby the defendant agreed, on or about the 1st day of September, 1904, to pay to the said plaintiff for said services the sum of $500."

L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; Willingham Sash & Door Co. v. Drew, 117 Ga. 850, 45 S. E. 237; J. A. Fay & E. Co. v. Dudley, 129 Ga. 314, 58 S. E. 826; Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

Ill.—McKinley v. Watkins, 13 Ill. 140; Barnett v. Barnes, 73 Ill. 217; Loach v. Farnum, 90 Ill. 368; Goldsborough v. Gable, 140 Ill. 269, 15 L.R.A. 294, 29 N. E. 722; Lord v. Haufe, 77 Ill. App. 91.

Ind.—Jarvis v. Sutton, 3 Ind. 289; Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328; Smith v. Tyler, 51 Ind. 512; Smith v. Boruff, 75 Ind. 412; Hyler v. Humble, 100 Ind. 38; Indiana Veneer & Lumber Co. v. Hageman, — Ind. App. —, 105 N. E. 253.

Iowa.—Jones v. Alley, 4 G. Greene, 181; Tomlinson v. Smith, 2 Iowa, 39; Hall v. Smith, 15 Iowa, 585; Ayres v. Chicago, R. I. & P. R. Co. 52 Iowa, 478, 3 N. W. 522; Wheeler v. Baker, 59 Iowa, 86, 12 N. W. 767; Carruthers v. McMurray, 75 Iowa, 173, 39 N. W. 255; Pence v. Adams, 116 Iowa, 462, 89 N. W. 1065.

Kan.—George v. Lane, 80 Kan. 94, 102 Pac. 55.

Ky.—Clausen v. Railey, 145 Ky. 350, 140 S. W. 547.

Me.—Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21; Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43.

Mass.—Smith v. Bartholomew, 1 Met. 276, 35 Am. Dec. 365; Com. v. Johnson, 3 Cush. 454; Pool v. Boston, 5 Cush. 219; Warren v. Hodge, 121 Mass. 106; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590.

Mich.—Bell v. Utley, 17 Mich. 508; Bartlett v. Smith, 146 Mich. 188, 117 Am. St. Rep. 625, 109 N. W. 260.

Minn.—Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860; Little v. Rees, 34 Minn. 277, 26 N. W. 7; King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

Mo.—Pfeiffer v. Kingsland, 25 Mo. 66; Williams v. Williams, 67 Mo. 661; McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Montgomery County v. Auchley, 92 L.R.A.1915B. Mo. 126, 4 S. W. 425; Lingenfelder v. Wainwright Brewing Co. 103 Mo. 578, 15 S. W. 844; MacFarland v. Heim, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030; Merrill v. Central Trust Co. 46 Mo. App. 236; Wilson v. Russler, 91 Mo. App. 275; Wear Bros. v. Schmelzer, 92 Mo. App. 314; Koerper v. Royal Invest. Co. 102 Mo. App. 543, 77 S. W. 307; Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126; Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275; McCrary v. Thompson, 123 Mo. App. 596, 100 S. W. 535; Holladay-Klotz Land & Lumber Co. v. Beekman Lumber Co. 136 Mo. App. 176, 116 S. W. 436; Norris v. Letchworth, 140 Mo. App. 19, 124 S. W. 559; Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733; Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448; Wilt v. Hammond, — Mo. App. —, 165 S. W. 362.

Neb.—Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838.

N. J.—Stryker v. Vanderbilt, 27 N. J. L. 68; Conover v. Stillwell, 34 N. J. L. 54; Nightingale v. Meginnis, 34 N. J. L. 461; Titus v. Cario & F. R. Co. 37 N. J. L. 98; Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22; Sommers v. Myers, 69 N. J. L. 24, 54 Atl. 812; Bishop v. Smith, — N. J. L. —, 57 Atl. 874; Moneyweight Scale Co. v. Vansciver, 76 N. J. L. 215, 68 Atl. 905; Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009; Watts v. Frenche, 19 N. J. Eq. 407.

N. Y.—Tryon v. Mooney, 9 Johns. 358; Bartlett v. Wyman, 14 Johns. 260; Wood v. Edwards, 19 Johns. 205; Crosby v. Wood, 6 N. Y. 369; Holden v. Putnam F. Ins. Co. 46 N. Y. 1, 7 Am. Rep. 287; Organ v. Stewart, 60 N. Y. 413; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120, aff'g 7 Hun, 157; Vanderbilt v. Schreyer, 91 N. Y. 392; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; Tinker v. Geraghty, 1 E. D. Smith, 687; McMaster v. Koehner, 12 Jones & S. 253; Smith v. Kerr, 33 Hun, 567, aff'd in 108 N. Y. 31, 2 Am. St. Rep.

To this the defendant pleaded the general issue and the statute of limitations, and the plaintiff replied.

The facts elicited at the trial were that the plaintiff, a builder residing at Bayonne, arranged with the defendant, his aunt, to reside with him, and that she did reside with him in the year 1888, and on and off until 1894, after which latter year she resided with him continuously until 1904. In 1894 the defendant purchased a lot adjoining the plaintiff's home, upon which she erected a small house, and then entered into a verbal agreement with the plaintiff that, in consideration of her board at his home, she would allow him to collect and retain the rents of her house during her life, and upon her death he should receive the property itself. The defendant, an aged lady, after making this agreement, continued in the plaintiff's household, performing no particular service, and received the attentions of the plaintiff's family as a member of his household, while he, in pursuance of the agreement, collected the rents, and, after the payment of certain claims, municipal and otherwise, against the property, and some claims against the defendant personally, retained the balance of the rents for his own use. In 1904, the defendant, becoming suspicious of the plaintiff's intentions regarding her property, decided to give up her residence with the plaintiff, and then inquired of plaintiff as to her indebtedness, to which plaintiff replied that he thought she owed him $1,000, but that he

362, 15 N. E. 70; Signer v. Newcomb, 42 Hun, 655, 6 N. Y. S. R. 315; Purdy v. Rome, W. & O. R. Co. 52 Hun, 267, 5 N. Y. Supp. 217, aff'd in 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255; Babcock v. Kuntzsch, 85 Hun, 615, 66 N. Y. S. R. 47, 32 N. Y. Supp. 663; Cosgray v. New England Piano Co. 10 App. Div. 351, 41 N. Y. Supp. 886; Calvert v. Cary, 50 App. Div. 619, 63 N. Y. Supp. 547; Jughardt v. Reynolds, 68 App. Div. 171, 74 N. Y. Supp. 152; Majory v. Schubert, 82 App. Div. 633, 81 N. Y. Supp. 703; Fanger v. Caspary, 87 App. Div. 417, 84 N. Y. Supp. 410; Bosoian v. Hubbard, 121 App. Div. 510, 106 N. Y. Supp. 178; Moskowitz v. Hornberger, 20 Misc. 558, 46 N. Y. Supp. 462; Rooney v. Thomson, 84 N. Y. Supp. 263; Kaven v. Chrystie, 84 N. Y. Supp. 470; Taubenblatt v. Galewski, 108 N. Y. Supp. 588; Rieser v. Calvert Constr. Co. 108 N. Y. Supp. 747; American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236; Altmayer v. Lahn, 113 N. Y. Supp. 964; Walters v. Borgia Marble Works, 125 N. Y. Supp. 548; Galway v. Prignano, 134 N. Y. Supp. 571; United Merchants' Press v. Corn Products Ref. Co. 76 Misc. 232, 134 N. Y. Supp. 578; Manhattan Top & Body Co. v. Boymann, 137 N. Y. Supp. 883.

N. C.—Hatchell v. Odom, 19 N. C. (2 Dev. & B. L. 302; Paxton v. Wood, 77 N. C. 11; Brown v. Catawba River Lumber Co. 117 N. C. 287, 23 S. E. 253.

N. D.—Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318.

Ohio.—Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328; Marshall v. Ames, 11 Ohio C. C. 363, 5 Ohio C. D. 403.

Pa.—Lukens's Appeal, 143 Pa. 386, 13 L.R.A. 581; Cannon v. Young, 5 Pa. Dist. R. 772; Taylor v. Winters, 6 Phila. 126.

R. I.—Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370.

S. C.—Smith v. Tunno, 1 M'Cord, Eq. 443, 16 Am. Dec. 617; Colcock v. Louisville, C. & C. R. Co. 1 Strobh. L. 329.

S. D.—Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000.

Tex.—Hogan v. Crawford, 31 Tex. 633; Waterbury v. Laredo, 68 Tex. 565, 5 S. W. 81; Gulf, C. & S. F. R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; Jones v. Risley, 91 Tex. 1, 32 S. W. 1027; Missouri, K. & T. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Brin v. McGregor, — Tex. Civ. App. —, 45 S. W. 923; Kahle v. Plummer, — Tex. Civ. App. —, 74 S. W. 786; Walker v. Tomlinson, 44 Tex. Civ. App. 446, 98 S. W. 906; Wilson v. Ellis, — Tex. Civ. App. —, 106 S. W. 1152; Cotulla v. Barlow, — Tex. Civ. App. —, 115 S. W. 294, s. c. on subsequent appeal, 141 S. W. 292; Whitsett v. Carney, — Tex. Civ. App. —, 124 S. W. 443; Sanborn v. E. R. Roach Drug Co. — Tex. Civ. App. —, 137 S. W. 182; Consumers' Fertilizer Co. v. Badt, — Tex. Civ. App. —, 157 S. W. 226; Bonzer v. Garrett, — Tex. Civ. App. —, 162 S. W. 934.

Utah.—McIntyre v. Ajax Min. Co. 20 Utah, 323, 60 Pac. 552, 20 Mor. Min. Rep. 142; Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331.

Vt.—Larabee v. Ovit, 4 Vt. 45; Bryant v. Gale, 5 Vt. 416; Brandon v. Jackson, 74 Vt. 78, 52 Atl. 114; Manley v. Vermont Mut. F. Ins. Co. 78 Vt. 331, 62 Atl. 1020, 6 Ann. Cas. 562.

W. Va.—Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 61 S. E. 815; Thomas v. Mott, — W. Va. —, 82 S. E. 325.

Wis.—Kingman v. Watson, 97 Wis. 596, 73 N. W. 438.

No contract is obligatory without some consideration, and a new agreement abrogating or modifying an old one is no exception. Smith v. Tunno, 1 M'Cord, Eq. 443, 16 Am. Dec. 617.

Every new agreement of the sort requires a consideration to give it validity. Hogan v. Crawford, 31 Tex. 633.

An agreement substituted for an existing contract is not valid without a consideration. Holladay-Klotz Land & Lumber Co. v. Beekman Lumber Co. 136 Mo. App. 176, 116 S. W. 436.

It is well settled that an agreement to rescind a contract to operate as an abrogation of it, must be supported by a valu-

would take $500 in settlement. To this the defendant assented, and, according to the testimony of plaintiff and his wife, then agreed with plaintiff to pay him $500 in settlement of their mutual accounts. The defendant thereafter applied to plaintiff's brother, requesting a loan of that amount, and stating that she had settled with the plaintiff upon that basis. The brother, being unable to advance the loan personally, went with her to a lawyer's office in Jersey City, to whom she made known the terms of her agreement with the plaintiff, and offered to secure the loan of the required money by a mortgage upon her property. The lawyer agreed to procure the loan, and drew the bond and mortgage to secure its payment, but the defendant failed to execute them. Subsequent to this the defendant informed another brother of the plaintiff of the existence of her agreement to pay the $500, and requested him to lend her the money. The money was not procured, and this action was brought to recover it. The defendant denied the indebtedness, and also denied the making of the agreement to pay $500, and this status created an issue of fact, which the trial court submitted to the jury, and upon which they found for the plaintiff for the amount claimed.

The defendant's counsel, upon a motion to nonsuit, insisted that the alleged promise of the defendant to convey her property was made anterior to six years, and that the promise to pay $500 did not prevent the operation of the statute of limi-

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able consideration. Lipschutz v. Weatherly, 140 N. C. 368, 53 S. E. 132.

A subsequent agreement which does not form any part of an original contract, and is not supported by the original consideration thereof nor by any new consideration, is a mere nude pact of no force or validity. First Nat. Bank v. Nakdimen, 111 Ark. 223, 163 S. W. 785.

A release of vested rights under a contract is itself a contract, and must be based on a consideration. Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 61 S. E. 815.

A voluntary surrender of valuable contract rights is of no effect unless supported by a consideration. Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733.

When by statute every payment upon a bill, bond, note, mortgage, or other writing evidencing a debt, in excess of the interest allowed by law, must be credited in reduction of the principal, an agreement for a premium presently paid in money, by the holder and the maker of an overdue protested promissory note upon which indorsers have been duly charged, which definitely extends and postpones the time of payment, is a mere nude pact of no binding force for want of a sufficient legal consideration, and hence cannot operate to discharge the indorsers. Nightingale v. Meginnis, 34 N. J. L. 461.

An agreement by one member of a firm that the other's interest in the partnership property shall be a certain fixed sum in any event requires some consideration to give it validity. And there must be some consideration beyond mere mutual consent to support a promise by one partner to surrender to the other his interest in the partnership property. Clausen v. Railey, 145 Ky. 350, 140 S. W. 547.

To rescind a completed bargain and sale of personal property requires some positive agreement upon a valid legal consideration. Bell v. Utley, 17 Mich. 508.

The revocation of a contract must be supported by a meritorious or valuable consideration. Lukens's Appeal, 143 Pa. 386, 13 L.R.A. 581.

A consideration is requisite to support the cancelation of an agreement to sell and deliver goods. Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275.

A naked agreement extending the time fixed by contract for the payment of the purchase price of personal property sold and delivered, being without consideration, is not valid. Babcock v. Kantzsch, 85 Hun, 615, 66 N. Y. S. R. 47, 32 N. Y. Supp. 663.

An alteration of a bill of sale of slaves, made by a footnote, from an absolute conveyance to a mere life estate, is not good without a valuable consideration. Mills v. Mercer, Dudley (Ga.) 158.

An agreement by the vendors of land to accept a reconveyance and to repay to the vendees all money paid by them, in case a projected railroad should not be completed to a near-by town within a stated time, made after a contract for the sale and purchase of the land, complete in all its parts, had been entered into and closed on both sides, without any increase in the purchase price or the assumption by the vendees of any obligation, burden, or duty beyond what the original contract imposed upon them, is unsupported by any sufficient consideration, and hence is void. Pence v. Adams, 116 Iowa, 462, 89 N. W. 1065.

An oral contract between a shipper and a railroad company requiring the carrier to furnish, for the former's use at a stated time, a stock car for a shipment of live stock to a named destination, is not abrogated and supplanted after the carrier has broken it, by a subsequent written contract for the carriage of the stock, signed and delivered by the shipper, unless a payment is made to him by the carrier of some consideration by way of compensation for the damages he sustained by the breach of the oral agreement to furnish the car at the appointed time and place. Clark v. Ulster & D. R. Co. 189 N. Y. 93, 13 L.R.A. (N.S.) 164, 121 Am. St. Rep. 848, 81 N. E. 766. 12 Ann. Cas. 883.

For a new promise to have the effect of extinguishing an existing cause of action,

tations, because it was not in writing, and therefore not in compliance with § 10 of that act (Gen. Stat. p. 1976, § 17). The court was also requested to charge substantially the same proposition in detailed form at the end of the case, and the court's refusal in each instance is made the basis for the bill of exceptions here presented. The case was presented to the jury by the trial court upon the simple issue of fact whether the defendant made the agreement sued upon, with instructions that if such an agreement had been made, it was binding upon her, and in this we think the trial court was correct. The plaintiff's case was not based upon the defendant's failure to carry out her original contract to convey her property to plaintiff, and allow him in the interim to receive and retain her rents; and the relevancy of that feature of the case was important in this issue only so far as its existence furnished *quid pro quo* for the agreement sued upon. The correct conception of the case presents an entirely new agreement, entered into between the parties in substitution for the previous agreement; and this, upon well-settled legal principles, constituted a novation, to which the statute of limitations has no application under the facts of this case.

The effect of the testimony in favor of the plaintiff led to the conclusion that the parties recognized an existing legal obligation, disputable in amount, which would require both computation, delay, and perhaps protracted discussion pro and con to

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it must be legally binding and enforceable as a substitute, and rest like every other contract upon a good consideration. Manley v. Vermont Mut. F. Ins. Co. 78 Vt. 331, 62 Atl. 1020, 6 Ann. Cas. 562.

No promise is good in law without a legal consideration for it. Thomas v. Mott, — W. Va. —, 82 S. E. 325.

A promise by an owner to pay a contractor for building materials rejected by the architect according to the provisions of a written contract for constructing a building, where the architect acted in good faith, is without consideration and void. Brin v. McGregor, — Tex. Civ. App. —, 45 S. W. 923.

An oral promise to deliver a chattel within ten days from the date of a contract in writing providing for the sale and delivery of such chattel as soon as possible, made by the selling agent of the vendor to the purchaser after the written contract had been fully signed, exchanged, and closed on both sides, is *nudum pactum* for want of consideration. Moneyweight Scale Co. v. Vansciver, 76 N. J. L. 215, 68 Atl. 905.

A promise by the vendor in a contract to convey real estate, made coincidentally with his tender of performance and immediately following the purchaser's default on the day fixed in the contract for closing the transaction, extending the time to complete, is of no validity without a new consideration. Stryker v. Vanderbilt, 27 N. J. L. 68.

It has been said that a new contract varying the provisions of an existing binding contract upon the same subject-matter requires some new consideration, and if it has none, is void. Barlow v. Cotulla, — Tex. Civ. App. —, 141 S. W. 292.

Also that, for a contract to operate wholly or partly to discharge a prior contract, it must have a valuable consideration. Whitsett v. Carney, — Tex. Civ. App. —, 124 S. W. 443.

A written contract to convey land cannot be varied by a subsequent oral agreement making the time of payment of the essence of the contract, which was not so originally, without some new consideration. Jones v. Alley, 4 G. Greene, 181.

A subsequent agreement by one previously contracting to purchase a farm from the ostensible owner, to accept in lieu of his another's deed, is a new and independent contract, not valid unless supported by a new consideration. Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43.

And it has been declared requisite that every such new agreement should rest upon a new and valuable consideration. Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346.

The cases, however, cited in this note, show that while there must indeed always be some consideration for agreements of this sort, that consideration need not be new in all cases nor especially valuable.

The modification of an existing contract is nothing more or less than a new contract, and like every other contract it must rest upon a consideration. Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Tinker v. Geraghty, 1 E. D. Smith, 687; Marshall v. Ames, 11 Ohio C. C. 363, 5 Ohio C. D. 403.

Those who make a contract have power to modify it by a subsequent agreement, but, to give the modification contractual force, there must be a sufficient consideration. Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448.

And ordinarily there must be a new consideration for the alteration of a contract, unless there are mutual undertakings which may form a consideration for the change. Capitol Food Co. v. Mode, — Ark. —, 165 S. W. 637.

An oral contract, if valid in itself, and not within the statute of frauds, for work and service for a year following at a stated compensation payable weekly, is not merged in or nullified by a subsequent written agreement giving the master a right arbitrarily to discharge the servant at the end of any week, because the latter is unsupported by a sufficient consideration. Fanger

reduce to a financial certainty; that they met and settled their difference by adjusting the indebtedness of one to the other at the sum of $500, which the debtor then and there agreed to pay, and took steps at once to make her agreement effectual. This agreement, in legal parlance, became novated or substituted for the prior arrangement between the parties, and the statute of limitations commenced to run only from the inception of the agreement.

A comparatively early case (Taylor v. Hilary, 1 Cromp. M. & R. 741) formulated the principle, after a controversial era of subtle discussion in the exchequer chamber and the house of lords, as to the necessity for an express consideration to support a bilateral contract based only upon mutual promises, that "before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part. . . . The latter then is a substituted contract, and is an answer to an action upon the former." Commenting upon this deliverance, a modern writer of distinction says: "The result of the matter is that, while the simple executory accord is nugatory, what we may call a double executory accord is good. As long as there are mutual obligations, those obligations by mutual consent can be abrogated or changed, or new obligations can be substituted in their place. . . . Where there are mutual executory obligations, the agreement to annul on one side is said to be supported by the consideration of the

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v. Caspary, 87 App. Div. 417, 84 N. Y. Supp. 410.

After cattle have been delivered to a common carrier for transportation to a live stock market by a shipper, under a parol shipping contract complete in all particulars, a new contract entered into at the demand of the carrier varying in several material respects the previous one, both by releasing the carrier from some of its obligations and imposing additional and onerous burdens upon the shipper, but neither lessening the charges for freight nor giving an additional advantage or benefit of any kind to the shipper, is invalid for want of any consideration to support it. Gulf, C. & S. F. R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; Missouri, K. & T. R. Co. v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

An oral agreement between the vendor and vendee of land covered by a deed of trust to secure the payment of the purchase money and interest, that a part of the land conveyed to a third person should be released from the lien of such deed, and the note taken from such third person for the purchase money should be indorsed and transferred to the original vendor and its proceeds be credited, both principal and interest, on the original vendee's debt, carried out by an assignment and delivery of such note as collateral, is not merged in or superseded by a subsequent writing agreeing that for the release of lien the original vendor might keep for himself the interest on the third person's note and give credit only for the principal, since the latter agreement is unsupported by any consideration. Cotulla v. Barlow, — Tex. Civ. App. —, 115 S. W. 294.

A new agreement supplanting or modifying an old contract must have a consideration to support it, but it is not essential that such consideration be a new or an additional consideration, in any sense apart from and independent of the original contract. Prye v. Kalbough, 34 Utah, 306, 97 Pac. 331.

A later agreement not a part of an original contract, and unsupported by its consideration or a new one, is a nude pact of no validity. Pfeiffer v. Kingsland, 25 Mo. 66; Williams v. Williams, 67 Mo. 661; McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Montgomery County v. Auchley, 92 Mo. 126, 4 S. W. 425; Macfarland v. Heim, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030.

An oral contract of common carriers to furnish at a particular time and place stock cars for transporting live stock to a named destination is not abrogated and supplanted by a subsequent written contract respecting the transportation of the animals to the destination, exacted by the carrier after a breach of the oral contract, as a preliminary to taking the stock on board. Gulf, C. & S. F. R. Co. v. House, 40 Tex. Civ. App. 105, 88 S. W. 1110.

This decision was substantially like that rendered in the New York case of Clark v. Ulster & D. R. Co. 189 N. Y. 93, 13 L.R.A.(N.S.) 164, 121 Am. St. Rep. 848, 81 N. E. 766, 12 Ann. Cas. 883.

An executory contract may always be altered or modified by the parties, but the varying of it is as much a matter of contract as was the original agreement, and every agreement adding to the terms of an existing contract and imposing new and onerous burdens upon one of the parties to it certainly requires the support of a consideration. Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

In a case not specially important to this note in other respects, Judge Potter, of New York, in dissenting from the conclusion, said *arguendo*, and aptly to the subject here in hand: It is elementary law that an adequate consideration is essential to the binding force of a contract, whatever may be the form or subject of the contract. Whether the contract is original, creating a status or condition of things that did not before exist, or whether it is secondary, changing the condition of things created by a former or existing contract, a consideration is as necessary to the secondary as to the primary contract. Hence a later contract having precisely

agreement to annul on the other. To use the popular formula, the mutual promises are considerations for each other." 2 Street, Legal Liability, p. 127. The same conclusion is reached in 29 Cyc. 1133, wherein it is stated, upon the strength of a number of cited cases: "A novation, like other valid contracts, must be supported by a consideration, which in this case is the discharge of the original debt." And again: "Novation may take place by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation. The question is always one of intention." 29 Cyc. 1134, and cases. Many concrete illustrations of the application of this doctrine are afforded by the adjudications in other jurisdictions, where it is quite unanimously held that, when damages are unliquidated, a fair settlement and compromise of a claim which has some legal merit, though less in amount than was claimed, is favored by the courts if intended to be final, upon the principle, doubtless, *Interest reipublicæ ut sit finis litium.* Specialty Glass Co. v. Daley, 172 Mass. 460, 52 N. E. 633; Morehouse v. Second Nat. Bank, 98 N. Y. 503; Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722; Chetwood v. California Nat. Bank, 113 Cal. 649, 45 Pac. 854; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448; Lattimore v. Harsen, 14 Johns. 330; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Connelly v. Devoe, 37 Conn. 570.

The maxim of procedure is *Novatio non*

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the elements of a former contract is invalid and incapable of enforcement for the reason that it has no consideration. Wahl v. Barnum, 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280.

After a contract for the sale on credit of land, in which time was made of its essence, has lapsed by failure of performance within the time limited, and default has continued for two years, a parol promise by the vendor to wait several months longer and upon payment of the purchase price to convey the land is void for want of mutuality and a consideration, and ineffectual to revive or extend the original contract. Tomlinson v. Smith, 2 Iowa, 39.

An agreement by the vendors of land, made after a contract for the sale and purchase of such lands has been signed and delivered on both sides, allowing the vendee the rents until the date for passing title, because of his complaint that he had made a hard bargain, is invalid for want of any consideration. Bonzer v. Garrett, — Tex. Civ. App. —, 162 S. W. 934.

The rule that the compromise of a controversy between the parties furnishes a consideration for a contract of settlement does not apply to a contract between an owner of woodland, her grantee of the timber, and the latter's licensee of the right to take turpentine from the pine trees, restricting rights already deeded to a part only of the lands, in the absence of proof that there was any bona fide dispute, or that it should be settled by mutual covenants in such contract, or that the landowner relinquished any claim previously made as a consideration. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

Ordinarily, no statute interfering, an agreement by a mortgagee to reduce from 10 to 7 per centum per annum the interest upon the mortgage debt upon the undertaking, in return of the mortgagor, to pay the taxes assessed by law upon the mortgage and the mortgaged premises, is supported by a legal and valuable consideration. But inasmuch as in California a statute (Code Civ. Proc. § 1494) prohibits the holder of a mortgage against an insolvent estate of a deceased mortgagor from charging or receiving on the mortgage debt interest at a rate greater than 7 per centum per annum, a mortgagee's agreement to reduce from 10 to 7 per centum per annum the interest on a mortgage debt in return for the undertaking of the mortgagor to pay the taxes on both the land and mortgage, where the mortgagor had died insolvent, affords no consideration to support the latter's agreement to pay taxes on the mortgage, because the mortgagee has done nothing beyond what the law obliged him to do in such a case. Re McDougald, 146 Cal. 196, 79 Pac. 875.

After a written lease has been signed by both landlord and tenant, which does not provide for payment of the rent in advance, if a remark of the lessor that he expected his rent on the first of the month, and an assenting reply of the lessee, may be deemed an oral modification of the lease and a promise by the tenant to pay rent in advance, they are *nudum pactum*, and invalid for want of a consideration. Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22.

An oral agreement by a landlord to reduce the rent payable by a tenant under a lease in writing and under seal, without a surrender of such lease, in return for the payment of rent past due and the costs of an action to recover it, before judgment, is void for want of consideration, because the tenant merely discharged a legal obligation resting upon him to pay back rent and cost. Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun, 157.

An agreement by the purchaser of a building occupied by a tenant under a lease from the former owner for a term of years at a stated rent the month, to the effect that such tenant might continue to occupy the building rent free until it should be torn down, is void both for uncertainty and want of consideration. Kaven v. Chrystie, 84 N. Y. Supp. 470.

In an action by a lessor to recover the possession of leased land, a plea by the tenant alleging a subsequent parol agreement to make promissory notes with good

præsumitur, and therefore whether such an agreement was actually entered into between the parties, so as to bring this case within the doctrine referred to, is a question of fact for the jury, where the facts are in dispute; and hence, in this instance, the question was properly submitted to the jury. Whether or not a debt has been novated is ordinarily a question of fact, and depends entirely upon the intention of the parties. Where there is no doubt as to the terms of the agreement, it is a question of law. But if the terms of the agreement are equivocal or uncertain, then it becomes a question of fact for the jury under suitable instructions. 29 Cyc. 1140, and cases.

The judgment is affirmed.

Parker, Vroom, Gray, and Congdon, JJ., dissent.

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security for payment of the rent is bad on demurrer for failing to show any consideration for the subsequent oral agreement, so as to make it a substitute for the written lease, and bar the lessor's right of possession pending the execution of the notes. Hyler v. Humble, 100 Ind. 38.

After a written contract of sale and purchase of live stock, complete in all parts, specifying a maximum and minimum number of animals deliverable, their kind, quality, and the minimum weight of each, the time and place of delivery, the price and time of payment, the latter coincident with delivery, has been entered into and become fully binding upon both seller and buyer, a subsequent oral agreement without any new and independent consideration moving to the buyer, requiring him to make in advance of delivery a payment of part of the purchase money, is unsupported by a consideration and cannot be enforced. Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

An agreement by the seller of a horse to return to the buyer a third person's promissory note delivered in part payment of the purchase money under a sale contract providing for the return of the animal unless within a stated time the buyer should give good security for the purchase price remaining unpaid, and for the forfeiture of the note to the seller, lacks a supporting consideration. Larabee v. Ovit, 4 Vt. 45.

A building contract in writing and under seal, requiring the contractor to conform to all deviations, alterations, additions, and omissions desired by the owner without affecting or nullifying the contract, but making the contract price subject to such additions or deductions as the case should require, gives the owner an absolute right to order changes in the work, and binds the contractor to obey his directions in that regard; hence, an order by the owner to substitute certain work for other work contracted to be done, and the promise of the contractor to do it, does not amount to a new agreement modifying the contract in that respect, and, if it could be so deemed, it would be without any consideration to support it. Tinker v. Geraghty, 1 E. D. Smith, 687.

A written contract between landowners and a contractor to remove from its site a house the former had purchased, and to set it up upon their land, without injury within a stated time and to the satisfaction of themselves and their architect, L.R.A.1915B.

for a named compensation, is ineffectively modified by a subsequent oral agreement merely requiring the contractor to exercise due care and diligence in doing the work, without any corresponding advantage to the owners, since the oral agreement is without any consideration. Marshall v. Ames, 11 Ohio C. C. 363, 5 Ohio C. D. 403.

When a contractor has failed to complete a building contract penalizing him in a specific sum for every day of delay beyond the named date, an oral remark by the owner to the effect that inasmuch as he had not been able to get the building in time for the trade of one season, he did not want it until the next season, if proved when denied and if then construable as a release from the stipulated penalty, lacks a consideration to give it validity. Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 61 S. E. 815.

A promise of the chief engineer supervising the work of contractors in excavating and embanking a section of the line under a written contract providing for the payment of a stated price for the work, made by the authority and direction of the president of the road, to reimburse the contractors for the expenses of passage and transportation to and from their labors that they were incurring during the performance of their contract upon another road, is without consideration and void. Colcock v. Louisville, C. & C. R. Co. 1 Strobh. L. 329.

An agreement by a servant signed during his employment, releasing in advance the master from liability for any injury sustained by the former through the latter's negligence, without any reciprocal agreement by the master to employ him for the future or increase his wage, or confer any other benefit, is nugatory for want of consideration. Purdy v. Rome, W. & O. R. Co. 52 Hun, 267, 5 N. Y. Supp. 217, affirmed in 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255.

An oral agreement by merchants made with a salesman in their employ upon his quitting their employment, to pay him afterward commissions on repeating orders from customers sold to by him in the past, to the end of the then current year, is void for want of consideration. Altmayer v. Lahm, 113 N. Y. Supp. 964.

One entitled by the terms of his employment to a commission or compensation of a stated sum for his services in procuring from a customer a contract for his employer to build a mausoleum, payable only

KANSAS SUPREME COURT.

W. B. KILER, Plff. in Err.,
v.
FRANK WOHLETZ.

(79 Kan. 716, 101 Pac. 474.)

Compromise — validity.

1. Where two parties in settlement of a controversy, wherein one contends that he owes the other one a small sum, while the other contends that there is due to him a much larger amount, compromise and fairly agree upon the amount due, and the debtor then executes a promissory note therefor, the promise will be binding upon the parties and the note valid.

Headnotes by JOHNSTON, Ch. J.

Same — reopening.

2. Where there has been a valid agreement to compromise, it is not admissible to go back of the settlement to determine who was in the right in the original contention.

Same — fraud — duress.

3. The fact that the creditor insisted that the larger amount was due, and that he threatened to enforce his claim by a civil action, constitutes neither fraud nor legal duress.

(April 10, 1909.)

ERROR to the District Court for Atchison County to review a judgment in plaintiff's favor in an action brought to recover possession of a certain promissory

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in case the contract should be performed and payment for the structure should be collected from the customer, who has had advanced to him on account as an accommodation a sum of money and his employer's promissory note for more, to be repaid in case the contract fell through or the customer failed to pay, otherwise to be credited on account, cannot recover from the successor and assignee of his employer, who assumed both his and the customer's contracts, and who took up the promissory note of the old employer after its protest with a new one of his own, which was paid at maturity, where the mausoleum, though finished, has not been paid for, on the strength of an oral agreement by such successor and assignee to pay the balance of the commission in four months in any event, because such oral agreement is void for want of consideration, the return of the protested note being none, and no other existing. Walters v. Borgia Marble Works, 125 N. Y. Supp. 548.

A contract in writing by which an attorney and agent assigned to his client and principal certain shares of stock in a corporation given him by the employer with certain cash payments, in compensation for services in acquiring lands and water rights rendered and to be rendered, and by which the employer in turn bound himself to pay a sum equal to the par value of such shares, is not modified or affected by a subsequent voluntary promise of the employer to increase by a named amount his payment for the shares, provided a pending transaction yielded him an expected profit, especially where his expectation was not realized, because such promise had no consideration to support it. Thomas v. Mott, — W. Va. —, 82 S. E. 325.

A modification of a landowner's contract with a real estate broker employed to sell land upon commission, whereby the former undertakes to pay the commission on the signing by a prospective purchaser secured by the broker, of an option to buy the land, and before the sale shall be consummated, instead of when the sale is completed and a deed passes, as provided in the original contract of employment, is not binding for want of a consideration. Wilson v. Ellis, — Tex. Civ. App. —, 106 S. W. 1152.

An alleged promise by an architect who had been employed by a landowner at the instance of a broker, to prepare plans and specifications for and superintend the construction of a building, for a fee of 3½ per cent of the cost, out of which he had agreed to pay the broker 1½ per cent if he should procure from a certain corporation a building loan required by his employer, made after the broker had failed and abandoned his efforts to obtain the needed loan, and the owner had procured it elsewhere, and then agreed with the architect upon a reduced fee of $500, to give the broker $175 out of the reduced fee, if made, was a mere nude pact without any consideration to support it. McCrary v. Thompson, 123 Mo. App. 596, 100 S. W. 535.

An agreement for the cancelation of a policy of fire insurance at the request of the insurer, in consideration of the return to the policy holder of the unearned premium, is ineffectual and inoperative, if in fact the premium is never repaid to the policy holder. Holden v. Putnam F. Ins. Co. 46 N. Y. 1, 7 Am. Rep. 287.

An oral agreement by the holder of a fire insurance policy and the agent of the insuring company, to the effect that whenever in the future there should occur a vacancy in the insured premises, a permit for them to be vacant would be issued, is without consideration, and hence of no validity as a new contract abrogating a provision in the policy making it void in case the insured premises become and remain unoccupied without the insurer's consent. Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448.

An agreement between the obligor and obligee in a bond with sureties to secure the payment of a sum of money, made after such bond was sealed and delivered, that certain money due the former on his books should be paid the latter and applied on the bond, unsupported by a consideration, is invalid. Bishop v. Smith, — N. J. L. —, 57 Atl. 874.

note held by defendant under claim of being a bona fide purchaser. Reversed.

The facts are stated in the opinion.

Messrs. Jackson & Jackson, for plaintiff in error:

The settlement of a disputed claim is a good consideration.

Hardesty v. Service, 45 Kan. 614, 26 Pac. 29; *Lapham v. Head*, 21 Kan. 332; *Tessendorf v. Lassiter*, 10 Kan. App. 19, 61 Pac. 677; *Dendy v. Russell*, 67 Kan. 721, 74 Pac. 248; *Atchison, T. & S. F. R. Co. v. Starkweather*, 21 Kan. 322; *Cavender v. Robertson*, 33 Kan. 632, 7 Pac. 152.

To recover in a replevin action, the plaintiff must have the right to the possession of the property.

Rucker v. Donovan, 13 Kan. 256, 19 Am. Rep. 84; *Cooper v. Brown*, 23 Kan. 584; *Leroy v. McConnell*, 8 Kan. 276.

The remedy by replevin can be invoked only in case of a wrongful detention.

Wilhite v. Williams, 41 Kan. 290, 13 Am. St. Rep. 281, 21 Pac. 256; Redinger v. Jones, 68 Kan. 632, 75 Pac. 997; Moore v. Moore, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673; Brand v. Hedwick, 43 Kan. 133, 23 Pac. 111; 20 Am. & Eng. Enc. Law, 1050.

Notes can be replevied only when wrongfully obtained, or where the maker has become entitled to the possession thereof after delivery by reason of some subsequent act.

Chickering v. Raymond, 15 Ill. 363; Savery v. Hays, 20 Iowa, 28, 89 Am. Dec. 511; Bush v. Groomes, 125 Ind. 14, 24 N. E.

An oral agreement making payable in any event a sum of money which, by the terms of a contract in writing under seal, was to be paid by one to the other party for procuring for the first a certain deed, is without consideration and void. Singer v. Newcomb, 42 Hun, 655, 6 N. Y. S. R. 315.

An agreement supplemental to a previous one, and not a modification, alteration, or an amendment of it, but one which leaves the original in unimpaired force and effect, and only adds a new and onerous obligation to those of one party, without any corresponding compensation by the other, either in the release of a previous obligation or in conferring a new benefit or advantage, is void for want of consideration. Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

An agreement by the grantor of land absolutely conveyed on credit, to extend for a definite number of years payment of notes made and delivered for the purchase price, upon condition that the grantee should within the time given erect a tavern on the granted premises worth a stated sum, is not supported by a sufficient consideration to give it validity. Hogan v. Crawford, 31 Tex. 633.

In thus concluding, the court adopted the following line of reasoning: To whose benefit did such an improvement inure? Surely to the vendee himself. But it is alleged that the security of the vendor was thereby increased when he should come to enforce his lien as a vendor. That may be very true; but it was one of those benefits in which the local community also participated, and may be fitly characterized as *potentia remotissima* upon which no legal obligation could be justly predicated. It was no legal consideration upon which to found a promise. If made it was a nude contract and could not be enforced.

If, beyond the enhancing of the value of the security to the grantor, it is remembered that the grantee was neither bound to build a tavern nor to invest in constructing it as much money as the new agreement required him to do, it would seem as if an adequate consideration for an extension of time was made out. The case is somewhat out of harmony with the majority of pertinent decisions.

III. Sufficiency of consideration in secondary agreements.

It has been remarked that to draw a line of distinction among the multifarious verbal negotiations of men in reference to their mutual stipulations in written contracts, between those which are valid and effectual as alterations or modifications of the terms of the contracts, and those which are mere *policitations* or *nuda pacta* of no binding validity, requires sometimes much nicety of discrimination; and that the reported adjudications bearing upon this distinction are not all entirely perspicuous and consistent. Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

A court of law will not look closely to the adequacy or inadequacy of a consideration for a contract. Austell v. Rice, 5 Ga. 472.

The courts will not discuss the adequacy of a lawful consideration for an agreement settling a controversy. Skeate v. Beale, 11 Ad. & El. 983, 3 Perry & D. 587, 9 L. J. Q. B. N. S. 233, 4 Jur. 766.

They do not ordinarily consider the equality or inequality of considerations of contracts. Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573.

The law does not inquire into the amount or adequacy of the consideration in such cases. Flannagan v. Kilcome, 58 N. H. 443.

If there appears to have been any consideration at all for a subsequent agreement varying or adding to the terms of a prior contract, the courts usually refuse to inquire into its adequacy. Robinson v. Hyer, 35 Fla. 544, 17 So. 745.

There must indeed be some consideration, but the amount of it is left to the parties. Austell v. Rice, supra.

The courts assume that persons capable of contracting are also capable of regulating the terms of their contracts. Shepard v. Rhodes, supra.

81; Smith v. Eals, 81 Iowa, 235, 25 Am. St. Rep. 486, 46 N. W. 1110; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 7 L.R.A. 595, 16 Am. St. Rep. 765, 23 N. E. 180; Penton v. Hansen, 13 Okla. 450, 73 Pac. 843; Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090.

Messrs. **George G. Orr** and **James W. Orr**, for defendant in error:

The defendant was not a holder in due course without notice.

French v. Gordon, 10 Kan. 376; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; Smith v. Popular Loan & Bldg. Asso. 93 Pa. 19; Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420.

When a suspicion of fraud is raised in the original transaction between maker and payee, the burden of showing that the holder is a bona fide purchaser for value before maturity is on the latter.

Munroe v. Cooper, 5 Pick. 412; Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306; Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; Smith v. Lockwood, 80 Wis. 491, 50 N. W. 401; Burroughs v. Ploof, 73 Mich. 607, 41 N. W. 704; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; Vallett v. Parker, 6 Wend. 615; First Nat. Bank v. Green, 43 N. Y. 300; Ocean Nat. Bank v. Carll, 55 N. Y. 441; Nickerson v. Ruger, 76 N. Y. 282; Smith v. Sac County, 11 Wall. 139, 20 L. ed. 102; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866; 1 Greenl. Ev. 14th

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A valuable consideration, however small, is clearly sufficient to sustain a contract. Price v. Price, 111 Ky. 772, 64 S. W. 746, 66 S. W. 529, 531.

Slight consideration will sustain a contract. Austell v. Rice, supra.

A very slight benefit or advantage to one party, or a slight detriment, trifling inconvenience, or the smallest injury to the other party, is sufficient consideration to support any contract freely and wittingly made. Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126; Flannagan v. Kilcome, supra; Harlan v. Harlan, 20 Pa. 303.

If one person does or agrees to do an act beneficial to another, it will form a sufficient consideration to support an agreement. Cooke v. Murphy, 70 Ill. 96.

If he does what otherwise he would not have done, there is a good consideration to support the contract, although from the doing of it the other party receives no benefit. Moench v. Hower, 137 Iowa, 621, 115 N. W. 229.

A payment of money, a transfer of something of value, or a release of reciprocal obligations, amounts to a valuable consideration for the rescission of a contract. Lipschutz v. Weatherly, 140 N. C. 368, 53 S. E. 132.

A new or sufficient consideration for a substituted contract exists when a party to the contract it supplants derives a benefit from the new contract, or gains something of value by it, to which he was not entitled by the original contract. Palmer v. Yager, 20 Wis. 91.

A right, interest, or benefit accruing to one party, or a forbearance, loss, or responsibility accorded, suffered, or assumed by the other party, constitutes a valuable consideration for a contract. Leaksville-Spray Institute v. Mebane, 165 N. C. 650, 81 S. E. 1020.

The doing or undertaking to do anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009.

A waiver of any legal right by one party at the request of the other is a sufficient

consideration for the latter's promise. Leaksville-Spray Institute v. Mebane, supra.

The parties to an existing contract may change its terms by a new agreement, and their mutual undertakings will constitute a sufficient consideration to support the new agreement, but if neither engages to do something that he was not previously bound to do, or surrenders anything to which the old contract entitled him, the new agreement will be lacking in consideration, and hence be without force or validity. Feldman v. Fox, — Ark. —, 164 S. W. 766.

If neither party to an existing contract does or agrees to do anything more than he is already bound by the contract to do; if no consideration of any kind is added; if no part of the contract is canceled; and if no new term or condition is added,—then the renewal of a promise or promises made in the contract in different language does not give rise to a new agreement, nor alter or discharge the old one. Kingman v. Watson, 97 Wis. 596, 73 N. W. 438.

The delivery of property or the rendition of service by one under contract to pay money to another, accepted by the latter in lieu of the money due, no matter how small the value or benefit may be, is a sufficient consideration to support an accord and satisfaction agreement. Lamberton v. Harris, — Ark. —, 166 S. W. 554.

An agreement by a mortgagor to surrender to the mortgagee land covered by a mortgage without a contest is a good consideration for the mortgagee's agreement to release the mortgagor from liability for the mortgage debt. Renwick v. Wheeler, 48 Fed. 431.

The substitution of a new for an old contract is a sufficient consideration for abrogating the old contract. Leonard v. Hallett, — Colo. —, 141 Pac. 481.

The surrender of an existing security is a good consideration for a new undertaking between the parties to the surrendered obligation. Erie County Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54.

An instrument containing mutual covenants to be kept and performed by the

ed. § 10; Woodin v. Durfee, 46 Mich. 424, 9 N. W. 457; Murphey v. Virgin, 47 Neb. 692, 66 N. W. 652; Roseberry v. Nixon, 58 Hun, 121, 11 N. Y. Supp. 523; Little v. Street R. Co. 78 Mich. 205, 44 N. W. 137.

The whole transaction was fraudulent.

Belknap Hardware Mfg. Co. v. Sleeth, 77 Kan. 164, 93 Pac. 580.

Johnston, Ch. J., delivered the opinion of the court:

This is an action of replevin brought by the maker of a promissory note to recover possession of the same from one claiming to hold it as a bona fide purchaser. The note was given by Frank Wohletz to J. H. McCann as a result of a lightning rod transaction, in which it is alleged that McCann agreed to equip plaintiff's house and barn with lightning rods if plaintiff would pay for the joint and brace and 75 cents per foot for 2 feet of the rod, and thereafter to represent to other farmers that the rods cost him 75 cents per foot. After placing the rods a dispute arose as to the price to be paid; McCann claiming that it was $240, and Wohletz offering to pay $1.50. The result of the dispute was that McCann drew up a promissory note for $150, which Wohletz finally signed, claiming that he thought he had to sign it or be sued. The note was subsequently indorsed by McCann and given to F. E. Crane, who transferred it without his indorsement to the defendant Kiler as security for an alleged indebtedness already existing. The jury

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parties to it expresses on its face a good legal consideration. McKenna v. McKenna, 118 Ill. App. 240; Parks v. Elmore, 59 Wash. 584, 110 Pac. 381.

A mutual agreement by the parties to a contract to postpone the performance of it is valid, for the promise on one side is a consideration for the promise on the other. National Time Recorder Co. v. Feypel, 93 Ill. App. 170.

It is a familiar general rule of law that applies in cases of substituted or modifying contracts as well as original agreements, that one promise is a sufficient consideration for another. Cooke v. Murphy, 70 Ill. 96; Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619; Murphy v. Murphy, 84 Ill. App. 292; Backus v. Spaulding, 116 Mass. 418; Scriba v. Neely, 130 Mo. App. 261, 109 S. W. 845; Smith v. Crane, 169 Mo. App. 695, 154 S. W. 857.

There are few questions better settled, said the court in Burnside v. Potts, 23 Ill. 411, than that mutual promises between the parties are a sufficient consideration to support an agreement. It is always so regarded when the promises refer to the performance of acts which are of inconvenience or benefit to the parties, when the agreement contravenes no provision of law or public policy. The doctrine is too familiar and well settled to require reference in its support to authorities, that all agreements for the settlement of matters in controversy are binding and valid without any other consideration than the mutual promises of the parties.

While one promise is a consideration for another, and is the usual consideration in executory contracts, yet there must always be mutuality and reciprocity in the promises, to make such contracts valid, and equally is this so in modifications of contracts as in original ones. Wilt v. Hammond, —Mo. App. —, 165 S. W. 362.

Although in ordinary circumstances mutual promises afford each for the other a sufficient consideration, and such effect and value are accorded to mutual promises in an original and primary agreement, such promises constitute no consideration for a L.R.A.1915B. new and secondary agreement when measured against larger obligations already resting upon the parties. Weed v. Spears, 193 N. Y. 289, 86 N. E. 10.

It is a sufficient consideration for a new promise that he who claims the benefit of it went on and completed the business in faith of it. Courtenay v. Fuller, 65 Me. 156.

A consideration is only necessary to support an agreement or executory contract; after the contract has been executed, although without a consideration when made, it is irrevocable. Stewart v. Hidden, 13 Minn. 43, Gil. 29.

There is a necessity for a consideration to support an executory agreement, as without one it is not valid, being *nudum pactum;* but an agreement fully executed and evidenced by a deed in writing or in fact is valid irrespective of a consideration. Paxton v. Wood, 77 N. C. 11.

A contract once fully performed will never be disturbed for want of consideration. Lamb v. Morrow, 140 Iowa, 89, 17 L.R.A.(N.S.) 226, 117 N. W. 1118; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

After one party has performed, and the other party has accepted the performance of, a parol agreement modifying a written contract, it is too late to raise the question of a want of consideration for the modification. Maxwell v. Graves, 59 Iowa, 613, 13 N. W. 758.

After one contract voluntarily entered into as a substitute for another has been fully performed on both sides, the original contract is completed, extinguished, and annulled, notwithstanding the substituted contract was made only because one party to the primary contract refused to perform, and the other party signed the new agreement under protest. McCabe Constr. Co. v. Utah Constr. Co. 199 Fed. 976.

When the vendor of land pursuant to a written contract to convey, confessing his inability to put the vendee in actual possession because of an outstanding unexpired tenancy, offers the vendee either to return the purchase money paid or a deed

returned a verdict in favor of the plaintiff, finding that Crane had full knowledge of the circumstances attending the giving of the note and did not in fact purchase it, and that, at the time the note was deposited as collateral security by Crane, Kiler knew, or had reason to believe, that the note was fraudulent; also, that there was no valid indebtedness existing between Crane and Kiler prior to the date of the note in question, and that the defendant when he took the note knew, or had reason to believe, that there would be opposition to its payment. Upon these findings the trial court gave judgment to the plaintiff awarding him possession of the note, of which judgment Kiler complains, alleging as error the giving of certain instructions and the refusal to give others.

Whether there was fraud in the inception or giving of the note was an important question in the case. Wohletz contended that under the contract with McCann he was to pay only $1.50, while McCann claimed that he was to pay $240. Wohletz insisted that he was to pay for only 2 feet of the rod at a certain rate per foot, while McCann insisted that he was to pay that rate for the entire length of the rods. Finally a compromise was effected by which it was agreed that the price of the rods should be $150, and Wohletz gave his note for that amount. At the close of the testimony, Kiler asked the court to give the following instruction: "Even though the

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of conveyance subject to the lease, and the vendee accepts the deed, the transaction amounts to a performance of the contract, and not the substitution of a new agreement, and requires no consideration to make the vendee's election binding. Kneib v. Beardsley, 139 Mo. App. 565, 123 S. W. 545.

A written contract of agistment providing for the keep of twenty cows for three years, and their increase, in a specified way, the value of the original twenty to be appraised and taken back in the end by the owner, and the remainder of the stock equally divided between him and the agister, is effectually and validly modified by a parol agreement subsequently made by which the barren animals were to be returned to and replaced by the owner with fertile ones, and when the barren beasts have been returned by the agister and accepted by the owner, the question of consideration for the oral modifying agreement is out of the case, and the owner is bound to make the exchange or respond in damages if he refuses. Maxwell v. Graves, 59 Iowa, 613, 13 N. W. 758.

That a fully executed contract knowingly and voluntarily performed cannot be repudiated on the ground that it was without a consideration was intimated, though not held, in Oregon P. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137.

IV. Mutuality as consideration for secondary contracts.

a. Abrogations.

The mutual consent of the parties to an executory bilateral contract, before a breach of it has occurred, to abandon and annul it, is all the consideration necessary.

Ala.—Langford v. Cummings, 4 Ala. 46; Lightfoot v. Strahan, 7 Ala. 444; Borum v. Garland, 9 Ala. 452; Hussey v. Roquemore, 27 Ala. 281; Murphy v. Barefield, 27 Ala. 634; Young v. Fuller, 29 Ala. 464; Stoudenmeier v. Williamson, 29 Ala. 558; Thomason v. Dill, 30 Ala. 444; Burkham v. Mastin, 54 Ala. 122; Cooper v. McIlwain, L.R.A.1915B. 58 Ala. 296; Robinson v. Bullock, 66 Ala. 548; Badders v. Davis, 88 Ala. 367, 6 So. 834; Hembree v. Glover, 93 Ala. 622, 8 So. 660; Maness v. Henry, 96 Ala. 454, 11 So. 410; Andrews v. Tucker, 127 Ala. 602, 29 So. 34; Mylin v. King, 139 Ala. 319, 35 So. 998; Wellden v. Witt, 145 Ala. 605, 40 So. 126; Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

Ark.—Trumbull v. Harris, 102 Ark. 669, 145 S. W. 547.

Cal.—Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154.

Colo.—Leonard v. Hallett, — Colo. —, 141 Pac. 481.

Del.—England-Kelch Co. v. Evening Journal Co. — Del. —, 91 Atl. 448.

Ga.—Crutchfield v. Dailey, 98 Ga. 462, 25 S. E. 526.

Ill.—Barrie v. King, 105 Ill. App. 426; Dickson v. Owens, 134 Ill. App. 561.

Ind.—Mills v. Riley, 7 Ind. 137; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925.

Iowa.—Leach v. Keach, 7 Iowa, 232; Lamb v. Morrow, 140 Iowa, 89, 18 L.R.A.(N.S.) 226, 117 N. W. 1118; Richards v. Hellen, 153 Iowa, 66, 133 N. W. 393.

Kan.—George v. Lane, 80 Kan. 94, 102 Pac. 55.

Ky.—Crawford v. Colyer, 12 Ky. L. Rep. 990.

Me.—Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21.

Mass.—Cutter v. Cochrane, 116 Mass. 408; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383.

Mo.—Lancaster v. Elliot, 55 Mo. App. 249; Sanders' Pressed Brick Co. v. Barr, 76 Mo. App. 380; Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Cannon-Weiner Elevator Co. v. Boswell, 117 Mo. App. 473, 93 S. W. 355; Peters & R. Pottery Co. v. Folckemer, 131 Mo. App. 105, 110 S. W. 598; Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733; Welch v. Mischke, 154 Mo. App. 728, 136 S. W. 36; Mulliken v. Haseltine, 160 Mo. App. 9, 141 S. W. 712.

jury may believe from the evidence that in the making of such settlement said McCann stated and represented that he had attorneys employed by the year, or made other representations as to his right to recover the amount claimed by him for the material furnished and work and labor of putting such rods upon said house or barn, or made other representations as to his right to recover the amount he claimed, and that, with full knowledge of the claims relied upon by said Wohletz, he (Wohletz) nevertheless made such settlement and agreement, he would be bound thereby and cannot recover in this action. The representations so claimed to have been made would not make void the said settlement or the note given in pursuance thereof." This was refused, but the court did instruct the jury that, if there was a real dispute between the parties as to the terms of the contract and as to the amount to be paid for the rods, each understanding the claims of the other, and if a settlement was made by which the note in question was given, Wohletz was bound by the settlement; but the court added, "Provided you find that said Wohletz was not induced to make such settlement and to sign the said note by fraud or deception on the part of McCann." The rule given as to the effect of a compromise was unexceptionable, but there was no basis in the testimony for the statement in the proviso. Of course, if there was fraud or deception practised upon Wohletz in the settlement itself, it would not bind Woh-

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Neb.—Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967.

N. Y.—McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Oregon P. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Bacon v. Proctor, 13 Misc. 1, 33 N. Y. Supp. 995.

Ohio.—Thurston v. Ludwig, 6 Ohio St. 1. 67 Am. Dec. 328.

Pa.—McNish v. Reynolds, 95 Pa. 483; Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Dreifus v. Columbian Exposition Salvage Co. 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370; Thompson v. Stone, 43 Pa. Super. Ct. 69.

R. I.—Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Wash.—Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 80, 64 Pac. 1009.

Wis.—Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181; Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551, 43 N. W. 956.

Eng.—King v. Gillett, 7 Mees. & W. 55. 10 L. J. Exch. N. S. 164; Langden v. Stokes, Cro. Car. 383; Edwards v. Weeks, 1 Mod. 262; May v. King, 12 Mod. 538; Bull. N. P. 152; O'Donnell v. Hugill, 11 U. C. Q. B. 441.

A contract to marry may be canceled and abandoned by mutual consent any time before a breach. King v. Gillett, 7 Mees. & W. 55, 10 L. J. Exch. N. S. 164.

The cancelation of a contract by mutual consent of the parties to it simply means that the real consideration for its annulment is to be found in the fact that thereby each reciprocally receives from the other a renunciation and surrender of the rights, benefits, and advantages which the contract conferred, and a release and discharge from the burdens and obligations it imposed. Shriner v. Craft, 166 Ala. 146, 28 L.R.A. (N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Trumbull v. Harris, 102 Ark. 669, 145 S. W. 547; Crutchfield v. Dailey, 98 Ga. 462, 25 S. E. 526; Barrie v. King, 105 Ill. App. 426; Dickson v. Owens, 134 Ill. App. 561; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925; Leach v. Keach, 7 Iowa, L.R.A.1915B. 232; George v. Lane, 80 Kan. 94, 102 Pac. 55; Crawford v. Colyer, 12 Ky. L. Rep. 990; Cutter v. Cochrane, 116 Mass. 408; Rollins v. Marsh, 128 Mass. 116; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733; Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967; McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Bacon v. Proctor, 13 Misc. 1, 33 N. Y. Supp. 995; Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328; Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Thompson v. Stone, 43 Pa. Super. Ct. 69; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370.

The release of each party by the other, from the obligations of an executory contract for the sale and purchase of personal property, is a sufficient consideration for an agreement by buyer and seller to rescind it. Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488.

Reciprocal releases by the parties to a contract for the sale and delivery of merchandise constitute a sufficient consideration for abrogating it. The agreement of the seller not to deliver the goods, and of the buyer not to take them, is consideration enough to cancel the contract of sale. Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275.

The parties to a contract may at any time rescind it in whole or in part by mutual consent, the surrender of their mutual rights, and the discharge of their mutual obligations, being a sufficient consideration; but when one party has on his part fully performed the contract, and the only obligation that remains rests upon the other party to it, a naked promise to release that obligation is invalid and void without some new consideration. George v. Lane, 80 Kan. 94, 102 Pac. 55.

After the breach of a contract has occurred, and a right of action upon it has accrued, the debt or damages can be discharged only for a valuable consideration.

letz; but we discover nothing in the testimony printed in the abstract which amounts to fraud in the settlement, or which afforded any reason for qualifying the effect of the settlement. In the making of the settlement there was no concealment of facts, no misunderstanding of the claims of McCann, nor is it contended that Wohletz did not know of the contents of the note which he signed. In describing the circumstances attending the making of the settlement, he said that, after the rods were put up, a dispute arose whether he should pay for 2 feet of the rods, or the whole of them, when he told McCann: "I am not going to pay for them rods. I didn't want them in the first place, and I am not going to pay for them." When McCann told him that he must give his note for $240, Wohletz replied that "he didn't believe that he was compelled to pay him $240; that finally McCann came down to $150, and said that he had to have $150 or they would sue me, and then McCann fixed up the note and said that I had to sign it." He stated that the reason that McCann cut it down from $240 to $150 was "because I wouldn't give him any more. I wouldn't settle it for $240." After stating that he told McCann that he would not pay the amount claimed, he stated that McCann "offered to take $150, and I supposed that I would have to pay that or be sued."

It will be observed that Wohletz conceded that he purchased the rods, and that he was owing something for them. There was a

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Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370.

A new contract of the parties to an existing written one, which supersedes it, and is a substitute for it, is not a modification or alteration, but an abrogation of such contract, and hence is not within the California statute (Civ. Code, § 1698) providing that a written contract may be altered by another one in writing or by an executed oral agreement, and not otherwise. Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154.

b. Alterations.

Any contract, bilateral in the advantages and obligations given and assumed, may at any time after it has been made, and before a breach of it has occurred, be changed or modified in one or more of its details, by a new agreement also bilateral, by the mutual consent of the parties, without any new, independent, or distinct consideration.

U. S.—Teal v. Bilby, 123 U. S. 572, 31 L. ed. 263, 8 Sup. Ct. Rep. 239.

Ala.—Langford v. Cummings, 4 Ala. 46; Lightfoot v. Strahan, 7 Ala. 444; Borum v. Garland, 9 Ala. 452; Hussey v. Roquemore, 27 Ala. 281; Murphy v. Barefield, 27 Ala. 634; Young v. Fuller, 29 Ala. 464; Stoudenmeier v. Williamson, 29 Ala. 558; Thomason v. Dill, 30 Ala. 444; Burkham v. Mastin, 54 Ala. 122; Cooper v. McIlwain, 58 Ala. 296; Stewart v. Cross, 66 Ala. 22; Robinson v. Bullock, 66 Ala. 548; Badders v. Davis, 88 Ala. 367, 6 So. 834; Hembree v. Glover, 93 Ala. 622, 8 So. 660; Maness v. Henry, 96 Ala. 454, 11 So. 410; Cornish v. Suydam, 99 Ala. 621, 13 So. 118; Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 523, 30 So. 79; Andrews v. Tucker, 127 Ala. 612, 29 So. 34; Mylin v. King, 139 Ala. 319, 35 So. 998; Warren v. Cash, 143 Ala. 158, 39 So. 124; Wellden v. Witt, 145 Ala. 605, 40 So. 126; Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Hertz v. Montgomery Journal Pub. Co. 9 Ala. App. 178, 62 So. 564; George v. Roberts, — Ala. —, 65 So. 345.

Ariz.—Mallory v. Globe-Boston Copper Min. Co. 11 Ariz. 296, 94 Pac. 1116.

Ark.—Feldman v. Fox, — Ark. —, 164 S. W. 766.

Cal.—Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

Ill.—Roberts v. Carter, 31 Ill. App. 142; Dickson v. Owens, 134 Ill. App. 561.

Iowa.—Le Grand Quarry Co. v. Reichard, 40 Iowa, 161; Gorton v. Moeller Bros. 151 Iowa, 729, 130 N. W. 910.

Ky.—Homire v. Stratton & T. Co. 157 Ky. 822, 164 S. W. 67.

Me.—Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21.

Mass.—Holmes v. Doane, 9 Cush. 135; Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683; Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Hetherington v. William Firth Co. 210 Mass. 8, 95 N. E. 961.

Mich.—Savercool v. Farwell, 17 Mich. 308.

Mo.—Grath v. Mound City Roofing & Tile Co. 121 Mo. App. 245, 98 S. W. 812; England v. Houser, 163 Mo. App. 1, 145 S. W. 514, and on second appeal, 178 Mo. App. 70, 163 S. W. 890.

Neb.—Morrissey v. Schindler, 18 Neb. 672, 26 N. W. 476; Delaney v. Linder, 22 Neb. 274, 34 N. W. 630; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Easton v. Snyder-Trimble Co. 94 Neb. 18, 142 N. W. 695; Strahl v. Western Grower Co. 5 Neb. (Unof.) 482, 98 N. W. 1043.

N. J.—Denoth v. Carter, 85 N. J. L. 95, 88 Atl. 835.

N. Y.—American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236.

Pa.—LeFevre v. LeFevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Carrier v. Dilworth, 59 Pa. 406.

Tex.—Old River Rice Irrig. Co. v. Stubbs, —Tex. Civ. App. —, 137 S. W. 154; Washington L. Ins. Co. v. Reinhardt, — Tex. Civ. App. —, 142 S. W. 596.

Vt.—Thrall v. Mead, 40 Vt. 540.

substantial controversy between the parties and a compromise and settlement of that controversy. That being true, the court cannot go behind the settlement to determine whether the original claim of McCann was just, or whether Wohletz's version of the negotiations was right. If the parties met on equal terms, and the dispute was settled without fraud, the settlement concludes both of the parties. Minor v. Fike, 77 Kan. 806, 93 Pac. 264. Now the fact that McCann insisted that the larger amount was due, and threatened that the claim would be enforced by civil action if the note was not given, does not of itself constitute fraud in the settlement. The facts involved in the controversy between the parties appear to have been as available to one as to the other. It is not claimed that there was weakness of mind on the part of Wohletz, nor that any confidential relations existed between them. McCann, it is true, urgently insisted on a settlement, but his importunity or persistent pressure cannot, under the circumstances, amount to fraud. Duress is a species of fraud, but the mere fact that McCann threatened to enforce his claim by a civil action is not duress, and will not avoid liability on the compromise agreement. It is never duress to threaten to do that which a party has a legal right to do, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud. Shelby v. Bowman, 64 Kan. 879, 68 Pac. 1131; Electric Plaster Co. v. Blue Rapids Twp. 77 Kan. 580, 96 Pac.

Wash.—Long v. Pierce County, 22 Wash. 330, 61 Pac. 142; Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084.

Wis.—Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181; Lynch v. Henry, 75 Wis. 631, 44 N. W. 837; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175; Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. 132 Wis. 1, 111 N. W. 237; Schoblasky v. Rayworth, 139 Wis. 115, 120 N. W. 822.

The same consideration which supported a primary agreement modified by mutual consent by a secondary one extends to and supports the latter as well. LeGrand Quarry Co. v. Reichard, 40 Iowa, 161; Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Morrissey v. Schindler, 18 Neb. 672, 26 N. W. 476; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142; Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084; Lynch v. Henry, 75 Wis. 631, 44 N. W. 837; Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. 132 Wis. 1, 111 N. W. 237.

The mutual promises and reciprocal releases of the parties to an existing contract in writing are a good consideration for a subsequent oral agreement by them modifying or superseding it in whole or in part. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236.

The mutual obligations assumed by the parties in a new agreement modifying a former contract between them constitute a sufficient consideration to support the modification. Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

An executory contract may be changed at any time by agreement, and the change in the obligations and rights of one party will constitute a sufficient consideration for the change in rights and obligations of the other. Washington L. Ins. Co. v. Reinhardt, — Tex. Civ. App. —, 142 S. W. 596.

The indorser and the indorsee of a promissory note have a right subsequently to rescind or modify the contract evidenced by the indorsement, and to put their contract in any shape they please, and an agreement exercising that right is valid, and will control the indorsement in so far as it may conflict. Young v. Fuller, 29 Ala. 464.

It is difficult to understand, it was said in one case, why parties competent to contract should not be permitted to judge for themselves whether a change in their situation is desirable, and if they so regard it and mutually agree, why should the law decline to enforce their agreement? Roberts v. Carter, 31 Ill. App. 142.

c. Substitutions.

The mutual agreement of the parties to a bilateral executory contract, before a breach of it, to abrogate and discharge it and to substitute in its stead a new contract conferring new advantages and imposing new burdens on both, constitutes a sufficient consideration to support the substituted contract. Denison v. Shawmut Min. Co. 86 C. C. A. 292, 159 Fed. 102; Cooper v. McIlwain, 58 Ala. 296; Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154; Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265; McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159; Leonard v. Hallett, — Colo. —, 141 Pac. 481; Connelly v. Devoe, 37 Conn. 570; England-Kelch Co. v. Evening Journal Co. — Del. —, 91 Atl. 448; Byrd Printing Co. v. Whitaker Paper Co. 135 Ga. 865, 70 S. E. 798, Ann. Cas. 1912A, 182; Burnside v. Potts, 23 Ill. 411; VanHousen v. Copeland, 180 Ill. 74, 54 N. E. 169; Roberts v. Carter, 31 Ill. App. 142; Mills v. Riley, 7 Ind. 137; Merry v. Allen, 39 Iowa, 235; Lamb v. Morrow, 140 Iowa, 89, 18 L.R.A.(N.S.) 226, 117 N. W. 1118; Richards v. Hellen, 153 Iowa, 66, 133 N. W. 393;

68; King v. Williams, 65 Iowa, 167, 21 N. W. 502; James v. Dalbey, 107 Iowa, 463, 78 N. W. 51; Whittaker v. Southwest Virginia Improv. Co. 34 W. Va. 217, 12 S. E. 507; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76; Pryor v. Hunter, 31 Neb. 678, 48 N. W. 736; Buck v. Axt, 85 Ind. 513; McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Holt v. Thomas, 105 Cal. 273, 38 Pac. 891; Atkinson v. Allen, 17 C. C. A. 570, 36 U. S. App. 255, 71 Fed. 58; 1 Page, Contr. § 253.

Since none of the things said or done, as set forth in the testimony, constituted fraud or duress, it became the duty of the court to so advise the jury upon the request of the defendant, and the instruction given by the court upon the theory that there was testimony tending to show fraud in the settlement was prejudicially erroneous. If there had been fraud in the giving of the note, the burden would have been upon Kiler to show that he was a bona fide holder for value, but, in the absence of proof of such fraud, the burden remained on the plaintiff. The finding, therefore, that the note was obtained by fraud, and that the subsequent holders knew that it was so obtained, was not sustained by the testimony. The evidence introduced for the purpose of impeaching the validity of the note in the hands of Crane and Kiler is not satisfactory, and, in view of the erroneous instructions and the unsustained findings, the verdict cannot be upheld.

The judgment is therefore reversed, and the cause remanded for a new trial.

Peterson v. Rankin. — Iowa, —, 143 N. W. 418; Graham v. Crisman, — Iowa, —, 146 N. W. 756; Proctor Coal Co. v. Strunk, 123 Ky. 520, 96 S. W. 603; Bell v. Pitman, 143 Ky. 521, 35 L.R.A.(N.S.) 820, 136 S. W. 1026; Toler v. Wheeler-Holden Co. 144 Ky. 829, 139 S. W. 1067; Hill v. Wilson, 15 Ky. L. Rep. 814; Moorman v. Plummer Lumber Co. 113 La. 429, 37 So. 17; Cutter v. Cochrane, 116 Mass. 408; Rollins v. Marsh, 128 Mass. 116; Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683; Strobridge Lithographing Co. v. Randall, 78 Mich. 195, 44 N. W. 134; Blagborne v. Hunger, 101 Mich. 375, 59 N. W. 657; Andre v. Graebner, 126 Mich. 116, 85 N. W. 464; Lancaster v. Elliot, 55 Mo. App. 249; Sanders' Pressed Brick Co. v. Barr, 76 Mo. App. 380; Peters & R. Pottery Co. v. Folckemer, 131 Mo. App. 105, 110 S. W. 598; Welch v. Mischke, 154 Mo. App. 728, 136 S. W. 36; Mulliken v. Haseltine, 160 Mo. App. 9, 141 S. W. 712; Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362; Morrissey v. Schindler, 18 Neb. 672, 26 N. W. 476; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Easton v. Snyder-Trimble Co. 94 Neb. 18, 142 N. W. 695; Strahl v. Western Grocer Co. 5 Neb. (Unof.) 482, 98 N. W. 1043; Hildreth v. Pinkerton Academy, 29 N. H. 227; McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Oregon P. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Bandman v. Finn, 185 N. Y. 508, 12 L.R.A. (N.S.) 1134, 78 N. E. 175; Hartwig v. American Malting Co. 74 App. Div. 140, 77 N. Y. Supp. 533, affirmed in 175 N. Y. 489, 67 N. E. 1083; American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236; McKeogh v. Browning, 125 N. Y. Supp. 368; Galway v. Prignano, 134 N. Y. Supp. 571; Brown v. Catawba River Lumber Co. 117 N. C. 287, 23 S. E. 253; Oregonian R. Co. v. Wright, 10 Or. 162; McNish v. Reynolds, 95 Pa. 483; Dreifus v. Columbian Exposition Salvage Co. 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370; Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000; Caples v. Port Huron Engine & Thresher Co. — Tex. Civ. App. —, 131 S. W. 303; Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331; Orpheus Vaudeville Co. v. Clayton Invest. Co. 41 Utah, 605, 128 Pac. 575; Lawrence v. Davey, 28 Vt. 264; Flanders v. Fay, 40 Vt. 316; Thrall v. Mead, 40 Vt. 540; Carstens v. Burleigh, 20 Wash. 283, 55 Pac. 221; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142; Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037; Parker v. Advance Thresher Co. 75 Wash. 505, 135 Pac. 229; Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084; Brown v. Everhard, 52 Wis. 205, 8 N. W. 925; Snell v. Bray, 56 Wis. 159, 14 N. W. 14; Lynch v. Henry, 75 Wis. 631, 44 N. W. 837; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; Stead v. Dawber, 10 Ad. & El. 57, 2 Perry & D. 447, 9 L. J. Q. B. N. S. 101; O'Donnell v. Hugill, 11 U. C. Q. B. 441.

If an original contract, either in whole or in part, is executory for both parties, a new agreement by the parties in which some liability under the old one is waived or released is supported by a sufficient consideration. Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331.

The same consideration which existed for an old agreement is imported into a new agreement substituted for it. Stead v. Dawber, 10 Ad. & El. 57, 2 Perry & D. 447, 9 L. J. Q. B. N. S. 101; O'Donnell v. Hugill, 11 U. C. Q. B. 441; Brown v. Everhard, 52 Wis. 205, 8 N. W. 925.

The mutual abrogation of a bilateral contract, whereby each party surrenders its benefits and advantages to himself, leaves both parties at liberty to make, if they choose to do so, a new contract upon the subject. Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

They may if they like make and perform a new contract with similar or different provisions. Mills v. Riley, 7 Ind. 137.

In case they do mutually agree to substitute a new for an old agreement, neither will be at liberty to repudiate the new one on the ground that the consideration for

IDAHO SUPREME COURT.

GEORGE T. RUSSELL et al., Respts.,
v.
J. G. LAMBERT, Appt.

(14 Idaho, 284, 94 Pac. 54.)

Contract — modification — consideration.

1. Where parties have been doing business under a written agreement, and differences and contingencies arise which were not foreseen and provided for by the agreement, and they thereafter make an additional or subsequent agreement, "in order to avoid complications," and for the purpose of fixing a basis on which their settlement shall be had, the consideration for the latter agreement shall be sufficient in law, and will not be disregarded by the courts for want of consideration, although no pecuniary consideration passed.

Same — settlement of dispute.

2. The settlement of disputes, and fixing a basis on which such settlement shall be made, is a sufficient consideration for an agreement or contract of compromise.

(February 11, 1908.)

APPEAL by defendant from a judgment of the District Court for Washington County in plaintiffs' favor in an action brought to recover the value of services rendered in cutting timber for defendant. Affirmed.

The facts are stated in the opinion.

Headnotes by AILSHIE, Ch. J.

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waiving his rights under the original agreement failed. Andre v. Graebner, 126 Mich. 116, 85 N. W. 464.

The voluntary entrance by the parties to a contract into a new agreement changing its terms and imposing other liabilities of itself gives rise to a new consideration the adequacy of which is no concern of the courts. Roberts v. Carter, 31 Ill. App. 142.

The consideration required to support an agreement adding to the terms of an existing contract, and imposing new and onerous burdens upon a party to it, may be either an entirely new one, or some beneficial modification of the original agreement. Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

A new obligation assumed or imposed by a substituted contract annulling a previous one between the parties is a sufficient consideration to support the new agreement. McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198.

An oral agreement made subsequently to a written contract, altering or abrogating such contract, which requires one of the parties to do or permit something which he was not required to do or suffer either by the contract or by law, is founded upon a good consideration. Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000.

When one party releases the other party from a valid contract, and the party released promises in return to pay the first a sum of money or to do some lawful act, the transaction amounts to a substitution of one contract for another, and the consideration that supported the original contract is sufficient to support the substituted one. Snell v. Bray, 56 Wis. 159, 14 N. W. 14.

When the performance of a contract is interrupted by causes beyond the control of either party, the parties are at liberty to abrogate it entirely, to modify or change it in any respect, or to replace it with a new agreement without other or further consideration than mutual consent. Carstens v. Burleigh, 20 Wash. 283, 55 Pac. 221.

The annulment of a previous contract, or the supplanting of it by a new one, and the acting upon such new one, constitute a sufficient consideration to support a new or modified contract, but only when the cancelation, substitution, and after conformity of conduct apply to both parties and affect the contract with respect of both of them. Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362.

d. Reciprocity.

In every abrogation, alteration, amendment, supplement, or substitution of an existing contract, like the primary contract itself, mutuality is an essential element. When mutuality is absent a consideration is lacking.

In an early case in Vermont in which was sustained the validity and efficiency, to extinguish a promissory note, of an agreement under seal to deliver and accept at a future date a horse as payment, where the animal had been tendered and refused, Mr. Justice Phelps, in delivering the opinion of the court, said: Much stress has been laid upon the necessity of mutuality in a contract. This term is often used in the books in connection with "consideration." It is difficult, however, to find any distinction in their import. It would be difficult to find any case where a consideration exists in which there is no mutuality, or a case of legal obligation without a consideration. The terms when applied to this subject are synonymous; the mutuality sometimes arising from a consideration, as in the case of a consideration executed, and the consideration sometimes consisting of mutual obligation, as in the case of a contract on both sides executory. Bryant v. Gale, 5 Vt. 416.

It is because of this lack of mutuality, and therefore of consideration, that no abrogation, change. modification, or substitution in a primary contract can be effected by the sole action of one of the parties to it. It requires the consent of both to cancel, alter, or supplant a contract.

Mr. **Lot L. Feltham**, for appellant:

A complaint on contract, which sets out a copy of the contract and fails to allege plaintiff's performance of the conditions, fails to state a cause of action.

Ball v. Doud, 26 Or. 14, 37 Pac. 70; 2 Estee, Pl. & Pr. 3183; Meyers v. Pacific Constr. Co. 20 Or. 603, 27 Pac. 584; King v. Faist, 161 Mass. 449, 37 N. E. 456; Couch v. Ingersoll, 2 Pick. 292; 9 Cyc. 699–760; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454.

The compromise agreement was incomplete and bound no one.

8 Cyc. 512, 540, 541; Beach, Contr. ¶ 53; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; Ahearn v. Ayres, 38 Mich. 692; Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172.

Mr. **L. L. Burtenshaw** for respondents.

Allshie, Ch. J., delivered the opinion of the court:

This action was commenced by the plaintiffs to recover from the defendant for labor and cost and expenses of logging and cutting timber for the defendant, and for the delivery of certain lumber and material at the places specified in the contract. The original contract between the plaintiffs and defendant was in the nature of a lease whereby the defendant leased and let to the plaintiffs a certain sawmill belonging to defendant. The plaintiffs, among other things, were to cut a large quantity of lumber and receive specified compensation

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fairly made. It needs the same meeting of minds that was necessary to make the contract in the first place. Wheeler v. New Brunswick & C. R. Co. 115 U. S. 29, 29 L. ed. 341, 5 Sup. Ct. Rep. 1061, 1160; Sturm v. Boker, 150 U. S. 326, 37 L. ed. 1099, 14 Sup. Ct. Rep. 99; Central Coal & Coke Co. v. George S. Good & Co. 57 C. C. A. 161, 120 Fed. 793; Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937; Central of Georgia R. Co. v. Gortatowsky, 123 Ga. 366, 51 S. E. 469; Indiana Veneer & Lumber Co. v. Hageman, — Ind. App. —, 105 N. E. 253; B. F. Sturtevant Co. v. Dugan, 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675; Bell v. Utley, 17 Mich. 508; Oellien v. Duncan, 148 Mo. App. 600, 128 S. W. 534; Wood v. Edwards, 19 Johns. 205; Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388; Bosoian v. Hubbard, 121 App. Div. 510, 106 N. Y. Supp. 178; Cook v. Matlack, 148 Pa. 331, 23 Atl. 1054; Sanborn v. E. R. Roach Drug Co. — Tex. Civ. App. —, 137 S. W. 182; McIntyre v. Ajax Min. Co. 20 Utah, 323, 60 Pac. 552, 20 Mor. Min. Rep. 142; O'Donnell v. Brand, 85 Wis. 97, 55 N. W. 154.

A contract may be rescinded by mutual consent, but not by one party alone by a mere notice to the other. Central of Georgia R. Co. v. Gortatowsky, 123 Ga. 366, 51 S. E. 469.

It cannot be rescinded by a proposal in writing by one to the other party to cancel it with the latter's consent, which was never replied to either in writing or orally, but wholly ignored. Parks v. Elmore, 59 Wash. 584, 110 Pac. 381.

An agreement intended as a substitute for an existing contract between the same persons, reduced to writing, sent to one of them, approved by him, and promised to be signed and exchanged by him, but never executed by the other party, lacks mutuality and consideration, and hence never becomes operative. Wood v. Edwards, 19 Johns. 205.

An indorsement upon a contract purporting to abrogate it, signed by one party only, and produced by the other at the trial on notice and demand, does not, standing alone, establish a cancelation by mutual consent. Cook v. Matlack, 148 Pa. 331, 23 Atl. 1054.

After a contract has been duly entered into, one party to it cannot add to it provisions imposing new burdens upon the other without his consent. Oellien v. Duncan, 148 Mo. App. 600, 128 S. W. 534.

A printed billhead sent by seller to buyer on delivering goods purchased in no way alters or controls the terms of a contract of sale already clearly and fully expressed in writing. Sturm v. Boker, 150 U. S. 326, 37 L. ed. 1099, 14 Sup. Ct. Rep. 99; Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388.

The issuing by a vendor without any new agreement or additional consideration, of a paper in form of a receipted bill, without other provisions, several days after a completed sale of all logs belonging to him, estimated at 1,000,000 feet, in the keeping of a boom company, for a stated price payable partly in property and partly in money upon a specified time, creates no new or substituted contract, but is only a method of obtaining possession of the logs from their custodian. Bell v. Utley, 17 Mich. 508.

A contract of bailment respecting the consignment of chattels for sale on commission, on stated terms and conditions, cannot be added to in such wise as to increase the obligations of the consignees, by a notice put on the consignment invoices requiring all goods billed therein to be kept insured against fire for the benefit of the consignors. B. F. Sturtevant Co. v. Dugan, 106 Md. 587, 68 Atl. 351, 14 Ann. Cas. 675.

A complete contract by the terms of which one party agreed to consign a quantity of furs to be sold at prices not less than those invoiced, and the other party in turn agreed to advance to the first party 50 per centum of such invoiced prices, and both agreed that if such furs were not sold by the consignee within a specified time

therefor, together with certain compensation for the delivery of the lumber at the market places. Thereafter some differences and disputes and disagreements arose between the lessees and the owner of the mill, the outcome of which was that the mill was turned back to the owner, the appellant herein. By paragraph 7 of plaintiffs' complaint they allege that on October 11, 1906, they turned over to the defendant the sawmill and all property received from him under the original contract, and that they then and there attempted to make settlement with defendant, but were unsuccessful in making any settlement at that time. By paragraph 8 they allege that on October 13th, "in order to effect a settlement, and to avoid litigation and further trouble, the said parties plaintiff herein entered into the following agreement with the said defendant:

"Council, Idaho, Sawmill,
"Oct. 13th, 1906.

"In order to avoid complications, I, J. G. Lambert, agree to pay Russell & Barbour $75 per month each, counting twenty-six days a month, and allowing full time, except Sundays, from the 17th day of July, 1906, till the evening of the 11th day of October, 1906, above actual expense of logging and cutting timber during the above-stated time by the said Russell & Barbour; and I, J. G. Lambert, agree to pay all actual expenses of logging and cutting lumber as per above, expenses to be account-

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that they should be shipped back and the advance be repaid, is not changed or modified by a receipt in writing signed by the consignor after the furs have been shipped for the sum advanced, reciting an agreement that the consignee might sell the consignment at public auction or private sale without limit, and that the consignor would, if there was a deficit, make good the deficiency. Klepner v. O. J. Lewis Mercantile Co. 86 C. C. A. 284, 159 Fed. 94.

An absolute unconditional sale of all the vendor's cattle in a certain county, at a stipulated price the head, with a privilege to the buyer to enter at any time the seller's pasture and take away any animals he might choose on paying the head price for each, with a covenant to round up and deliver on certain day all the rest of the stock, is not modified or supplanted by a writing signed and delivered at the end of the bargain, reciting a sale of all the vendor's cattle for a stated sum in exchange for the buyer's check for such sum, which was afterward tendered back, refused by the drawer, and destroyed by the seller, because the transaction, if amounting to aught more than a receipt for payment on account, is as a new modifying agreement unsupported by a consideration requisite to make it valid. Whitsett v. Carney, — Tex. Civ. App. —, 124 S. W. 443.

If a contract in writing binding one who has contracted to do the interior trimming, including windows, jambs, doors, dressers, and wardrobes, according to specifications to furnish and put in all chambers and bedrooms of the building portable wardrobes of directed sizes, can be deemed to have been subsequently modified by the delivery of plans showing the location of such wardrobes only in the bedrooms for the use of servants, and by a footnote signed by the owner on a sketch given the contractor to the effect that wardrobes need not be supplied for any but servants' rooms, such modification is of no force and effect, since it is without any supporting consideration. Rieser v. Calvert Constr. Co. 108 N. Y. Supp. 747.

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When a servant has been employed for a definite time under an express contract stipulating the payment of a stated compensation, the master has no power arbitrarily to reduce that compensation during the term of the employment. He can do so only with the servant's consent given for a good consideration. Indiana Veneer & Lumber Co. v. Hageman, — Ind. App. —, 105 N. E. 253.

But when there is no definite term of employment fixed by contract, a notice by the master that for the future he will pay less wages to the servant, and the continued service thereafter of the servant without objection, create a new contract based upon a sufficient consideration. Spicer v. Earl, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. 923.

Negotiations and efforts of parties to a written contract all the time recognized as in force, to settle differences over the question whether or not it has been completely performed, with concessions reciprocal or unilateral, do not constitute a modification or abandonment of the contract. England v. Houser, 163 Mo. App. 1, 145 S. W. 514.

An assent once given to a change or modification of a contract by one of the parties to it, before the contract is executed, may not afterward be withdrawn by the consenting party without the acquiescence, and against the will, of the other party, because the assent to the change or modification made a new contract as a substitute, and necessarily terminated the old one. Hertz v. Montgomery Journal Pub. Co. 9 Ala. App. 178, 62 So. 564.

The principle just stated has been applied in sundry cases in which the parties had entered into a complete contract by parol and one of them attempted to change its terms by, and merge it in, a subsequent writing.

The general rule that prior oral negotiations and contemporaneous understandings are superseded by and merge in written agreements finally made by the parties does not apply in such cases, since plainly there is no meeting of minds upon any later written agreement.

ed for by accounts and receipts. We, the undersigned, mutually agree to the foregoing.

"J. G. Lambert,
"R. M. Barbour,
"Geo. T. Russell."

By paragraph 9 plaintiffs allege that on October 15th they demanded settlement with the defendant in pursuance with and according to the terms of the additional or supplemental agreement of October 13th, and that the defendant neglected and refused to pay them. The defendant demurred to the complaint, and also moved to strike these three paragraphs—7, 8, and 9—from the complaint. The court overruled the demurrer and also the motion, and the appellant assigns that action as error.

It is argued that this agreement of October 13, 1906, was a compromise agreement, and was without consideration. The objection is not well taken. The agreement was made after the happening of contingencies not foreseen in the original agreement. The appellant had taken back the mill, and the parties were no longer operating under the original agreement, but were, on the contrary, having differences and disputes as to a proper settlement for the time the plaintiffs had been in possession of the property and been cutting lumber. The settlement of that dispute, and the fixing of a definite basis upon which settlement could be made, was within itself a sufficient con-

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A complete oral contract is not superseded and supplanted by a subsequent writing, unless the latter is mutually accepted and agreed upon by the parties as embodying the terms of their agreement. Lionel C. Simpson Plumbing & Heating Co. v. Geschke, 75 N. J. Eq. 394, 72 Atl. 90.

A complete oral contract between a shipper and a common carrier, to furnish a car and transport freight in it, cannot be changed after the shipper has accepted the car and loaded it with his freight, by a receipt or bill of lading handed him by the carrier's agent so folded as to conceal its contents, and taken away unread. Stoner v. Chicago G. W. R. Co. 109 Iowa, 551, 80 N. W. 569.

A complete oral agreement between a customer and a broker respecting speculations in cotton, by which accounts were not to be closed out without notice and a call for more margins, is not modified by the rendition of statements of account by the broker containing printed footnotes assertive of the latter's right to close out transactions without notice, silently retained by the customer, especially where the latter is a foreigner and somewhat illiterate, since mutuality cannot in such case be implied from mere silence. Bosoian v. Hubbard, 121 App. Div. 510, 106 N. Y. Supp. 178.

A complete oral contract for the unconditional absolute sale and purchase of a stated number of railroad bonds at a specified price, after payment of the purchase money, is not changed by drafts drawn by the selling agent on and accepted by the railroad company, calling for delivery of the bonds when issued, ingrafting new terms upon the contract of sale having the effect to reduce it to a conditional sale dependent upon the performance of a contract with third persons unrelated to the purchasers and made without their knowledge; and if, by the reception and retention of such accepted drafts, the purchasers of the bonds can be held to have assented by implication to the change and substitution of their original contract by a new one conforming to the terms of the drafts, such L.R.A.1915B.

new agreement will not be binding upon them, because it has no consideration to support it. Titus v. Cairo & F. R. Co. 37 N. J. L. 98.

A valid oral contract is not destroyed or otherwise affected by an effort to substitute an invalid written one in its stead. Word v. Kennon, — Tex. Civ. App. —, 75 S. W. 365.

It is beyond the power of one party to a contract to abrogate it by repudiation. Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

Thus, a contract of a corporation is not annulled simply by a vote of its board of directors to cancel it, followed by the mutilation or destruction of its copy of the contract. Hetherington v. William Firth Co. 210 Mass. 8, 95 N. E. 961.

One contract may be abandoned and another substituted in its stead, but when a corporation is a party to it, the consent of someone in authority with power to make the change must be shown. Imeson v. Newport, etc. Bridge Co. 5 Ky. L. Rep 685.

e. Supplements.

Those who have made a contract may always supplement it by another and an additional one. Headley v. Cavileer, 82 N. J. L. 635, 48 L.R.A.(N.S.) 564, 82 Atl. 908; Bartlett v. Stanchfield, 148 Mass. 394, 2 L.R.A. 625, 19 N. E. 549.

When a written contract is supplemented by mutual consent of the parties, by an additional provision not before contained in it, no new consideration is required. Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520.

It is competent for the parties to a contract whereby one has undertaken to pay the other a sum of money in grain at a stated time, to come together and agree upon a place where the grain shall be delivered, and their mutual assent is all the consideration necessary. Miles v. Roberts, 34 N. H. 245.

A subsequent agreement fixing the time within which personal property sold under a previous written contract silent as to

sideration for the new agreement. The first clause in the agreement, namely, "in order to avoid complications," indicates the purpose of the agreement. A sufficient consideration is shown for the agreement to enable plaintiffs to maintain their action thereon. Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181; 8 Cyc. 509–512.

It is further contended by the appellant that the respondents failed to comply with that part of the agreement of October 13th wherein it is stipulated, "expense to be accounted for by accounts and receipts." This contention is not supported by the record. The plaintiffs substantially complied with the requirement in furnishing bills, receipts, and vouchers upon which a settlement was asked.

The record contains a long list of assignments of error, all of which go to rulings of the court in admission of evidence and rejection of proofs offered, and to the sufficiency of the evidence to justify the findings and judgment. After an examination of these assignments and specifications of error, and the record upon which they depend, we are satisfied that no prejudicial or substantial error has been committed, and that the judgment in this case should be affirmed. In this view of the case it would serve no useful purpose to consider or discuss these assignments further in this opinion. The judgment is affirmed, with costs in favor of respondents.

Sullivan and Stewart, JJ., concur.

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time of delivery must be delivered is valid upon the sole consideration of the mutual consent of seller and buyer. Elliott v. Howison, 146 Ala. 568, 40 So. 1018.

A supplemental oral contract for the commissions of a broker upon an exchange of lands is not to be deemed an alteration or modification of a previous written contract for his compensation on sales of the land, where the former contract was silent respecting exchanges. Kurtz v. Payne Invest. Co. 156 Iowa, 376, 135 N. W. 1075.

An oral agreement of a landowner with a real estate broker to whom he has given successive options to buy on certain terms at a stated price the acre, the coal underlying his land, to let the surface land go along with the coal at a stated price the acre for it on the same terms, embraces an independent subject, and does not affect the options or the rights of the parties under them. Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457.

When a building is under construction according to the terms of a written contract, a further agreement between the owner and a subcontractor concerning extra work and materials, without regard to the provisions thereunto relating in the original contract, is valid and binding, and supported by a sufficient consideration. Foley v. Tipton Hotel Asso. 102 Iowa, 272, 71 N. W. 236.

A written contract whereby one party agrees to furnish the materials for and build a permanent refrigerator affixed to the building of the other for a stated sum of money, silent respecting the packing material and method of putting it in to conserve the interior cold, does not necessarily embrace the entire agreement of the parties, and an oral warranty by the builder after beginning work, guarantying the packing he was using to be effective as a nonconductor of heat and the refrigerator itself to be efficient and give satisfaction when finished, is valid and supported by a good consideration, whether it is to be deemed a part of the contract not complete in the writing, a supplement to a written contract covering a matter not included in it, or a subsequent oral modification and alteration of the written contract. Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683.

An agreement providing for a method of determining a scale of logs made subsequently and as a supplement to an original contract for a sale of logs and their manufacture into lumber, to be paid for at a stated rate the thousand log measure, which did not provide any rule of measurement mutually agreed upon, rests upon a sufficient consideration. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. 132 Wis. 1, 111 N. W. 237.

A consent between the buyer and seller of lumber pursuant to a written contract, to substitute another inspector for the one named in the contract after it was found that the person originally agreed upon could not act, constitutes no material variation from or impairment of the contract. Savercool v. Farwell, 17 Mich. 308.

An oral agreement between a fire insurance company and a policy holder whose insured property had been destroyed by fire, who had other insurance, following and supplementary to a written adjuster's agreement which fixed the amount of loss on each class of the property insured and destroyed, and the total insurance, not in conflict or inconsistent with such written agreement, but covering matters untouched by it, to wit, the exact sum to be paid by the insurer and accepted by the insured in full of the claim of loss, and the time of paying it, is valid and binding on both parties, and is supported by the same consideration as the written adjuster's agreement, and none in addition thereto is necessary. Millers' Nat. Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368, affirming 35 Ill. App. 105.

Where there has been a complete oral contract made by a landowner and the agent of a firm of growers of nursery stock, for the purchase and future delivery of a number of fruit trees to be set out and cared for for four years, all trees dying during that time to be replaced by the sellers free,

payment to be made by a negotiable promissory note when the trees are delivered, orders signed by the landowner and given to the agent, silent with respect to which party shall set out and thereafter care for the trees, notwithstanding they contain an express statement that the entire contract is printed or written in them, and that no verbal agreement or alteration of the printed matter shall be binding, and that the trees that fail in the first year shall be replaced, and the orders shall not be countermanded, do not really cover the whole contract, and a further writing delivered to the landowner by the seller's agent authorized to collect from and settle with purchasers, on a refusal to execute the note or pay without it embodying the rest of the contract, does not constitute an alteration, change, or modification of the original contract, but simply completes it, and is as valid and as binding as the orders, and is upheld by the common original consideration. Griffith v. Fields, 105 Iowa, 362, 75 N. W. 325.

A written contract by a quarrying company to furnish within a reasonable time to a contractor cut stone for his use in a certain building then under construction is effectually and validly modified by a subsequent agreement fixing a definite time for the stone contracted for to be delivered, made in consequence of complaints concerning the slowness of past deliveries; and the consideration of the original contract is sufficient support for the modifying agreement. LeGrand Quarry Co. v. Reichard, 40 Iowa, 161.

A modification by mutual agreement between a general contractor to cut, float, and boom logs for and from a certain tract of timber land belonging to a third party, a lumbering corporation, and a subcontractor to remove and boom the logs from a part of the tract, of such subcontract, which left the subcontractor wholly free to choose his own ways and means of performance, agreed upon after the landowner interfered and prevented the subcontractor from continuing the method he intended and had started to employ, prescribing a new and more expensive mode of performance, promising a stated additional compensation for employing such method, and releasing the subcontractor from his obligation to cut the remaining uncut timber, is supported by a sufficient consideration. Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895.

f. Rectifications.

An oral agreement of the parties to a written contract, correcting a mistake in its terms, is supported by a sufficient consideration in their mutual consent. Hetherington v. William Firth Co. 210 Mass. 8, 95 N. E. 961.

The parties to a contract may by mutual agreement, and without any new consideration, correct errors and supply omissions in it, and make explanations of its terms. Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21. L.R.A.1915B.

The parties to a written contract have power to reform it by mutual consent in such wise as to correct a common mistake of both, without any new consideration passing between them, whether such mistake arose out of the accidental omission of words they intended to insert, or a misunderstanding of the legal effect of the language they used. Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703.

After the sale of a business and good will, with a covenant on the seller's part not to re-embark in the same business again without the buyer's consent, which covenant by reason of not being limited, either geographically or in respect of time, would be void as an unreasonable restraint of trade, the parties may reform it by mutual consent by limiting it as to time or space, or both, where their original purpose was to affect competition only in a particular locality for a time; and no new consideration is necessary for the reformation. Ibid.

When, in course of the performance of a contract between a general contractor and a subcontractor respecting work to be done along a line of railroad, a disagreement arises over the question whether or not in respect of certain items and the compensation for them the contract truly represents what the parties to it actually agreed upon, and the subcontractor refuses to proceed unless the contract is modified in such wise as to make his compensation definite and certain and payable at a fixed rate for a specified item of work, for which, by the original contract, he was to be paid nothing, and thereupon both parties mutually agree that the contract shall be modified accordingly, and the work proceeded with under the modified agreement, the new and modifying agreement is supported by a sufficient consideration. Lynch v. Henry, 75 Wis. 631, 44 N. W. 837.

g. Explanations.

A mere explanatory supplemental agreement, which is in fact only a part of a previous contract, needs no other consideration to support it than the consideration of the main agreement. Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

A written memorandum to the effect that if a house wrecking company which had previously contracted to demolish a certain building and remove from its site the *débris* preparatory to the erection of a new structure, within a fortnight after possession should be delivered for the purpose of demolition, with a stated premium for each day gained and under an equal penalty for each one lost, should enter upon and then remove doors, windows, etc., from such parts of the condemned building as were vacant and unoccupied, such work should not be construed as the beginning of the performance of the contract, so as to deprive the wrecking company of premiums or subject it to penalties, but the beginning of the work of dismantling under the contract

should date only from the time when all tenants had departed and possession of the completely vacant building was obtained, is not a modification, change, or alteration of the contract, nor a substitute for it, but merely a precautionary statement of its true meaning as the parties understood it, designed to expedite performance. House Wrecking Co. v. Sonken, 152 Mo. App. 458, 133 S. W. 355.

An agreement between supervising architects and a contractor to build a county courthouse under the direction and superintendence of, and according to plans, specifications, and modifying orders by, such architects, made upon their refusal to accept the building and to certify to its completion according to the contract, providing, without prejudice to the rights of either party, that the public officials should at once take possession of and occupy the building, and that the contractors should without interference go on and do such further work as the architects should require, and that the questions whether or not the refusal to accept and certify was justifiable, and whether or not further work should be regarded as extra to be paid for additionally or as done to complete the contract, should be left open for future settlement, is supported by a sufficient consideration, and may be established as a supplemental or amendatory contract. Long v. Pierce County, 22 Wash. 330, 61 Pac. 142.

Articles of copartnership may be altered or changed by the mutual consent of the partners, so that the interest of each in the firm shall be fixed and determined in conformity with their understanding and agreement. Clausen v. Railey, 145 Ky. 350, 140 S. W. 547.

An agreement between partners of whom one had received from a debtor of the firm a promissory note to his individual order for the partnership debt, and had in turn given his partner his own promissory note for one half of the amount of the debtor's, made while they disagreed as to whether the partner's note was a mere memorandum to show the interest of the payee and the sum the maker must account for if the debtor paid his note, or was a purchase outright of the obligation of the debtor and the partner's interest in it, settling and stating a balance as due on the partner's note, to be paid in full if the debtor's obligations were met, otherwise to be only half paid, is supported by a good consideration. Goodenow v. Parkinson, 67 Iowa, 95, 24 N. W. 608.

When a railroad is in course of construction under a written contract calling for its completion between named terminals by a stated date, at a specified rate of compensation for divers items of work under certain conditions, and there arise between the railroad company and the contractor a misunderstanding and controversy in respect of the scope and meaning of certain terms in the contract, a new agreement between them modifying such contract in sundry particulars, entered into for the purpose of cleaning up their misunderstanding, and involving mutual concessions, is supported by a sufficient consideration, even though they fail lucidly to express their meaning a second time. J. N. H. Cornell & Co. v. Virginia Air Line R. Co. 120 C. C. A. 518, 202 Fed. 390.

L.R.A.1915B.

h. Extensions of time.

Any time previously to an actual breach of an executory contract, the time fixed in it for it to be performed may be extended without any other consideration than the mutual consent of the contracting persons. Raymond v. Smith, 5 Conn. 555; Thayer v. Meeker, 86 Ill. 470; Biederman v. O'Conner, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463; Anderson v. Moore, 145 Ill. 61, 33 N. E. 848; Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619, s. c. subsequent appeal 242 Ill. 233, 89 N. E. 990; Jones v. Alley, 4 G. Greene, 181; Stearns v. Hall, 9 Cush. 31; McKay v. Evans, 48 Mich. 597, 12 N. W. 868; Cox v. Bennet, 13 N. J. L. 165; Stryker v. Vanderbilt, 25 N. J. L. 482; Keating v. Price, 1 Johns. Cas. 22, 1 Am. Dec. 92; Fleming v. Gilbert, 3 Johns. 528; Dearborn v. Cross, 7 Cow. 48; Langworthy v. Smith, 2 Wend. 587, 20 Am. Dec. 652; Crane v. Maynard, 12 Wend. 408; Clark v. Dales, 20 Barb. 42; Homer v. Guardian Mut. L. Ins. Co. 67 N. Y. 478; Fallon v. Lawler, 102 N. Y. 228, 6 N. E. 392; Wyman v. Phœnix Mut. L. Ins. Co. 119 N. Y. 274, 23 N. E. 907; Green-Shrier Co. v. State Realty & Mortg. Co. 199 N. Y. 65, 92 N. E. 98; Veerhoff v. Miller, 30 App. Div. 355, 51 N. Y. Supp. 1048; Fellows v. Mulligan, 140 N. Y. Supp. 985; Meehan v. Williams, 36 How. Pr. 73; Scott v. Hubbard, 67 Or. 498, 136 Pac. 653; Malone v. Dougherty, 79 Pa. 46; McNish v. Reynolds, 95 Pa. 483; Whitehill v. Schwartz, 27 Pa. Super. Ct. 526; Lester v. Hutson, — Tex. Civ. App. —, 167 S. W. 321; Sherwin v. Rutland & B. R. Co. 24 Vt. 347; Barker v. Troy & R. R. Co. 27 Vt. 766; Hill v. Smith, 34 Vt. 535; Lane v. Sprague, 36 Vt. 289; Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457; Thornhill v. Neats, 8 C. B. N. S. 831, 2 L. T. N. S. 539; Thresh v. Rake, 1 Esp. 53; Hurlburt v. Thomas, 3 U. C. Q. B. 258; O'Donnell v. Hugill, 11 U. C. Q. B. 441.

Of these cases, the following related to contracts of sale and purchase of personal property in which enlargements of the time to deliver the property sold were held valid upon no other consideration than the agreement of the sellers to deliver at the deferred times, and of the buyers to accept delivery at the later dates: McKay v. Evans, 48 Mich. 597, 12 N. W. 868; Keating v. Price, 1 Johns. Cas. 22, 1 Am. Dec. 92; Clark v. Dales, 20 Barb. 42; McNish v. Reynolds, 95 Pa. 483; Hill v. Smith, 34 Vt. 535; Lane v. Sprague, 36 Vt. 289.

The case of Biederman v. Conner, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463, upheld the validity of an extension of time to a purchaser of personal property to pay

a part of the purchase price that he had agreed to pay in advance, and no extraneous or independent consideration for the extension appeared.

So, too, the mutual agreement of the parties to a contract for the sale and purchase of real estate is a sufficient consideration for an extension of time in which to pass the title under the terms of the contract. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619, s. c. subsequent appeal 242 Ill. 233, 89 N. E. 990; Stearns v. Hall, 9 Cush. 31; Stryker v. Vanderbilt, 25 N. J. L. 482.

An extension of time to a definite date for the performance of a contract for the sale and purchase of real estate, providing for the payment of the purchase price in cash, is sufficient consideration for promissory notes made and delivered by the vendee in lieu of the cash. Fellows v. Mulligan, 140 N. Y. Supp. 985.

An oral agreement modifying the terms of a written agreement made subsequently to and extending the time to perform an earlier contract to convey real property, and giving a further extension to the vendees, is valid. Hurlburt v. Fitzpatrick, 176 Mass. 287, 57 N. E. 464.

Adjournments from time to time of the fixed date and hour for performance of a contract for the sale and purchase of real estate have no effect to modify the contract except in respect of time for passing title, and leave it in every other particular in full and binding force. Green-Shrier Co. v. State Realty & Mortg. Co. 199 N. Y. 65, 92 N. E. 98.

An extension of time to perform a contract works no material change in it; it does not vary or change, but merely continues, the stipulations of the contract. Jones v. Alley, 4 G. Greene, 181.

An agreement enlarging the time to perform a contract is simply a renewal of it, by which the parties agree in all respects as before except as to the date of performance, which they then fix for a future time. Clark v. Dales, 20 Barb. 42.

It simply continues, without varying it, the contract in all respects as it was before except as to time. Thresh v. Rake, 1 Esp. 53.

Its effect is as if the postponed time had been written in and made a part of the contract, leaving every other provision of it intact. Homer v. Guardian Mut. L. Ins. Co. 67 N. Y. 478.

Agreements extending the time for performing previous agreements merely supplement, but do not supersede, the old ones, or change their terms and obligations in other respects. Orpheus Vaudeville Co. v. Clayton Invest. Co. 41 Utah, 605, 128 Pac. 575.

An oral agreement modifying a contract of bailment of personal property in respect only of times of payment of rentals leaves the contract in full force and effect in all other particulars. Whitehill v. Schwartz, 27 Pa. Super. Ct. 526.

The consideration of the original contract extends over and supports it as extended by a new agreement enlarging the time for it to be performed. Hurlburt v. Thomas, 3 U. C. Q. B. 258.

A new agreement by the parties to an old one, made before a breach of the old one, concerning the sawing of logs and the delivery of lumber at a stated rate before a named time, modifying their original contract in divers particulars as to times of delivery of the sawn lumber and payment for the same, and in other respects, is supported by and rests on the same consideration which induced the making of the original agreement. O'Donnell v. Hugill, 11 U. C. Q. B. 441.

After a contract for the construction of dwelling houses to be delivered in habitable finished condition on or before a named date, under a stated weekly penalty for delay beyond that date, has been reduced to writing and its performance commenced, a later oral agreement between the owner and contractor to put in additional work not embraced in the contract, and so intimately blended with the contract work that the whole cannot possibly be completed within the time limit, operates to extend the time of performance and to nullify the provisions relating to penalties for delay, and is founded upon a sufficient consideration. Thornhill v. Neats, 8 C. B. N. S. 831, 2 L. T. N. S. 539.

A qualification of the general doctrine that an extension of time to perform a contract requires for its support no other consideration than the mutual agreement of the parties to it is implied in some cases which add a proviso that the contract stipulates for mutual acts. Anderson v. Moore, 145 Ill. 61, 33 N. E. 848; Scott v. Hubbard, 67 Or. 498, 136 Pac. 653.

The principle of estoppel lends additional support to agreements extending time to perform contracts. After one party has consented to postpone the time fixed by a contract for it to be performed, and the other party in reliance upon that consent has neglected to perform the contract on his part on the day designated in it, the party who consented to the extension is estopped from claiming a default of the other, or from refusing himself to perform. Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673; Becker v. Becker, 250 Ill. 117, 95 N. E. 70, Ann. Cas. 1912B, 275.

The party for whom a condition or covenant is to be performed may by acts or words enlarge the time of performance. Cox v. Bennet, 13 N. J. L. 165.

An oral agreement by a landowner and an architect for the professional services of the latter in the making and delivering within sixty days next ensuing, of plans and specifications for constructing a dwelling at a cost not beyond $3,000, for a compensation of 2½ per cent on the actual cost of the building erected accordingly, is supplanted by a new agreement to be implied from the adoption and approval of plans and sketches prepared by the archi-

tect, and from time to time altered and added to by the direction of the landowner after he has been fairly and fully advised that their completion would necessarily be delayed beyond the time limit and the cost of the building be greatly enhanced. Bowell v. Draper, 149 Iowa, 725, 129 N. W. 54.

The time for performing a sealed contract to make and deliver within one year certain plane irons is extended by a new unsealed agreement afterward entered into by the parties upon a sufficient consideration. Mill Dam Foundry v. Hovey, 21 Pick. 417.

A refusal by manufacturers to deliver an engine made to order under a written contract requiring a delivery conditioned upon their ability to finish the work, afterward changed by an oral agreement requiring delivery absolutely at a later named date, where they did not finish the work and get the engine ready to deliver until several weeks later, unless the purchaser would accept the engine then as a performance on their part of the contract, and waive any claim for damages he might have on account of the delay, followed by such waiver and a delivery and acceptance of the engine, makes a valid agreement upon sufficient consideration, virtually enlarging the time of delivery and waiving the breach of the contract. Moore v. Detroit Locomotive Works, 14 Mich. 266.

A contract by which one party undertook to furnish the other annually between the first days of April and November in each of five successive years 40,000 cords of wood suitable for conversion into pulp, at a stated price the cord, one third payable in advance, having from time to time been modified in such wise as to make it easier and more profitable for the party who contracted to deliver the wood, a final agreement mutually entered into by the parties extending the time to make further deliveries, increasing the price per cord to be paid, and modifying the sizes of the wood deliverable favorably for the seller, and providing for the restoration to full force and effect of the original contract, should the final modifying one not be performed, is founded upon a sufficient consideration, and makes the original contract controlling of the rights of the parties upon default in performing the final agreement. Pulpwood Co. v. Perry, 158 Mich. 272, 122 N. W. 552.

t. Modifications in general.

A great many cases may be cited showing that new agreements by parties to prior executory contracts, to abandon, cancel, supplant, change details or methods of performing, explain, settle differences, correct mistakes, or cover matters not embraced in, or otherwise supplement, the earlier agreements, require no consideration beyond mutual consent.

It is competent for the parties to a written lease subsequently to make a contract, either in writing or by parol, which shall supersede the lease either in whole or in part. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236.

An executory contract of employment may, before any service is performed under it or any compensation made for service under it, be discharged by a new agreement or supplanted by a substitute, without any other consideration than the mutual acquittance of the parties from their engagements. Brown v. Catawba River Lumber Co. 117 N. C. 287, 23 S. E. 253.

Where differences have arisen between the lessor and lessee of a mine concerning the amount of royalties payable, and a litigation is pending, their mutual agreement to settle all matters in dispute, providing for the payment by the lessee to the lessor of a stated sum in full, is a sufficient consideration to support the cancelation of the lease and the substitution for it of a new lease of the mine. Cherokee Constr. Co. v. Prairie Creek Coal Min. Co. 102 Ark. 428, 144 S. W. 927.

A new contract by which the parties to a previous one on the same subject agree upon a sale and delivery of the output of a mine from and after its date, to be paid for monthly at specified prices, to settle a dispute that had arisen upon their old contract by the payment by one to the other of a stated sum of money, and to cancel and abrogate the former contract, is founded upon a sufficient consideration, and does not lack mutuality. Denison v. Shawmut Min. Co. 86 C. C. A. 292, 159 Fed. 102.

If parties agree while work is in progress, to abrogate the contract under which it is being done, and to make a new one on different terms in its stead, the new agreement will be valid, and is supported by a sufficient consideration. Galway v. Prignano, 134 N. Y. Supp. 571.

An oral modification of a written contract to remodel some houses to the owner's satisfaction, for a stated compensation payable in a few equal instalments, so as to require instead a larger number of more frequent payments of smaller sums to be made, to the same aggregate amount, operates to abrogate the written contract and substitute an oral one for it upon the same terms save as to payments, by the mutual consent of the parties, upon a sufficient consideration under the rule recognized in Massachusetts in such cases. Tobin v. Kells, 207 Mass. 304, 93 N. E. 596.

An agreement of a landowner and a contractor to cancel and abandon a contract previously entered into between them to remove certain buildings and construct a dwelling on the cleared site, by which the contractor was to retain a sum of money previously paid him, and to be paid for materials he had bought and delivered on the premises, is supported by a sufficient consideration. Blagborne v. Hunger, 101 Mich. 375, 59 N. W. 657.

The making of a new contract as a substitute for a former one, respecting the repurchase of shares in a corporation at the price paid for them, where they were bought

originally at the instance of the defendants upon somewhat different terms, after the corporation had increased its capital stock and the number of its shares and reduced the par value of the shares, has its sufficient consideration in the mutual abrogation of the old, and the substitution of the new, contract. Mulliken v. Haseltine, 160 Mo. App. 9, 141 S. W. 712.

A contract to manufacture and deliver a hundred thousand muskets for the United States, duly entered into but wholly unperformed, is abrogated and replaced by a new contract between the manufacturer and the government to make and deliver a smaller number, and any claim the manufacturer might, but for the new contract, have had for the refusal of the government to take all the muskets called for in the old contract, is extinguished by making and performing the new one. Mason v. United States, 17 Wall. 67, 21 L. ed. 564.

The place designated in a contract for it to be performed may be changed simply by mutual consent without other consideration. For example, the parties to a contract to make a certain garment and deliver it at a named place may modify it by mutual agreement for the delivery at another place. Langford v. Cummings, 4 Ala. 46.

A subsequent agreement between buyer and seller modifying and amending a previous contract of sale and purchase, in respect of the amount and character and mode of payment of the purchase price, rests upon the same consideration as the original contract, and needs no other to support it. Mallory v. Globe-Boston Copper Min. Co. 11 Ariz. 296, 94 Pac. 1116.

A written contract between a cotton manufacturer and a merchant, whereby one was to deliver and the other take the product of the former's looms consisting of a certain number of pieces of calico weekly, of a stated width and number of picks of warp and filling to the inch, of a described quality, during the then ensuing four months, at a named price the yard, on eight months' credit, is effectively modified upon a sufficient consideration by a subsequent oral and mutual agreement providing for payments in cash less a specified percentage of discount as fast as goods not previously paid for should be delivered, to the value of $1,000. Cummings v. Arnold, 3 Met. 486, 37 Am. Dec. 155.

A later agreement between the seller and buyer of logs for sawing, to accept as the true quantity the mill run at the mill doing the sawing, instead of pursuing the method laid down in their original contract for determining the quantity, made in consequence of a difficulty arising over applying such method, is valid, and has a good consideration in the adjustment of such difficulty, needing no other or new consideration. Perkins v. Hoyt, 35 Mich. 506.

A mutual agreement and promise of the parties, orally made after entering into a written contract for the cutting of standing timber on the land of one of them, and the sale of it to the other at a stated price the thousand feet of lumber, to settle according to the lumber tallies of the consignee to whom the lumber was shipped, and to waive the keeping of accounts of timber cut and shipped, are sufficient consideration to support their supplementary agreement. McKinney v. Matthews, — N. C. —, 82 S. E. 1036.

When, during the process of weighing cattle sold by weight at the place of delivery, the buyer and seller disagree over the accuracy of the scales in use, and then and there agree that the stock shall be paid for according to the apparent weight, and that if, on the arrival of the cattle at the distant market to which they were consigned, they shall be found to weigh more, the balance to cover the additional weight shall be forthwith paid by buyer to seller, the new contract is valid and binding, and stands on a sufficient consideration. Nelson v. Hagen, 72 Iowa, 705, 31 N. W. 875.

Where there is a sale at public auction of slaves by an administrator, with a distinct refusal by the auctioneer to warrant any of them as sound, and a slave actually unsound is knocked down to the highest bidder at the bidder's risk, and thereafter, by his and the vendor's consent, the bid is transferred to another person, who subsequently refuses to complete the sale by executing and delivering the requisite promissory notes for the purchase price unless the administrator will warrant the slave to be sound, and the latter does so and receives the notes, the contract of warranty supersedes the previous one of sale, and is a good modification of the original contract, needing to support it no other consideration than the mutual agreement of vendor and vendee. Stoudenmeier v. Williamson, 29 Ala. 558.

Although a promise by the purchaser of a slave after the sale is complete, and the title has passed by a delivered bill of sale from the vendor and the coincidental making and delivery of the vendee's promissory note, to give a new note for the purchase price with security, solely in consideration of an unaccepted offer during the negotiation leading to the sale, is a mere nude pact; nevertheless if both parties should mutually agree to modify the contract of sale by the passing of a new and secured note and the surrender of the old one, such agreement would need no other consideration than their mutual consent, promises, and concessions. Thomason v. Dill, 30 Ala. 444.

The provisions of a written contract for the sale and delivery of a quantity of timber of specified sizes, at stated prices and times, may be orally changed afterward by mutual consent of the parties in respect of quantities, times of deliveries, terms of payment, or prices, and the new contract will supersede the old and rest upon a sufficient consideration. Carrier v. Dilworth, 59 Pa. 406.

A plea in defense of an action to recover

the purchase price of goods sold and delivered, averring in substance a subsequent modification of the contract of sale by mutual consent of seller and buyer, by which it was agreed that if said goods proved to be unsalable, they might be returned and the debt for the purchase price should be discharged, and stating that such goods did prove unsalable and were returned, need not allege any consideration for the new and modifying agreement. Warren v. Cash, 143 Ala. 158, 39 So. 124.

An agreement rescinding the sale of a mule where the purchase price was payable by a promissory note with surety, until there should be substituted for the note delivered a new note altered so as to draw interest at a certain rate, needs no further consideration than the mutual consent of buyer and seller. Wellden v. Witt, 145 Ala. 605, 40 So. 126.

A subsequent promise by the seller of soldiers' additional homestead land scrip to the buyer under an original contract guarantying the validity of such scrip, and covenanting to refund the purchase money should it be disallowed and finally rejected, made as an amendment or supplement to such contract, to repay the money in case the United States Department of the Interior refuses to recognize or returns the scrip as invalid, is supported by the same consideration as that upon which the original contract rested. Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084.

An agreement in writing between a policy holder and an insurance company, submitting to appraisement the loss and damage insured against, and making the award thereon binding and conclusive, although the policy made it only prima facie evidence of the amount of loss, is supported by the same consideration that supported the policy, and needs nothing more than mutual consent. Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175.

An indorsement in writing put upon a written contract to manufacture and deliver glass bottles some months after it was entered into, adding to its terms a provision requiring the bottles to be made by union workmen, or else the contract to be canceled, must be deemed an additional agreement modifying the original contract by mutual consent, supported by the original consideration, and needing none other. Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520.

An oral modification of an unsealed written lease of a farm and live stock, providing *inter alia* for a division at its termination of the increase of the animals equally between the landlord and tenant, after an appraisement of their market value, entered into after the lease was signed, but before it took effect, by which it was mutually agreed that the appraisal should be made for the purpose of determining whether the condition of the stock was better or worse at the end than at the beginning of the lease, without regard to its market value, is supported by a sufficient consideration, and hence is valid. Flanders v. Fay, 40 Vt. 316.

In an action by a contractor to recover the balance of an agreed compensation for work done under a written building contract which imposed on him a daily penalty for delay beyond a named time in completing his work, wherein the owners set up a counterclaim for demurrage penalties, it is a sufficient reply to the counterclaim and excuse for the delay, that such delay was attributable to the failure for an unduly long time, of the owners to perform a supplemental oral agreement by which they covenanted to construct a railroad siding to transport the building materials to the building site. Huckestein v. Kelly, 152 Pa. 631, 25 Atl. 747.

A written agreement to grade a strip of railroad before a stated time shall elapse, to be paid for according to the estimates of the engineer of the railroad company, made between a contractor and a subcontractor, and partly performed to the extent of three fifths of the whole work, may, without any consideration beyond the assent of both, be mutually abandoned by the oral agreement of both parties, and the promise of the contractor to pay the subcontractor a definite sum of money as a balance due for work thus far done is valid and binding, notwithstanding no estimate of the engineer was made and the original time limit had expired. Andrews v. Tucker, 127 Ala. 602, 29 So. 34.

An oral agreement changing the route of a water conduit, actually carried into effect and fully performed, from the courses and distances given in a prior grant of the right of way by deed, for the mutual convenience of the parties, is valid, and rests upon a sufficient consideration. Le Fevre v. Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

A modification of an agreement for the hire of two slaves, whereby one of them was taken back by the owner before the term expired, when made by mutual agreement, is good, and operates to rescind it as to one, and continue it as to the other slave. Borum v. Garland, 9 Ala. 452.

No new consideration is needed to support a subsequent agreement respecting the services and compensation of a secretary for a corporation, which deviates in no material respect from the original arrangement made with him. Grath v. Mound City Roofing Tile Co. 121 Mo. App. 245, 98 S. W. 812.

It is competent for a master and servant who have made a contract for the latter's service in working up material belonging to and furnished by the former, where the remuneration to be paid was to be measured by the quantity of the finished product, if they are so mutually minded, to modify their contract before any work has begun under it, and while they wait the arrival of a supply of material, so as to provide for the payment of a definite daily wage to the workman. Brown v. Catawba Lumber Co. 117 N. C. 287, 23 S. E. 253.

A new agreement between debtor and

creditor respecting a debt previously payable by contract in specific property, made before it matures, changing the mode and extending the time of payment, needs no new consideration. Thrall v. Mead, 40 Vt. 540.

The modification of an executory contract to build a private road, made just as the contractors were ready to begin work, upon the ground that the price agreed upon was excessive, by which such price was abated to a certain extent by the contractors, and in lieu of the reduction consented to by them, the employers promised in case they did not make a fair profit at the reduced price to pay in addition 10 per centum of the amounts disbursed for labor and material, rests upon a sufficient consideration, and is supported as well by that of the original contract. Barr v. Johnson, 170 Mo. App. 394, 155 S. W. 459.

A mutual agreement between the parties to a contract to run a passenger omnibus from railroad trains to a hotel, to abandon it, requires no new and independent consideration. Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551, 43 N. W. 956.

An agreement between an indorser and the indorsee of a promissory note, made subsequently to the indorsement and delivery of such note, rescinding or modifying the contract evidenced by the indorsement, is good without other or further consideration than the mutual consent and agreement. Young v. Fuller, 29 Ala. 464.

The explicit withdrawal by an applicant of his application for a policy of life insurance, and the consent of the agent who solicited and received it to such withdrawal, before it has been acted upon by the insurance company to which it was addressed, and when no policy has been issued, rescinds and annuls the applicant's promissory note given with the application to pay the first premium, and for such rescission no other consideration than the abandonment of the transaction by both parties is requisite. Crutchfield v. Dailey, 98 Ga. 462, 25 S. E. 526.

A surrender of a fire insurance policy containing a provision authorizing the insurer to cancel any time on refunding or tendering the unearned premium, by the insured, and his assent to a postponement of the payment of the unearned premium at the insurer's request, make a valid cancelation of the policy upon a sufficient consideration. Bingham v. Insurance Co. of N. A. 74 Wis. 503, 43 N. W. 494.

A contract of sale and purchase of merchandise of a guaranteed purity and quality, partly paid for by the purchaser on delivery, is mutually canceled and rescinded when the buyer, objecting to the goods as impure and not up to standard, returns them to the seller, who takes them back and refunds the purchase money. Alden v. Thurber, 149 Mass. 271, 21 N. E. 312.

A contract by the owner of a farm, binding her to build a dairy, barn, hog houses, and to furnish materials for fences, and the other party to furnish dairy implements, milch kine, and other live stock, to reside upon and manage the farm for three years, and to be compensated for his services by a certain share of the produce, terminable by either party on sixty days' notice at the end of any year, may be abrogated and annulled by mutual consent, since it imposes reciprocal obligations, and the release by each of the other from the respective obligations is sufficient consideration for the cancelation of the contract. Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733.

A contract of guaranty entered into concurrently with the principal obligation is supported by the same consideration which supports the primary contract. Erie County Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54.

A written promise made subsequently to a purchase of real estate under a written contract, which merely reduced to writing an oral promise concurrently made by the vendor to procure within a year a purchaser of the land at a stated higher price to the vendee, is valid and binding, and rests upon the same consideration as the original contract of sale, to which the promise was an inducement. Hurless v. Wiley, 91 Kan. 347, — L.R.A.(N.S.) —, 137 Pac. 981.

A written agreement made by landlord and tenant, providing that the monthly rent payable by the terms of the lease shall be equally divided between the landlord and a third person, is valid, and not open to any objection from the tenant as lacking in consideration. Waters v. Pearson, 39 App. D. C. 10; Waters v. McKahan, 39 App. D. C. 18.

An oral agreement between a landlord and tenant, made at the expiration of the term, by which the tenant was to continue, free of rent, to occupy the leased premises as care taker for the landlord's benefit pending the making of sundry contemplated improvements, and a new lease after the improvements were completed, would be, if proven, supported by a sufficient consideration. San Juan Light & Transit Co. v. Segura, 1 Porto Rico Fed. Rep. 507.

When, by mutual consent of landlord and tenant, a written lease is orally abrogated and all arrears of rent to date are paid and accepted in full, and the premises are surrendered, the lease is effectually and completely canceled and the tenancy is terminated, and if, afterward, both parties orally agree upon a new lease of the same land with different terms and conditions, and the tenant resumes and continues in possession paying rent under it while the landlord accepts the new rent and makes certain improvements that he had agreed to make, the new lease is a complete substitute for the former one, and constitutes the whole contract of the parties, and needs no new or additional consideration for its support. Evans v. McKanna, 89 Iowa, 362, 56 N. W. 527.

An agreement by the purchaser of slaves, to return them to the vendor and pay him on demand a sum of money equaling their depreciation in value, is a good considera-

tion for the rescission of the contract of sale. Lightfoot v. Strahan, 7 Ala. 444.

The waiving by a tenant of his right to rescind a lease because of the falsity of the landlord's representations concerning the supply of water to the leased premises is a sufficient consideration for a subsequent agreement by the landlord to furnish an adequate supply of water. Sisson v. Kaper, 105 Iowa, 599, 75 N. W. 490.

An oral promise by the landlord to the tenant of a theater, occupying it under a lease containing no covenant by the lessor or lessee to make alterations or repairs to the building, made on the demand of a public officer under a threat to revoke the license, to provide additional exits from the building to the street, will be valid and binding, and have a sufficient consideration in the enhanced value of and benefit to the leasehold estate. Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203.

A written contract of employment as a traveling salesman at a stated monthly salary and expenses in a specified territory, terminable by either party on thirty days' notice, may be modified by the mutual agreement of the master and servant orally expressed, without a new consideration, changing the salesman's compensation for future service to one half the gross profits from sales in his territory. Strahl v. Western Grocer Co. 5 Neb. (Unof.) 482, 98 N. W. 1043.

An oral agreement by the tenant of premises rented in writing for a colt not warranted, afterward discovered to be unable to eat or drink in consequence of an injured throat, to take back the animal in the fall and pay the landlord $50 for it, or if it died in the meantime to pay a fair and reasonable compensation to the landlord, is founded upon a good consideration. Jackson v. Helmer, 73 App. Div. 134, 77 N. Y. Supp. 835.

V. Right to make secondary contracts upon consideration.

The parties to any contract, if they continue interested and act upon a sufficient consideration while it remains executory, and before a breach of it occurs, may by a new and later agreement rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute.

U. S.—Chesapeake & O. Canal Co. 101 U. S. 522, 25 L. ed. 792; Teal v. Bilby, 123 U. S. 572, 31 L. ed. 263, 8 Sup. Ct. Rep. 239; Renwick v. Wheeler, 48 Fed. 431; Domenico v. Alaska Packers' Asso. 112 Fed. 554, reversed in 54 C. C. A. 485, 117 Fed. 99 (the subsequent reversal of the decision in this case did not affect the above stated general proposition); Danison v. Shawmut Min. Co. 86 C. C. A. 292, 159 Fed. 102; J. N. H. Cornell & Co. v. Virginia Air Line R. Co. 120 C. C. A. 518, 202 Fed. 390; San Juan Light & Transit Co. v. Segura, 1 Porto Rico Fed. Rep. 507.

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Ala.—Langford v. Cummings, 4 Ala. 46; Lightfoot v. Strahan, 7 Ala. 444; Borum v. Garland, 9 Ala. 452; Hussey v. Roquemore, 27 Ala. 281; Murphy v. Barefield, 27 Ala. 634; Young v. Fuller, 29 Ala. 464; Stoudenmeier v. Williamson, 29 Ala. 558; Thomason v. Dill, 30 Ala. 444; Burkham v. Mastin, 54 Ala. 122; Cooper v. McIlwain, 58 Ala. 296; Stewart v. Cross, 66 Ala. 22; Robinson v. Bullock, 66 Ala. 548; Badders v. Davis, 88 Ala. 367, 6 So. 834; Hembree v. Glover, 93 Ala. 622, 8 So. 660; Maness v. Henry, 96 Ala. 454, 11 So. 410; Cornish v. Suydam, 99 Ala. 621, 13 So. 118; Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 523, 30 So. 79; Andrews v. Tucker, 127 Ala. 612, 29 So. 34; Mylin v. King, 139 Ala. 319, 35 So. 998; Warren v. Cash, 143 Ala. 158, 39 So. 124; Wellden v. Witt, 145 Ala. 605, 40 So. 126; Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; Huntsville Elks Club v. Garrity-Hahn Bldg. Co. 176 Ala. 128, 57 So. 750; Hertz v. Montgomery Journal Pub. Co. 9 Ala. App. 178, 62 So. 564; George v. Roberts, — Ala. —, 65 So. 345.

Ariz—Mallory v. Globe-Boston Copper Min. Co. 11 Ariz. 296, 94 Pac. 1116.

Ark.—Mason v. Wilson, 43 Ark. 172; Russell v. Stewart, 78 Ark. 603, 94 S. W. 47; Trumbull v. Harris, 102 Ark. 669, 145 S. W. 547; Cherokee Constr. Co. v. Prairie Creek Coal Min. Co. 102 Ark. 428, 144 S. W. 927; Feldman v. Fox, — Ark. —, 164 S. W. 766; Capitol Food Co. v. Mode, — Ark. —, 165 S. W. 637; Lamberton v. Harris, — Ark. —, 166 S. W. 554.

Cal.—Adler v. Friedman, 16 Cal. 139; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co. 121 Cal. 167, 53 Pac. 565; Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937; Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985, 21 Mor. Min. Rep. 695; Re McDougald, 146 Cal. 196, 79 Pac. 875; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154; Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265.

Colo.—Cofield v. Clark, 2 Colo. 101; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Hyman v. Jockey Club Wine, Liquor & Cigar Co. 9 Colo. App. 299, 48 Pac. 671; Heath v. Vaughn, 11 Colo. App. 384, 53 Pac. 229; McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159; Leonard v. Hallett, — Colo. —, 141 Pac. 481.

Conn.—Raymond v. Smith, 5 Conn. 555; Connelly v. Devoe, 37 Conn. 570; O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763.

Del.—England-Kelch Co. v. Evening Journal Co. — Del. —, 91 Atl. 448.

D. C.—Waters v. Pearson, 39 App. D. C. 10; Waters v. McKahan, 39 App. D. C. 18.

Fla.—Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346; Howard v. Pensacola & A. R. Co. 24 Fla. 560, 5 So. 356; Fischler v. Kurtz, 35 Fla. 323, 17 So. 661; Robinson v. Hyer, 35 Fla. 544, 17 So. 745; Gumby v. Drew, 45 Fla. 350, 34 So. 305.

Ga.—Crutchfield v. Dailey, 98 Ga. 462, 25 S. E. 526; Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703; Byrd Printing Co. v. Whitaker Paper Co. 135 Ga. 865, 70 S. E. 798, Ann. Cas. 1912A, 182; Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056; Little Rock Furniture Co. v. Jones, 13 Ga. App. 502, 79 S. E. 375.

Ill.—Burnside v. Potts, 23 Ill. 411; White v. Walker, 31 Ill. 422; Bishop v. Busse, 69 Ill. 403; Thayer v. Meeker, 86 Ill. 470; Biederman v. O'Conner, 117 Ill. 493, 57 Am. Rep. 876, 7 N. E. 463; Millers' Nat. Ins. Co. v. Kinneard, 136 Ill. 199, 26 N. E. 368; Anderson v. Moore, 145 Ill. 61, 33 N. E. 848; Moses v. Loomis, 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952; Starin v. Kraft, 174 Ill. 120, 50 N. E. 1059; VanHousen v. Copeland, 180 Ill. 74, 54 N. E. 169; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110; Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619, s. c. on subsequent appeal 242 Ill. 233, 89 N. E. 990; Roberts v. Carter, 31 Ill. App. 142; National Time Recorder Co. v. Feypel, 93 Ill. App. 170; Barrie v. King, 105 Ill. App. 426; White v. Magirl, 113 Ill. App. 224; Dickson v. Owens, 134 Ill. App. 561; Doyle v. Dunne, 144 Ill. App. 14; Murphy v. Lever, 147 Ill. App. 460.

Ind.—Mills v. Riley, 7 Ind. 137; Coyner v. Lynde, 10 Ind. 282; Friermood v. Pierce, 17 Ind. 461; Clark v. Billings, 59 Ind. 509; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925.

Iowa.—Jones v. Alley, 4 G. Greene, 181; Cox v. Carrell, 6 Iowa, 350; Leach v. Keach, 7 Iowa, 232; Hall v. Smith, 10 Iowa, 45; Merry v. Allen, 39 Iowa, 235; LeGrand Quarry Co. v. Reichard, 40 Iowa, 161; Maxwell v. Graves, 59 Iowa, 613, 13 N. W. 758; Dewey v. Life, 60 Iowa, 361, 14 N. W. 347; Jaffray v. Greenbaum, 64 Iowa, 492, 20 N. W. 775; Goodenow v. Parkinson, 67 Iowa, 95, 24 N. W. 608; Richardson & B. Co. v. Independent Dist. 70 Iowa, 573, 31 N. W. 871; Nelson v. Hagen, 72 Iowa, 705, 31 N. W. 875; Chandler v. Knott, 86 Iowa, 113, 53 N. W. 88; Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432; Evans v. McKanna, 89 Iowa, 362, 56 N. W. 527; Foley v. Tipton Hotel Asso. 102 Iowa, 272, 71 N. W. 236; Sisson v. Kaper, 105 Iowa, 599, 75 N. W. 490; Jones v. Haines, 117 Iowa, 80, 90 N. W. 518; Morrison Mfg. Co. v. Byson, 129 Iowa, 645, 103 N. W. 1016, 106 N. W. 153; Moench v. Hower, 137 Iowa, 621, 115 N. W. 229; Lamb v. Morrow, 140 Iowa, 89, 18 L.R.A.(N.S.) 226, 117 N. W. 1118; Quarton v. American Law Book Co. 143 Iowa, 517, 32 L.R.A.(N.S.) 1, 121 N. W. 1009; Tague v. McColm, 145 Iowa, 179, 123 N. W. 960; Bowell v. Draper, 149 Iowa, 725, 129 N. W. 54; Gorton v. Moeller Bros. 151 Iowa, 729, 130 N. W. 910; Richards v. Hellen, 153 Iowa, 66, 133 N. W. 393; Kurtz v. Payne Invest. Co. 156 Iowa, 376, 135 N. W. 1075; Pardoe v. Jones, — Iowa, —, 143 N. W. 405; Peterson v. Rankin, — Iowa, —, 143 N. W. 418; Graham v. Crisman, — Iowa, —, 146 N. W. 756.

Kan.—Evans v. Jacobitz, 67 Kan. 249, 72 Pac. 848; George v. Lane, 80 Kan. 94, 102 Pac. 55.

Ky.—Price v. Price, 111 Ky. 772, 64 S. W. 746, 66 S. W. 529, 531; Proctor Coal Co. v. Strunk, 123 Ky. 520, 96 S. W. 603; John King Co. v. Louisville & N. R. Co. 131 Ky. 46, 114 S. W. 308; Bell v. Pitman, 143 Ky. 521, 35 L.R.A.(N.S.) 820, 136 S. W. 1026; Clausen v. Railey, 145 Ky. 350, 140 S. W. 547; Homire v. Stratton & T. Co. 157 Ky. 822, 164 S. W. 67; Menefee v. Rankins, 158 Ky. 78, 164 S. W. 365; Imeson v. Newport & C. Bridge Co. 5 Ky. L. Rep. 685; Crawford v. Colyer, 12 Ky. L. Rep. 990; Hill v. Wilson, 15 Ky. L. Rep. 815; Albin Co. v. Firth Carpet Co. 24 Ky. L. Rep. 2432, 74 S. W. 212.

La.—Moorman v. Plummer Lumber Co. 113 La. 429, 37 So. 17; Winston Bros. v. Louisiana Cent. Constr. Co. 127 La. 10, 53 So. 367.

Me.—Courtenay v. Fuller, 65 Me. 156; Hanson v. Hellen, — Me. —, 6 Atl. 837; Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21; Copeland v. Hewett, 96 Me. 525, 53 Atl. 36; Pancoast v. Dinsmore, 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43.

Md.—Howard v. Wilmington & S. R. Co. 1 Gill, 311; Brooke v. Waring, 7 Gill, 5; Coates v. Sangston, 5 Md. 131; Allen v. Sowerby, 37 Md. 420; Fusting v. Sullivan, 41 Md. 170; Furness, W. & Co. v. Randall, — Md. —, 91 Atl. 797; Furness, W. & Co. v. Fahey, — Md. —, 91 Atl. 800.

Mass.—Johnson v. Reed, 9 Mass. 78, 6 Am. Dec. 36; Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475; Mill Dam Foundery v. Hovey, 21 Pick. 417; Cummings v. Arnold, 3 Met. 486, 37 Am. Dec. 155; Adams v. Wilson, 12 Met. 138, 45 Am. Dec. 240; Stearns v. Hall, 9 Cush. 31; Holmes v. Doane, 9 Cush. 135; Blasdell v. Souther, 6 Gray, 149; Peck v. Requa, 13 Gray, 407; Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80; Cutter v. Cochrane, 116 Mass. 408; Rollins v. Marsh, 128 Mass. 116; Byington v. Simpson, 134 Mass. 145; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Hastings v. Lovejoy, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776; Bartlett v. Stanchfield, 148 Mass. 394, 2 L.R.A. 625, 19 N. E. 549; Alden v. Thurber, 149 Mass. 271, 21 N. E. 312; Gloucester Isinglass & Glue Co. v. Russia Cement Co. 154 Mass. 92, 12 L.R.A. 563, 26 Am. St. Rep. 214, 27 N. E. 1005; Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683; Hobbs v. Columbia Falls Brick Co. 157 Mass. 109, 31 N. E. 756; Hurlburt v. Fitzpatrick, 176 Mass. 287, 57 N. E. 464; Pease v. McQuillin, 180 Mass. 135, 61 N. E. 819; Taylor v. Finnigan, 189 Mass. 568, 2 L.R.A.(N.S.) 973, 76 N. E. 203; Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Tobin v. Kells, 207 Mass. 304, 93 N. E. 596; John Hetherington & Sons v. William Firth Co. 210 Mass. 8, 95 N. E. 961; Owen v. Button, 210 Mass. 219, 96 N. E. 333; Borden v. Fine, 212 Mass. 425, 98 N. E. 1073.

Mich.—Moore v. Detroit Locomotive

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Minn.—Bryant v. Lord, 19 Minn. 396, Gil. 342; Michaud v. MacGregor, 61 Minn. 198, 63 N. W. 479; King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105; Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026.

Miss.—Lee v. Hawks, 68 Miss. 669, 13 L.R.A. 633, 9 So. 828.

Mo.—Fine v. Rogers, 15 Mo. 315; Bunce v. Beck, 43 Mo. 266; Henning v. United States Ins. Co. 47 Mo. 425, 4 Am. Rep. 332; Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467; Warren v. A. B. Mayer Mfg. Co. 161 Mo. 112, 61 S. W. 644; Lancaster v. Elliot, 55 Mo. App. 249; Pim v. Greer, 64 Mo. App. 175; Sanders Pressed Brick Co. v. Barr, 76 Mo. App. 380; McClung v. Whitney, 82 Mo. App. 625; Wilson v. Russler, 91 Mo. App. 275; Creamery Package Mfg. Co. v. Sharpless Co. 98 Mo. App. 207, 71 S. W. 1068; Fullerton v. Schloss, 104 Mo. App. 195, 77 S. W. 770; Harrington v. F. W. Brockman Commission Co. 107 Mo. App. 418, 81 S. W. 629; Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126; Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542, 86 S. W. 275; Cannon-Weiner Elevator Co. v. Boswell, 117 Mo. App. 473, 93 S. W. 355; Grath v. Mound City Roofing Tile Co. 121 Mo. App. 245, 98 S. W. 812; Scriba v. Neely, 130 Mo. App. 258, 109 S. W. 845; Peters & R. Pottery Co. v. Folckemer, 131 Mo. App. 105, 110 S. W. 598; Lindsly v. Kansas City Viaduct & Terminal Co. 152 Mo. App. 221, 133 S. W. 389; Sheetz v. Price, 154 Mo. App. 574, 136 S. W. 733; Welch v. Mischke, 154 Mo. App. 728, 136 S. W. 36; Schneider v. Chew, 157 Mo. App. 354, 138 S. W. 357; Wilson v. Duffy, 158 Mo. App. 509, 138 S. W. 918; Mulliken v. Haseltine, 160 Mo. App. 9, 141 S. W. 712; England v. Houser, 163 Mo. App. 1, 145 S. W. 514, on second appeal 178 Mo. App. 70, 163 S. W. 890; Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448; Smith v. Crane, 169 Mo. App. 695, 154 S. W. 857; Barr v. Johnson, 170 Mo. App. 394, 155 S. W. 459; Goller v. Henseler Mercantile Oil & Supply Co. 179 Mo. App. 48, 161 S. W. 584; Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362.

Neb.—Morrissey v. Schindler, 18 Neb. 672, 26 N. W. 476; Delaney v. Linder, 22 Neb. 274, 34 N. W. 630; Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749; Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Walsh v. Lunney, 75 Neb. 337, 106 N. W. 447; Easton v. Snyder-Trimble Co. 94 Neb. 18, 142 N. W. 695; Strahl v. Western Grocer Co. 5 Neb. (Unof.) 482, 98 N. W. 1043; Dengler v. Fowler, 94 Neb. 621, 143 N. W. 944.

N. H.—Hildreth v. Pinkerton Academy, 29 N. H. 227; Miles v. Roberts, 34 N. H. 245.

N. J.—Cox v. Bennet, 13 N. J. L. 165; Stryker v. Vanderbilt, 25 N. J. L. 482; Cooper v. Hawley, 60 N. J. L. 560, 38 Atl. 964; New Jersey Trust & S. D. Co. v. National Gas & Constr. Co. 71 N. J. L. 29, 58 Atl. 104; Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009; Headley v. Cavileer, 82 N. J. L. 635, 48 L.R.A.(N.S.) 564, 82 Atl. 908; Denoth v. Carter, 85 N. J. L. 95, 88 Atl. 835; Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209.

N. Mex.—Amarillo Hardware Co. v. McMurray, 15 N. M. 562, 110 Pac. 833.

N. Y.—Keating v. Price, 1 Johns. Cas. 22, 1 Am. Dec. 92; Ballard v. Walker, 3 Johns. Cas. 64; Fleming v. Gilbert, 3 Johns. 528; Lattimore v. Harsen, 14 Johns. 330; Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380; Erwin v. Saunders, 1 Cow. 249, 13 Am. Dec. 520; Franchot v. Leach, 5 Cow. 506; Dearborn v. Cross, 7 Cow. 48; Langworthy v. Smith, 2 Wend. 587, 20 Am. Dec. 652; Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Crane v. Maynard, 12 Wend. 408; Esmond v. Van Benschoten, 12 Barb. 366; Clark v. Dales, 20 Barb. 42; Eccleston v. Ogden, 34 Barb. 444; Like v. McKinstry, 41 Barb. 186; Keeney v. Mason, 49 Barb. 254; Stewart v. Keteltas, 36 N. Y. 388; Homer v. Guardian Mut. L. Ins. Co. 67 N. Y. 478; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120; Morehouse v. Second Nat. Bank, 98 N. Y. 503; Fallon v. Lawler, 102 N. Y. 228, 6 N. E. 392; Erie County Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54; McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Wyman v. Phœnix Mut. L. Ins. Co. 119 N. Y. 274, 23 N. E. 907; McKenzie v. Harrison, 120 N. Y. 260, 8 L.R.A. 257, 17 Am. St. Rep. 638, 24 N. E. 458; Oregon P. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Bandman v. Finn, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; Green-Shrier Co. v. State Realty & Mortg. Co. 199 N. Y. 65, 93 N. E. 98; Horgan v. Krumwiede, 25 Hun, 116; Roberts v. Summit Park Co. 72 Hun, 458, 25 N. Y. Supp. 297; McIntosh v. Miner, 37 App. Div. 483, 55 N. Y. Supp. 1074; Veerhoff v. Miller, 30 App. Div. 355, 51 N. Y. Supp. 1048; Melville v. Kruse, 69 App. Div. 211, 74 N. Y. Supp. 826, affirmed in 174 N. Y. 306, 66 N. E. 965; Jackson v. Helmer, 73 App. Div. 134, 77 N. Y. Supp. 835; Hartwig v. American Malting Co. 74 App. Div. 140, 77 N. Y. Supp. 533, affirmed in 175 N. Y. 489, 67 N. E. 1083; Spier v.

Hyde, 78 App. Div. 151, 79 N. Y. Supp. 699; Smith v. Kissel, 92 App. Div. 235, 87 N. Y. Supp. 176, affirmed in 181 N. Y. 536, 73 N. E. 1133; Haight v. Cohen, 123 App. Div. 707, 108 N. Y. Supp. 502; Napier v. Spielmann, 127 App. Div. 711, 111 N. Y. Supp. 1009; H. G. Vogel Co. v. Wolff, 156 App. Div. 584, 141 N. Y. Supp. 756; Freeland v. Bacon, 27 N. Y. S. R. 273, 7 N. Y. Supp. 674; French v. Wallack, 12 N. Y. S. R. 159; Copper v. Fretnoransky, 42 N. Y. S. R. 472, 16 N. Y. Supp. 866; Bacon v. Proctor, 13 Misc. 1, 33 N. Y. Supp. 995; Post v. Blankenstein, 30 Misc. 796, 63 N. Y. Supp. 218; Ireland v. Hyde, 34 Misc. 546, 69 N. Y. Supp. 889; Innes v. Ryan, 37 Misc. 806, 76 N. Y. Supp. 921; Natelsohn v. Reich, 50 Misc. 585, 99 N. Y. Supp. 327; American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236; McKeogh v. Browning, K. & Co. 125 N. Y. Supp. 368; Galway v. Prignano, 134 N. Y. Supp. 571; Fellows v. Mulligan, 140 N. Y. Supp. 985; Meehan v. Williams, 36 How. Pr. 73; Schmidt v. Couperthwait, 66 How. Pr. 477.

N. C.—Brown v. Catawba Lumber Co. 117 N. C. 287, 23 S. E. 253; Gatlin v. Serpell, 136 N. C. 202, 48 S. E. 631.

Ohio.—Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

Or.—Oregonian R. Co. v. Wright, 10 Or. 162; Scott v. Hubbard, 67 Or. 498, 136 Pac. 653.

Pa.—Le Fevre v. Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Goucher v. Martin, 9 Watts, 106; Boyce v. M'Culloch, 3 Watts & S. 429, 39 Am. Dec. 35; Lauer v. Lee, 42 Pa. 165; Carrier v. Dilworth, 59 Pa. 406; Malone v. Dougherty, 79 Pa. 46; Collins v. Barnes, 83 Pa. 15; McNish v. Reynolds, 95 Pa. 483; McCauley v. Keller, 130 Pa. 53, 17 Am. St. Rep. 758, 18 Atl. 607; Huckestein v. Kelly, 152 Pa. 631, 25 Atl. 747; Green v. Paul, 155 Pa. 126, 25 Atl. 867; Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Dreifus v. Columbian Exposition Salvage Co. 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370; Evans v. Lincoln Co. 204 Pa. 448, 54 Atl. 321; Thompson v. Craft, 238 Pa. 125, 85 Atl. 1107; Whitehill v. Schwartz, 27 Pa. Super. Ct. 526; Thompson v. Stone, 43 Pa. Super. Ct. 69.

R. I.—Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Smith v. Lilley, 17 R. I. 119, 20 Atl. 227.

S. C.—Smith v. Tunno, 1 M'Cord, Eq. 443, 16 Am. Dec. 617; Morse v. Ellerbe, 4 Rich. L. 600.

S. D.—Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000.

Tex.—Hogan v. Crawford, 31 Tex. 633; Galveston v. Galveston City R. Co. 46 Tex. 435; Foley v. Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442; Craig v. Dumars, 7 Tex. Civ. App. 28, 26 S. W. 743; Ligon v. Wharton, — Tex. Civ. App. —, 120 S. W. 930; Caples v. Port Huron Engine & Thresher Co. — Tex. Civ. App. —, 131 S. W. 303; Old River Rice Irrig. Co. v. Stubbs, — Tex. Civ. App. —, 137 S. W. 154; Washington L. Ins. Co. v. Reinhardt, — Tex. Civ. App. —, 142 S. W. 596; Lester v. Hutson, — Tex. Civ. App. —, 167 S. W. 321.

Utah.—Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331; Orpheus Vaudeville Co. v. Clayton Invest. Co. 41 Utah, 605, 128 Pac. 575.

Vt.—Bryant v. Gale, 5 Vt. 416; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Sherwin v. Rutland & B. R. Co. 24 Vt. 347; Barker v. Troy & R. R. Co. 27 Vt. 766; Lawrence v. Davey, 28 Vt. 264; Hill v. Smith, 34 Vt. 535; Lane v. Sprague, 36 Vt. 289; Flanders v. Fay, 40 Vt. 316; Thrall v. Mead, 40 Vt. 540.

Wash.—Brodek v. Farnum, 11 Wash. 565, 40 Pac. 189; Carstens v. Burleigh, 20 Wash. 283, 55 Pac. 221; Long v. Pierce County, 22 Wash. 330, 61 Pac. 142; Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 80, 64 Pac. 1009; Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037; Parker v. Advance Thresher Co. 75 Wash. 505, 135 Pac. 229; Stofferan v. Depew, 79 Wash. 170, 139 Pac. 1084.

W. Va.—Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457.

Wis.—Palmer v. Yager, 20 Wis. 91; Wells v. Millet, 23 Wis. 64; Brown v. Everhard, 52 Wis. 205, 8 N. W. 925; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Snell v. Bray, 56 Wis. 159, 14 N. W. 14; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181; Bingham v. Insurance Co. of N. A. 74 Wis. 503, 43 N. W. 494; Hathaway v. Lynn, 75 Wis. 186, 6 L.R.A. 551, 43 N. W. 956; Lynch v. Henry, 75 Wis. 631, 44 N. W. 837; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; Montgomery v. American Cent. Ins. Co. 108 Wis. 146, 84 N. W. 175; Kerslake v. McInnis, 113 Wis. 659, 89 N. W. 895; Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. 132 Wis. 1, 111 N. W. 237; Schoblasky v. Rayworth, 139 Wis. 115, 120 N. W. 822.

Eng.—Goss v. Nugent, 5 Barn. & Ad. 65, 2 Nev. & M. 28, 2 L. J. K. B. N. S. 127; Thornhill v. Neats, 8 C. B. N. S. 831, 2 L. T. N. S. 539; Foster v. Dawber, 6 Exch. 839, 20 L. J. Exch. N. S. 385; King v. Gillett, 7 Mees. & W. 55, 10 L. J. Exch. N. S. 164; Langden v. Stokes, Cro. Car. 383; Edwards v. Weeks, 1 Mod. 262; May v. King, 12 Mod. 538; Bull. N. P. 152.

Can.—Penman Mfg. Co. v. Broadhead, 21 Can. S. C. 713; Hurlburt v. Thomas, 3 U. C. Q. B. 258; O'Donnell v. Hughill, 11 U. C. Q. B. 441.

The parties to an existing contract may modify it by a new agreement on any new consideration. Smith v. Tunno, 1 M'Cord, Eq. 443, 16 Am. Dec. 617.

It is well settled that a contract may be discharged—usually and correctly termed rescinded—by an express agreement that it shall no longer bind either party. Lipschutz v. Weatherly, 140 N. C. 368, 53 S. E. 132.

It is always competent for the parties to rescind a subsisting simple contract by a naked agreement to that effect. Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363.

The right to contract comprehends the

right to modify, alter, or abrogate a prior contract. Bishop v. Busse, 69 Ill. 403.

It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. Foster v. Dawber, 6 Exch. 839, 20 L. J. Exch. N. S. 385.

An agreement creating a different obligation to take the place of an original one is valid. Price v. Price, 111 Ky. 772, 64 S. W. 746, 66 S. W. 529, 531.

The right of the parties to an existing contract, to make a new one to take its place, is beyond doubt. Peters & R. Pottery Co. v. Folckemer, 131 Mo. App. 105, 110 S. W. 598.

No rule of law forbids the relinquishment of existing contracts and the substitution of new contracts in their stead. Conkling v. Tuttle, 52 Mich. 630, 18 N. W. 391.

The parties to a contract ordinarily are as free to change it after making it as they were to make it in the first instance, and this notwithstanding provisions in it designed to hamper such freedom. O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763; Copeland v. Hewett, 96 Me. 525, 53 Atl. 36; Headley v. Cavileer, 82 N. J. L. 635, 48 L.R.A.(N.S.) 564, 82 Atl. 908.

Mr. Justice Collins, of New Jersey, has expressed his inability to discern any reason why a valid contract of whatever nature should be denied efficacy because the parties to it had previously made a different contract, however solemn in form. Cooper v. Hawley, 60 N. J. L. 560, 38 Atl. 964.

The parties who have contracted respecting a subject may, while their contract is unperformed, supersede it by mutual agreement and make a new contract in substitution; that is, the parties to an unexecuted contract may get together and abandon it at any time if so disposed, and for any reason they consider sufficient, and substitute for it any new contract they please. Caples v. Port Huron Engine & Thresher Co. — Tex. Civ. App. —, 131 S. W. 303.

It is competent for the parties to an executory contract of sale and purchase of personal property, to agree upon another purchase price than that once fixed. H. G. Vogel Co. v. Wolff, 156 App. Div. 584, 141 N. Y. Supp. 756.

The contract between an indorser and the indorsee of a promissory note is distinct from and independent of that of the maker, and the same rights and powers of the parties to it exist to alter, revise, or waive the contract of indorsement by mutual consent, as exist in respect of other contracts. Spann v. Baltzell, 1 Fla. 338, 46 Am. Dec. 346.

That the plaintiff in an action to recover damages for the breach of a contract to marry wholly released and absolved the defendant from his promise and its performance is a good plea in defense. King v. Gillet, 7 Mees. & W. 55, 10 L. J. Exch. N. S. 164.

It is competent for the master of a vessel sued for a breach of contract to carry a carpenter to a distant port in return for L.R.A.1915B.

work done in preparing the ship for sea, and a promise to do the necessary carpenter work during the voyage, to prove in defense that the contract was modified afterward and before the vessel sailed by further stipulations imposing other obligations. Holmes v. Doane, 9 Cush. 135.

A written agreement canceling and abrogating a sealed contract theretofore made by a railroad corporation and an individual, for the purchase by the latter and delivery to the former of a large quantity of rails with the necessary fish-plates, bolts, spikes, nuts, and fittings at actual cost, plus a certain number of the company's first mortgage bonds and of shares of its stock, to secure payment of which the company had turned over a large number of such bonds as collateral, entered into after a considerable lapse of time during which no rails had been delivered under the primary contract, and when the company was asserting, and the individual denying, a breach, by the terms of which the greater number of the bonds held as collateral were returned to and acknowledged by the railroad company, and the rest of them were transferred absolutely to the individual, is supported by a sufficient consideration. Oregon P. R. Co. v. Forrest, 128 N. Y. 83, 28 N. E. 137.

The abrogation of a contract is in effect a new contract putting an end to a prior one. Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467.

But not every addition to or variation of a contract destroys it or substitutes a new one. The parties are at liberty always to adjust the details of their transactions, where they do not materially affect their vested rights under the contract, without abrogating the whole contract. England v. Houser, 163 Mo. App. 1, 145 S. W. 514, and on second appeal 178 Mo. App. 70, 163 S. W. 890.

The validity of a mutual agreement to alter, modify, qualify, or supersede by another a contract previously entered into by the parties is unaffected by the proximity in time of such agreement to the primary contract. If it is really in sequence, plainly a distinct and independent affair, it will be valid and effective, even if entered into before the parties separate, after making the primary contract. Smith v. Lilley, 17 R. I. 119, 20 Atl. 227; Bryan v. Hunt, 4 Sneed, 543, 70 Am. Dec. 262; Richardson v. Hooper, 13 Pick. 446; Bunce v. Beck, 43 Mo. 266.

But the new agreement must be distinct. If it is a part and parcel of the transaction resulting in the primary contract it cannot stand. Kimball v. Bradford, 9 Gray, 243.

The general language sometimes used, to the effect that parties to a written contract by a parol agreement may waive, abandon, discharge, alter, or modify it, in whole or in any of its terms, has, in the esteem of one court, led some to the inconsiderate but mistaken conclusion that this could be done without any new and valid consideration. Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

VI. Oral secondary contracts and their consideration.

The general question of how far a written contract within the statute of frauds may be altered by parol is treated in a note to be published with a series of cases in a forthcoming volume.

But in order that an oral contract shall supersede or modify a prior written one, it must necessarily be supported by a consideration. Walker v. Tomlinson, 44 Tex. Civ. App. 446, 98 S. W. 906.

Any subsequent change by parol in a written contract requires some new consideration to uphold and render it effective. Wilson v. Russler, 91 Mo. App. 275.

Unless there is a consideration for an oral modification of a written contract, it is a nude pact and void. Norris v. Letchworth, 140 Mo. App. 19, 124 S. W. 559.

It is competent for the parties to a written contract, after they have made it, to abandon, waive, annul it entirely, or to alter or qualify its terms in any manner, by a new agreement, either oral or written, but only upon some legal consideration. A valid consideration is an essential and indispensable element in every binding agreement, and if a written contract be altered by an oral agreement, such oral agreement must have the essential elements of a binding contract, and must be founded on a new and distinct consideration of itself, although it may refer to, and even embody the terms of, the written contract. Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

While a written agreement may afterward be modified by an oral one, nevertheless when a liability has been incurred and has become fixed by and upon a party to a valid agreement, he will not be discharged from such liability by a new modifying compact which is without consideration of any kind. Weed v. Spears, 193 N. Y. 289, 86 N. E. 10.

An oral agreement by the parties to a written contract, changing it in such wise as to correct a mistake in its terms, rests upon a sufficient consideration, and is valid. John Hetherington & Sons v. William Firth Co. 210 Mass. 8, 95 N. E. 961.

VII. Need of reciprocity in consideration of secondary contracts.

The consideration required to support a new agreement by the parties to an old one, by which they modify in one or more particulars their former contract, or replace it with a substitute, must be reciprocal. Each party must gain something by the change. If the benefit is unilateral, a consideration is lacking, for it is a widely recognized and well established legal principle that doing or undertaking to do only that which one is already under a legal obligation to do by his contract is no consideration for another's agreement.

U. S.—Alaska Packers' Asso. v. Domenico, 54 C. C. A. 485, 117 Fed. 99, reversing 112 Fed. 554; Empire State Surety Co. v. Hanson, 107 C. C. A. 1, 184 Fed. 58.

Ala.—Burkham v. Mastin, 54 Ala. 122; Shriner v. Craft, 166 Ala. 146, 28 L.R.A. (N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

Cal.—Main Street & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

Colo.—Leonard v. Hallett, — Colo. —, 141 Pac. 481.

D. C.—Littlepage v. Neale Pub. Co. 34 App. D. C. 257.

Ga.—C. H. Davis & Co. v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; Willingham Sash & Door Co. v. Drew, 117 Ga. 850, 45 S. E. 237; J. A. Fay & E. Co. v. Dudley, 129 Ga. 314, 58 S. E. 826; Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

Ill.—McKinley v. Watkins, 13 Ill. 140; Barnett v. Barnes, 73 Ill. 217; Loach v. Farnum, 90 Ill. 368; Goldsborough v. Gable, 140 Ill. 269, 15 L.R.A. 294, 29 N. E. 722; Lord v. Haufe, 77 Ill. App. 91.

Ind.—Ford v. Garner, 15 Ind. 298; Reynolds v. Nugent, 25 Ind. 328; Smith v. Tyler, 51 Ind. 512; Smith v. Boruff, 75 Ind. 412; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925.

Me.—Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21.

Mass.—Smith v. Bartholomew, 1 Met. 276, 35 Am. Dec. 365; Com. v. Johnson, 3 Cush. 454; Pool v. Boston, 5 Cush. 219; Warren v. Hodge, 121 Mass. 106; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590.

Minn.—King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

Mo.—Lingenfelder v. Wainwright Brewing Co. 103 Mo. 578, 15 S. W. 844; Wear Bros. v. Schmelzer, 92 Mo. App. 314; Koerper v. Royal Invest. Co. 102 Mo. App. 543, 77 S. W. 307; Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126; Grath v. Mound City Roofing & Tile Co. 121 Mo. App. 245, 98 S. W. 812; Norris v. Letchworth, 140 Mo. App. 19, 124 S. W. 559; Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362.

N. J.—Conover v. Stillwell, 34 N. J. L. 54; Nightingale v. Meginnis, 34 N. J. L. 461; Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22; Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009; Watts v. Fenche, 19 N. J. Eq. 407.

N. Y.—Bartlett v. Wyman, 14 Johns. 260; Gibson v. Renne, 19 Wend. 389; Crosby v. Wood, 6 N. Y. 369; Organ v. Stewart, 60 N. Y. 413; Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120; Vanderbilt v. Schreyer, 91 N. Y. 392; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; Tinker v. Geraghty, 1 E. D. Smith, 687; Signer v. Newcomb, 42 Hun, 655, 6 N. Y. S. R. 315; Cosgray v. New England Piano Co. 10 App. Div. 351, 41 N. Y. Supp. 886; Jughardt v. Reynolds, 68 App. Div. 171, 74 N. Y. Supp. 152; Galway & Co. v. Prignano, 134 N. Y. Supp. 571; United Merchants' Press v. Corn

Products Ref. Co. 76 Misc. 232, 134 N. Y. Supp. 578.

N. D.—Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318.

Pa.—Lukens's Appeal, 143 Pa. 386, 13 L.R.A. 581, 24 Am. St. Rep. 557, 22 Atl. 892; Taylor v. Winters, 6 Phila. 126.

S. C.—Colcock v. Louisville, C. & C. R. Co. 1 Strobh. L. 329.

S. D.—Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000.

Tex.—Waterbury v. Laredo, 68 Tex. 565, 5 S. W. 81; Jones v. Risley, 91 Tex. 1, 32 S. W. 1027; Kahle v. Plummer, — Tex. Civ. App. —, 74 S. W. 786; Bonzer v. Garrett, — Tex. Civ. App. —, 162 S. W. 934.

Utah.—McIntyre v. Ajax Min. Co. 20 Utah, 323, 60 Pac. 552, 20 Mor. Min. Rep. 142.

Vt.—Brandon v. Jackson, 74 Vt. 78, 52 Atl. 114.

W. Va.—Thomas v. Mott, — W. Va.—, 82 S. E. 325.

A modification of a contract relieving one party from a liability imposed by such contract, without imposing another upon him in its place, and without either varying the liability or enhancing the advantage of the other, is without a supporting consideration. Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 61 S. E. 815.

It is entirely competent for parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for the promise of the other; but when the promise by one to the other is simply a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party, and there is no warrant to infer that the contract has been voluntarily modified or rescinded. King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

If, when a contract is changed, added to, or otherwise modified, one party gets nothing beyond what he was entitled to by the original contract, and the other surrenders nothing more than he was already bound to give up, there is no consideration for the new contract concerning the subject-matter of the old one. Thompson v. Robinson, 34 Ark. 44; Feldman v. Fox, — Ark. —, 164 S. W. 766.

The conversion by a subsequent agreement, of an option to purchase into an absolute obligation to buy and pay for certain shares of corporate stock, requires, to render it valid and binding upon the prospective buyer, some new consideration from the seller beyond what he was already bounden by the option contract. Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21.

Unless one to whom a promise is made covenants in turn to do or refrain from doing something, the promise is without consideration, and void for lack of mutuality. McKinley v. Watkins, 13 Ill. 140.

It, of course, goes without saying, said the court in Littlepage v. Neale Pub. Co. 34 App. D. C. 257, that a promise to do a thing which the promisor is already bound to do is not a good consideration upon which to found another promise.

To be good in law, the consideration for a promise must consist of something more than what the maker of that promise had a right at the time he made it to claim. Nightingale v. Meginnis, 34 N. J. L. 461. Thus, as respects two parties to a contract attempting a modification of it, a mere promise by one of them to pay the other money or more money for what the recipient of the promise was by the terms of the contract bound to do gratuitously or for less money is held to be without a supporting consideration. Willingham Sash & Door Co. v. Drew, 117 Ga. 850, 45 S. E. 237; Galway & Co. v. Prignano, 134 N. Y. Supp. 571; Colcock v. Louisville, C. & C. R. Co. 1 Strobh. L. 329; Jones v. Risley, 91 Tex. 1, 32 S. W. 1027.

A promise to pay one for doing something he is bound by law to do without pay is nude, although it induced him to do it. Brando v. Jackson, 74 Vt. 78, 52 Atl. 114.

A promise by one party to a contract already made, and not broken, to make the other an allowance of money, where the other neither agrees to pay or do anything that he is not already bound by the contract to pay or do, is a mere nude pact, without any consideration to support it. Bonzer v. Garrett, — Tex. Civ. App. —, 162 S. W. 934.

A promise by a corporation to pay the architect of a building it was constructing a commission of a stated percentage on the cost of the refrigerating outfit independently ordered for the building, to induce him to resume the work of supervising the erection of the building under plans and specifications prepared by him, after he had withdrawn his superintendent and carried away his plans, because he was interested in a competing refrigerating concern, is a mere nude pact, void for want of consideration. Lingenfelder v. Wainwright Brewing Co. 103 Mo. 578, 15 S. W. 844.

The alteration of a contract of employment for a definite term at a stated salary, in such wise as to reduce the salary, is not valid without some consideration passing from master to servant. Indiana Veneer & Lumber Co. v. Hageman, — Ind. App. —, 105 N. E. 253.

An agreement between master and servant made during the service under a contract of employment for a term of one year at a stated monthly salary, increasing the amount of compensation payable without any change whatever in the character of the service, the hours or place of employment, is a mere nude pact, without a supporting consideration. C. H. Davis & Co. v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732.

Where a written contract of employment for one year at a stated salary was renewed six months after it had terminated by a written indorsement upon it, although in the interval the employee's salary had been orally increased, a further oral agreement after his indorsement, for the same service

for the same time at a higher salary, lacks the support of a consideration to make it valid, because by the indorsement the servant was under a contract obligation to serve for the lower salary, and the master under another to employ him for the term. Cosgray v. New England Piano Co. 10 App. Div. 351, 41 N. Y. Supp. 886.

A mere agreement by a contractor to go on and complete a building in accordance with the terms of an unprofitable contract, made after he has received the full contract price and appealed to the owner to save him from loss, is no consideration for the owner's promise to pay him an additional sum, and, the promise being void for want of consideration, a creditor of the contractor can reach naught by garnishee process against the landowner. Willingham Sash & Door Co. v. Drew, 117 Ga. 850, 45 S. E. 237.

In general, a promise by one party to the other party to a subsisting contract, made to prevent a breach of such contract by the promisee, is without consideration. King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

The fact that a party to a contract which the other party refused to perform elected to promise him something additional to what the contract gave him, to induce him to go on and perform it, rather than sue for damages for the breach, does not afford a good consideration for such promise. Lingenfelder v. Wainwright Brewing Co. 103 Mo. 578, 15 S. W. 844.

It was said in an Alabama case that an agreement made solely to induce the performance or to prevent the breach of an existing valid contract would be without consideration, and hence not valid. Burkham v. Mastin, 54 Ala. 122.

This is a general rule. It has been held in New York that no estoppel arises out of an agreement not otherwise binding, made to induce one voluntarily to perform a contract which he could have been compelled to perform, notwithstanding he performed it relying upon and in consequence of the agreement. Organ v. Stewart, 60 N. Y. 413.

An extension of time by the owners of buildings in process of construction, to the contractor, in which to finish them, beyond the time fixed by the written contract under which they were to be built, upon the naked undertaking of the contractor fully to perform the contract within the enlarged time, is void for want of consideration, where the contractor neither relies upon the extension nor defaults because of it. Empire State Surety Co. v. Hanson, 107 C. C. A. 1, 184 Fed. 58.

A contract between a railroad company and a firm which had taken a contract previously to build the road and had found it unprofitable, to repay the contractors all the obligations they should incur by going ahead and completing the work, is without a consideration to support it. Ayres v. Chicago, R. I. & P. R. Co. 52 Iowa, 478, 3 N. W. 522.

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An agreement upon new articles at a higher rate of wages, made at an intermediate port by the master of a vessel with a crew shipped for the voyage under original articles, to prevent their desertion, is void for want of consideration, because it is the duty of the crew to finish the voyage, and they have no right to abandon the ship before it is over. Bartlett v. Wyman, 14 Johns. 260.

The rule adopted in some states, notably in Massachusetts, and approved, at least tacitly, in Bryant v. Lord, 19 Minn. 396, Gil. 342, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit, and such a promise is made to him by the other party, it is supported by a valid consideration because the making of the promise shows a rescission of the original contract and the substitution of another, which rests on the theory that a party refusing to perform his contract subjects himself to an action for damages, and thereupon the other party has an election either to bring an action to recover his damages or to accede to the demands and join in abrogating the old and making a new contract, and if he takes the latter course the old contract is abandoned and a new agreement is substituted for it, commended itself neither to the judgment nor the sense of justice of the Minnesota supreme court when afterward it came critically to examine the rule and the grounds for it, for, said the court, where the refusal to perform, and the promise to pay extra compensation for performance of the contract, are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party refusing to perform, who thereby coerces a promise from the other party to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. In the view of the court, to hold in such circumstances that the party promising extra compensation presumably voluntarily elected to relinquish and abandon all his rights under the original contract, and to substitute for it a new and modified agreement, is wholly to disregard the natural inference to be drawn from the transaction, and to invite people to repudiate their contracts whenever they can gain by so doing. King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

After there has been entered into a written contract whereby one party was bounden to furnish the other, free of cost, certain appliances, a subsequent agreement by the other party, without more, to pay a stated sum for such appliances, has no supporting consideration. Rooney v. Thomson, 84 N. Y. Supp. 263.

A subsequent agreement by the buyer to pay the seller of goods, or to adjust, extra charges for packing such goods, where the

seller had already contracted and was bound to pack the goods sold in quantities ordered by the buyer, is without consideration and void. United Merchants' Press v. Corn Products Ref. Co. 76 Misc. 232, 134 N. Y. Supp. 578.

An agreement to perform professional services by a lawyer for a client, which he is under a legal obligation to perform already by a contract fixing his compensation, affords no consideration for the client's agreement to pay him more money. Waterbury v. Laredo, 68 Tex. 565, 5 S. W. 81; Kahle v. Plummer, — Tex. Civ. App. —, 74 S. W. 786.

When a cropper has rented and gone into possession of land, and begun to cultivate it, under an agreement with the landowner to grow and gather a crop of cotton for half of it and 50 cents a hundred pounds for gathering the other half, and has become dissatisfied with his contract and made threats to sell out, an undertaking by the landowner upon his promise to stay and harvest the crop, guarantying him the sum of $300 for his share, is a mere nude pact without any consideration to support it, because it binds the cropper to do only what he was already under a legal obligation to do. Feldman v. Fox, — Ark. —, 164 S. W. 766.

The principle making nugatory promises to pay money or additional compensation for work, service, or other things contracted to be done or rendered for nothing or for less pay applies with equal force and like effect to invalidate agreements with benefits wholly unilateral, modifying or supplanting earlier contracts of the parties.

A naked promise to release a party to a contract from performing what he is under an obligation to perform by the terms of such contract is no consideration, because the promisor gains nothing by his promise. Leonard v. Hallett, — Colo. —, 141 Pac. 481.

If one party to a contract, in agreeing upon a modification of it, neither assumes an additional obligation nor renounces any right, the promise of the other is *nudum pactum* and void. Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

A compromise in which one party makes the entire concession and receives nothing in return lacks mutuality, and hence is not binding. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

The discharge of a legal obligation by an obligor to the obligee cannot be an injury to the former or a benefit to the latter, so as to make what the law calls a sufficient consideration for an agreement. Gibson v. Renne, 19 Wend. 389.

An oral agreement making a failure to perform a covenant or condition of a sealed contract equivalent to performing it, without any reciprocating advantage whatever, is void for want of consideration. Signer v. Newcomb, 42 Hun, 655, 6 N. Y. S. R. 315.

A waiver of one's refusal to sign certain documents which he is legally bound by L.R.A.1915B.

contract to execute and deliver to another, unless that other shall enter into further agreements and assume additional obligations, affords no consideration for the other's new agreements and obligations. Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318.

A promissory note made by a mortgagor as a substitute for a previous note secured by a mortgage which had been paid in full, in order to obtain a release and discharge of the mortgage, to which he was legally entitled, is void for want of consideration. Smith v. Boruff, 75 Ind. 412.

A promise by a landowner to pay a contractor only what was actually due him when it was made, by the terms of an existing building contract in writing not requiring the work to be finished within any stated time, is not alone a sufficient consideration for a subsequent supplemental agreement fixing a definite time for the completion of the work, and subjecting the contractor to a penalty or forfeiture for every day of delay beyond the time limit. Koerper v. Royal Invest. Co. 102 Mo. App. 543, 77 S. W. 307.

After one has been appointed and rendered service as secretary for a corporation, under a definite agreement respecting his compensation and its payment, a subsequent agreement that his salary should be paid only when payment could be made from the operating expenses is unsupported by a consideration, and does not affect the secretary's right to payment of his salary regardless of the financial condition of the corporation. Grath v. Mound City Roofing & Tile Co. 121 Mo. App. 245, 98 S. W. 812.

After two street railway companies have made a contract whereby one has granted the other a right to construct, maintain, and operate, jointly with the grantor, a part of its track between named points, with a right to make necessary connections and crossings, and the grantee, in turn, has covenanted to construct and electrify a good and sufficient track between such points to replace the existing one, a supplemental subsequent agreement of the two companies, which, without any compensating advantage whatever, binds the grantee to pay the whole cost of widening the trackage in case the grantor shall decide to spread its tracks at the stated place, is void for want of a consideration. Main St. & A. P. R. Co. v. Los Angeles Traction Co. 129 Cal. 301, 61 Pac. 937.

After an owner of woodland has deeded all the timber growing upon it, with rights of ingress and egress by tramways, wagon roads, and paths, without limitation except against cutting pine wood to make rails or cord wood for market, reserving a right to use for fences and firewood the timber of one lot unsuited for milling, the grantee to have ten years in which to cut and remove the timber, and the grantee has in turn assigned to a third person the right to cut and drain the pine timber for turpentine,—a subsequent agreement between the landowner, the grantee of the timber, and

the assignee of the turpentine privilege, limiting the right to take turpentine to a part only of the land granted, is invalid for want of consideration, where none is expressed and where neither a detriment to the landowner or a benefit to the other parties is made to appear. Red Cypress Lumber Co. v. Beall, 5 Ga. App. 202, 62 S. E. 1056.

When a modification of a contract is altogether on one side, and wholly in favor of the other; when the obligations of the other party remain as before, and he relinquishes no right, makes no new promise, assumes no additional burden, and in nowise changes his position respecting the contract or its subject, the modification is void for want of consideration. Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362.

Thus, if it can be said that a written contract to sell ice throughout an entire season at a stated price the ton, payable daily in cash according to quantities delivered, was modified by the making and accepting of weekly instead of daily payments, for the convenience of the purchaser, without any other change, when the purchaser parted with no right, promised nothing new, took on no further burden, and did not change his position, such modification would be invalid for lack of a consideration. Wilt v. Hammond, supra.

The mere engagement by a buyer to pay the seller of an article sold, delivered, and conclusively accepted in fulfilment of the sale contract, only the balance of the purchase price, which the contract bound him to pay anyway, is no consideration for the undertaking of the seller to receive, repair, alter, and reship the subject of the sale at his own cost and expense. Thus, after a machine has been sold and delivered under a written contract providing that its acceptance and retention by the buyer for a stated length of time shall be deemed a full trial and conclusive admission by the buyer that the seller's representations and warranties concerning it were all true, a new agreement, after such time has expired, permitting the purchaser to return the machine and requiring the seller to make certain changes in it and send it back, paying the freight both ways, whereupon the buyer if satisfied should pay the balance of the original purchase price, but no more, is a mere voluntary gratuitous undertaking on the seller's part, unsupported by a consideration. J. A. Fay & E. Co. v. Dudley, 129 Ga. 314, 68 S. E. 826.

An agreement supplementary to an earlier one between the same parties on the same subject, which in terms leaves the primary contract in full force and effect save only in such particulars as may be expressly changed by the supplement, lacks a consideration to support new obligations and promises assumed and made by one party, where the other simply undertakes to do some things he was already legally bound to do by the original contract. Thus, a new agreement between an author and a publisher, expressly stated to be supplemental to an existing contract for the publication of a book, of which the manuscript had already been furnished and accepted, providing that the original contract was to remain in force and bind the parties except only in those particulars where it was explicitly changed by the supplemental agreement, by which the author promises to advance to the publisher within a specified number of days a certain sum of money to be refunded when a stated number of copies of the book shall have been sold, but does not require the publisher to do aught that the original contract did not already legally oblige it to do, or put any additional burden upon it, is without any consideration to support the author's promise, and therefore cannot be enforced against him. Littlepage v. Neale Pub. Co. 34 App. D. C. 257.

The payment by a mortgagor of the mortgage debt, which by the terms of the mortgage he was under a legal obligation to pay in the manner and at the time he did pay, is not a sufficient consideration to support a note for a sum of money, executed by the mortgagee, conditioned upon his giving a bond of indemnity with surety against any claims thereafter arising to affect the title or right of possession to the mortgaged property. Conover v. Stillwell, 34 N. J. L. 54.

Withdrawal of a refusal of a subcontractor for constructive masonry in bridge piers for a railroad, to conform to the requirements of the railroad company's engineer respecting the materials used and number and width of courses laid, as he had contracted to do by written agreement with the contractor, on the ground that by a previous oral agreement the materials he was using and the manner of laying them had been approved by such engineer, affords no consideration for the contractor's promise of extra compensation to induce him to go on with the work, first, because the antecedent oral agreement was merged in the written agreement, and, second, because he was already bound by the written agreement to do what the engineer required. Jones v. Risley, 91 Tex. 1, 32 S. W. 1027.

If a resolution adopted by the directors of a corporation which had contracted with two or more persons united in interest, declaring for and stating the terms of a modification of such contract, can be deemed an agreement modifying such contract by reason of the circumstance that one of the other parties to it was a director of the corporation and voted for the resolution upon the assumption that his assent bound his associates and supplied the element of mutuality, yet, if the corporation paid nothing to the other parties to the contract, and the modification set forth in the resolution was neither in any wise beneficial to the other parties nor in the least detrimental to the corporation, such modification considered as a new agreement is void for want of consideration. McIntyre v. Ajax Min. Co. 20

Utah, 323, 60 Pac. 552, 20 Mor. Min. Rep. 142.

An agreement by the vendor of an unfinished dwelling sold under a contract silent respecting a water-proof cellar, which provided that it should be completed equal or superior to a certain pattern house, to make the cellar water-tight, upon the refusal of the vendee to take title without such agreement, is without consideration and void, because the vendee was bound by contract to take title without such agreement. Jughardt v. Reynolds, 68 App. Div. 171, 74 N. Y. Supp. 152.

The motive which prompts one to enter into a contract, and the consideration for the contract, are distinct and different things. Philpot v. Gruninger, 14 Wall. 570, 20 L. ed. 743; Clark v. Continental Improv. Co. 57 Ind. 135; Standley v. Northwestern Mut. L. Ins. Co. 95 Ind. 254; Warey v. Forst, 102 Ind. 205, 26 N. E. 87; Thomas v. Thomas, 2 Q. B. 851.

This is a distinction which the courts of some states have overlooked.

There is a line of cases, most of them in Massachusetts, holding that if one party to an executory contract arbitrarily refuses to perform it on his part, unless the other party shall agree to pay him more money, and thereupon the latter, in order to have the contract performed at once, enters into a new agreement with the former, and binds himself to pay the extra sum demanded, the new agreement is valid on the theory that immediate performance of the old contract is worth more to the promisor than his right of action for damages for its breach, and that this supplies the necessary element of consideration.

If a party to an executory contract chooses to waive his right to damages when the other party refuses to perform, and elects instead to make a new contract on the subject with provisions more advantageous to the recalcitrant, such new contract will be valid and rest upon a sufficient consideration. Holmes v. Doane, 9 Cush. 135; Peck v. Requa, 13 Gray, 407; Rollins v. Marsh, 128 Mass. 116.

The making of a new contract in such circumstances is held to be in legal effect a rescission of the former one. Rollins v. Marsh, supra.

When a party to a contract which the other party refuses to perform not only fails to elect to stand upon it, and regard the acts and declarations of the other party as a repudiation of its terms entitling him to the benefits thereof, but accepts a new proposal from the other party and afterwards joins in carrying it into effect, a rescission of the contract is wholly consummated, and it is too late to revive the privileges and obligations of such contract, for they have vanished as completely as if they never had existed. Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265.

When, by the refusal of one party to perform a written contract, it is brought to an end, the other party has his election to sue for damages for the breach, or to waive his claim and contract anew, and if he waives and makes a new contract either written or oral, and the other party joins and fully performs, the new contract has a good consideration to support it, and the old one is abrogated. Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475.

When a party abandons his contract, the other party to it has an election to sue or make a new contract, and if he elects to make a new contract with new and additional promises on his part, dependent upon performance by the opposite party, who in turn promises to perform, the new promises are binding and a consideration for each other. Coyner v. Lynde, 10 Ind. 282.

When work had begun and been partly done pursuant to an oral agreement to excavate a section of railroad at stated prices for earth, loose rock or rip-rap, and solid rock removed, and then the agreement was reduced to writing, and the parties made a further oral agreement which provided that, regardless of the rules of measurement in the specifications of the written contract, enough of the earth excavated should be accounted loose rock or rip-rap, to insure the contractor a profit on the whole job, and thereupon the work proceeded and was completed under such further oral agreement, that agreement had sufficient consideration to give it validity in the mutual assent of the parties to its terms and its after complete performance. Courtenay v. Fuller, 65 Me. 156.

A written contract with the guardian of a lunatic, to furnish board, lodging, and care for his ward for life in consideration of possessing and using certain real and personal property of the ward, found after a time to be more onerous and expensive to perform than was anticipated, is superseded by a subsequent new agreement between the parties for a continuation of the service for such further compensation as shall be found to be just. Rollins v. Marsh, 128 Mass. 116.

After a building under construction has been partly completed under a contract covering the mason work, lathing, and plastering, and a greater part of the contract price has been paid, an agreement in writing entered into by the owner and the contractor, reciting that the latter would probably be inadequately compensated for his work by the contract price, and therefore the owner should and would pay him such sum of money after the contract price was exhausted as would insure him after he had paid his laborers the usual or current day wages paid others for performing like work, rests upon a sufficient consideration and is valid and binding. Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493.

An oral agreement between owners and contractors, made while the construction of a hotel was in progress under a written contract prescribing the price to be paid for the work and materials, which abrogates the written contract and substitutes a promise by the owners to pay the contractor whatsoever the materials and labor are fair-

ly and justly worth, on the faith of which the contractor goes on and completes the building, is supported by a good consideration. Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475.

The refusal of a manufacturer to ship any more goods except upon different and specific terms respecting discounts and prices, to a merchant ordering the products of the factory pursuant to a previous contract for their purchase and sale during a stated period in the future at stipulated discounts from list prices published, to be paid for at the end of each month, and the merchant's acquiescence in the new terms demanded by the manufacturer, in order to procure needed goods to supply customers, amount to a waiver of the old contract and of the damages otherwise recoverable for its breach, and the making of a new contract in its stead, and for the substituted contract there is a sufficient consideration in the shipment and delivery of goods and their acceptance on the new terms. Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122.

A promissory note given by the maker to the payee in consideration of the synchronous resignation by the latter, at the former's request, of the presidency of a bank, is founded on a good consideration, notwithstanding there had been a previous agreement between the parties based on a valuable consideration, that the payee would resign his office on the maker's request, which the payee had refused to carry out; because the case falls within the principle that where there is an executory contract which one party declines to perform, and a new contract is made on the same subject, the latter is a good consideration for the promise, and does not come within the principle that the doing of what one is already under a legal obligation to do is no consideration for a promise. Peck v. Requa, 13 Gray, 407. "The fallacy," said the court in answering the argument that the payee did only what he had previously agreed to do, "consists in assuming that the original agreement for the resignation of the office was the only consideration of the note. But the case shows that the plaintiff refused to fulfil this contract. He may have found that his private interest or his duty to others required him to continue in the office and to incur the legal consequences of a breach of his contract with the defendant. On his refusal to resign, what was then the relative condition of the parties? The plaintiff still held the office, but he was liable to the defendant for a breach of his agreement. The defendant could not displace him or in any way compel the immediate performance of the agreement. He had only his remedy against the plaintiff for the breach. But he did not see fit to resort to this. Probably it would not have answered his purpose, which seems to have been to procure the plaintiff to vacate the office immediately. To accomplish this, he entered into a new agreement with the plaintiff. Previously, he had only the plaintiff's agreement to resign. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note in suit. By the surrender of an office which he had a right to return, the plaintiff suffered a detriment, and the defendant thereby gained an advantage, which furnished a valid consideration for the note."

There are a few other cases outside of Massachusetts that lend a certain degree of support to the doctrines just referred to, in which, however, certain other elements were mixed which make it possible to distinguish them to some extent. The following three are examples:

If one bound by law to do a thing in the first instance has a remedy against another in certain circumstances for indemnity, and honestly, with plausible reasons, asserts the existence of such circumstances and makes claim for the indemnity, and the other yields to his contention and promises to pay him for doing such thing, which he does relying on the promise, such promise rests upon a good consideration and is binding. Brandon v. Jackson, 74 Vt. 78, 52 Atl. 114.

An agreement to modify a written contract for the construction of a sewer and sewerage system, made after a difference had arisen between the parties over the construction of the contract, and the contractor had in good faith refused to go on with the work on the ground that the construction of the other party left out of the contract things which the contractor intended and expected it to include when he made it, by which the work is resumed without further objection or dispute, is founded on a sufficient consideration. New Jersey Trust & S. D. Co. v. National Gas & Constr. Co. 71 N. J. L. 29, 58 Atl. 104.

A refusal of agents to sell sewing machines, to go on and do business under their appointment and contract, which contains a requirement that they should indorse and unconditionally and absolutely guarantee the payment of all notes taken from purchasers of machines on account of the purchase price, unless the principal should consent so to change the contract and terms of the agency as to require that such notes be presented for payment and payment of them demanded from the makers, and that they be protested if not paid and notice of protest be given in the usual way to the agents to hold them only as indorsers, and the consent of the principal to change the contract accordingly, make a valid modification of such contract upon a good consideration. Bryant v. Lord, 19 Minn. 396, Gil. 342. This case upon the point cited was adversely criticized, although not overruled, in King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105, because of the supposed support lent by it to decisions upholding doctrines strongly condemned by the critic, from which cases—threatened breaches of contract to extort additional remuneration—the case may plausibly be distinguished by the nature of the contract and the character of the modification.

It was contended in Moore v. Detroit Locomotive Works, 14 Mich. 266, where the evidence showed a failure to complete and deliver a steam engine made to order within, and for several weeks later than, the time fixed by a written contract as amended subsequently to its making, and the manufacturer refused then to deliver unless the purchaser would accept the engine unconditionally as a performance of the contract, and waive all damages for the breach, that there was no consideration for the agreement to waive because the purchaser was legally entitled to a delivery of the engine under his contract, and got nothing but what was his of right. To this it was answered by the court that while the purchaser was entitled to an engine, he was not entitled to that particular engine, and could not get title to it until it was actually delivered. The manufacturers, having failed to deliver when they agreed to, had their option to deliver if the purchaser would accept, and thus reduce damages for the breach of their contract, or they might submit to damages, keep the machine, and sell it to another purchaser, possibly for a higher price. The case would have been different if the engine had been delivered, and after receiving it the purchaser has been asked and had agreed to waive his damages, because in that case there would have remained nothing for the manufacturers to do or promise which would be a consideration for the waiver.

But despite the Massachusetts decisions just cited, others affirm it to be the rule in that commonwealth as elsewhere, that a promise to pay one for doing something he was under a prior legal duty to do is not binding for want of a consideration. Smith v. Bartholomew, 1 Met. 276, 35 Am. Dec. 365; Com. v. Johnson, 3 Cush. 454; Pool v. Boston, 5 Cush. 219; Warren v. Hodge, 121 Mass. 106.

That rule was applied to defeat the claim of the plaintiffs in Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590, to recover an additional sum of money promised for expenses in publishing a sportman's guide book under a prior written contract making no provision for such a payment.

The cases just cited were, together with the language of Allen, J., in Abbott v. Doane, 163 Mass. 433, 34 L.R.A. 33, 47 Am. St. Rep. 465, 40 N. E. 197, referred to in Parrot v. Mexican C. R. Co. supra, as exemplifying an exception recognized in Massachusetts to the generally acknowledged rule, and a majority of the court expressed the opinion that the case at bar did not come within the exception.

In harmony with the decision in Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265, Judge DeHaven, of the United States district court for the northern district of California, in Domenico v. Alaska Packers' Asso. 112 Fed. 554, held that seamen who had contracted to serve as mariners and fishermen on a voyage to, in, and from seas off Alaska, and who had refused to work unless they should be paid higher wages, which the employer promised to induce them to go on, which they did, were entitled to the additional wages promised. The learned judge, after citing the two opposing lines of cases upon this subject, opined the true rule to be that laid down in the Massachusetts decisions, because, said he, it would seem upon principle that contracting parties had a perfect right to change their contract or add to its terms for any reason they might deem adequate, and they might also entirely discharge their agreement and substitute for it another upon the same subject, and, he thought, there is no more a legal objection to a promise to pay more for future services contracted to be rendered than to an agreement that services shall be other or different from those named in the original contract with a corresponding increase or reduction in the compensation. It will be perceived that the analogy is imperfect. To make it complete, the judge should have considered the contrasting agreement to render more onerous services or to work longer hours exacted by the master without any corresponding increase in the wage. Quite a different matter. The judgment in that case was later reversed in 54 C. C. A. 485, 117 Fed. 99, upon the principle that an undertaking to render services which the undertaker is already obliged by his contract to render for a stipulated compensation is no consideration at all for a promise by the party for whom they are to be rendered to pay more for such services than the contract bound him to pay. The reviewing court disapproved the doctrine of the Massachusetts cases.

The point was made in a Georgia case that an alleged agreement by a firm to induce a salesman to return and serve out the term of employment according to his contract, to pay him a higher commission upon surplus sales, where he had quit service because the employers had failed in performing an undertaking with his father-in-law in which he had a pecuniary interest, was without any consideration to support it, because the salesman was bound anyway to perform his original contract; but the court, while holding the breach by the salesman of his contract to be without legal excuse, found that the evidence fell short of proving that the alleged new contract was really made, for the reason that the minds of the parties never met upon its terms. Stix v. Roulston, 88 Ga. 743, 15 S. E. 826.

There is no hard and fast rule under which the mere existence of a prior obligation to do the acts relied upon as a part performance of a substituted agreement bars all inquiry on the subject. Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154.

VIII. Changed conditions as consideration for changed contracts.

If, in the course of performing a contract, unexpected obstacles are encountered or new conditions arise that the parties could have neither contemplated nor reasonably fore-

seen, making the performance more onerous or less advantageous than was anticipated, and requiring, equitably at least, a readjustment of the contractual relations, a subsequent agreement of the parties providing that he who is called upon to meet the new obligations shall be correspondingly compensated by an increase of remuneration or a decrease of outlay is generally deemed to be supported by a sufficient consideration.

The case is then one to which the general principle that a promise to pay something for what the recipient of the promise is bound to do already by contract is *nudum pactum* does not apply.

Although at times it may be difficult to distinguish upon the facts some of the cases held to be governed by the general principle, from others which were held to fall within the exception, yet there are numerous illustrations of the latter class.

An agreement to annul, modify, or make further compensation for an agreement operating oppressively by reason of a change of circumstances, or a contract obtained by a mistake, does not lack consideration. Galveston v. Galveston City R. Co. 46 Tex. 435.

If one refuses to perform his contract because there have arisen some unforeseen and substantial difficulties in performing it which were neither known nor anticipated by the parties when they entered into the contract, and which cast upon him additional burdens not contemplated by the parties at the outset, the promise of the opposite party of extra or additional benefits if the contract shall be completed is supported by a valid consideration; but cases of this character form an exception to the general rule that a promise to do what one is already legally bound to do is insufficient consideration for another promise in return. King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105.

Obstacles, difficulties, and burdens arising in course of performing a contract which will excuse a party encountering them in refusing to go on unless some modification is consented to, and compensation or relief afforded by the other party, must be substantial, unforeseen, and uncontemplated by the parties when they made the contract, but they need not be such as legally to justify the party in breaking his contract unless his demands shall be granted, or to warrant a court of equity in absolving him from his contract. It is enough if they are such as to render his requests reasonable and fair, and to rebut all inference that he is seeking to evade an unprofitable contract, or to extort more compensation from the necessities of the other party. Mere insufficiency of the contract price due to an error of judgment and to an excusable mistake of fact is not enough. Ibid.

An oral agreement between a contractor and a railroad company after work has been begun and for some time has progressed under a written contract for excavating a cut through a hill for the line, and it has been discovered, where there was no means of knowing at the outset, that instead of soil and loose shale a solid ledge of rock must be cut, amounting to nearly half the entire required excavation, by the terms of which the contractors are to proceed diligently with the work and receive, instead of the price stated in the writing, whatsoever should be a fair and just compensation, is valid, and rests upon a good consideration to be found in the mutual mistake of both parties respecting the real character of the material to be removed when the written contract was made, and their mutual agreement correcting the compensation fixed by that mistake. John King Co. v. Louisville & N. R. Co. 131 Ky. 46, 114 S. W. 308.

Notwithstanding a provision in a subcontract for constructing a railroad stipulates for completing the work at a certain time, and makes that time of the essence of the contract, when the progress of the work has been delayed by conditions and causes for which the subcontractors were not, but for some of which the original contractors were, responsible, and when, too, the railroad company consented to extend the original contractor's time to complete the road, and it was in fact actually finished and accepted with the extended time by the railroad company, an extension granted by the original contractor to the subcontractors after the time first fixed had expired amounts to a waiver of the provisions of the subcontract respecting time and penalties for breach of time provisions. Winston Bros. v. Louisiana Cent. Constr. Co. 127 La. 10, 53 So. 367.

When a railroad company, by changing the location of its line and by sundry defaults of its own, has so far delayed the work of a contractor for grading, clearing, and constructing its roadbed under a contract to complete it within a stated time for a stipulated price for each general item of work and labor to be performed, that the contractor is unable to finish within the time agreed upon except at a greater expense, an agreement by the railroad company to waive delays and defaults of the contractor, and to pay extra compensation for completing the contract on time, is supported by a legal consideration. King v. Duluth, M. & N. R. Co. supra.

When there was a contract between a contractor and a subcontractor to excavate rock and grade a section of railroad at a price based on representations of the railroad engineer respecting the character, quality, and fitness for after use of the rock to be removed, and it has been discovered in course of the work that such rock was harder to drill and blast than was represented, and thus more expensive to remove, and was also worthless to use as expected for foundations and culverts, a refusal of the subcontractor to go on without additional compensation, and a promise by the contractor to pay a higher price for rock excavation, followed by a continuation of the work under the new arrangement, amount to a waiver of performance of the original contract respecting the price of

excavating rock, and the substitution of a new agreement by mutual consent upon a sufficient consideration. Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209.

An employment contract for the labor of a dozen workmen in excavating and tunneling for a line of railroad, partly performed when, upon a change of route, half of the laborers quit work, is validly modified and supplanted upon a sufficient consideration, by a new agreement with the others to continue work upon the new route for a stated sum in payment of past labor and a *per diem* wage for future labor. Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

A parol agreement betwen a corporation and a contractor to build piers for a bridge according to the terms of a written contract for a stipulated compensation, made after the work had been in progress some time, and when it had been discovered that the bed rock upon which the masonry was to rest did not lie as near the surface as it was at the outset supposed, modifying the written agreement by providing for the payment of the fair and reasonable worth of excavating below the depth mentioned, instead of at the rate per cubic yard as originally provided, is supported by a sufficient consideration in the adjustment of a controversy as to the construction and as to what should have been embraced in the written contract, followed by continuation of the work. Imeson v. Newport & C. Bridge Co. 5 Ky. L. Rep. 685.

An agreement between a contractor and a public corporation, made during the progress of a constructive public work under a contract calling for payments month by month for work previously done, made upon the inability of the latter to raise the needed money and make the promised payments, that the work should be suspended for an indefinite time until money to pay for it should be forthcoming, is supported by a sufficient consideration. Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 80, 64 Pac. 1009.

An oral agreement by a landowner and a contractor to furnish the materials and erect a building on the land, entered into while the work is in progress under a prior contract, and made in view of a great increase in the market price of the required materials since the contract was made, to go on with and finish the work for whatever compensation should be right, just, and equitable, regardless of the contract price, is based on a sufficient consideration in the mutual promises of the parties. Bishop v. Busse, 69 Ill. 403.

An arrangement between a contractor to build a house, and the owner, made after the work had been partly done and the contractor had been taken ill so that he was unable to go on, by which the owner agreed to hire others to complete the building and to deduct from the contract price only the actual expenditures he should be compelled to make, amounts in legal effect to an abandonment of the old contract and the substitution of a new one in its place, and not the mere appointment of the owner by the contractor, as his agent to hire workmen and finish performing the contract; therefore, after the work has been completed, the contractor cannot recover the original contract price and leave the owner to establish independently his claim for disbursements in completing the building, but the contractor can recover upon the modified contract as such only the surplus of the contract price over and above what he may have received and the owner may have paid out to complete the work required by the contract. Owen v. Button, 210 Mass. 219, 96 N. E. 333.

An oral agreement between owner and contractor, made after entering into and beginning work under a building contract in writing, upon discovering rocks embedded in the soil, of the existence of which both parties were ignorant and unsuspecting when the contract was made, and the presence of which precluded effective pile driving, the rocks having been deposited by the wrongful act of the city in which the land was situated, that the contractor should remove such rocks and be paid by the owner for the expense of doing so, and should also keep an account of the work and cost of removal as a basis for the owner's claim for damages against the city, is valid, and rests upon a good consideration. Michaud v. MacGregor, 61 Minn. 198, 63 N. W. 479. The facts disclose a valid consideration to support the contract, said the court; a bona fide controversy was settled. The contractor's promise and performance as to keeping an account of the cost of removal of the rocks, and furnishing the appellant with evidence of his damages, were a disadvantage to the former and a benefit to the latter.

The promise of a landowner engaged in constructing a house through separate contractors for different sorts of material and labor, to pay a certain sum over and above the contract price to the contractor for the carpenter work, to induce him to go on and finish such work, is supported by a good consideration where it was discovered during the progress of the work that the walls and partitions built by the mason contractor were so irregular and crooked that extra labor and expense were in consequence imposed upon the carpenter. Marten v. Brown, 80 N. J. L. 143, 76 Atl. 1009.

When a contractor for work of a certain character on a building agrees with the owner upon a stipulated price less than his estimate according to the specifications, on the owner's assurance that a part of such work equal in value to the deduction made would not be necessary or insisted upon, and it subsequently develops in the progress of the work that such work was really indispensable, a subsequent agreement by the owner to pay the contractor an additional sum to cover the work omitted from his estimate, made upon the contractor's refusal to proceed, is supported by a sufficient consideration. Stewart v. Keteltas, 36 N. Y. 388.

An agreement by the owners of a building in the course of construction, to pay a contractor to furnish the material and do the general plumbing work in the building at a fixed price, an additional amount to cover the value of materials which had been abstracted by thieves after a large portion of them had been put in place, and the labor of replacing the stolen property according to its fair and reasonable value, rests upon a good consideration, and is valid. Innes v. Ryan, 37 Misc. 806, 76 N. Y. Supp. 921.

A new contract between a land owner and one of several contractors to erect a building for him, made after work on the building under the original contract was suspended in consequence of the fall of one of the walls, and a resulting dispute as to who was responsible for the collapse, providing for the resumption and completion of the work, is a waiver and abrogation of the old contract and its obligations, and a substitution of another in its place, supported by a sufficient consideration. Brodek v. Farnum, 11 Wash. 565, 40 Pac. 189.

A contract to dig a well for a stipulated sum payable only on condition that a reasonable and fair flow of water was obtained, but also conditioned upon no rock being encountered in digging, is validly modified upon a sufficient consideration, upon rock being encountered, so as to provide for the payment of a fair and just compensation for the work and its continuance until water is obtained in useful quantities. Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331.

The abandoning of a contract to dig and stone a well complete with 3 feet of water within ten days, because of delays while the work was proceeding in good faith with reasonable diligence, due to the caving in of the sides of the excavation, and the mutual agreement of the parties to go on and finish within a further stated time, make a new and substituted contract supported by a sufficient consideration to be found in the fact that the landowner, by the modification and extension, secured the benefit of the work already done and could probably have the well to use sooner by allowing the contractor to finish it rather than a third person, while the contractor in turn gained an extension of time to perform his contract. Connelly v. Devoe, 37 Conn. 570.

A modification of a contract by which a landowner having sold another person the right, for a cash payment, to cut all the timber of the land at a stated annual rate, to be paid for at a named sum the thousand feet as cut, made after a forest fire had seriously damaged much of the timber, so that the injured trees, if left uncut, would be a total loss, by which the license was bound promptly to cut the burned timber and was chargeable at a less rate the thousand feet up to a specified number of feet for such burned timber when cut, is founded upon a sufficient consideration. Gatlin v. Serpell, 136 N. C. 202, 48 S. E. 631.

An agreement between the seller and buyer of a machine for sawing barrel staves, upon which a vendor's lien had been retained, and for which a purchase money note had been given payable by consent in staves to the number of half a million at $12.50 per thousand, by a deduction of $1 for every thousand delivered, made after the selling price of staves in the open market had doubled, rescinding the sale and substituting for it the return by the vendor of the note and the return by the vendee of the machine, together with the remainder of the half million staves in consideration of its use, is supported by a good and sufficient consideration. Welch v. Mischke, 154 Mo. App. 728, 136 S. W. 36.

After a contract to deliver a certain number of cords of wood within a stated time on board railway cars at a named station, for a stated price the cord, has been made, and is as yet wholly unperformed, and while its obligations are to be met in the future, and it is discovered that the wood cannot be cut and delivered within the prescribed time at the price agreed upon without very great loss to the party who agreed to cut and deliver it, a mutual agreement increasing by $1 a cord the price payable is supported by a good consideration. Foley v. Storrie, 4 Tex. Civ. App. 377, 23 S. W. 442.

A modification of a shipping contract under which cattle have been accepted for transportation to a named destination by a common carrier, agreed upon when transportation has been interrupted by a strike of the carrier's servants, and when the carrier is unable to perform, whereby the shippers assume the care and management of the beasts at the place where they are interned until they can be sent forward, and the carrier undertakes in turn to pay the expense entailed by the care of the stock and any damage sustained by the shippers from the delay, mutually consented to, although it costs greater burdens on the carrier and lessens those of the shipper, is supported by a sufficient consideration. Carstens v. Burleigh, 20 Wash. 283, 55 Pac. 221.

A new and mutual agreement between a life insurance company and its general agent in a state from which it is withdrawing in consequence of adverse legislation, relating to collections at the home office of future premiums from policy holders in such state, upon which commissions were by previous agency contracts payable at a certain rate to the general agent, and which were in certain circumstances revocable by either party, changing such rate of commissions and the charges for collecting future renewal premiums directly by the company, is valid, and is supported by a sufficient consideration. Washington L. Ins. Co. v. Reinhardt, — Tex. Civ. App. —, 142 S. W. 596.

An agreement by the proprietors of a school to pay increased compensation to a teacher employed by them to teach a class under a contract for an annual salary of a

stated amount is supported by a sufficient consideration when the number of pupils in the class has been increased about 35 per cent and the labor of teaching them is correspondingly greater. Freeland v. Bacon, 27 N. Y. S. R. 273, 7 N. Y. Supp. 674.

IX. Reciprocity of benefits and burdens as consideration for secondary contracts.

Any new agreement between the parties to an existing executory contract, made in substitution or modification of the elder compact, and bilateral in benefit and burden, has, like the primary contract, a sufficient consideration in the reciprocating advantages and obligations which it confers and imposes. The illustrative examples are a multitude.

Where the buyers of merchandise by a written order signed and given to a traveling salesman of the sellers, and forming in itself a complete contract of sale when accepted and filled, decline on the arrival of the goods by common carrier to accept them unless the sellers, in fulfilment of the salesman's alleged oral promises when he got the order, will send free additional goods and do certain other things, and the sellers in turn agree to ship more goods free and to consider the other demands, the letters and telegrams embodying the final understanding make up a new and valid contract modifying in the particulars specified the original contract of sale, and the mutual engagements of the parties in them constitute a sufficient consideration. Capitol Food Co. v. Mode, — Ark. —, 165 S. W. 637.

A supplemental agreement between the sellers of a cargo of lumber purchased for export to fill a foreign order, which the sellers had by several contracts agreed to deliver in kind, quality, and sizes to conform to the foreigners' requirements, made during the delivery upon the purchasers' objection that the lumber did not meet the standards contracted for, by which the sellers promised to hold harmless and indemnify the purchasers against all loss suffered by allowing the deliveries to go on and the lumber to go abroad, is supported by a sufficient consideration. Robinson v. Hyer, 35 Fla. 544, 17 So. 745.

After a merchant had ordered from a manufacturer's salesman, subject to his principal's approval, 100 rolls of carpet, to be shipped 25 at once, and the remainder in three equal shipments in the following autumn, each a month a part, and the manufacturer had delivered the first 25 rolls and failed to ship any more, an agreement made the next spring between the two whereby the manufacturer was released from all obligation to fill the balance of the order, and in turn undertook to ship 25 rolls of carpet billed at the same price as was charged the previous year, is supported by a good consideration, and binds both parties. Albin Co. v. Firth Carpet Co. 24 Ky. L. Rep. 2432, 74 S. W. 212.

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An agreement by the seller of merchandise sold by sample, made after delivery and upon the buyer's complaint that the goods delivered were inferior to the sample shown, to reimburse the buyer the difference between the price paid by him and the price he obtained upon a resale, is supported by a sufficient consideration when accepted by the buyer. Borden v. Fine, 212 Mass. 425, 98 N. E. 1073.

That the parties to a contract for the sale of seed of a designated grade at a stated price the bushel, for future delivery, to enable the buyer to fill a contract with a third party, after delays had occurred in deliveries, abrogated the contract, and by a subsequent agreement made substantial changes in its terms, thereafter conforming their conduct to the modification assented to, will uphold the modifying agreement so far as consideration is concerned. Cannon-Weiner Elevator Co. v. Boswell, 117 Mo. App. 473, 93 S. W. 355.

An agreement to cancel a written contract for the sale and delivery of 10,000 bushels of barley at 48 cents the bushel within three weeks, which the vendor, to the vendee's loss, had failed to perform, substituting an obligation by the vendor to pay the vendee a sum of money equal to the net profits he would have gained by reselling the barley, had it been delivered as contracted, and releasing all claims for damages on account of the breach of the canceled contract, is supported by an ample consideration. Hartwig v. American Malting Co. 74 App. Div. 140, 77 N. Y. Supp. 533, affirmed without opinion in 175 N. Y. 489, 67 N. E. 1083.

Where a written contract providing for the sale and delivery of several tons of scrap steel at stated prices and in various lots at divers times has not been fully performed by the seller in respect of quantities delivered and promptitude of shipments, and the buyer waives the breach and thereupon agrees with the seller to accept a fixed quantity of the steel of a designated quality at certain stated times, and at prices different from those specified in the former contract, and the seller assents to the new arrangement, the legal result is a cancelation of the old contract and the making of a new one as a substitute for it, with different terms and upon a sufficient consideration. Dreifus v. Columbian Exposition Salvage Co. 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370.

When a written order embodying a new contract is substituted for a wholly unperformed previous contract of purchase and sale of wagons, and it contains many different provisions all more advantageous to the seller and more onerous on the buyer, but also gives the buyer a benefit in enlarging from six months to a year the seller's guaranty of efficiency and against breakages and his covenant to keep the wagons in repair, the new contract cannot be avoided by the buyer on the ground that it is wanting in a sufficient consideration. Caples

v. Port Huron Engine & Thresher Co. — Tex. Civ. App. —, 131 S. W. 303.

A new contract of sale of a threshing machine, made by the vendor to one member of a partnership which had bought it before, used it a season, and surrendered it, containing some terms not included, and omitting others embraced, in the former contract of sale, supersedes, and is a substitute for, the previous contract, and its mutuality is a sufficient consideration. Parker v. Advance Thresher Co. 75 Wash. 505, 135 Pac. 229.

An agreement between the vendor and vendee of a steam plow sold under an express warranty that it would break up and properly turn salt grass sod on the buyer's farm, made after it had been discovered that it would be impossible for a long period of time to test such plow upon the buyer's farm, to try it out upon other land instead, by mutual consent, is a valid modification of the sale contract by substitution of a different place of try-out, and needs no additional consideration to support it beyond that of the original contract. Amarillo Hardware Co. v. McMurray, 15 N. M. 562, 110 Pac. 833.

A proposal in writing by contractors to accept $750 in full for furnaces and heating apparatus put in by them in a public schoolhouse, and guaranteed to heat the building, for a contract price of $1,050, and to be paid the balance with interest if, during the ensuing winter, they should demonstrate to the satisfaction of the school board the ability of such furnaces adequately to warm the building, accepted by the school board and followed by the immediate payment and receipt of the $750, constitutes a valid substitute for the original contract, founded on a good consideration. Richardson & B. Co. v. Independent Dist. 70 Iowa, 573, 31 N. W. 871.

An agreement for the conditional sale and purchase of a fire extinguishing apparatus to be installed on or prior to a named date, in working order, in buildings belonging to the purchaser, at a stated price with sundry provisions respecting times and amounts of payment, the location of the title pending payment in full, rentals until payment and approval by public officers and fire insurance boards, which agreement was not performed by the seller when the date fixed upon came and passed, and which the purchaser claimed to be entitled to rescind on account of nonperformance in time, is validly modified upon a sufficient consideration by a new oral agreement providing for the delivery and installation of the apparatus thereafter as soon as may be, and the abatement from the purchase price of a sum equal to the excess paid by the purchaser in fire insurance premiums for the deferred time over and above what he would have been charged had the apparatus been installed and working in his premises during such deferred time. H. G. Vogel Co. v. Wolff, 156 App. Div. 584, 141 N. Y. Supp. 756.

A promise by the owner of a steamboat which was wrecked or destroyed by a collision with another vessel after he had sold an interest therein, to repay to the buyer the money paid on account of the purchase price, and upon an agreement to resume the entire ownership, is valid, and rests upon a sufficient consideration. Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488.

An agreement in writing for the sale and purchase of a printing business and outfit upon credit, conditioned upon the payment of the purchase price at the times specified, the title to remain in the seller until payment in full, executed as a substitute for a previous contract for an absolute and unconditional sale of the same property for cash, mutually abandoned, is supported by a sufficient consideration. Richards v. Hellen, 153 Iowa, 66, 133 N. W. 393.

The anticipation by several days of the time for completing a contract for the sale and purchase of a stock of goods and the taking of a lease for a retail shop, on the part of the purchaser, and his simultaneous consent to the seller's selling at retail a consignment of flour which was not included in the sale, are a sufficient consideration to uphold a supplemental covenant by the seller not to engage in the same business in the same town for the next five years. Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80.

An agreement by a vendor who had sold, but not delivered, although requested to deliver, a slave, and who had received a part of the purchase price and promised to make delivery at a future day, to refund the money paid by the vendee where the slave sold died before delivery, is supported by a good consideration in the substitution of a definite sum to be paid in place of damages recoverable for a breach of the contract to deliver the slave sold. Brooke v. Waring, 7 Gill, 5.

A new agreement between vendor and purchaser, substituted for an old contract of sale and purchase of certain property, real and personal, rescinding the sale and providing for the canceling of the notes given by the vendee for the purchase money, for a reconveyance of most of the property, and a retention of the rest to offset money paid on account of the purchase, with sundry other stipulations on the part of each party, rests upon a good consideration. Merry v. Allen, 39 Iowa, 235.

A subsequent oral modification of a written contract of sale and purchase of real estate, providing for payment of the purchase price in monthly instalments with interest beginning on the date of the contract, whereby the payments were to begin only when the purchaser was let into possession, because the vendor could not deliver possession at once, is good. Delaney v. Linder, 22 Neb. 274, 34 N. W. 630.

An oral agreement by the vendor of land, discharging the vendee from payment of a balance due on a note given for the purchase money where title to part of the land conveyed had failed, unless within a reasonable time such title should be made good.

is valid, and is supported by a good consideration. Hussey v. Roquemore, 27 Ala. 281.

A promissory note made by the grantee of land, to reimburse his grantor for money expended at his request in purchasing an outstanding title, is supported by a sufficient consideration, regardless of whether the title acquired was good or bad, and notwithstanding the deed of the grantor to the grantee contained covenants making any subsequent acquisitions of title to the land conveyed by the grantor inure to the grantee's benefit. Cassell v. Ross, 33 Ill. 244, 85 Am. Dec. 270.

An agreement by the vendor in a contract of sale and purchase of land, to accept from the vendee the purchase money before it is due and to make a deed if the vendee shall anticipate the payment, is supported by a sufficient consideration. Anderson v. Moore, 145 Ill. 61, 33 N. E. 848.

An agreement between the vendor and vendee in a contract of sale and purchase of a tract of land at a stated price payable partly in cash and in part according to the terms of the purchaser's promissory notes, by which one of such notes was surrendered and canceled in return for a deed of the land in which the vendor's wife had not joined, accepted by the vendee, is supported by a good consideration. Friermood v. Pierce, 17 Ind. 461.

An agreement between vendor and vendee in a contract to convey real estate, made when the latter had questioned the former's title and on the request of the vendor for time to prove it good, postponing the date of performance and stipulating for the furnishing of a policy of title insurance, or in lieu thereof the return of the purchase money paid on account, is a valid modification of the contract, and supported by a sufficient consideration. Green-Shrier Co. v. State Realty & Mortg. Co. 199 N. Y. 65, 92 N. E. 98.

An agreement in writing made and delivered by a grantor to the grantee of land, reciting a sale of such land on the day of its date at $10 per acre in cash, and the delivery of a deed calling for 2,722.5 acres, and an uncertainty as to the quantity, and providing that a survey should be made as soon as possible to determine accurately such quantity, and binding the grantor to pay back to the grantee in case the contemplated survey should show that there were less acres of land in the property than the deed called for, $10 for each acre that it fell short, is supported by a sufficient consideration, and is valid. Craig v. Dumars, 7 Tex. Civ. App. 28, 26 S. W. 743.

An agreement for the sale of lands which the vendor is unable to perform because he owns but a half interest and his cotenant declines to sell the other half at the price agreed upon is discharged and abrogated by a new contract between the parties whereby the vendor agrees to convey his interest for half the original price, and the vendee to accept the conveyance, and when synchronously with the making of the new contract the vendee makes a contract with the cotenant for his half at a higher price. McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159.

An agreement between a land owner and a purchaser of the land who entered into possession of it under a sale contract, made valuable improvements upon it, but at last defaulted in the payment of a large part of the purchase price, that such purchaser should negotiate a new sale to a designated third party at a price which would pay the landowner the balance of the original purchase money and the original purchaser a stated sum for his equity, carried out so far as a new contract of sale upon the contemplated terms between the landowner and the third party, in which, however, time was made of the essence of the contract, is validly modified upon a sufficient consideration, by a subsequent agreement of the landowner and the original vendee, cutting in half the sum payable to the latter on the sale to the third party in consideration of a grant to the latter of an extension of time to complete such sale, made at the request of the original vendee and on condition of his consent to the reduction. Leonard v. Hallett, — Colo. —, 141 Pac. 481.

An agreement between vendor and vendee in possession to rescind and annul a contract for the sale and purchase of a dwelling house, the vendor undertaking to pay back the sums paid on the purchase money, and the vendee to keep possession and care for the property until a new purchaser could be found, when it should be forthwith surrendered, is valid and binding, and based on a good consideration. Cutter v. Cochrane, 116 Mass. 408.

After a half interest in a mine was sold for a stated price upon an agreement calling for a payment of four fifths of it in cash and the other fifth only out of the net proceeds of working the mine, without any personal obligation of the purchaser to pay the balance or any part of it, an agreement subsequently entered into in order to enable the purchaser to convey his half interest in the mine to a third person, who declined to take it except freed from the claim of the original seller for the balance of the original purchase price, whereby a personal obligation to pay such balance was assumed in lieu of the lien upon the output of the mine, which was released and discharged at the obligor's request, is supported by a good and ample consideration. Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985, 21 Mor. Min. Rep. 695.

An executory contract for the sale of mining claims to be paid for with certain shares of the capital stock of the corporate purchaser and such purchaser's notes secured by a mortgage on the claims, and a subsequent modifying and amendatory agreement between seller and buyer providing for a payment in cash and continuous employment at the mines of the seller at a stated wage, are to be considered and treated as but one entire contract, and the later agreement is not open to the objec-

tion that it is without consideration, upon the principle that the doing of an act which the promisee was already bound by contract to do is not a valid consideration for the promisor's obligation. Mallory v. Globe-Boston Copper Min. Co. 11 Ariz. 296, 94 Pac. 1116.

An agreement between creditor and debtor in respect of a debt secured by deed of trust on the debtor's real estate, due in two payments of one and five years respectively, with interest, but with a privilege to the debtor of paying at any time with a bonus of six months' interest, made several years before the debt matured at the creditor's request, to release and discharge the bonus for immediate payment of the debt from the proceeds of a new loan procured by the debtor, modified upon the creditor's refusal to accept payment without such bonus, by the creditor's undertaking to repay the bonus on making a new investment, is supported by ample consideration, and is binding on the creditor; the release of the obligation to remit the bonus when the loan was paid being sufficient consideration to support the promise to repay it when there was a new investment, and the mutual agreement acted upon to procure a new loan and pay the original debt before maturity being a good consideration for the agreement to release and discharge the bonus. Fullerton v. Schloss, 104 Mo. App. 195, 77 S. W. 770.

An agreement abrogating and annulling a previous one between the parties for a division of profits anticipated on a resale of real estate purchased in the name of one, by the aid of the other in procuring a loan to pay a part of the purchase price, which was secured by a second mortgage on the property acquired, by which agreement he who procured the loan paid it off, took up the second mortgage, had a suit to foreclose it discontinued, and released the other party from liability for the mortgage debt and to account for collected rents, and the latter in turn relinquished all claim and interest in the property and to the hoped-for profits, is supported by a good consideration, and is valid and binding. Smith v. Kissel, 92 App. Div. 235, 87 N. Y. Supp. 176, affirmed in 181 N. Y. 536, 73 N. E. 1133.

Two contracts between a partnership contemplating the purchase of an extensive tract of land in a certain county, and a man to whom the owner had promised a certain commission for selling it at a stated price per acre, whereby the prospective purchasers, by the first of such contracts, undertook, in case they should buy the tract, to sell at a named price to such man, such an interest in it as that price should proportionately bear to the whole purchase price of the tract, less the selling commission, and the man in turn promised to pay over to the firm all the commissions he should receive from the vendor; and by the second of such contracts, the man agreed to buy for the partnership other tracts of land in another county, on which he had secured options at or less than a stated price the acre, the partnership to furnish the man the necessary funds to pay the owners and his expenses in procuring conveyances, where the firm purchased the first tract as contemplated and advanced divers sums to the man, were, after controversies had arisen, held to have been abrogated and superseded by a new and different agreement with mutual covenants between the parties, settling previous accounts, waiving claims for repayment of commissions and other advances, and stipulating, on the conveyance of the additional lands, for the reimbursement of the man for the sums paid out by him to obtain titles. Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154.

A written agreement between a landowner and a railroad company seeking the condemnation of his land for its right of way, providing for immediate possession of the *locus in quo* by the railroad and the payment of a sum of money to the landowner to be credited upon the judgment thereafter recovered by him, is validly modified and supplanted by a subsequent oral agreement for the entry of a judgment of condemnation by consent, and for a stated amount of damages and costs over and above and in addition to the sum previously paid, and the fact that the litigation was thereby settled, and the landowner waived the chance of either preventing condemnation or of recovering a large amount, affords an ample consideration for the substituted agreement. Oregonian R. Co. v. Wright, 10 Or. 162.

A writing by which a judgment creditor who has acquired by execution sale a coal mine and mining property of his judgment debtor gives an option to a junior judgment creditor of the same debtor to buy the mine and mining property for a stated sum within thirty days (time being of the essence), cancels, takes the place of, and supersedes a previous agreement between the two judgment creditors looking to the acquisition through execution sales of such mine and property, and providing for the purchase of the senior judgment by the junior creditor for a certain sum and expenses within a stated time, which expired without performance before the option was given. Peterson v. Rankin, — Iowa, —, 143 N. W. 418.

The parties to a building contract to be performed within a stated time have a right to alter it by a new agreement providing for extra work and additional recompense, by mutual consent, without any new consideration. Thus, a contract to build a dwelling house with an unfinished second story, to be completed ready to be occupied within a stated number of days after date, is effectively modified by consent in such wise as to annul the time limit, by a later agreement between the owner and contractor calling for additional work and additional compensation. Cornish v. Suydam, 99 Ala. 620, 13 So. 118.

The oral modification of a written contract to construct certain grain elevators with lumber furnished for the purpose, increasing in size some of the structures, and

undertaking in return to pay the contractor extra transportation and to assure him against loss, is valid without further consideration. Morrissey v. Schindler, 18 Neb. 672, 26 N. W. 476.

An oral agreement modifying a written building contract so as to change from brick to stone a cesspool, and from a blind to an open drain, between owner and contractor, after the contract has been partly performed, is valid and binding. Denoth v. Carter, 85 N. J. L. 95, 88 Atl. 835.

An agreement between an owner and a contractor subsequently entered into, abrogating a clause in a building contract providing for the payment by the contractor of a specific sum *per diem* for every day beyond a named date in case of failure to finish the building on or before such date, and substituting for it a provision limiting the demurrage payable to the actual damage sustained in consequence, where the delay that occurred was due in part to extra work required by the owner, is supported by a sufficient consideration. Gunby v. Drew, 45 Fla. 350, 34 So. 305.

A joint and several promise in writing by a husband and wife, to pay a stated sum of money to a firm who contracted with the husband as agent to build on the wife's land houses for a named price, given to induce the contractors to go and complete the construction of the buildings after the work had been partly done on one house, and default had been made in making payments due by the terms of the contract, equal to the sum promised, is founded upon a good consideration in the contractors' waiver of the breach of the contract, and their agreement to complete its performance. Byington v. Simpson, 134 Mass. 145.

An agreement by the owner to go on and finish the masonry of a building under construction for him, temporarily stopped by the contractor on account of illness, and to pay the unpaid balance of the agreed contract price, less the cost of completing the work, is valid and supported by a sufficient consideration in the contractor's assent to the owner's undertaking. Pease v. McQuillin, 180 Mass. 135, 61 N. E. 819.

The making of alterations in work contracted to be done, during its progress under a building contract, by the contractor under orders from the employer, is a sufficient consideration to support the latter's agreement to pay the whole contract price for the work as soon as it is finished, where the original contract as afterwards modified made the price payable in instalments, and deferred the final payment a year after the completion and acceptance of the building. Morse v. Ellerbe, 4 Rich. L. 600.

A contract for building a bridge for $700, which was claimed by the contractor to have been fully performed, and by the employer to have been uncompleted, was superseded by a second contract receipting for a present payment of $500 on account, and providing for payment of the balance whenever the concrete has set hard and the footings inside the arch have been filled up by

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the contractor. The second contract is valid and binding, and not within the rule that an agreement to do what one is already legally bound to do is no consideration for a waiver of performance of an original contract, but its consideration rests in the settlement of a controversy or dispute over whether or not the original contract really had been fully performed. White v. Magirl, 113 Ill. App. 224.

The substitution of one piece of work for another releases the contractor from the obligation to do, and the other party from paying for, the work supplanted, and thus furnishes a sufficient consideration for the modifying of the contract by making the substitution. Shriner v. Craft, 166 Ala. 146, 28 L.R.A.(N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884.

There is a sufficient consideration to support an oral contract to finish the construction of a cartway, the labor to be paid for by the day, and to rescind a previous written contract for the work at a stipulated sum under a penalty, in the abandonment of work under the old contract by the contractor, the waiving of the penalty by the owner, and the resumption at once, and prosecution to completion, of the work as contemplated. Lattimore v. Harsen, 14 Johns. 330.

The modification of a written subcontract to excavate a trench, grade and lay in it drain tiles, at a stated price the running rod, by an oral agreement of the subcontractor to accept a delivery of the tiles at distance from, and haul them himself to, the trench, and the contractors' promise in turn to pay an increased consideration, supported by a sufficient consideration in the reciprocal engagements. Gorton v. Moeller Bros. 151 Iowa, 729, 130 N. W. 910.

An agreement to change a contract between a water company and a landowner so as to provide that in lieu of a fair and reasonable rent to be paid for water for irrigation, the farmer should give one fifth of the crop raised on the irrigated land, is supported by a sufficient consideration in the substitution of a definite for an indefinite, and possibly variable, rental. Old River Rice Irrig. Co. v. Stubbs, — Tex. Civ. App. —, 137 S. W. 154.

A written and partly performed agreement between landowners and the assignee of a contract they had previously made with certain contractors for cutting timber on their land, made after they had forcibly stopped further work and excluded the assignee from possession upon the controverted ground that the latter was violating the provisions of the assigned contract, providing for the rescission and cancelation of the latter, the surrender and discharge of a bond with sureties that had been given to secure its performance, the payment by the landowners of a stated sum of money for improvements made, the further payment for logs delivered and certain work to be delivered to the assignors, the continuation of possession until a named date of the

timber lands, the boarding of the lumbermen at a stated rate in the meantime, and the giving of the right for a limited time to remove tools, stock, camp fixtures, and other personal property, is valid and supported by a good consideration. Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162.

A second contract between a corporation and a miner, which was made to supersede and as a substitute for an earlier contract concerning the mining of coal within a certain area at a stipulated price, and which changed the agreement from one providing for taking out all the coal within the specified area and the retention of 5 per centum of the price to be paid until the coal was exhausted, to one running for a year only with settlement at the end, including the percentage retained, being more beneficial to the miner in providing for an earlier payment, and more favorable to the company in giving it a right to end the contract relation at the expiration of a year, is supported by a sufficient consideration. Proctor Coal Co. v. Strunk, 123 Ky. 520, 96 S. W. 603.

A contract providing for the furnishing by one party of timber and logs to be sawed by the other for railroad ties at a compensation of $5 the thousand, with stipulations in it for its continuance only so long as it should be satisfactory to each party, and for its termination upon notice in advance by either party, is abrogated and supplanted by a new contract increasing the compensation for sawing half a dollar a thousand, after the sawyer had given notice of his dissatisfaction and purpose to terminate the old contract according to its terms. Moorman v. Plummer Lumber Co. 113 La. 429, 37 So. 17.

An oral modification by mutual consent of the parties, of a written contract of agistment originally calling for the care and feeding during the coming fall and ensuing year of 15,000 head of cattle represented to be on the average like a sample lot of 200 previously seen by the agister, to be returned to the owner increased in weight 450 pounds each, and containing provisions respecting the kinds of food to be supplied, and relating to deaths among the cattle with the evidence thereof, which was agreed upon after the delivery of the cattle to the agister and the discovery that their real conditions and needs were different from what an inspection of the sample lot had indicated, and that the animals required a different diet to make them thrive, changing the old contract as to character and quality of food, waiving the requirement as to increased weight to a definite amount, and the other provisions respecting animals that might die on the agister's hands, rests upon a good and sufficient consideration. Teal v. Bilby, 123 U. S. 572, 31 L. ed. 263, 8 Sup. Ct. Rep. 239.

An appointment by a landowner of an agent to collect and account for rents, without any agreement as to the amount of commissions or compensation to be paid for the services, implies a contract to pay a reasonable compensation, and is supplanted and canceled by an after-made express agreement to pay and receive for such services a stated percentage of the sums collected. Pim v. Greer, 64 Mo. App. 175.

The agreement of a real estate broker to cancel a contract with a landowner entitling him to a commission of $200 in case he should make a sale, in return for the landowner's promise to pay him unconditionally $100 within a stated time, is supported by a sufficient consideration. Scriba v. Neely, 130 Mo. App. 258, 109 S. W. 845.

An oral modification of a written contract between a landowner and an agent for the sale of lots on stated terms within a named period upon commission, calculated to promote the sales for the common benefit of both parties, is supported by a sufficient consideration. Roberts v. Summit Park Co. 72 Hun, 458, 25 N. Y. Supp. 297.

An oral limitation to a term of six months, grafted by mutual consent upon an employment contract in writing to sell real estate for a stated commission payable irrespective of whosoever should actually bring about the sale, is supported by a sufficient consideration in relieving the broker from efforts to sell after the lapse of the six-months period. Smith v. Lilley, 17 R. I. 119, 20 Atl. 227.

When a contract between an auctioneer and a land owner for a division of profits on the sale of land at a certain price is abrogated and superseded by a new one upon the refusal of the landowner to sell at the price originally named, providing for the sale of the land at auction by such auctioneer at a higher price, he to have the excess if any is realized, the expectation of higher profits and compensation than the original contract contemplated is a sufficient consideration to support the new agreement, although it afterwards was disappointed. Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265.

A written contract self-renewing by its terms year after year, unless one or the other party shall terminate it by serving a notice to that effect three months before a year expires, binding one party to procure for sale by the other the entire products of certain silk mills to be consigned on commission, and to sell such silks afterward upon certain terms for a stated compensation, by which the consignees covenanted as factors to make advances of two thirds of the value on the consigned goods, furnish certain facilities for marketing them, pay certain expenses, render regular statements and accounts of sales, charge stated rates of interest, etc., and which contained other mutual and reciprocal provisions imposing burdens and giving advantages, is validly modified by a subsequent parol agreement releasing and discharging the first party from his obligation to obtain for the other the whole products of the designated mills, but continuing the contract in all other respects, upon the first party's refraining from giving the notice provided for to terminate the contract and his liability

under it, and his engaging to continue to procure as many and as large consignments of silks for sale as he should thereafter be able to influence; and such oral modifying agreement is supported by a sufficient consideration. Napier v. Spielmann, 127 App. Div. 711, 111 N. Y. Supp. 1009.

An oral agreement by an employing principal with a selling agent bound by his contract of employment to repay commissions which had been paid him for sales to customers who failed and could not be forced to pay for their purchases, to release and discharge the salesman from his liability to make any further refunds as an inducement and consideration to cancel such contract, and to substitute for it a new contract to sell on commission in other states and a different territory, synchronously entered into by both parties, is valid and binding. Morrison Mfg. Co. v. Byson, 129 Iowa, 645, 103 N. W. 1016, on rehearing, 129 Iowa, 648, 106 N. W. 153.

A contract of employment and service brought to an end either because of the termination of the period of employment, or by the wrongful discharge of the servant at the end of six months according to the fact, disputed, whether the term was one year as the servant contended, or only half a year as the master asserted, is abrogated, merged in, and supplanted by a new agreement for the resumption and continuance of the employment on the old terms for what time there is then left of a one-year period, and for such new agreement there is a sufficient consideration in the settlement of the dispute. McKeogh v. Browning, King & Co. 125 N. Y. Supp. 368.

When a client, after agreeing with her attorney for the latter's professional services in a certain litigation, his compensation to be wholly contingent upon his success in winning certain desired results, changes her plan and directs a different course of procedure, looking toward other results, such change of plan and instruction is a sufficient consideration to support a new agreement providing for the payment to the attorney of the fair and reasonable value of his services whatever the outcome. Jones v. Haines, 117 Iowa, 80, 90 N. W. 518.

The agreement of a teacher employed for a specific time at an annual salary, to cancel the definite contract and to serve during the pleasure of the school board, is a sufficient consideration for the promise of the board to pay an increased compensation. Hildreth v. Pinkerton Academy, 29 N. H. 227.

No new consideration is required to support a modification with additional undertakings and obligations, of a contract by a master of a vessel, to carry a carpenter to a distant port in exchange for his labor in preparing the vessel to go to sea and doing necessary carpenter work during the voyage, where such modification was mutually agreed upon before the vessel put to sea. Holmes v. Doane, 9 Cush. 135.

After the widow and heirs of a deceased interstate supposed to have died possessed of two tracts of land which had been sold for taxes to two different persons, but while there was yet time to redeem, contracted with the holder of one of the tax titles to buy the other tax title, and then reciprocally to convey for certain stipulated payments, the respective tracts so as to vest title to one in one party and to the other in the other party, each free from the other's claims, a new agreement made by the same parties upon discovering an outstanding deed by the deceased in his lifetime to a third person absolute on its face, but asserted to have been merely collateral security for a debt subsequently paid, looking to the extinction of such deed, and providing for payment of the expenses of annulling it, rests upon a sufficient consideration in the mutual covenants of the parties. Dewey v. Life, 60 Iowa, 361, 14 N. W. 347.

A partnership agreement between two physicians to practise their profession jointly in and about a named place is a sufficient consideration to support the release of one of them, who had theretofore sold to the other his practice and covenanted not to practise further in such place, from his obligations under the former agreement. Menefee v. Rankins, 158 Ky. 78, 164 S. W. 365.

An agreement between partners under articles of copartnership entitling one of them upon the dissolution of the firm to the entire assets, terminable by either partner upon twenty days' notice to the other, modifying their contract so as to give each partner an equal interest in the assets upon the undertaking to refrain from serving notice of dissolution before the term expired, is supported by a good consideration. Melville v. Kruse, 69 App. Div. 211, 74 N. Y. Supp. 826, affirmed in 174 N. Y. 306, 66 N. E. 965.

Repeated modifications by mutual consent of a contract of partnership looking to the purchase of land and the construction of buildings upon it, the profits to be divided finally among the members in proportion to their several interests, affecting the title, character of the buildings, expenses of construction, contributions of capital, and division of the buildings or proceeds of their sale, made from time to time as circumstances seem to make it desirable, and for the purpose of carrying out the original undertaking to the benefit and advantage of the several partners, each rests upon a sufficient consideration in the mutual concessions and reciprocal engagements of the respective members of the firm. Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169.

Where three persons in writing agree jointly to purchase, through one of their number, a tract of land at a public judicial sale to be afterward apportioned between them in parcels and at prices determined by three arbitrators, and, subsequently, after the designated purchaser has, with the knowledge of all, bought at private sale an undivided two-thirds interest in the tract, enter into a new agreement in writing abro-

gating the former one, and fixing the portions and prices of the tract each is to have, and providing for the purchase through the same person of the tract at the public sale as before, the new contract supersedes and is a substitute for the old one, is supported by a sufficient consideration, and governs the rights of the parties so that when the syndicate is outbid at the sale by a stranger, its members have no joint interest in, or right in common to, the two thirds purchased at private sale or the profits of the purchaser in that transaction. Cooper v. McIlwain, 58 Ala. 296.

The giving of additional security and an agreement to pay the costs of a pending action constitute sufficient consideration to support a release of an indorser. Eccleston v. Ogden, 34 Barb. 444.

An agreement by the holder of a promissory note to accept payment of it in specified bank bills and notes in lieu of money, from an indorser paying it punctually at maturity out of his own funds, absolutely and unconditionally, creates a substitute for the ordinary contract of indorsement, and there is a sufficient consideration for the substituted contract in the change of the indorser's contingent liability to a certain one. Spann v. Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

An agreement by the holder of an overdue promissory note to waive interest upon it, on receiving new notes from the maker, has been held to be based upon a good consideration. Roberts v. Carter, 31 Ill. App. 142.

A contract between a debtor and creditor by which the former promises to pay, and the latter to accept, an annuity payable quarterly during the creditor's life, exceeding the legal annual interest, in extinction of the debt, is valid and supported by a good consideration. Price v. Price, 111 Ky. 772, 64 S. W. 746, 66 S. W. 529, 531.

An agreement between the maker and holder of a promissory note payable in grain deliverable in parcels at stated times, entered into before all of the grain was deliverable, by which the grain was not to be demanded until the last instalment of it fell due, and by which also, in the meantime, the maker was to render to the holder certain services from time to time as requested, the compensation for which was to be applied on the note, is supported by a sufficient consideration without any new or additional one being required beyond the mutual consent of the parties. Thrall v. Mead, 40 Vt. 540.

The subsequent enlargement by letter from an advertiser to a publisher, of the space to be occupied in the publication by an advertisement ordered in writing, previously, followed by publication conformably to the later direction, makes a valid binding contract upon a sufficient consideration. Chandler v. Knott, 86 Iowa, 113, 53 N. W. 88.

A written contract for the printing and publishing of a special edition of a newspaper with advertisements solicited, approved and compensated for at a stated rate, with regulative details, may be orally abandoned and replaced by a substitute upon other terms, by mutual consent, and no other consideration is necessary. England-Kelch Co. v. Evening Journal Co. — Del. —, 91 Atl. 448.

The mutual agreement of the parties to a contract to marry, to abrogate it and release each other from its obligations on the promise of the man to pay the woman a sum of money, is supported by a good consideration, and the promise may be enforced by an action. Swell v. Bray, 56 Wis. 159, 14 N. W. 14.

A written proposal by a divorced wife to her former husband, accepted in writing by him, to the effect that he surrender his rights under the decree in certain particulars respecting visits to the child of their marriage and the cancelation of her bond to allow such visits, he in turn to pay at once all post due alimony and continue paying in the future, while she released her right to prosecute him for disobeying the decree, amounts to a valid contract upon sufficient consideration, as a modification of the decree, a cancelation of the bond, and a substitution of the accepted proposal. Lancaster v. Elliot, 55 Mo. App. 249.

A mutual agreement by the parties to a contract before the arrival of the time for performing it, canceling and annulling it upon payment by one party to the other of a sum of money, is based on a sufficient consideration. McIntosh v. Miner, 37 App. Div. 483, 55 N. Y. Supp. 1074.

An agreement by theatrical managers with the owner of plays to produce one in lieu of another affords a sufficient consideration for canceling and annulling a former agreement to produce the other play, and notes given on account of expected royalties accruing from its performance. French v. Wallack, 12 N. Y. S. R. 159.

X. Consideration for modifications and substitutions of executed contracts.

A contract completely executed cannot afterwards be modified without a new consideration. Baltimore Refrigerator & Heating Co. v. Wetzel, 89 C. C. A. 117, 162 Fed. 117.

After an oral agreement has been performed on one side, and a cause of action upon it has accrued, it cannot be orally discharged without a consideration and satisfaction. Edwards v. Weeks, 1 Mod. 262, 2 Mod. 259.

There is a clear distinction between a parol modification of an executory written agreement before breach and before the time for performance has arrived, and an attempt to satisfy a liquidated accrued indebtedness by the payment and acceptance of a less sum. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

A previous contract fully performed, for which the agreed consideration has been received, is not a sufficient consideration to support a later contract upon the same subject, giving additional consideration to the

party who had performed the earlier contract. Barlow v. Cotulla, — Tex. Civ. App. —, 141 S. W. 292.

An extension of time to pay a debt already due is not good without a new consideration. Parmelee v. Thompson, 45 N. Y. 58, 6 Am. Rep. 33; Graham v. Negus, 55 Hun, 443, 8 N. Y. Supp. 679; Manchester v. Van Brunt, 46 N. Y. S. R. 566, 19 N. Y. Supp. 687.

After a completed sale of cattle and the payment of the purchase money, followed by a failure of the seller to deliver the animals at the time fixed in the contract, and the accrual to the buyer of a cause of action to recover damages for the breach, a subsequent executory agreement that the cattle should be delivered at a later date is without a consideration to support it, and is not binding. Cofield v. Clark, 2 Colo. 101.

A mere naked oral premise without a consideration, by the vendor in a contract of sale and purchase of land on credit, with the vendee in possession, to extend the time of payment of the purchase money, is of no validity. Bartlett v. Smith, 146 Mich. 188, 117 Am. St. Rep. 625, 109 N. W. 260.

An agreement by the owner of land subject to a mortgage, made with the mortgagee after the latter had released and discharged the mortgage as to a part of the land which had been sold to a third person, and had received the grantee's promissory note for the purchase money bearing interest at the same rate as did the mortgage debt, to the effect that only the principal of such note should be applied upon the mortgage, and that the mortgagee might retain as his own any and all interest collected on such note for having theretofore released the land sold from the lien of the mortgage, is invalid for want of a consideration. Barlow v. Cotulla, supra.

An agreement by a seller of merchandise unconditionally and absolutely sold and delivered to the purchaser for a stipulated price payable on demand, to the effect that it need not be paid for until sold again by the buyer, without any reciprocal agreement by the buyer to pay interest in the meantime, is invalid for want of consideration. Consumers' Fertilizer Co. v. Badt, — Tex. Civ. App. —, 157 S. W. 226.

An agreement for the sale and purchase of a specific lot of wool which had been theretofore the subject of negotiation between seller and buyer at a previous time when two other lots were sold and delivered cannot be deemed a subsequent enlargement of the previous contracts of sale; neither can it be supported by a consideration consisting solely of the payment of the purchase price for the two lots of wool previously sold and delivered. Organ v. Stewart, 60 N. Y. 413.

An agreement by the seller of a slave not warranted sound when sold, where no fraud or misrepresentation entered into the sale, made after the sale was complete, upon a discovery by the purchaser that the slave was diseased, either to cure the slave's ailment or pay back the purchase money, is void for want of a consideration. Hatchell v. Odom, 19 N. C. (2 Dev. & B. L.) 302.

An oral agreement after a completed sale and delivery of goods at stated prices, not warranted, to the effect that the buyer should keep the property for resale and pay only for so much of it as he should sell again, is a mere nude pact without consideration. Cannon v. Young, 5 Pa. Dist. R. 772.

After a written contract, complete upon its face, for the purchase, sale, delivery, and installation of a stated number of machines, containing no warranty or guaranty of any description by the vendor, has been performed on his part by delivering the machines and properly setting them up in working order, it cannot be validly supplemented without a new consideration by a subsequent parol agreement adding to it a warranty and guaranty that had formed a part of an earlier contract of sale of other similar machines previously delivered, set up, and paid for, and such agreement, if proved, is without a supporting consideration, and affords the purchaser no defense to an action to recover the purchase price. Baltimore Refrigerating & Heating Co. v. Wetzel, 89 C. C. A. 117, 162 Fed. 117.

An agreement by the vendor of machinery sold and delivered to the vendee under a written contract requiring him to make and deliver in return certain promissory notes for the purchase price, made in order to obtain such notes, binding the vendor to do specified things respecting the machinery not embraced in the sale contract, is without consideration and void. Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318.

After a contract to build and deliver ready for use, for a stated price, a device known as an observation roundabout wheel for public amusement, covered by letters patent, has been fully performed and the price paid and the machine has been in use for a year under a license from the owners of the patent to use it on payment of an annual stated royalty during the life of the patent at a named place, a promise by the patentees thereafter to remit payment of further royalties on complaint of the licensees that competition of other wheels elsewhere made the use unprofitable, so long as such competition should continue unchecked, if made, is invalid for want of a supporting consideration. Sommers v. Myers, 69 N. J. L. 24, 54 Atl. 812.

After a contract for the sale of a business with the stock of goods, and lease of the shop where it has been carried on, has been fully performed on both sides, a subsequent agreement by the seller to refrain for a time from entering into the same business at the same place in competition with the purchaser is something more than a mere modification of the sale contract, and is in effect a new and distinct one requiring to be binding a new consideration. Carruthers v. McMurray, 75 Iowa, 173, 39 N. W. 255.

Where the directors of a corporation

agree each with the others, all being stockholders in varying amounts, for the purpose of enabling the corporation to borrow needed capital to carry on its business, to pay the notes and other obligations given to obtain money for the purpose in proportion to the number of shares respectively held, and, subsequently, after the corporation and the other directors have become insolvent, two of them agree with each other to discharge certain named debts and satisfy certain creditors by payment or compromise, and that agreement is so far performed by each that all the debts save one are settled and released, by which the party assigned to pay such debt has without it in fact paid a larger sum than he was bound to pay as his share, while the other has paid a much smaller sum than he on his part was bound to pay as his share, and the unpaid debt amounts to less than the saving on one side and more than the excess on the other, the promise of him who has paid too much already to pay the last outstanding debt is without any consideration to support it. Weed v. Speers, 193 N. Y. 289, 86 N. E. 10.

After a subcontractor has by mistake performed work not covered by the subcontract without any previous request or order from the contractors, their agreement to pay him a compensation for it, if made, is void for want of consideration. Majory v. Schubert, 82 App. Div. 633, 81 N. Y. Supp. 703.

An agreement by a construction company which had contracted to build a railroad and had not completed the work, to accept a reduction of the compensation payable by the terms of the contract for the finished work upon an acceptance of the work in its unfinished state, is supported by a sufficient consideration and is valid; but an agreement by such company after completing the work to take something less than the contract price for the finished work is without consideration, and of no binding force. Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 374, 59 N. W. 838.

After service has been rendered or remuneration has been paid under a contract of employment, it can be discharged only by a new agreement founded upon a new consideration. Brown v. Catawba Lumber Co. 117 N. C. 287, 23 S. E. 253.

After services have been fully performed for a purchaser of lands sold for taxes, in making searches and serving notices to redeem upon the persons interested, under a contract for payment of fees fixed by statute when the property is redeemed and the redeemer has paid such fees, but not otherwise, a subsequent agreement to pay for such services upon the taking by the purchaser of deeds for unredeemed property is invalid for want of consideration. Calvert v. Cary, 50 App. Div. 619, 63 N. Y. Supp. 547.

After a real estate broker employed to sell property has produced a buyer able and willing to purchase upon his employer's terms, and so earned the promised commission, his subsequent agreement not to claim any commissions unless a sale should be consummated is void for want of consideration. Taubenblatt v. Galewski, 108 N. Y. Supp. 588.

And if the broker was employed to negotiate an exchange of his employer's property for other, and he has produced a person able and willing to make an exchange of property with the principal, and the two enter into a contract to trade properties, the broker's service being completed and his remuneration earned, his subsequent mere agreement to release his claim for commissions if the exchange contract is not performed is a nude pact, without consideration and void. Little v. Rees, 34 Minn. 277, 26 N. W. 7.

And in like circumstances an agreement exacted by the principal from the broker to await the passing of the title deeds for payment of his compensation, and to waive payment if they do not pass, unless his principal's title proves to be unmerchantable, is void for want of consideration. Moskowitz v. Hornberger, 20 Misc. 558, 46 N. Y. Supp. 462.

But an agreement by real estate brokers to make no charge to a vendor for services or commissions on a sale of lands and chattels brought about by their efforts, unless such sale should culminate in a deed of conveyance, where they had previously been employed to procure a customer and had brought the parties together to agree upon terms, which was made at the same time and place as a part and parcel of the same transaction, to induce the vendor to exchange and deliver a sale contract signed on that occasion, is supported by a sufficient consideration. Ligon v. Wharton, — Tex. Civ. App. —, 120 S. W. 930.

An agreement between a building and loan association and a shareholder, made a few years after the latter had subscribed for his shares and obtained a loan evidenced by his bond and secured by a mortgage on a building lot and a pledge of the shares as further collateral security, which provided for a modification and change of the subscription contract in important respects, chief of which were a postponement of the time when the association would be bound to take up the shares at par and a continuation of payments by the shareholder in the meantime, was held valid and binding in Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 523, 30 So. 79.

In that case the court said that while the original stock contract was in a sense an executed contract, it was nevertheless, in the performance of conditions attached to it, continuing in its nature, and its completion was dependent upon the performance of these conditions by the shareholder extending over a number of years: this rendered the contract as to the payment by the company of the face value of the shares at the date fixed for their maturity, as well as the payment by the shareholder of the assessments on his shares, in its character executory. We think there can be no doubt that such a contract may be modified or

changed by the parties without requiring a new consideration to support the alteration; their mutual assent being all that is necessary.

XI. Consideration for waivers.

It has on the one hand been said that a mere waiver by one party to a contract, unsupported by any consideration moving from the other, will not bar the former's rights. Maness v. Henry, 96 Ala. 454, 11 So. 410.

And, on the other hand, that the party in whose favor a clause in a contract was inserted may waive the performance of that clause effectively without any consideration if he so chooses. Ruege v. Gates, 71 Wis. 634, 38 N. W. 181.

The contradiction in these two statements, however, is more apparent than real.

The same court from which emanated the first statement has held that any executory contract imposing obligations beyond the mere payment of stated sums of money may, without further consideration than the mutual agreement of the parties, written or oral, be so changed as to waive any right either party might have had under the original agreement but for the new agreement. Andrews v. Tucker, 127 Ala. 602, 29 So. 34.

The waiver of a particular covenant or provision in a contract by the party for whose benefit it was inserted has not infrequently been held binding where a consideration, if it existed, was not obvious.

Thus, early New York cases held that the strict performance of the condition of a bond might be waived by parol. Fleming v. Gilbert, 3 Johns. 528; Dearborn v. Cross, 7 Cow. 48.

Notwithstanding a written and sealed lease forbids the tenant to make alterations in the demised premises without the landlord's consent in writing, the provision to that effect may be orally waived by the latter. Moses v. Loomis, 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952.

A parol waiver of a particular covenant or provision in a contract under seal is held valid on the principle of estoppel. A party to a written contract who has by some affirmative action led the other party to believe, and act on the belief, that he will not be held to a strict performance of his covenant, will be estopped in equity from claiming the contract to be no longer obligatory on him because the covenant was not performed. Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673; Becker v. Becker, 250 Ill. 117, 95 N. E. 70, Ann. Cas. 1912B, 275.

A failure to keep accounts of timber cut and shipped as required by a written contract of sale of standing timber at a stated price the thousand feet is justified and excused by a subsequent oral agreement of the parties to waive the requirement, and to settle on the basis of the consignee's tallies of lumber cut from the shipments. McKinney v. Matthews, — N. C. —, 82 S. E. 1036.

An oral agreement by a mortgagee reducing the rate of interest on the mortgage debt has been held to be binding, because it was said that if the mortgagor had not relied upon such agreement he might have borrowed the money at the reduced rate from another person on like security, and taken up the mortgage. Milton v. Edgeworth, 5 Bro. P. C. 313.

After a vendee of land has entered into and remained in possession under a contract of sale expiring on a date in the future, and has with the vendor's acquiescence, after such date has passed, made improvements at his own cost on the land, and while he is all the time claiming ownership, a new agreement by the vendor and vendee that the latter should (as he did) sell a part of the land to a third person at a price to be applied toward the payment of his own purchase is supported by a sufficient consideration in the mutual waiver of the time limit and the reciprocal covenants to convey and pay for the rest of the original entire tract. Lester v. Hutson, — Tex. Civ. App. —, 167 S. W. 321.

When, during the performance of an oral contract to move back an old, and construct on its former site a new, building according to certain plans and specifications, the owner stops the work on the ground it is not being properly performed, and engages an architect to examine it, point out the defects, and prescribe remedies, and thereupon the contractor accepts the architect's views and agrees to go on conformably to them and complete the work as he has directed, to which in turn the owner assents, the arrangement amounts to a new and substituted contract upon a sufficient consideration, and to a waiver by the owner of forfeiture of the old contract for failure to perform it, so that, if the owner afterward refuses to allow the contractor to go on under the new contract, upon his repeated offers and requests to do so, the contractor may recover for the work he has done, and the owner is estopped from claiming a nonperformance. Fallon v. Lawler, 102 N. Y. 228, 6 N. E. 392.

A written contract of sale and purchase of several thousand bushels of hardwood coals, deliverable at the buyer's forge in stated quantities between specified dates, and payable at a stated rate the bushel on the first day of every month for quantities previously delivered, which the seller had failed fully to perform by delivering less than the stipulated number of bushels within the named periods, is waived and modified by a subsequent oral agreement of buyer and seller waiving the breach and providing for the continued delivery and acceptance of the remainder of the coals and payment therefor as delivered at the contract price; and for such oral agreement there is a sufficient consideration in the mutuality of its terms. Lawrence v. Davey, 28 Vt. 264.

Incidental matters of waiver and substitution, remarked Judge Christiancy, frequently arise in executing the provisions of contracts, as, for instance, a contract for the delivery of so many bushels of wheat, or so many cords of a particular kind of

wood; the parties may mutually assent that a certain number of bags shall be taken for so many bushels, instead of measuring or weighing the wheat, or that a certain number of loads shall be received for a certain number of cords of wood, and the party who is to receive the article may assent to receive an article somewhat inferior as a performance of a stipulation for a better. Savercool v. Farwell, 17 Mich. 308.

Buller (N. P. 152) notes that a promise before it is broken may be discharged by parol agreement, but that after it is broken it cannot be discharged without deed, by any new agreement without satisfaction, and cites, as authorities, Season v. Gilbert, 2 Lev. 144; Walwyn v. Awberry, 1 Mod. 259; May v. King, 12 Mod. 538.

Although there may have occurred technically a breach of an existing contract, yet if both parties to it treat it as continuing in force, their mutual agreement to annul it and substitute a new contract for it upon different terms is good. Dreifus v. Columbian Exposition Salvage Co. 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370.

There is declared to be a well defined distinction betwen a parol contract adding to or modifying the terms of an executory written contract under seal, and an oral agreement of the parties by which some covenant in such written and sealed contract is waived by the person for whose benefit it was inserted. Becker v. Becker, 250 Ill. 117, 95 N. E. 70, Ann. Cas. 1912B, 275.

XII. Secondary agreements as accords and satisfactions or novations.

The courts regard a subsequent agreement by the parties to an existing contract, entered into either as a substitute in whole or in part, or for the purpose of abrogating or altering and modifying it in one or more details, sometimes as a novation, and at others as an accord and satisfaction.

It has been said, for instance, that a change in the nature or the terms of a contract is a novation. Little Rock Furniture Co. v. Jones, 13 Ga. App. 502, 79 S. E. 375.

And, to take another example, it has been held that an offer of evidence in a suit to dissolve a partnership that a subsequent written agreement had been substituted for the original articles and an oral agreement abrogating them is not an offer to prove an executory oral agreement, but one fully executed by the substitution; in effect, an offer to prove a novation and to show its consideration. Guidery v. Green, 95 Cal. 630, 30 Pac. 786.

After a principal contractor has so acted as to prevent a subcontractor from completing the work he had undertaken to do, by conduct amounting to a breach of the subcontract and justifying the subcontractor in refusing to go on with his contract, an agreement between the owner of the projected structure and such subcontractor, performed by him, that the latter should go on and finish the work and be paid the fair and reasonable value of the materials and labor required to complete it, constitutes a new and independent contract founded upon a new and sufficient consideration. Lindsly v. Kansas City Viaduct & Terminal Co. 152 Mo. App. 221, 133 S. W. 389.

An accord and satisfaction always require a new agreement and usually that it be performed. It must ordinarily be an executed agreement founded upon a new consideration. Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Mance v. Hossington, 205 N. Y. 33, 98 N. E. 203.

Thus, a landlord's agreement to accept from his tenant cotton in lieu of cash for his rent, followed by a delivery of the cotton, is a fine example of a complete accord and satisfaction. Lamberton v. Harris, — Ark. —, 166 S. W. 554.

An accord is an agreement for giving and taking a thing in satisfaction; the satisfaction is the actual giving and taking of such thing. Bragg v. Pierce, 53 Me. 65; Burgess v. Denison Paper Mfg. Co. 79 Me. 266, 9 Atl. 726.

An accord and satisfaction result when a new contract is substituted for an old one between the same parties, and the new one is fully performed. Heath v. Vaughn, 11 Colo. App. 384, 53 Pac. 229; Swofford Bros. Dry Goods Co. v. Goss, 65 Mo. App. 55; Story v. Maclay, 6 Mont. 492, 13 Pac. 198; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

A substituted oral agreement actually performed, whether made and executed prior or subsequently to the breach of the written contract it superseded, is a good accord and satisfaction. McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198.

If the parties have performed the modified contract so that naught remains to be done by either, it ceases to be executory, and the contract as executed will not be disturbed. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110.

By the Civil Code of California (§§ 1521–1523) an accord is an agreement to accept, in extinction of any obligation, something different from or less than that to which the person agreeing to accept is entitled; yet it does not extinguish the obligation until it is fully executed, and the acceptance by the creditor of the consideration of an accord extinguishes the obligation, and is called satisfaction. Creighton v. Gregory, 142 Cal. 34, 75 Pac. 569.

In general, accord and satisfaction are indissolubly linked, and while the accord is executory it is no defense to an action upon its subject-matter. Memphis v. Brown, 20 Wall. 289, 22 L. ed. 264; Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; Noe v. Christie, 51 N. Y. 270; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491.

An accord without satisfaction is no bar. Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; Bell v. Pitman, 143 Ky. 521, 35 L.R.A. (N.S.) 820, 136 S. W. 1026; Hoxsie v. Em-

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pire Lumber Co. 41 Minn. 548, 43 N. W. 476; Palmer v. Yager, 20 Wis. 91.

The reason is that without satisfaction the accord lacks a consideration, and every agreement of accord and satisfaction needs the support of a consideration. Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126.

Mr. Justice Phelps, of the Vermont supreme court, in delivering its opinion in an early case reversing a judgment of the court below holding bad a plea in bar of an action on a promissory note, alleging an agreement in writing under seal for the delivery and acceptance at a future date of a certain horse in payment of the obligation, with a tender of the animal at the time appointed, and a refusal to receive it, on the ground that the plea was simply one of an accord without satisfaction, had this to say: The reason for the rule upon which the plaintiff relies is obvious. An accord without satisfaction is no bar, simply because there is no consideration and no mutuality to support it; because the creditor has no means of obtaining satisfaction by enforcing it, and, of course, derives no satisfaction directly or indirectly from it. The authorities all put the subject on this ground. The want of consideration not only appears, but is assigned, as the ground of decision. Bryant v. Gale, 5 Vt. 416.

But it is not absolutely necessary in all cases to an accord and satisfaction that the new agreement of the parties be performed. If the new agreement is actually intended to be a complete substitute for and to extinguish the old contract, it is in and of itself an accord and satisfaction. Hall v. Smith, 10 Iowa, 45, on second appeal 15 Iowa, 588; Graham v. Crisman, — Iowa, —, 146 N. W. 756; Bell v. Pitman, 143 Ky. 521, 35 L.R.A.(N.S.) 820, 136 S. W. 1026; Strobridge Lithographing Co. v. Randall, 78 Mich. 195, 44 N. W. 134; Morehouse v. Second Nat. Bank, 98 N. Y. 503; McCreery v. Day, 119 N. Y. 1, 6 L.R.A. 503, 16 Am. St. Rep. 793, 23 N. E. 198; Jaffray v. Davis, 124 N. Y. 164, 11 L.R.A. 712, 26 N. E. 351; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Bandman v. Finn, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175.

A claim may effectively be extinguished by taking in lieu of it a valid promise which may be enforced in law. Smith v. Elrod, 122 Ala. 269, 24 So. 994; Goodrich v. Stanley, 24 Conn. 613; Ranlett v. Moore, 21 N. H. 336; Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Bandman v. Finn, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Laughead v. H. C. Frick Coke Co. 209 Pa. 368, 103 Am. St. Rep. 1014, 58 Atl. 685; Hard v. Burton, 62 Vt. 314, 20 Atl. 269.

In one case it was said in this association that an accord and satisfaction as known and applied in the law mean the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 Pac. 625.

And in another, that a written contract containing new terms and a new consideration, entered into as a satisfaction of the obligations arising out of a former agreement between the parties which were in controversy, although still executory, is of itself a complete accord and satisfaction. Byrd Printing Co. v. Whitaker Paper Co. 135 Ga. 865, 70 S. E. 798, Ann. Cas. 1912A, 182.

A second contract on the same subject-matter, even when not fully performed, will be presumed to be a substitute for the first unless the contrary clearly appears, especially when founded upon a new consideration. McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159.

An implied contract reasonably to compensate one for services rendered is superseded and extinguished by a subsequent one entered into by the parties agreeing upon an express compensation. Pim v. Greer, 64 Mo. App. 175.

Before one contract merges in and is superseded by another, the last contract must be between the same parties, embrace the same subject-matter, and be intended as a substitute for the first. Walsh v. Lunney, 75 Neb. 337, 106 N. W. 447.

An oral contract never supersedes a prior written one, unless it was intended to take the place of, abrogate, and supplant it. England v. Houser, 163 Mo. App. 1, 145 S. W. 514.

An executory contract discharging a previous contract between the same parties does not operate as a release and satisfaction until fully performed, unless expressly so agreed. Cohan v. Rosenberg, 69 Misc. 335, 125 N. Y. Supp. 769.

If there has been no breach of an existing contract, and the time for its performance is still open, so that no cause of action has accrued upon it, a new contract upon the subject between the parties, agreeing to cancel it, will supersede it, although it provides for the payment of a less sum of money at a definite time in the future than the party to receive it would have been entitled to at an uncertain time in certain contingencies. Bandman v. Finn, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175. Haight and Gray, JJ., dissenting.

At common law an accord without satisfaction is no bar to a suit upon the original obligation, but if the accord rests on a new consideration, and is accepted as satisfaction, it so operates and takes away the remedy on the old contract. This, we believe, said the court in Hall v. Smith, 15 Iowa, 585, to be in accordance with the current of authorities, and it is certainly in harmony with the analogies and equities of the law. Whether there has been a new consideration in legal contemplation, and particularly whether the accord or new agreement was accepted as satisfaction, depend upon the circumstances of each case, and in determining its tenor and effect we must from the circumstances endeavor to

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ascertain the intention of the parties; for, while some authors and some of the cases speak of the unexecuted promise being satisfaction in those cases only where it is made so by express agreement, we suppose that ordinarily no rule is violated in holding that it is sufficient if this intention or purpose is evidenced by any unequivocal act or in any clear manner.

An accord and satisfaction is the settlement of a dispute or the satisfaction of a claim by an executed agreement between a party injuring and the party injured; or, in other words, more definitely indicating its peculiar nature, it is something of legal value to which the creditor before had no right, received in full satisfaction of the debt without regard to the magnitude of the satisfaction. Bull v. Bull, 43 Conn. 455.

A novation is made by contract, and the contract is subject to all the rules concerning contracts in general. Linder Hardware Co. v. Pacific Sugar Corp. 17 Cal. App. 81, 118 Pac. 785.

It presupposes a previous obligation for which a new one is substituted. Ibid.

A new contract substituted for an old one must be valid and afford a remedy to the parties in order to constitute a novation. Clark v. Billings, 59 Ind. 509; Hosack v. Rogers, 8 Paige, 229; Guichard v. Brande, 57 Wis. 534, 15 N. W. 764; Lynch v. Austin, 51 Wis. 287, 8 N. W. 129; Spycher v. Werner, 74 Wis. 456, 5 L.R.A. 414, 43 N. W. 161.

It is well here to mention the elements present in every valid novation. As enumerated in one case, these are (1) a valid existing contract; (2) an agreement by all the parties to it upon a new contract; (3) a valid new agreement; and (4) the extinction of the old by the new contract. Pope v. Vajen, 121 Ind. 317, 6 L.R.A. 688, 22 N. E. 308.

Another case has named the necessary legal elements in a novation as (1) parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution; (4) a sufficient consideration for such consent; (5) the extinction of the prior obligation; and (6) the creation of a new and valid obligation. Harrington-Wiard Co. v. Blomstrom Mfg. Co. 166 Mich. 276, 131 N. W. 559.

A novation and an accord and satisfaction have features in common, the former being a species of the latter. The principal distinction between the two is that a novation implies the extinction of an existing debt or obligation and its transition into a new one between the same or other parties, whereas an accord and satisfaction relate solely to extinguishing the debt or obligation. Cooke v. McAdoo, 85 N. J. L. 692, 90 Atl. 302.

The stated distinction being kept in mind, the following cases are examples rather of novations than accords and satisfactions in respect of modifying or substituted secondary contracts.

An agreement between an insured and an insurance company adjusting, and promising to pay as adjusted, a loss at a less sum than stated in the policy and less than the sum claimed by the insured, is essentially a substitution of an entirely new contract for the policy, supported by a new consideration, to wit, an agreement to take less than the sum insured in satisfaction. Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co. 121 Cal. 167, 53 Pac. 565.

An agreement by a consignee of a debtor's goods with a creditor of the debtor, to take and receipt for the debtor's promissory notes held by the creditor as evidences of the indebtedness, and to pay the debt out of the proceeds of the sale of the consigned goods, provided they shall be sufficient after paying previously accepted drafts drawn against them, to evidence which the consignee made and delivered his own note for the amount of the debt to be held in escrow by the payee's agent pending the sale of the consignment and an accounting, is abrogated and replaced by the cancelation and surrender of the note held in escrow and the delivery and acceptance, as a substitute for it, of the consignee's new note to the creditor, payable unconditionally and for a slightly less sum; and there is a good legal consideration for the new note. Adams v. Wilson, 12 Met. 138, 45 Am. Dec. 240.

A contract for the sale and delivery of a quantity of lumber at a stipulated price paid in part by the purchaser upon taking possession is in substance and effect a new, distinct, and independent contract made in substitution for a previous contract for the sale and purchase of the same lumber at a lower price between the same parties, which the seller had carried to and deposited at the place of delivery, where the buyer had failed to attend and receive at the place and time fixed by the contract. Keeney v. Mason, 49 Barb. 254.

A new bond and subsidiary guaranty of sureties indorsed upon it, made to secure the payment by a bank of deposit of past and future deposits in it by a savings bank, with interest at a lower rate, made and delivered as a substitute for a previous bond of like character with other sureties and a higher rate of interest, surrendered and canceled in exchange, is supported by a sufficient consideration. Erie County Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54.

When persons who have been associated in business as masters and servants orally agree to become partners, taking over the stock and assets of the former business at an agreed valuation, and each of the employees agreeing thereafter to contribute a stated sum as capital at a time not determined, interest to be paid upon the capital paid in and charged upon the deferred payments, the profits and losses to be shared equally, and the partnership to continue for three years, and then proceed to carry on the business jointly, but never as they at first contemplated reduce their agreement to writing, and after a time a dispute arises

over the question of dividing the profits earned, and whether or not a partnership was actually formed, an agreement then entered into to credit each of the parties a stated amount on the books of the concern as his share of the profits, and to thereafter be partners upon the terms outlined previously, is sustained by a sufficient consideration in the abrogation of the former agreement and the settlement of the controversy that arose over its terms and the mutual agreement of the partners to do business together in the future. Wahl v. Barnum, 116 N. Y. 87, 5 L.R.A. 623, 22 N. E. 280. Potter, J., dissenting.

A majority of the court entertained the opinion that the primary agreement was void by the statute of frauds, because it was oral and by its terms was not to be performed within a year, and being invalid the second agreement should be regarded as the original and only one between the parties.

A written contract of employment providing for the payment for a stated period, of a specified monthly stipend, at the end of which the employer was entitled to terminate the relation without further liability, or to continue the employment with a liability to pay double such stipend both for past and future time, is abrogated and annulled, and not merely modified and amended, by a new oral contract at the end of the period named in the old one for the exercise of the employer's election, providing for the payment of the doubled compensation for the future only, since the amount of the stipend payable is the material part of the contract, and a change in that respect is the creation of a substitute for, and not an amendment to, the original agreement. Homire v. Stratton & T. Co. 157 Ky. 822, 164 S. W. 67.

An agreement between controlling stockholders in a corporation and a promoter who had at their instance acquired options upon the stock for them, and joined them in incorporating a new company to operate the old business, fixing a definite number of shares in the new corporation to be delivered to the promoter in full of all his claims and demands for past and contemplated services, supersedes and supplants a former contract calling for such services to be compensated by an indefinite amount of stock and money, upon stated contingencies requiring an accounting to determine the respective interests of the parties, and it is supported by a sufficient consideration. Spier v. Hyde, 78 App. Div. 151, 79 N. Y. Supp. 699.

An agreement by the retiring partners of a firm of contractors for the construction of a railroad, who had assigned to the remaining partners their interest in the contract upon their undertaking to fulfil its obligations, save them harmless from the claims of creditors, pay a sum of money in cash, and a further sum according to the terms of a promissory note executed and delivered contemporaneously, to surrender and cancel the note provided the makers in turn should release to the railroad company their interest in the construction contract, and the releasing of the railroad company accordingly, may be established by parol testimony, and if proven will constitute a defense to the note and a new substituted contract upon a good consideration. Malone v. Dougherty, 79 Pa. 46.

An option given by a landowner to another to purchase the coal underlying his land, conditioned to be null should his wife refuse to join in a conveyance, afterward renewed from time to time, and then assigned by the holder to a third person, is superseded and supplanted by a final renewal making the option an absolute unconditional one upon a payment of part of the purchase money; and the last may be enforced by a decree for specific performance at the suit of the assignee. Thompson v. Craft, 238 Pa. 125, 85 Atl. 1107.

A contract in writing under seal between the maker and payee of a promissory note, by which the one covenants to deliver and the other to receive at a time named a certain horse in satisfaction, bars any action upon the note, and substitutes a new remedy upon a superseding agreement. Bryant v. Gale, 5 Vt. 416.

A second option given by a landowner to a real estate broker who already held from him an option to buy the coal underlying the land within a limited time at a stated price the acre, payable according to specified terms, and given before the first option expired, changing the time of acceptance and the terms of payment, without altering the price, is a new contract that abrogates the first, and is supported by a sufficient consideration. Runnion v. Morrison, 71 W. Va. 254, 76 S. E. 457.

An agreement of a manufacturer to pay royalties to the patentee of a machine upon which goods are manufactured is supplanted and superseded by a new agreement made after the patentee has invented and obtained another patent for a novel device for making the same class of goods, whereby the manufacturer is granted a license limited to the term of one year, to manufacture under both patents for a specified sum paid as royalty. Penman Mfg. Co. v. Broadhead, 21 Can. S. C. 713.

XIII. Consideration of secondary agreements between landlords and tenants.

The principles which govern the validity of secondary agreements between landlords and tenants do not differ from those applying to other contracts, but the group is large enough to present in a separate division, and it is believed will be of greater service thus presented than if the cases were not segregated.

As in all other cases of secondary agreements, a consideration of some sort is a necessity.

An oral agreement of a landlord to reduce the rent of land and release the rent of personal property, payable under a previous lease to a tenant in possession, is not

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good without a consideration. Walker v. Tomlinson, 44 Tex. Civ. App. 446, 98 S. W. 906.

An agreement of a tenant not to use a part of the rented land in his possession through a lease under seal, without paying the landlord extra for it, requires a consideration to give it validity. Tryon v. Mooney, 9 Johns. 358.

Thus, an oral agreement between a landlord and tenant of a farm, made subsequently to a written lease and the beginning of a tenancy under it, to the effect that the tenant should not use the pasture except for his team when at work on the farm, and if he did, should pay the landlord extra, is without a consideration and void. Ibid.

Where there was an oral agreement between the owner of a farm and a prospective purchaser, that the former, supplied with certain land warrants by the latter, should journey to another state, look over the country, and, if he liked it, should convey the farm at a stated price, under which the prospective grantee was put in possession of certain fields to plant with corn, and allowed to stable horses in the barn while cultivating such corn, and by the terms of which, if the landowner did not like the new country, there was to be no sale, but the other party was to pay a rent of $2 the acre for the cornfields; a subsequent oral agreement between the two parties to enable the landowner to sell the farm to a third person, by which the farm owner agreed to give the first prospective vendee, if he would relinquish his claim to purchase, the rent for the cornfields and the growing wheat in a certain field pointed out, was held a mere nude pact without consideration, since the original contract was void and amounted to naught but a lease of the cornfields. Jarvis v. Sutton, 3 Ind. 289.

The making orally of a new lease during the term of an existing written one, at a reduced rent, between the same parties, may operate to abrogate the old lease, and substitute the new one, even before the reduced rent is paid and accepted in full; but, to have that effect, some new consideration is requisite when the tenant is in possession of the leased premises and entitled to remain under the old lease. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

An executory agreement by a landlord to reduce the amount of rent which the tenant is bound by the terms of a written lease to pay, made during the term of the lease without canceling it or surrendering the premises, where no change is made in the character of the tenancy or the state of the premises to the tenant's disadvantage or the landlord's benefit, is a nude pact, without consideration and void. Barnett v. Barnes, 73 Ill. 217; Loach v. Farnum, 90 Ill. 368; Goldsborough v. Gable, 140 Ill. 269, 15 L.R.A. 294, 29 N. E. 722.

In a modern case a tenant under a written and sealed lease, sued by his landlord for unpaid rent, relied in defense upon an alleged oral agreement reducing the amount of the monthly instalments payable by the terms of the lease, but on appeal the court, after reviewing the testimony, held that the alleged oral agreement for reduction had not been proved. It added, however, that if the proof had been sufficient to establish the agreement to reduce the rent, such agreement was a mere nude pact, without any consideration to uphold it,—the tenant being under a legal obligation to pay the full rent reserved in the lease, and the landlord receiving nothing in return for agreeing to take less. The court was further of the opinion that in any event the agreement, if it existed, reducing the rent, was void under the common-law rule that an indenture under seal cannot be varied by parol. Lord v. Haufe, 77 Ill. App. 91.

A gratuitous oral agreement of a landlord to accept in full for the remainder of the term, from a tenant in possession of leased premises under a written lease for a term of years, a less sum if paid punctually than the tenant had covenanted in the lease to pay as monthly rent, is invalid for want of consideration, and notwithstanding the reduced amount has been for many months paid, accepted, and receipted for in full, the landlord thereafter, for the rest of the term at least, may recover the entire amount of rent reserved in the lease. Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860.

In the case of Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026, in which a landlord's agreement reducing rent was held supported by a good consideration, and therefore valid and binding, Wharton v. Anderson, supra, was thus spoken of: That, said the court, was a case where the lessee by the terms of the written lease promised to pay rent for certain premises at the rate of $250 per month for five years, but not paying promptly the lessor reduced the rent to $208.33, and then to $150, per month upon condition that such rent was paid punctually. This the lessee failed to do, and the lessor brought suit for the full rental of $250 per month according to the terms of the original lease, upon the ground that the defendant had failed to pay according to the terms of the modified lease. The plaintiff recovered upon the ground that the alleged modification was a gratuitous parol promise. The court thereupon distinguished the decision in Wharton v. Anderson, supra, from the case then at bar, by saying: But the right to defend in this action against a recovery upon the terms of the original lease is claimed to rest upon the principle that the written modification is supported by facts which show a valid consideration and make it a binding contract, especially as it has been executed—that is, performed from October, 1883, until February, 1895—and nearly $6,000 paid pursuant to such modified contract. Certainly, the facts in the case of Wharton v. Anderson, supra, are not analogous to those at bar.

In a Pennsylvania case in which the trial court had held an agreement by a

landlord to reduce rent was unsupported by a consideration, the supreme court on appeal declined to rule upon the question whether or not the agreement was without consideration, because in that case the evidence established that the agreed reduction was for a temporary and indefinite period of time, and therefore the landlord had a right at any time to demand for the future payment of the full rent reserved in the lease, and consequently the judgment in his favor in the case at bar was right. Rohrheimer v. Hofman, 103 Pa. 409.

An oral agreement by a landlord in a written lease for a term of years under seal, to accept in the future a reduced rent from the tenant without any other change whatever in the terms of the lease, or any corresponding benefit to the landlord, or detriment to the tenant, even when followed by acceptance of the reduced sum and the giving of receipts therefor, is void for want of consideration, the payment in whole or in part by the tenant of the rent he had agreed to pay being insufficient. Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 120, affirming 7 Hun, 157.

A new lease, to have the effect of abrogating an existing lease, as a matter of law, must itself be valid in law to create a tenancy according to the purpose of the parties, and, inasmuch as a lease for a longer term than one year is good only when in writing, an oral lease for more than one year between the parties to a lease under seal cannot operate as a surrender and cancelation of the latter. Ibid.

An agreement by parol between the landlord and tenant of premises leased by writing under seal for a term of years, reducing for the future the rent payable, does not constitute a new lease, but merely modifies the terms of the existing one, leaving all its provisions save as to the amount of rent in force, and does not, without explicitly so stating, authorize an inference that the parties intended thereby a surrender. Ibid.

An oral agreement between a landlord and tenant of a business site upon which stood a wooden building rented by a lease in writing under seal, for a term of years at a stated rent, made after the structure had been destroyed by fire, but while the tenant continued the use and occupation under the lease, instead of surrendering, and upon the rebuilding by the landlord of the structure in brick, because of the constraint of local law, doubling the amount of rent payable for the rest of the term in the new building, is without consideration and void. Smith v. Kerr, 33 Hun, 567.

This decision was subsequently affirmed by the court of appeals in an opinion holding that when a leased building is destroyed by fire, the tenant has his election by statute (Laws 1860, chap. 345), either to end the lease and surrender the premises, or to continue in possession to the end of his term paying the reserved rent. That if he takes the latter course, as the tenant did in the case at bar, the lease continues in full force and effect. That in the absence of a covenant in the lease, neither landlord or tenant is bound to rebuild a burned building, but if the landlord does rebuild with the tenant's acquiescence, the tenant has the right to occupy the new structure under his lease to the end of the term. That a new agreement by parol not altering the term, or in aught inconsistent with the lease, does not, in the absence of an intention expressed or clearly implied, operate as a surrender of the written lease. That a naked release of rent by the landlord for the reconstruction period was void for want of consideration, and, resting in parol and unperformed, it could furnish no consideration for another parol agreement increasing the rent. Also, that the consent of the landlord that the tenant might put fixtures in the new building, and deduct the cost of them from the rent, furnished no consideration for the oral agreement increasing the rent. As the tenant was entitled to continued possession of the premises under his lease, and refused to pay any more rent, the new agreement was executory only, and the landlord could neither recover any more nor regain possession for nonpayment of more. Smith v. Kerr, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70.

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An agreement between landlord and tenant, binding the latter thereafter to pay an increased rent for premises theretofore occupied as tenant at will, is supported by a good consideration in the continued use and occupation of the premises afterward. Hanson v. Hellen, — Me. —, 6 Atl. 837.

An agreement by a tenant in the middle of the term, to pay more rent for the rest of the term, without any corresponding benefit to himself, is *nudum pactum*, without a consideration to support it. Taylor v. Winters, 6 Phila. 126.

An oral lease of business premises, made early in the year to run for the remainder of it, under which the tenant is in possession, stipulating for the payment of a stated monthly rent, where a lease in writing is in contemplation by the parties for a longer term, over the provisions of which they are in negotiation, is not changed or modified in any respect by the landlord's demand in writing that a form of lease submitted by him be signed by the tenant before a certain time, and if not so signed, that he will demand and insist upon a rent 25 per cent higher, followed, after the tenant has once replied and refused to sign the lease, by further letters to the same effect, ignored by the tenant, since, if it could be implied that the tenant had agreed to modify the lease and pay the higher rent demanded, by silence and continued use and occupation, such agreement would not be valid for lack of a consideration to support it. Sanborn v. E. R. Roach Drug Co. — Tex. Civ. App. —, 137 S. W. 182.

Because a statute of Oklahoma (Wilson's Rev. & Anno. Stat. 1903, § 829) provides that a written contract may be altered only by another in writing or by an executed oral agreement, a parol undertaking by a

landlord to pay back to a tenant money received by virtue of a written lease of lands and buildings, abrogated and surrendered by mutual consent, was held invalid. Early v. King, 38 Okla. 206, 135 Pac. 286.

There are many cases in which such agreements have been held valid and supported by a sufficient consideration.

An oral lease for less than a year, by which the landlord covenants to repair the leased premises, made to supplant a written lease containing no such covenant, after the landlord has served and the tenant has accepted a notice to quit, and preparations to vacate the premises have begun, although no change is made in the rent, is a new and substituted lease, not a continuation of the old one, and the mutual agreement of the lessor and lessee, with continued use and occupation of the premises, is a sufficient consideration. Conkling v. Tuttle, 52 Mich. 630, 18 N. W. 391.

An agreement by a tenant to repair the demised premises before the term begins, in such wise as to meet the requirements of the public municipal tenement house department, is a good consideration to support the landlord's agreement to reduce the rent payable by the terms of a previously signed lease, although such lease bound the tenant to make all repairs at his own expense, because such clause had application only to repairs that became necessary after the term began. Haight v. Cohen, 123 App. Div. 707, 108 N. Y. Supp. 502.

A parol agreement between a landlord and tenant of premises rented by a written lease, that the latter shall make certain alterations and additions to such premises not included in and beyond the necessary repairs he had covenanted to make, and that the former shall reduce the rent payable by the terms of the lease, is supported by a sufficient consideration. Natelsohn v. Reich, 50 Misc. 585, 99 N. Y. Supp. 327.

A lease in writing of a vacant plat of land for a long term of years at a stated annual ground rent, binding the lessees to erect on the land a commercial building according to prepared plans and specifications, and the landowner to advance in parcels a certain sum towards defraying the cost of construction, is validly, and upon a sufficient consideration, modified after the building has been erected in conformity to the contract and but a part of the lessor's contribution to the cost of it has been paid, by an oral agreement between the lessor and lessees entitling the latter to withhold payment of the rent to an amount equal to the unpaid balance due from the landowner for his contribution towards the cost of construction. American Exch. Nat. Bank v. Smith, 61 Misc. 49, 113 N. Y. Supp. 236.

An oral agreement by a landlord reducing for the future the amount of rent agreed to be paid by the tenant in a previous written lease for a term of years, in consideration of the tenant's covenant to take a partner in business for the remainder of the term and borrow a large sum of money to use as capital and continue in business in the leased premises, performed on the tenant's part, is valid and supported by a good consideration. Hastings v. Lovejoy, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776.

An agreement betwen landlord and tenant of premises previously leased for a term of five years by written lease, made during the term and evidenced by correspondence, whereby the lessee was granted an option to purchase at the expiration of his term the leased premises for a stated price payable partly in cash and partly secured by mortgage, is valid and enforceable, and has a good consideration in the payment of the rent reserved in the lease and the promise of the tenant to pay the purchase price for a conveyance. Dengler v. Fowler, 94 Neb. 621, 143 N. W. 944.

Where, during the existence of an oral agreement for the hire of a farm for three years, but only valid for one year because not in writing as required by law, the tenant in possession and his landlord agreed that the former might in the fall sow a crop of rye and reap it when matured, with the privilege of using the barn, press, and slat wood of the farm in connection with such crop, the subsequent sowing of the crop in the fall before the expiration of the lease by the tenant, with the assent, approval, and active assistance of the landlord, virtually makes a new agreement for the continued use of the farm for the purpose of the crop of rye, for which the rental of the farm affords a sufficient consideration, because the new agreement merely provides for carrying out the prior understanding, which was an important element in the contract of hiring. Like v. McKinstry, 41 Barb. 186.

An agreement between the landlord and tenant of a store leased for a year at a stated monthly rent payable in advance, where the execution of such lease had been induced by the landlord's representation that the rent reserved was the same as that paid by the tenant of adjoining premises, which representation was untrue, reducing the rent to the amount paid by the adjoining tenant as long as the store should thereafter be occupied by the lessee, supersedes the lease and substitutes a tenancy from month to month at the reduced rent, and rests upon a sufficient consideration. Andre v. Graebner, 126 Mich. 116, 85 N. W. 464.

If a tenant in possession of rented premises under a lease in writing has not covenanted and is not bound to remain in possession for any purpose, his agreement to continue to occupy the premises at the landlord's request may furnish a sufficient consideration for the landlord's agreement to reduce the rent. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

An agreement by the landlord of premises rented by a lease in writing at an annual rent payable quarterly in advance, releasing the tenant from his obligation to pay one quarter's rent, made to induce the tenant to discontinue the removal of his goods then in progress, and to resume the occupa-

tion of the premises to the end of the term, rests upon a good consideration, and is valid because there was an accepted surrender of the lease and the creation of a new tenancy. Copper v. Fretnoransky, 42 N. Y. S. R. 472, 16 N. Y. Supp. 866.

After an occupation of rented premises has begun and continued for a year and upwards under a lease in writing for a ten-year term, and the tenant's covenant to pay the stipulated rent has been broken, an oral agreement between the landlord and tenant to abrogate the provision fixing the amount of rent payable, and substitute a new agreement reducing the amount of rent payable, where the tenant continues in possession and pays the reduced rent, is valid, the continuing tenancy being a sufficient consideration for the new contract. Hyman v. Jockey Club Wine, Liquor & Cigar Co. 9 Colo. App. 299, 48 Pac. 671.

It is competent for the lessor and lessee of premises occupied under a tenancy at will to vary their contract respecting the rent to be paid in future. Hanson v. Hellen, — Me. —, 6 Atl. 837.

An oral agreement changing the terms of a previous unsealed written lease of a farm, for a year, entered into after the lease was executed and before it took effect, is valid. Flanders v. Fay, 40 Vt. 316.

An agreement by a landlord deducting from the rent payable by a tenant under a lease, the rent for the time the premises were undergoing extensive and substantial repairs greatly interfering with the tenant's enjoyment and use of the demised premises, is founded upon a sufficient consideration. Post v. Blankenstein, 30 Misc. 796, 63 N. Y. Supp. 218.

A parol agreement, one of the inducements to which was a change of street grade making the adjoining premises less desirable by the influx of surface water and insufficient drainage, between the landlord and tenant of a city boarding house, reducing the rent reserved in a written and sealed lease, followed by payment and acceptance of the reduced rent for the rest of the term, was valid and binding, and founded on a sufficient consideration. White v. Walker, 31 Ill. 422.

An oral agreement by the landlord and tenant of a farm, made after storms and inclement weather had greatly injured the crops, canceling a lease in writing which provided for a rental of 16 bushels of corn for each acre, and substituting a rental of one half the crop of corn harvested, is valid and binding and supported by a good consideration in the mutual agreement of the parties, because when entered into it was purely speculative whether the land would yield more or less corn than 32 bushels per acre. Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432.

An indorsement in writing upon the written lease of a hotel rented for ten years at $500 a month rent, with a covenant by the tenant to keep it in repair, made after three years of the term has run, and when changed conditions have so impaired the business of the hotel that the tenant has been obliged to make an assignment for creditors and has become insolvent, by the terms of which the landlord agrees for the next four years to reduce the rent to $350 a month and make certain necessary repairs himself, in recognition of the fact that his loss would be greater if the hotel became vacant and the insolvency of the tenant continued, where the use and occupation go on and the reduced rent is regularly paid and accepted in full for sixteen months, is supported by a good consideration, and is valid and binding. Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026.

An agreement between landlord and tenant of premises partly destroyed by fire, that the tenant should continue in the occupancy after suitable repairs have been made, and that the rent should be apportioned, and none charged until the premises should be restored to their former state, is based upon a sufficient consideration. Ireland v. Hyde, 34 Misc. 546, 69 N. Y. Supp. 889.

The landlord and tenant of a farm leased in writing by a lease neither exempting the tenant from liability in whole or in part for rent in case an act of God should prevent the cultivation of the farm or a part of it, nor binding the landlord to make repairs or restore destroyed property, may, after a flood of water has made it impossible to grow crops on or cultivate a considerable part of the land, validly cancel the lease, discharge each other from their obligations, and substitute for it a new lease requiring the payment of rent only for so much of the land as was unflooded at a stated rate the acre, and for their substituted agreement there is a sufficient consideration. Hill v. Wilson, 15 Ky. L. Rep. 814.

It has been held in New York that an oral agreement between a landlord and tenant reducing the amount of rent reserved in a lease under seal, for the balance of the term, performed by the tenant and accepted by the landlord, is valid and binding upon the latter, when a new consideration moving to him supports it. Horgan v. Krumwiede, 25 Hun, 116.

But in another case it was held that an agreement by a landlord made during the term of a lease to reduce the rent for the rest of the term, notwithstanding it was followed by payment at the reduced rate, is without consideration and void. McMaster v. Kohner, 12 Jones & S. 253.

In several other jurisdictions the courts regard the payment and acceptance of reduced rent as agreed as an executed accord and satisfaction.

An oral agreement between landlord and tenant reducing the rent payable by the terms of a lease in writing under seal, while invalid and void so long as it remains executory, is valid and binding when followed by the regular payment and acceptance of the reduced amount in full. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110.

An agreement by a landlord reducing the rent reserved in a written and sealed lease, followed by his acceptance in full of the reduced amount by the tenant, amounts to an executed contract, and precludes the landlord from recovering rent at the old rate, on the principle that the difference was a completed gift to the tenant which could not be reclaimed. Doyle v. Dunne, 144 Ill. App. 14.

An oral agreement between landlord and tenant, reducing for the future the rent stipulated in a written lease, where the reduced amount is thereafter paid and accepted in full, is valid and binding without other consideration than mutual agreement. Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580.

An agreement between the landlord and tenant of premises leased in writing for a term of two years, entered into orally when more than half the term had expired, reducing the rent for the remainder of the term, followed by continued occupation and payment and acceptance of the reduced rent under the new arrangement, is supported by a sufficient consideration, and annuls the written lease. Doherty v. Doe, 18 Colo. 456, 33 Pac. 165.

An oral agreement between lessor and lessee of a coal mine, made after possession and mining have begun under a lease, whereby the rent reserved was reduced from 40 to 25 cents the hundred bushels for coal taken out, but the lease changed in no other respect whatsoever, and nothing added to the rights or obligations of either lessor or lessee, made merely to forestall an abandonment and forfeiture, is nevertheless supported by a sufficient consideration, and is valid and binding after several years of operating the mine under the new agreement, during which the reduced rent is paid and accepted in full by the respective parties. Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925.

An agreement between a landlord and tenant of a store floor and part of a basement leased by a writing under seal for five years at a stated rent for the first three, and a higher rent for the last two, and also of a floor above orally leased and occupied for three years contemporaneously with the first three years of the tenancy of the store and basement, made at the expiration of such three years, reducing the total rent of both premises upon the offer of the tenant to surrender the upper floor and the request of the landlord that he continue in possession, followed by payment of the reduced rent and its acceptance to the end of the term, is founded upon a sufficient consideration, and, having been fully performed according to its terms, effectually modifies the written lease and precludes the landlord from recovering the additional rent thereby made payable. Horgan v. Krumwiede, 25 Hun, 116.

An agreement by the owner of a hotel leased for a term of years at a stated rental, without any provision restricting the right of the tenant to conduct it in any way that he should deem most advantageous to himself, reducing the rent upon condition that the lessee shall thereafter run the hotel as a strictly first class one, followed by a compliance with the condition on the tenant's part and an acceptance by the landlord of the reduced rent for many months, until the tenant became a bankrupt, precludes the landlord from claiming of the trustee in bankruptcy the rent originally made payable by the lease, because, first, the agreement reducing the rent was supported by a sufficient consideration, and, second, it was an executed one. Evans v. Lincoln Co. 204 Pa. 448, 54 Atl. 321.

It can scarcely be maintained, it was said in the opinion of the court in that case, that an agreement to continue and conduct a business in a manner that would best advance the pecuniary interest of the owner of the property, when the tenant was at liberty to consult his own interest, was without consideration; but be this as it may, the agreement was an executed one, as payments were made and received on the basis of a reduction of the rent for twenty months and until the tenant went into bankruptcy.

An oral agreement by the lessors of premises leased for ten years at a rental of $4,500 a year for the first half of the term, and of $5,000 a year for the last half, reducing rent at the end of five years for the remainder of the term to $3,200, annually, followed by their written indorsement to the same effect upon the lease signed, and reciting that the reduction was made for value received, is valid and binding, and, when made in circumstances showing the financial embarrassment of the tenants, their inability to continue business and obtain credit, while bound to pay the high rent originally reserved and made by law a lien upon their stock of goods, and the admission of the landlords that it was worth something to them to have the tenants continue and succeed in business, constitute a sufficient consideration for the reduction of rent. Jaffray v. Greenbaum, 64 Iowa, 492, 20 N. W. 775.

Speaking of the validity of an agreement by landlords to reduce the rent reserved in a lease for years of business premises, the Iowa supreme court said in one case: We regard the case as essentially the same as if the original lease had been surrendered and a new lease substituted providing for a rent of $3,200 a year. A lease which provides for too high a rent may be less valuable to the landlord than one providing for a proper rent, and especially if the tenant is a merchant and can do business only by purchasing goods upon credit. The lease in question with the rent reduced was preferred by these landlords, as is shown by the fact that they made the reduction on purely business considerations. They desired that their tenants should continue in business in circumstances which should afford more assurance of success. The tenants made arrangements to continue, and did continue, and paid rent at the rate of

$800 the quarter for several quarters. If complete success had been secured, we do not think a claim for rent would have been made at a higher rate. But the tenants were finally broken up and ceased business, and, the contest as to the rent having arisen substantially between the landlords and the creditors who sold goods to the tenants, the landlords have conceived the idea of avoiding their agreement. In our opinion they cannot be sustained. We think the court erred in rendering a decree for rent at a rate greater than the rate of $3,200 a year for any part of the term. Ibid.

An oral agreement between the landlord and tenant of a farm leased in writing without restriction respecting the crops to be raised, for a stated rent to be in part abated if half the produce grown should not equal the rent in value, modifying the lease in such wise as to require the planting of all the arable land with corn, and wholly releasing the rent for the season in case the corn crop should fail, followed by the planting of the corn as contemplated, and the total failure of the crop solely from natural and unavoidable causes, and the cancelation of the landlord's claim for rent for the year, constitutes an executed agreement founded upon a good consideration. Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000.

A tenant alleging the reduction of rent reserved in a written lease, by a subsequent oral agreement, has the burden of both establishing the agreement and proving a consideration for it. Wheeler v. Baker, 59 Iowa, 86, 12 N. W. 767.

The burden is on a tenant sued for the rent of a farm payable by the terms of the lease in money, who alleges an agreement by the landlord to accept in lieu of the rent reserved one half of the crops produced, not only to establish by evidence that the modifying agreement was made, but to go further and prove that it was performed at least on his side. Graham v. Crisman, — Iowa, —, 146 N. W. 756.

The mere acceptance by a landlord of a reduced amount of rent, with an expression of his satisfaction of the payment in full, does not establish an oral agreement reducing the rent reserved in a written lease. Wheeler v. Baker, supra.

Later this case was distinguished by the statement that no proof had been adduced in it of a new agreement, and no attempt had been made to show any consideration for the alleged new contract. Raymond v. Krauskopf, 87 Iowa, 602, 54 N. W. 432.

Recently the appellate term of the supreme court, on an appeal from the municipal court in New York city, reversed a judgment in favor of a tenant against a landlord grounded upon an alleged breach of a contract to install an elevator in the leased premises. By an original contract in writing, the landlord had covenanted to put in an electric elevator without any specification as to time, and therefore within a reasonable time. The tenant set up a subsequent oral agreement to install the elevator L.R.A.1915B. complete in three weeks. Evidence of such oral agreement was admitted at the trial over the landlord's objection, and the jury was instructed that the tenant was entitled to recover if the oral agreement was in fact made. There was a verdict for the tenant followed by judgment and an appeal. In its opinion reversing the judgment the appellate court said: The reception of the evidence was erroneous, first, because it tended to vary the terms of the written agreement, and, secondly, because, having been made after the original agreement, there was an absence of consideration fatal to its existence as a contract. . . . The charge was erroneous and prejudicial . . . because it predicated the liability . . . upon a condition which was not a part of the original contract. Manhattan Top & Body Co. v. Boymann, 137 N. Y. Supp. 883.

This decision is open to sundry obvious criticisms. First, a subsequent oral agreement modifying a prior written one does not come under the rule excluding parol evidence to vary a writing. Second, the modification of a written contract in which time is not of the essence, fixing a definite time limit for performance, needs no other consideration than the mutual assent of the parties. Third, the parties were competent to agree upon what period should constitute a reasonable time, and practically construed that to be three weeks.

XIV. Pleadings and proof respecting secondary contracts.

A change or modification of a contract by a new agreement must be pleaded to avail the party who claims that it was made. Musser v. Adler, 86 Mo. 445; Lanitz v. King, 93 Mo. 519, 6 S. W. 263; Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813; Kelerher v. Henderson, 203 Mo. 498, 101 S. W. 1083; Merrill v. Central Trust Co. 46 Mo. App. 243; Harrington v. F. W. Brockman Commission Co. 107 Mo. App. 418, 81 S. W. 629; England v. Houser, 163 Mo. App. 1, 145 S. W. 514, and on second appeal, 178 Mo. App. 70, 163 S. W. 890.

A party who has not set up in his pleadings the abrogation or modification of a contract can have no benefit or advantage from testimony concerning it incidentally given on the trial. Musser v. Adler; Sutter v. Raeder; Keleher v. Henderson; Merrill v. Central Trust Co. and England v. Houser, supra.

Evidence under a plea of the general issue in an action to recover demurrage provided for in an charter party for detaining the ship beyond the stipulated day is not admissible to prove a consent enlarging the time to discharge the cargo. Such a defense though good must be pleaded. Ratcliff v. Pemberton, 1 Esp. 35.

In the trial of an action to recover a balance of the purchase price of town and county bonds sold and delivered pursuant to a written contract, testimony offered by de-

fendant to show a modification and amendment of the contract is properly excluded where no such modification had been pleaded, and the making of the original contract was not denied in defendant's answer, and, also, no consideration was shown for any change in such contract. Merrill v. Central Trust Co. 46 Mo. App. 236. It does not appear from the report of this case what were the changes alleged to have been made in the contract or the circumstances environing the asserted alteration. The court sustained the ruling excluding the testimony on the ground that the defendant, while admitting tacitly the making of the contract sued upon, could not rely upon a new or modified one subsequently entered into without setting it up in the answer; and added: "And if said original contract was attempted to be rescinded, changed, or modified in any way, it could only be accomplished by a new agreement supported by some new consideration."

When an action is based upon an absolute, independent oral agreement, unconnected with any previous transaction, it is not competent for the plaintiff at the trial to graft the oral on a prior written contract, and blend the two in his cause of action. Henning v. United States Ins. Co. 47 Mo. 425.

Where contractors with a land company to build a road under the terms of a written contract, in suing for compensation for work done, rest their right to recover upon a new or modified contract, and their evidence shows that there were breaches on their part of both the old and the new contracts, if a new one was made, and that nothing was ever done under the new contract, their rights must be determined by the provisions of the old contract. Dillon v. Suburban Land Co. — W. Va. —, 80 S. E. 471.

The rule of pleading respecting modifications and substitutions of contract is greatly relaxed, or wholly ignored, in cases brought before justices of the peace, where formal pleadings are not required. Barr v. Johnson, 170 Mo. App. 394, 155 S. W. 459.

It was decided in the English case of Littler v. Holland, 3 T. R. 590, that in an action brought by a contractor upon a written building contract calling for the complete construction of certain houses on a day named, for a stipulated sum, in which a performance according to the contract on time was averred, the contractor could not be permitted to prove a parol agreement with the owner extending the time fixed by the contract. The point, said Lord Kenyon, in that case, is so clear that I am not inclined to grant a rule to show cause. Whether his lordship meant that under an averment of performance of a primary contract, evidence of a modification of that contract and a performance of it as modified was not admissible, or that a written contract could not be modified by parol, is not clear from the report.

The burden of proving a novation is on the party who claims its benefit. Linder L.R.A.1915B. Hardware Co. v. Pacific Sugar Corp. 17 Cal. App. 81, 118 Pac. 785.

The same burden rests upon one who claims that a new agreement was made as a substitute for an earlier contract which was abrogated. Sayles v. Quinn, 196 Mass. 492, 82 N. E. 713; Bangs v. Farr, 209 Mass. 339, 95 N. E. 841.

The burden rests upon the party alleging a change in a contract, of establishing by proof that such a change was made. Huntsville Elks Club v. Garrity-Hahn Bldg. Co. 176 Ala. 128, 57 So. 750.

He has the burden of both establishing the new agreement and proving that it had a consideration. Wheeler v. Baker, 59 Iowa, 86, 12 N. W. 767.

And in addition to this he must ordinarily also prove the performance on his part of the new agreement. Graham v. Crisman, — Iowa, —, 146 N. W. 756.

The parties may vary or change their written contracts by subsequent parol agreements, but if a change thus made is asserted on one side, and denied on the other, clear and satisfactory proof of the alleged change is required. Huntsville Elks Club v. Garrity-Hahn Bldg. Co. supra.

The new agreement must be established by clear and convincing evidence when it rests in parol and affects a primary contract in writing. Dinsmore Sawmill Co. v. Falls City Lumber Co. 70 Wash. 42, 126 Pac. 72.

When the time of completion is made in express terms an essence of a building contract, the mere circumstance that the contractor was allowed by the owner to go on with the work contracted for does not prove that an agreement modifying the contract in this respect was made. Huntsville Elks Club v. Garrity-Hahn Bldg. Co. supra.

It is not competent to show by parol evidence that new terms and conditions have been incorporated in a written agreement, but to make such evidence admissible at all, it must appear that the written agreement was rescinded and abandoned. Adler v. Friedman, 16 Cal. 139.

If a substituted contract is founded upon any new or sufficient consideration, the contract for which it is substituted is extinguished, and no action can be maintained upon it, irrespective of whether or not the superseding contract is performed. Palmer v. Yager, 20 Wis. 91.

When a subsequent agreement modifying a previous contract in material respects has been established by the proof, it will govern the later rights and obligations of the parties. Holmes v. Doane, 9 Cush. 135.

A subsequent contract between the parties to a previous one covering the same subject-matter in its entirety, where naught indicates an intention to make it an additional or supplemental agreement, supersedes the former contract, and alone measures the rights and duties of the parties. Parker v. Advance Thresher Co. 75 Wash. 505, 135 Pac. 229.

Where there is that in an instrument which shows that the parties intended the

original security to stand, the new one has not the effect of extinguishing the old. Twopenny v. Young, 3 Barn. & C. 208, 5 Dowl. & R. 259.

To entitle a party to a written agreement asserted to have been abrogated by parol, to the benefit of a new agreement as a substitute, the alleged new agreement must be valid in itself and capable of being the basis of an action. Adler v. Friedman, supra.

When the parties to an existing contract, by their mutual assent expressed in writing, abrogate it and make a new contract varying materially in its stipulations and respecting the rights of the parties, the new agreement alone can be considered in ascertaining their rights and obligations in relation to the subject-matter. Cooper v. McIlwain, 58 Ala. 296.

When the parties have modified an existing contract by adding new or changing old terms, any suit thereon must be based on the original contract and its later modifications as an entirety, for it is the breach of the whole contract as modified which gives rise to the cause of action. Goller v. Henseler Mercantile Oil & Supply Co. — Mo. App. —, 161 S. W. 584.

An indenture modified in sundry particulars by a new agreement of the parties is not destroyed, but remains in full force and effect in all respects, except only where it has been altered by the new agreement. Mill Dam Foundery v. Hovey, 21 Pick. 417.

A new agreement intended by the parties to supplement, modify, or change without annulling an old one upon the same subject does not supersede or supplant the old one except in such respects as its terms are inconsistent with those of the old contract. Orpheus Vaudeville Co. v. Clayton Invest. Co. 41 Utah, 605, 128 Pac. 575.

A new contract between the same parties and on the same subject as an old one does not supersede and annul the obligations of the earlier contract except in so far as it may be inconsistent with that contract, when it is apparent from an inspection of both contracts and an examination of the environing circumstances that the parties intended the later agreement to be a supplement to, and not a substitute for, the prior contract. Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749; Walsh v. Lunney, 75 Neb. 337, 106 N. W. 447.

When an agreement in writing under seal, for constructive work of a described grade and quality, is modified by a subsequent oral agreement calling for work of a higher grade and superior quality in certain specified particulars, the original contract continues in force except in the modified particulars, and the two agreements are blended in one and construed together. McCauley v. Keller, 130 Pa. 53, 17 Am. St. Rep. 758, 18 Atl. 607.

A new oral contract between the parties to an old written one, making changes in it, may be proved in part by the writing and in part by the subsequent verbal terms ingrafted upon what is thus left of the written agreement. Goss v. Nugent, 5 Barn. & Ad. 65, 2 Nev. & M. 28, 2 L. J. K. B. N. S. 127.

When two contracts relating to the same subject-matter have been successively entered into by the same parties, and they are so inconsistent as to be unreconcilable and unable both to stand, the later will control and abrogate the earlier one. Lightfoot v. Strahan, 7 Ala. 444; McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159; Menefee v. Rankins, 158 Ky. 78, 164 S. W. 365; Paul v. Meservey, 58 Me. 419; Thompson v. Craft, 238 Pa. 125, 85 Atl. 1107; Orpheus Vaudeville Co. v. Clayton Invest. Co. 41 Utah, 605, 128 Pac. 575.

This is *a fortiori* the case when the second agreement makes the performance of the first impossible. Menefee v. Rankins, 158 Ky. 78, 164 S. W. 365.

This rule has at base the same principle that an act of the legislature is repealed when another act inconsistent with it is afterwards enacted. Paul v. Meservey, 58 Me. 419; McKay v. Fleming, 24 Colo. App. 380, 134 Pac. 159.

XV. Conclusion.

Only a few words may be said in conclusion. The decisions warrant one in saying that the power and right of the parties to a contract to cancel, change, or replace it by a new one are beyond dispute; that for the new agreement some consideration is requisite; that consideration, where a contract is rescinded, may consist simply of mutual releases; when it is changed in unimportant details without impairing its main obligations and purposes, nothing more than mutual consent is necessary, and when it is explained, supplemented by additional matter not covered, or corrected as to errors, the original consideration is enough for the new agreement. When a contract is altered in some or all of its essential features, or is supplanted by a substitute, the secondary contract must have a new consideration, which may be, of course, the release of old obligations, the lightening of former burdens, the according of new benefits or advantages, but if all the benefits are conferred upon one party, and all the burdens put upon the other, a consideration will be lacking, and the new contract will be void. Either party may waive any right or benefit he may have by a contract, and if the other party acts upon the faith of the waiver, the question of consideration is out of the case, upon the doctrine of estoppel. If a new agreement abrogates, alters, or supplants an old one, and is fully executed by performance on both sides, inquiry into its consideration is closed. As to what constitutes a consideration, especially as to what constitutes a sufficient consideration, for a secondary contract, can be understood only by a great multitude of special instances, and these in their variety have been set forth. Secondary contracts may be made either orally or by implication, as well as in writing or ex-

pressly, and, the elements of mutuality and consideration being present, they will in any case be equally valid and efficacious, provided only neither a special statute nor the statute of frauds interferes.

J. B. G.

FLORIDA SUPREME COURT.

BEN B. JONES, Plff. in Err.,
v.
STATE OF FLORIDA.

(64 Fla. 92, 59 So. 892.)

Indictment — larceny — description of property.

1. A description of stolen property as "one female animal of the bovine species, nearly two years old," alleges with sufficient accuracy that the animal was a cow or heifer, and satisfies Florida Gen. Stat. 1906, § 3299.

Venue — proof — admission.

2. An admission by the accused in open court of facts showing venue is sufficient proof thereof.

Evidence — pedigree of animal.

3. The claimant of an animal alleged to have been stolen may testify as to where and by whom the animal was raised.

Criminal law — sentence — correction.

4. When the sentence imposed is below the minimum fixed by law, the case will be sent back for proper sentence.

(October 17, 1912.)

ERROR to the Circuit Court for Jackson County to review a judgment convicting defendant of larceny of an animal. Reversed.

The facts are stated in the opinion.

Messrs. **Calhoun & Campbell** for plaintiff in error.

Headnotes by COCKRELL, J.

Note. — Sufficiency of description of property in an indictment or information for larceny.

I. Introduction, 71.
II. In general, 72.
III. Under statute.
a. In general, 78.
b. Express statutes, 82.

I. Introduction.

As to sufficiency of description of money in an indictment for larceny, see the note to People v. Hunt, 36 L.R.A.(N.S.) 933. And as to sufficiency of description of property in an indictment or information for receiving stolen property, see Korab v. State, post, 83, and the note appended thereto. And as to sufficiency of description of property in an indictment for robbery or larceny from the person, see the note to People v. Nolan, 34 L.R.A.(N.S.) 301.

The present note treats merely the question of the sufficiency of an indictment for larceny with respect to the physical description of the object or thing alleged to have been stolen. This, of course, excludes all questions as to the sufficiency of the allegations of value, ownership, etc., which to a certain extent are distinctive.

To summarize the conclusion reached by an examination of the cases, it may be said that in the absence of controlling statute, and assuming the value and ownership to be well laid, an indictment for larceny should describe the property alleged to have been taken with reasonable certainty, or, as is sometimes said, with "certainty to a common intent." This means that the property should be so described as to individualize the transaction to such an extent that the description as laid will (1) enable the court to determine that the property alleged to have been taken is the subject of larceny, (2) show the jury that the things proven to have been stolen are those upon which the indictment is founded, (3) reasonably inform the accused of the instance meant in conformity with the usual constitutional guaranty that persons accused of crime shall have the right to demand the nature and cause of the accusation, so that he may properly prepare his defense, and (4) be such that the judgment rendered after trial upon the indictment may be pleaded in bar of a subsequent prosecution for the same offense. At least, a description sufficiently broad to satisfy this rule would undoubtedly be beyond question. But it should be remembered that in the great majority of jurisdictions the particularity required at common law has been abrogated, in part at least, by statute, so that the description in an indictment for larceny would not have to be stated with such minuteness of detail as would be necessary were the above-stated rule strictly applied.

And to apply the rules deducible from the cases it seems that property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof.

And if a sufficiently certain description cannot be given because unknown, such fact, if alleged in the indictment or information, will generally cure the otherwise insufficiency, for the law is not inclined to require a greater certainty than the nature of the case affords; and consequently, to avoid what would in many cases result in a failure of justice were the rule requiring a definite description enforced, the courts make an exception in case the ordinarily essential descriptive facts cannot be stated because neither known nor obtainable. But this exception is one of necessity only, and

Messrs. C. O. Andrews and Park Trammell, Attorney General, for the State:

This court has given the state a wide range as to the introduction of testimony, even where it appears irrelevant, if it tends to connect the accused with the crime.

Milton v. State, 40 Fla. 252, 24 So. 60; Gantling v. State, 40 Fla. 237, 23 So. 857.

The indictment does not sufficiently identify the animal, because of the ruling in the case of Mobley v. State, 57 Fla. 22, 49 So. 941, 17 Ann. Cas. 735.

It is not necessary, under our present statute prohibiting cattle and horse stealing, to allege value.

Mizell v. State, 38 Fla. 20, 20 So. 769.

The state attorney stated to the jury that the defendant admitted that the cow was killed in Jackson county, etc., and while the plaintiff in error states in his brief that he made no such admission, yet he took no exception at the time.

McCune v. State, 42 Fla. 192, 89 Am. St. Rep. 225, 27 So. 867; Leslie v. State, 35 Fla. 184, 17 So. 559.

The refusal of the trial court to grant a new trial for insufficiency of the evidence to sustain the verdict, or because the verdict is contrary to the evidence, will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it was wrong and unjust.

Bexley v. State, 59 Fla. 6, 51 So. 278.

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the method of pleading sanctioned by it should not be resorted to if reasonably avoidable.

On the whole it seems that, in the absence of statutory regulation or established rule in the jurisdiction in question, the safest course undoubtedly is to describe the property alleged to have been taken, with as much particularity as the known facts will permit, and if facts deemed essential are not known, allege that fact, as in many instances such a recital, as is above noted, will cure an otherwise insufficient description. Care should be exercised, however, not to allege facts with greater particularity than can be proved, as all specifications not rejected as surplusage must be proved as laid, and not to allege ignorance of a more particular description except where necessity demands.

For the various rules under statutes, see infra, III.

II. In general.

The decisions in many of the cases treated in this subdivision of the note possibly were influenced or governed by statutory provision; but if so, and to what extent, it has been impossible to determine from the reports.

In the first place, stolen property must be described in the condition it was in at the time it was stolen. United States v. Jones, 31 Fed. 718, holding that a check was accurately described in an indictment for larceny thereof, although indorsements written on it after it was stolen were not mentioned.

As stated supra, I., the general rule, in the absence of controlling statute, is that the property alleged to have been stolen should be described with such certainty and particularity as will show that it is the subject of larceny, and that the thing proved to have been stolen is the property upon which the indictment was founded, as well as enable the defendant to prepare his defense and to plead the judgment rendered in bar of a subsequent prosecution for the same offense. Applying this rule, L.R.A.1915B.

in whole or in part, the following parenthetically stated descriptions have been held sufficient: State v. Parker, 34 Ark. 158, 36 Am. Rep. 5 ("twenty-five cords of wood," etc.); Osborne v. State, 96 Ark. 400, 132 S. W. 210 ("22 saw logs," etc.); State v. Fenn, 41 Conn. 590, 1 Am. Crim. Rep. 378 ("one certain promissory note dated . . . signed by," etc., for the payment of a certain sum to F. W., and indorsed by F. W. to H. W., "a more particular description of which is to the attorney for the state unknown." etc.); State v. Heck, 1 Marv. (Del.) 524, 41 Atl. 142 (man's gum coat sufficiently described as "one person's garment commonly called a waterproof coat," etc.); State v. Spencer, 2 Penn. (Del.) 225, 45 Atl. 399 (one mileage book on the P. W. & B. R. Co.," etc.; "one pair of men's shoes," etc.; and "one man's hat," etc.); Glover v. State, 22 Fla. 493 ("one gold watch" sufficiently describes what is known to jewelers as a gold-filled watch); Clark v. State, 59 Fla. 9, 52 So. 518, on rehearing in 59 Fla. 15, 52 So. 521 ("one feather bed, 8 bed quilts, 6 pillows, 6 pillow shams, 6 vases, one lamp, one collar case and two collars, 10 table dishes, two pair window curtains, one rug, 3 pictures, two ladies' hats, one sugar dish, and one cake plate, a better description & all of said property is to the grand jury unknown, and of the total value of one hundred and twenty-five dollars ($125), and of the goods and property of," etc.); Menefee v. State, 59 Fla. 316, 51 So. 555 ("thirty-five sacks of fertilizer, a more particular description of which is to the grand jurors unknown, of the value of three dollars per sack, of the total value of one hundred and five dollars," etc.); Bone v. State, 120 Ga. 866, 48 S. E. 356 (report of case does not set out the description under consideration); Ayers v. State, 3 Ga. App. 305, 59 S. E. 924 (indictment charged the larceny of "one Eclipse Frick engine, 25 horse power, 1 Frick box boiler, 3 log carts, 1 set lumber trucks and track irons, all of the value of $500, and of the personal goods of," etc., and recited that the property had been levied upon under a described

Cockrell, J., delivered the opinion of the court:

Jones was convicted of stealing "one female animal of the bovine species, nearly two years of age, with a white body and red head, and without horns, marked swallow fork in one ear and underbit in the other ear, a more particular description of same being to the grand jurors unknown, the property of one R. Wardlow."

It is here insisted that the indictment should have been quashed, because no value of the animal is given, if the indictment proceeds under the general statute against larceny; and if under General Statutes, § 3299, set out at length in Mobley v. State, 57 Fla. 22, 49 So. 941, 17 Ann. Cas. 735, directed against horse and cattle stealing, it fails to allege that the animal stolen was a "cow, heifer, calf, steer, or what." The indictment sets out the sex and age of the animal, so that it could only be a cow or heifer, both of which are named in the statute; the theft of either being identically the same crime, with the same penalty and irrespective of value. The word "bovine" comes from the Latin word "bos," meaning ox or cow, and in common parlance applies only to those well-known domestic animals which have so long supplied the people of this country with both meat and drink. The accused could not possibly have been misled or endangered by the description of the animal, and in fact was not, as it is clearly shown the sole question was

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attachment against the accused); Gibson v. State, 13 Ga. App. 67, 78 S. E. 829 (indictment charging the larceny of "one metal church bell" belonging to a named church held sufficiently definite to enable the defendant to know the exact transaction in which it was claimed he violated the law, especially where the demurrer did not itself specify in what respect the description should have been more minute); People v. Freeman, 1 Idaho, 322 (holding the description "a quantity of specimens of gold and silver ores of one hundred and fifty pounds in weight," etc., was sufficient under the rule that the description must be of such certainty as will enable the jury to say whether the chattel proved to have been stolen is the same as that upon which the indictment was founded); McBride v. Com. 13 Bush, 337 (holding the description, "one horse," etc., sufficient to prevent a second conviction for the same offense); Beauchamp v. Com. 4 Ky. L. Rep. 27 (holding same as next preceding case with respect to the description "one gray mare," etc.); State v. Johnson, 30 La. Ann. 904 (holding the description, "a pair of pants," etc., sufficient); State v. Stelly, 48 La. Ann. 1478, 21 So. 89 (holding the description, "one hog," etc., sufficient to put the defendant upon his guard with reference to the commission of the particular crime charged); Com. v. Brettun, 100 Mass. 206, 97 Am. Dec. 95 (indictment for larceny of "one promissory note of the value of three hundred dollars and one piece of paper of the value of three hundred dollars of the goods," etc., held not insufficient in that the description afforded no adequate protection against a second indictment for the same offense); Wein v. State, 14 Mo. 125 (holding sufficient as against the contentions that there was no legal certainty and no certainty sufficient to enable the defendant to defend, an indictment containing the following description: "Five red cows of the value of fifteen dollars each; five brindle cows of the value of fifteen dollars each; five black cows of the value of fifteen dollars each; five red and white cows of the value of fifteen dollars each; five black and white cows of the value of fifteen dollars each; five spotted cows of the value of fifteen dollars each; five yellow cows of the value of fifteen dollars each; five white cows of the value of fifteen dollars each; five cows of the value of fifteen dollars each; all of the property of," etc.); Barnes v. State, 40 Neb. 545, 59 N. W. 125 (holding sufficient the description, "three hogs about eleven months old, weighing about one hundred and seventy-five pounds, each of the value of $12"); State v. Campbell, 76 N. C. 261 (discussing the rule and holding in effect that a "kip" skin may be described as a "calf" skin); State v. Nipper, 95 N. C. 653 (indictment for the larceny of "three bushels of corn" held sufficient to enable the court to identify the corn, and to enable the accused to make his defense and to plead conviction or acquittal in case of a subsequent prosecution for the same offense); State v. Bishop, 98 N. C. 773, 4 S. E. 357 (holding the description, "one United States pension check on the assistant treasurer of the United States for twenty-four dollars in money, check and property of," etc., sufficient to identify the check); Woodring v. Territory, 14 Okla. 250, 78 Pac. 85, 2 Ann. Cas. 855 (general discussion of the rule and its exception); State v. Parker, 47 Vt. 19 (the description, "one feather bed," held sufficient to enable the defendant to know what he was alleged to have taken and to prepare his defense). But the following parenthetical descriptions have been held insufficient under the rule: Walthour v. State, 114 Ga. 75, 39 S. E. 872, 14 Am. Crim. Rep. 472 ("a lot of cotton wood" of a stated value); Melvin v. State, 120 Ga. 490, 48 S. E. 198 ("one shovel," etc.); Bright v. State, 10 Ga. App. 17, 72 S. E. 519 ("one hundred pounds of cotton seed," etc.); State v. Hoyer, 40 La. Ann. 744, 4 So. 899 (the description, "some bottled beer," held to not individualize the property so as to enable the jury to determine whether the property proved to have been stolen was the same as that described in the indictment, so as to enable the defendant, in case of acquittal or conviction, to plead the same

whether he had bought the particular cow or heifer from Wardlow.

We fail to see how it can be seriously contended that there is a total failure to prove the venue, when the accused in open court admitted that he took this identical animal in Jackson county and then and there sold her. Needless to say no authority is cited to the proposition that an open admission of such fact dispenses with the necessity for other evidence.

Two other assignments upon the evidence are also without merit. A question addressed to the alleged owner of the animal, as to where and under whose control the animal was raised, calls for a relevant fact within his knowledge, not for an opinion. Nor does harmful error appear from a refusal to strike evidence, admitted apparently without objection, which is objectionable only in that it was largely negative and irrelevant.

It was peculiarly within the province of the jury to decide whether Wardlow or Jones told the truth, and we are not disposed to interfere.

Our attention is directed, both by the plaintiff in error and the state, to the fact that the sentence imposed by the court upon the verdict was below the minimum fixed by the statute. We are therefore constrained to reverse the cause, in order only that a proper sentence be imposed. Webster v. State, 47 Fla. 108, 117, 36 So. 584, and cases cited.

Whitfield, Ch. J., and **Taylor, Shackleford**, and **Hocker**, JJ., concur.

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to a subsequent indictment relating to the same property); State v. Dawes, 75 Me. 51 (holding the description, "one case of merchandise of the value of six dollars," insufficient in the absence of an averment of lack of knowledge of a more full and definite description); State v. Kroeger, 47 Mo. 530 (holding that the description, "one check for five thousand dollars on the Traders' National Bank of the value of five thousand dollars," was not sufficiently definite to inform the accused of the nature and cause of the accusation, he being entitled to be informed of the specific check intended); Com. v. Henry, 2 Brewst. (Pa.) 566 (holding the description, "one promissory note," insufficient in that it did not inform the defendant of the offense whereof he stood accused); Com. v. Byerly, 2 Brewst. (Pa.) 568 (holding the description, "one due bill," insufficient in that it did not enable the defendant to prepare his defense); State v. Ham, 21 S. D. 598, 114 N. W. 713 (holding that the description, "twenty-two head of cattle the same being neat and which cattle were then and there all steers two and three years old," in the absence of a correct allegation of ownership, was not sufficiently certain to identify the cattle charged to have been taken); Calentine v. State, 50 Tex. Crim. Rep. 154, 123 Am. St. Rep. 837, 94 S. W. 1061 ("one promissory note of the value of thirty-one dollars and eighty cents"); Patrick v. State, 50 Tex. Crim. Rep. 496, 123 Am. St. Rep. 861, 98 S. W. 840, 14 Ann. Cas. 177 (holding the description, "six railroad tickets reading from T., Texas to K. C., said tickets of the value of fourteen dollars and sixty-five cents each," etc., insufficient in that it did not name the railroad or state, whether the tickets had been issued or stamped so as to entitle the bearer to transporation). In Clark v. State, 59 Fla. 9, 52 So. 518, the court discussed this question as follows: "In a prosecution for larceny the indictment, for the purpose of giving individuality to the act charged, should with reasonable certainty state the species or names and the number of the articles or things alleged to have been stolen, so as to show that the things or articles are personal property and the subjects of larceny, and that the proofs are of the same property, and to prevent embarrassment to the accused in making his defense, and to protect him against a second prosecution for the same offense. The description required is only such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, is sustained by proof, and will reasonably inform him of the facts charged and enable him to make defense. The limit in requiring certainty of description is that it need not be so minute or expanded as to impose unreasonable burdens upon the prosecution, or otherwise defeat justice. . . . The names by which the articles are commonly known and the number of each being given in the indictment, the property could be readily identified, and it does not appear that a more particular description than was given could have been reasonably required to protect the rights of the defendant." For a statutory provision providing that the indictment must be sufficiently certain to enable the accused to plead the judgment that may be given upon it in bar of any subsequent prosecution for the same offense, see infra, III. b.

And it has been held that the rule in criminal pleading is that an indictment for larceny is sufficient as regards description if the thing stolen be designated by the generic name of the class to which it belongs. This rule was adhered to in the following cases: Nordlinger v. United States, 24 App. D. C. 406, 70 L.R.A. 227, holding sufficient the description, "a certain musical instrument known as and called an auto-electric piano and autolectra," etc.; Glover v. State, 22 Fla. 493, holding that the description, "one gold watch," sufficiently described what is known to jewelers as a gold-filled watch; State v. Martin, 82 N. C. 672, holding that in an indictment for the larceny of a "hat" it was unnecessary to describe it as a "felt or beaver hat." And in the following cases it was held that

in an indictment for the larceny of cattle the particular species or kind of cattle taken need not be averred: People v. Littlefield, 5 Cal. 355 (indictment charged the taking of three head of cattle, and the court said that the defendant could not be prejudiced by the failure to aver the kind of cattle taken); People v. Barnes, 65 Cal. 16, 2 Pac. 493 (indictment charged the taking of "two head of cattle," etc.). So, in People v. Stanford, 64 Cal. 27, 28 Pac. 106, it was held that an information charging the larceny of "a certain hog" was not defective in that it did not aver the "kind" of hog which was alleged to have been stolen. And it has been held that in an indictment for larceny of a book it is unnecessary to set out the title of the book. State v. Logan, 1 Mo. 532, holding sufficient the description, "a book of the value of three dollars," etc. But where certain species of the same class are the subject of larceny, and other species of the same class are not the subject of larceny, it has been held that the species must be stated. Thus, in Reg. v. Cox, 1 Car. & K. 494 (criticized in Reg. v. Gallears, which is set out infra) the description, "three eggs," was held insufficient in that it "should have stated what sort of eggs were stolen." But see Reg. v. Gallears, 2 Car. & K. 981, 3 Cox, C. C. 572, 1 Den. C. C. 501, 19 L. J. Mag. Cas. N. S. 13, 3 New Sess. Cas. 704, Temple & M. 196, 13 Jur. 1010, wherein it was held, doubting Reg. v. Cox, supra, that the description, "one ham," was sufficient even though the indictment did not state the animal of which the ham had formed a part.

So it has been held that a thing or article alleged to have been stolen may be described by the particular name by which it is known to trade or in the arts, pursuits, or employment of life. See State v. Clark, 30 N. C. (8 Ired. L.) 226, holding that a particular kind of plowshare known as a "bull-tongue" was properly described in an indictment for larceny by the term "bull-tongue;" and Rex v. Nibbs, 1 Moody, C. C. 25, wherein it was held that a single piece of silk containing six handkerchiefs so marked or stamped that they could be cut apart could properly be described in an indictment for larceny thereof as "six handkerchiefs," they being so known to the trade, even though still in one piece of cloth.

And it has been held that a description is not rendered insufficient for the purpose of identification, by reason of the fact that some of the words of description consist of technical terms requiring explanation by expert testimony. Wrenn v. State, 12 Ga. App. 694, 78 S. E. 202 (description under consideration not set out in report of case).

And it is held that a distinction should be drawn between the description of the same article in different forms of existence. Thus, when property which is alleged to have been stolen is in a raw or unmanufactured state, it may be described by the name of the material, and as so much in quantity, weight, or measure; but if it be worked into a specific article, and remain so at the time when the larceny is alleged to have occurred, it must be called by the particular name by which such specific article is commonly known. See Rex v. Halloway, 1 Car. & P. 127, wherein it was held in effect that pieces of brass into which a brass furnace had been broken could not be described as a "brass furnace."

And the number of articles or things taken should, if known, be stated. Thus it has been held that an indictment for theft of cattle which failed to specify the number of cattle taken was insufficient, it being said that the use of the term "cattle," which may be either singular or plural, did not sufficiently describe the property alleged to have been taken. Mathews v. State, 39 Tex. Crim. Rep. 553, 47 S. W. 647, 48 S. W. 189. So, it has been held that the description, "seven bags of chickens," was defective in that it conveyed no idea of the number or quantity of chickens taken, the court saying that the chickens could not be described by what they were contained in, chickens usually being described by number or weight. State v. Shutts, 69 N. J. L. 206, 54 Atl. 235. But it has been held that where the things or articles alleged to have been taken are of one kind, the number need not be stated, it being sufficient to allege that "divers and sundry" or "a quantity" of, etc., was stolen. See Com. v. Butts, 124 Mass. 449, wherein the indictment charged the larceny of "divers promissory notes," etc.

And with respect to whether an animal must be described as dead or alive, it has been held that an indictment for larceny of a dead animal must state that it was dead: since the law presumes an animal to be alive unless otherwise stated, and proof could not be made which would support the indictment: Com. v. Beaman, 8 Gray, 499 ("peahen and turkey"); Rex v. Rough, 2 East, P. C. 607 ("pheasant"); Rex v. Edwards, Russ. & R. C. C. 497 (*dictum* as to turkeys). So, in State v. Krider, 78 N. C. 481, it was held that an indictment charging the larceny of "five fish" was fatally defective in that it did not charge that the fish were dead, the reason being that the indictment as drawn did not show that the fish in question were the subject of larceny. But directly to the contrary was the conclusion reached in State v. Donovan, Houst. Crim. Rep. (Del.) 43, wherein it was held that in an indictment for stealing fish it was not necessary to allege that the fish were dead.

And it has been held that an indictment for larceny of animals *ferœ naturæ* must, if the animal in question is not dead, describe it as tame or domesticated, or else larceny will not be alleged: Rex v. Rough, 2 East, P. C. 607, wherein the indictment charged the larceny of "a pheasant." But, on the other hand, it has been held that an indictment for the larceny of "chickens" and "turkeys" need not state whether they

were tame or wild: State v. Bassett, 34 La. Ann. 1108 (chickens); State v. Turner, 66 N. C. 618 (turkeys).

But it has been held that it is not necessary to allege the name or weight or size or height of an animal alleged to have been stolen: People v. Stanford, 64 Cal. 27, 28 Pac. 106, holding that in an indictment for the larceny of a hog it was unnecessary to state either the name or the weight of the hog; Jones v. State, 51 Miss. 718, 24 Am. Rep. 658, holding that in an indictment for the larceny of a mule it was unnecessary to state either its size or height.

So, it has been held that an allegation as to the color of an article or thing alleged to have been stolen is not essential to the description: People v. Smith, 15 Cal. 408 (horse); People v. Stanford, supra (hog); Mizell v. State, 38 Fla. 20, 20 So. 769 (cow); Quinn v. People, 123 Ill. 333, 15 N. E. 46 (horse); State v. Bassett, 34 La. Ann. 1108 (chickens); Jones v. State, supra (mule); State v. Martin, 82 N. C. 672 (hat); Turner v. State, 3 Heisk. 452 (*dictum*—"bay mare mule"); State v. Gilbert, 13 Vt. 647 (horse). Nor is a description in an indictment rendered defective by reason of the color having been stated in the alternative. People v. Smith, 15 Cal. 408, so holding where the indictment charged the larceny of a "black or brown mare or filly" etc., and especially as other terms of description were given which identified the animal.

And it has been held that an allegation as to the sex of an animal alleged to have been stolen is not an essential element of its description: Brown v. State, 44 Ga. 300 (indictment for the larceny of "one black pig, white listed, one white pig, with blue rump; said pigs having no earmarks," etc.); State v. Bassett, 34 La. Ann. 1108 (indictment charged the larceny of "two Cochin China chickens," etc.); Jones v. State, 51 Miss. 718 ("one mule," etc.); Turner v. State, 3 Heisk. 452 (*dictum*—"bay mare mule").

Nor is an allegation of age an essential of the description of an animal alleged to have been stolen. State v. Bassett, supra (chickens).

Nor is it essential that the marks or brands upon an object or thing alleged to have been stolen be averred: Fletcher v. State, 97 Ark. 1, 132 S. W. 918 (hog); People v. Stanford, 64 Cal. 27, 28 Pac. 106 (hog); Mizell v. State, 38 Fla. 20, 20 So. 769 (cow); Crenshaw v. State, 64 Ga. 449 (hog); Robertson v. State, 97 Ga. 206, 22 S. E. 974 (hog); State v. Bassett, 34 La. Ann. 1108 (chickens); Ranjel v. State, 1 Tex. App. 461 (horse); Allen v. State, 8 Tex. App. 360 (heifer); State v. Bailey, 63 W. Va. 668, 60 S. E. 785 (barrels of whisky).

As indicated supra, I., where a more definite description than that given is not known, and it is so alleged, the description given is generally held sufficient. In the following cases this element enters into the decisions, the respective descriptions being held sufficient upon the ground that the recital of lack of knowledge cured any otherwise insufficiency: State v. Mumford, 70 Kan. 858, 79 Pac. 669 ("one head of neat cattle, to wit, a steer about three years old, and a more particular description of which the informant was not then able to give); Com. v. Butts, 124 Mass. 449 ("divers promissory notes of the amount and of the value in all of five thousand dollars, a more particular description of which is to the jurors unknown of the property of," etc.); State v. Brin, 30 Minn. 522, 16 N. W. 406 ("divers and sundry genuine railroad passenger tickets prepared for sale," etc., by a named railroad company, "a more particular description," etc., to the grand jury unknown); State v. O'Connell, 144 Mo. 387, 46 S. W. 175 (certificate of deposit issued by the M. bank of St. Louis for two hundred dollars, the property of etc., a further description of which was unknown, etc.); Woodring v. Territory, 14 Okla. 250, 78 Pac. 85, 2 Ann. Cas. 855 ("a certain domestic animal, to wit, a horse about two and a half years old, the said horse having been a stallion until about the time he was so taken, and having been castrated and made a gelding about the time he was so taken, so that the grand jurors cannot ascertain and do not know whether said horse was a stallion or a gelding at said time." And see State v. Dawes, 75 Me. 51, wherein the description, "one case of merchandise of the value of six dollars," was held insufficient for lack of an allegation of lack of more definite knowledge; the court saying that where the indictment does not describe the property alleged to have been taken with reasonable certainty, technically called, "certainty to a common intent," the reason why such a description cannot be given should be stated in the indictment. But an averment of lack of knowledge will not cure an otherwise insufficient description, where the particulars necessary to a sufficient description were known or could have been learned, since the exception only arises from necessity. State v. Thompson, 137 Mo. 620, 39 S. W. 83. But see Woodring v. Territory, supra, where it was held that an allegation that a better description cannot be given because of lack of knowledge was not traversable. But in the latter case the court said: "If the want of proper description, or the allegation that a better description could not be given by the grand jury, should in any way prejudice the rights of the defendant, or by reason of the evidence given at the trial, the defendant was taken by surprise, or if he was misled by the language of the indictment, then the court might very properly grant him a new trial."

In the following cases the parenthetically stated descriptions were held sufficient without discussion, except as noted, of the applicable rules of pleading: Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, 15 Sup. Ct. Rep. 325 (see the following *dicta*: "It is no valid objection to an indictment that the description of the property in respect

to which the offence is charged to have been committed is broad enough to include more than one specific article. Thus, an indictment charging the larceny of 'a horse the property of A B.,' is not overthrown by proof that A B. is the owner of many horses, any one of which will satisfy the mere words of description"); Parker v. State, 39 Ala. 365 (holding that "a heifer between two and three years old that had never had a calf" was not misdescribed in an indictment for larceny thereof, describing her as a "cow"); Washington v. State, 58 Ala. 355 (holding that a pig was properly described as a "hog"); Churchwell v. State, 117 Ala. 124, 23 So. 72 ("one trunk," etc.); Johnson v. State, 159 Ala. 113, 48 So. 792 ("four clearing-house certificates of the denomination of five dollars each, issued by the Clearing House Association of M., Alabama, of the value of twenty dollars," etc.); People v. Smith, 15 Cal. 408 ("a black or brown mare or filly branded with a small mule's shoe on the left shoulder"); People v. Stanford, 64 Cal. 27, 28 Pac. 106 ("a certain hog," etc.); People v. Machado, 6 Cal. Unrep. 600, 63 Pac. 66 ("one cow," etc.); People v. Warren, 130 Cal. 683, 63 Pac. 86 ("four calves," etc.); State v. Tootle, 2 Harr. (Del.) 541 (holding that a "lamb" may be described as a sheep, especially where a statute does not specifically enumerate both); Peeples v. State, 46 Fla. 101, 35 So. 223, 4 Ann. Cas. 870 (holding the description, "one bull," etc., not so vague and indefinite as to require the quashing of an indictment); Brown v. State, 44 Ga. 303 (holding the description, "one black pig, white listed, one black pig with blue rump, said pigs having no earmarks," etc., sufficient, the court saying that certainty to a reasonable intent is all that the law requires); Rivers v. State, 57 Ga. 28 (holding sufficient the description, "a black hog, mark unknown," etc., the court saying that the only description necessary is one such that the owner may identify); Alderman v. State, 57 Ga. 367 ("one hog of the male sex," etc., and "a black hog," etc.); Sanders v. State, 86 Ga. 717, 12 S. E. 1058 (holding that the description, "fifteen head of beef cattle," etc., in an indictment for larceny after trust was sufficient); Nightengale v. State, 94 Ga. 395, 21 S. E. 221 (holding that "a cow" was sufficiently described in the following language: "One animal of the female sex and of that species of animals known as cattle, red in color, marked crop in each ear and branded with the letter 'P' of the personal goods of," etc.); Harvey v. State, 121 Ga. 590, 49 S. E. 674 ("one black and white male hog," etc.); Patterson v. State, 122 Ga. 587, 50 S. E. 489 ("one double-case silver watch," etc.); Lindsey v. State, 9 Ga. App. 299, 70 S. E. 1114 ("one hundred and twenty-five pounds of upland or short cotton in the seed," etc.); State v. West, 15 Idaho, 73, 95 Pac. 949 ("one brown gelding branded H on the left stifle, said gelding being then and there the personal property of A. J. H., and one black gelding branded X on the left shoulder, said gelding being then and there the personal property of," etc.); Baldwin v. People, 2 Ill. 304 (holding in effect that either a mare or a gelding could properly be described as "a horse," etc.); Waller v. People, 175 Ill. 221, 51 N. E. 900 (holding that the description "one cape" sufficiently complied with the rule that the indictment must state with reasonable certainty what was stolen); Young v. People, 193 Ill. 236, 61 N. E. 1104 (holding that no greater particularity is required in an indictment for the larceny of a "note" than to so designate it and aver value and ownership); Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494 ("'five county orders drawn by the auditor of the county of Allen, in the state of Indiana on the treasurer of said Allen county, one of these county orders being of the denomination of 87 dollars and 27 cents, and of the value of 25 dollars; one other of said county orders being of the denomination,' etc., (describing each remaining order after the manner of the first) 'of the personal goods of,'" etc.); Williams v. State, 25 Ind. 150 ("one watch," etc.); Harrington v. State, 76 Ind. 112 ("ten yards of brocade silk, of the value of thirty dollars; fifteen yards of bronze colored satin, of the value of nineteen dollars; fifteen yards of other satin, of the value of nineteen dollars; and four and a half yards of brown silk, of the value of four dollars and fifty cents; all of the aggregate value of seventy-two dollars and fifty cents"); Turner v. State, 102 Ind. 425, 1 N. E. 869, 5 Am. Crim. Rep. 360 ("one book," etc.); Palmer v. State, 136 Ind. 393, 36 N. E. 130 (wherein in holding sufficient the description, "one pair of shoes," etc., the court said that such description was in no wise uncertain or misleading, and that it is not necessary to so describe property as to identify it from property of the same class"); Oxier v. United States, 1 Ind. Terr. 85, 38 S. W. 332 (holding the description, "a steer, the property of some person or persons to the grand jury unknown," was sufficient as against the contention that as the name of the owner was not given the description of the animal should have been more definite); State v. Pierson, 59 Iowa, 271, 13 N. W. 291 (holding it sufficient to describe a check for the payment of money as such, and stating by whom signed, where payable, and the date, owner, and value); State v. Hoffman, 53 Kan. 700, 37 Pac. 138 (holding that "steers" could properly be designated "neat cattle"); State v. Charlot, 8 Rob. (La.) 529 (holding it sufficient to describe an animal by its kind, color, and sex,—"one cow of a brown and white color; one cow of a red and brown color; and one cow of a red and white color," etc.); State v. King, 31 La. Ann. 179 ("one mule," etc.); State v. Carter, 33 La. Ann. 1214 ("one hog," etc.); State v. Baden, 42 La. Ann. 295, 7 So. 582 ("one beef," etc.); State v. Curtis, 44 La. Ann. 320, 10 So. 384 ("four pairs of shoes, four pairs of pants, one lot of jewelry, one lot of shirts and cravats,"

etc.); State v. Labauve, 46 La. Ann. 548, 15 So. 172 (description not set out in report of case); State v. Polland, 53 Me. 124 (holding that the description, "one sheep," etc., complied with the rule that "certainty in an indictment to a general intent is sufficent"); State v. Dowell, 3 Gill & J. 310 ("one hide," etc.); Com. v. James, 1 Pick. 375 (holding the description, "three tons weight of barilla," etc., not insufficient in that it was unintelligible because of the use of the term "barilla"): State v. Friend, 47 Minn. 449, 50 N. W. 692 ("one mare," etc.); Jones v. State, 51 Miss. 718, 24 Am. Rep. 658 ("one mule," etc.); Garvin v. State, 52 Miss. 207 (holding that a "heifer" is a young "cow"); State v. Donnegan, 34 Mo. 67 (holding, in effect, that a "gelding" may be described as a "horse"); Sharp v. State, 61 Neb. 187, 85 N. W. 38, 15 Am. Crim. Rep. 462 ("fifty-five coats, each coat of the value of five dollars; fifty-five vests, each vest of the value of three dollars; sixty pairs of trousers, each of the value of five dollars; four overcoats, each of the value of ten dollars," etc.); Territory v. Valles, 15 N. M. 228, 103 Pac. 984 ("one mule," etc.); State v. Brown, 12 N. C. (1 Dev. L.) 137, 17 Am. Dec. 562 (holding the description, "a parcel of oats," sufficient under the rule requiring "security to a certain intent"); State v. McLeod, 50 N. C. (5 Jones, L.) 318 (holding the description, "a certain writ of execution against him, the said John McLeod, for the sum of one hundred and seventy-one dollars and three cents, issued from the said superior court of law, for the said county of Randolph, and belonging to the said superior court of law," sufficient to identify the thing "with certainty to a general intent"); Goodall v. State, 22 Ohio St. 203 ("one coffee pot" and "one tea pot," etc.); Taylor v. State, 3 Heisk. 460 ("two hams of bacon and two shoulders of bacon and eight jowls, weighing one hundred pounds," etc.); State v. Mansfield, 33 Tex. 129 ("one certain hog," etc.); Short v. State, 36 Tex. 644 ("one beef steer," etc.); State v. Murphy, 39 Tex. 46 ("one head of neat cattle," etc.); Lunn v. State, 44 Tex. 85 ("four certain hogs"—the court said that the identity of the hogs as the property stolen was a question of evidence); Johnson v. State, 1 Tex. App. 118 (a "cow," etc.); Grant v. State, 2 Tex. App. 163 (same as second preceding case except that indictment charged the taking of "one certain hog," etc.); Grant v. State, 3 Tex. App. 1 ("one certain calf of the neat cattle kind"); Trafton v. State, 5 Tex. App. 480 ("one certain yearling of the species of neat cattle"); Mathews v. State, 41 Tex. Crim. Rep. 98, 51 S. W. 915 ("one head of cattle"); Walton v. State, 41 Tex. Crim. Rep. 454, 55 S. W. 566 ("twenty head of cattle"); Guerrero v. State, 46 Tex. Crim. Rep. 445, 80 S. W. 1001 ("one head of hogs"); Butler v. State, 49 Tex. Crim. Rep. 159, 93 S. W. 743 ("two diamond rings," etc., and "one diamond brooch," etc.); Fulshear v. State, 59 Tex. Crim. Rep. 376, 128 L.R.A.1915B. S. W. 134 (holding sufficient a description of an instrument as a check, the number and the amount, and the names of the drawer and payee being set out); State v. Blair, 63 W. Va. 635, 60 S. E. 795 ("one man's saddle" and "one horse," etc., held reasonably certain descriptions); Reg. v. Spicer, 1 Car. & K. 699, 1 Den. C. C. 82 (holding that the term "one sheep" sufficiently describes a lamb); Reg. v. Milnes, 2 East, P. C. 602 (one promissory note); Reg. v. Heath, 2 Moody, C. C. 33 (holding it unnecessary in the descriptive part of an indictment for larceny of a check to aver that the named persons upon whom it was drawn were bankers).

And in the following cases the respective descriptions noted were held insufficient, the reasons for the holding not being stated except as noted: Stollenwerk v. State, 55 Ala. 142, holding too indefinite the description, "a yearling," etc.; Com. v. Merrifield, 4 Met. 468, holding that sheets printed and bound in book form cannot be described as "the printed sheets of two thousand copies of a certain publication called the Temperance Harp," etc., in that the description was not accurate; State v. McLeod, 50 N. C. (5 Jones, L.) 318, holding that neither the description, "a certain writ of fi. fa. belonging to the superior court," nor the description, "a certain process of and belonging to the said superior court," nor the description, "a certain record of and belonging to the said supreme court," were sufficient to identify the property alleged to have been taken "with certainty to a general intent;" State v. Patrick, 79 N. C. 655, 28 Am. Rep. 340, holding the description, "one pound of meat," insufficient, as too vague and uncertain; the court saying that the property should be described with "reasonable certainty;" Stewart v. Com. 4 Serg. & R. 194, holding too vague and uncertain the description, "sundry promissory notes for the payment of money of the value of eighty dollars of the goods and chattels of," etc.; Potter v. State, 39 Tex. 388, holding the description, "one certain trunk or chest containing various articles of clothing, jewelry," etc., bad for "uncertainty" in that "there should be a more definite description of the property alleged to have been stolen," the court saying that such property "should be plainly and distinctly described;" State v. Morey, 2 Wis. 494, 60 Am. Dec. 439, holding insufficient because not "reasonably certain" the description, "one hundred pounds of meat;" Reg. v. Jewett, 2 Cox, C. C. 227, holding, though seemingly erroneously, that a "ewe teg" (a female sheep which has never had a lamb) could not properly be described as a "ewe" (a term applied to a sheep which has had a lamb); Reg. v. Bonner, 7 Cox, C. C. 13, holding insufficient the description, "one parcel," etc.

III. Under statute.

a. In general.

As intimated supra, I., many jurisdictions have statutes which influence or con-

trol the particularity of description essential to the validity of an indictment for larceny. These statutes are of various scopes, ranging from those which are of general application to those which specifically designate the kind of description that must be given.

Of the former class are those which require the facts to be stated in ordinary and concise language, and in such manner as to enable persons of common understanding to know the exact charge which is to be made. Under statutes of this character, the following parenthetically stated descriptions have been held sufficient: Pfister v. State, 84 Ala. 432, 4 So. 395 (holding that a watch case composed of a metal the same being ten carats of gold and fourteen of alloy was properly described as "a gold watch," although jewelers would not consider it such); State v. Rathbone, 8 Idaho, 161, 67 Pac. 186 ("two mares," etc.); State v. Collett, 9 Idaho, 608, 75 Pac. 271 ("one horse," etc.); Wessels v. Territory, McCahon (Kan.) 100 ("two steers or working cattle," etc.); Millner v. State, 15 Lea, 179 ("one railroad ticket from K., Tennessee, to W., D. C., of the value of seventeen dollars"); People v. Sensabaugh, 2 Utah, 473 (holding sufficient the description, "two horses," etc., the court saying that technically descriptive words need not be used to designate the sex or artificial character of the animal); State v. Shuck, 38 Wash. 270, 80 Pac. 444 ("two certain mares"); State v. McIntyre, 53 Wash. 178, 101 Pac. 710 ("fifty-one head of horses consisting of mares and geldings").

And under statutes which declare the unlawful taking of named animals to be larceny, it has been held that description of the thing taken in the terms used in the statute, or in terms substantially conforming to such statutory terms, is sufficient. Under this rule the descriptive parts of indictments for larceny were held sufficient in the following cases: Gabriel v. State, 40 Ala. 357 (defendant charged in one count with stealing "a mule" and in another with stealing a "horse, mare, gelding, colt, filly, or mule"); Lavender v. State, 60 Ala. 60 (holding that a pig four or five months old could be described as "a hog" under a statute making it grand larceny to steal any "hog," etc.); Peters v. State, 100 Ala. 10, 14 So. 896 (holding that "two bales of cotton" is a sufficient description under a statute relating to the larceny of "bags of cotton"); Wolcott v. Stickles, 85 Conn. 322, 82 Atl. 572 (holding sufficient an indictment for the theft of "chickens" under a statute relating to the wrongful taking of "poultry"); State v. Dewitt, 152 Mo. 76, 53 S. W. 429 (holding the description, "two head of neat cattle," sufficient under a statute making it grand larceny to steal any "neat cattle," the court saying that "when a statute describes the whole offense . . . and the indictment is in the language of the statute it is sufficient, and need not be more specific"); Territory v. Christman, 9 N. M. 582, 58 Pac. 343 (holding the description, "one neat cattle," sufficient, that being the term used in the statute); Phelps v. People, 72 N. Y. 334 (property described, as in the statute, as a "draft"); People v. Lovejoy, 37 App. Div. 52, 55 N. Y. Supp. 543 (indictment charging the taking of an unsatisfied "check or bill of exchange" for the payment of money, and alleged its ownership and value, and set out a copy of the instrument); State v. Wilson, 63 Or. 344, 127 Pac. 980 (railroad passenger ticket); Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670 (instrument described as a certain instrument of writing containing evidence of an existing contract [for the conveyance of real estate, to wit, a town lot] etc.); Whalen v. Com. 90 Va. 544, 19 S. E. 182 ("one paper purporting to be a check for the payment of," etc.). In Dignowitty v. State, supra, the court said that "in statutory offenses the description given in the law creating the offense has in general been deemed sufficient," and quoted with seeming approval from Wharton, American Criminal Law, 131, as follows: "This doctrine . . . is founded partly on the fact that the prosecutor is not considered in possession of the article stolen, and is not therefore enabled to give a minute description; and partly because, notwithstanding the general description, it is made certain to the court, from the face of the indictment, that a crime had been committed if the facts be true."

But it has been held that if the statute makes a thing the subject of larceny the taking of which is not indictable at common law, and the words of the statute are descriptive, it will be strictly construed, and the thing must be so described as clearly to bring it within the meaning of the statute. Thus, under a statute making the wrongful taking of things "cultivated for food or market" larceny, it has been held that an indictment charging the taking of one gallon of figs" was fatally defective in that it did not describe them as figs cultivated for food or market. State v. Liles, 78 N. C. 496. And the same conclusion was reached in State v. Thompson, 93 N. C. 537, with respect to an indictment charging the larceny of "one watermelon." And in Com. v. Shissler, 7 Pa. Dist. R. 341, it was held that the description, "one check for the payment of $900," was defective in that it did not allege that it was upon a bank, the statute making the "check of or on any bank" larceny. But if the thing is specifically named in such a statute it has been held sufficient to merely so designate it. See State v. Ballard, 97 N. C. 443, 1 S. E. 685, holding that an indictment for the larceny of "one peck of corn" was not defective in that it was not described as "cultivated for food or market," corn being specifically named in the statute. So, it has been held that where an instrument is made the subject of larceny by statute, the taking of which was not larceny at common law, it is sufficient to describe the instrument by its usual name, and the amount and face

thereof, and value. See State v. Hinton, 56 Or. 428, 109 Pac. 24, holding sufficient the description, "bill of exchange, commonly called a bank check, drawn on the First National Bank of Heppner, Oregon, and payable on demand to the order of F. M. Rounds, said bill of exchange then and there being the personal property of the said F. M. Rounds and of the value of sixty dollars and fifty cents."

But it has been held that where the statute uses merely the generic name of a class, any kind of an animal or object falling within such class may be described in the name used in the statute. See State v. Godet, 29 N. C. (7 Ired. L.) 210, wherein it was held that a boar shoat between five and six months old could be described as "a hog," the legislature having used the term "hog" as including swine of all ages; Wiley v. State, 3 Coldw. 375, wherein it was held in effect that a "bay colt" could be described as a "bay horse," the statute expressly providing that the term "horse" was used therein in its generic sense; Hubotter v. State, 32 Tex. 479, holding that an indictment for the stealing of "two beeves, the same being cattle," was sufficient under a statute providing punishment for the stealing of any "neat cattle, sheep, goat, or hogs;" State v. Garrett, 34 Tex. 674, holding sufficient under the statute referred to in the next preceding case the description, "certain neat cattle, to wit, one beef," etc.; State v. Earp, 41 Tex. 487, following Hubotter v. State, supra, and holding sufficient the description, "one certain steer," etc.; Moore v. State, 2 Tex. App. 350, holding sufficient the description, "one beef steer, neat cattle;" Duval v. State, 8 Tex. App. 370, holding the description, "one beef cattle," sufficient under a statute using merely the general term "neat cattle;" Valesco v. State, 9 Tex. App. 76, holding the description, "a certain horse," sufficient under a statute in which the term "horse" was used in a generic sense; McIntosh v. State, 18 Tex. App. 284, holding the description, "four animals of the cattle species," sufficient to cover any domesticated animals of the bovine genus; and Warren v. State, — Tex. Crim. Rep. —, 105 S. W. 817, holding the description, "one head of cattle," sufficient under a statute relating to "any cattle."

And where the statute enumerates several specific kinds of animals as a subject of larceny, it has been held that the indictment need not specify the particular kind taken, but may use a broader term, which includes one or more of the enumerated kinds: People v. Barnes, 65 Cal. 16, 2 Pac. 493 (indictment charging the theft of "two head of cattle," etc., held sufficient under a statute declaring it grand larceny to steal a "horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, goat, sheep, or hog"); JONES v. STATE (holding that a cow or heifer may be described as "one female animal of the bovine species nearly two years old," under a statute declaring the taking of either a cow or a heifer to be larceny.

And where the statute does not enumerate the specific class of animals to which the animal which was alleged to have been stolen belongs, but does expressly include a general class of which such specific class is a part, designation of the general class is sufficient: People v. Soto, 49 Cal. 67, holding that a heifer one and one-half years old could properly be designated a "cow" in an indictment under a statute making it a felony to steal cows, bulls, steers, and calves, which did not specifically include heifers; State v. Williams, 12 Idaho, 483, 86 Pac. 53, holding the description, "one gray horse colt," sufficient as against the contention that the statute did not apply to a "colt," because it did not specifically enumerate same as such among the animals designated as the subject of larceny; Rex v. Stroud, 6 Car. & P. 535, holding that either a "rig" or a "weather" could be described as "one sheep;" Rex v. Welland, Russ. & R. C. C. 494, holding that a "mare filly" may be described as a "mare" in an indictment under a statute making it a crime to steal a "horse, gelding, or mare."

And it has been held that where a comprehensive or generic term is used in the statute, the indictment may designate the animal alleged to have been taken by a specific name which is synonymous with the term used in the statute or is included within its meaning: State v. Lawn, 80 Mo. 241, holding that the term "steer" is sufficient under a statute relating to "neat cattle," etc.; State v. Bowers, — Mo. —, 1 S. W. 288, holding same as the preceding case; State v. Crow, 107 Mo. 341, 17 S. W. 745, holding sufficient the description, "certain cattle, to wit, one cow," under a statute specifying "neat cattle," etc.; Wilburn v. Territory, 10 N. M. 402, 62 Pac. 968, 14 Am. Crim. Rep. 500, holding the description "one cow" sufficient under a statute making it an offense to steal, etc., any "neat cattle;" Parchman v. State, 44 Tex. 192, holding the description one "ox" sufficient under a statute relating to "neat cattle;" Berryman v. State, 45 Tex. 1, holding sufficient the description, "a dun-colored bull yearling," under the statute referred to in the next preceding case; Henry v. State, 45 Tex. 84, holding same as second preceding case; Camplin v. State, 1 Tex. App. 108, holding same as next preceding case; Robertson v. State, 1 Tex. App. 311, holding the descriptive term "beef steer" sufficient without adding the statutory term "cattle." But the direct contrary has been held. Thus, in State v. M'Lain, 2 Brev. 443, the court went so far as to hold that where the statute made the taking of cattle and hogs larceny, an indictment charging larceny of a "pig" was fatally defective, the court saying that the animal should have been described as "a hog." In connection with the foregoing Texas cases, see Castello v. State, 36 Tex. 324, wherein it was held without discussion that the description,

"three head of neat stock or beeves," was insufficient as "uncertain."

There is a decided conflict of authority as to the method of description to be employed where the statutes enumerate several kinds of animals falling within the same class.

Thus, a number of cases hold that where the statute describes more than one object or thing belonging to the same class or species, the indictment must be framed according to the particular facts, even though one of the descriptive terms, if taken in a generic sense, is sufficiently comprehensive to include all: State v. Plunket, 2 Stew. (Ala.) 11, holding that a "gelding" was defectively described as a "horse," under a statute prescribing punishment for the larceny of "any horse, mare or gelding, foal or filly, ass or mule," etc.; Territory v. Marinez, 5 Ariz. 55, 44 Pac. 1089, holding that a "steer" could not be described as "a cow," under a statute relating to the taking of a "cow, steer, bull, calf . . . or any neat or horned cattle," etc.; State v. Tootle, 2 Harr. (Del.) 541 (*dictum* to effect that a "lamb" could not be described as a "sheep" in an indictment under a statute making it a felony to steal any "ram, ewe, sheep, or lamb"); Mobley v. State, 57 Fla. 22, 49 So. 941, 17 Ann. Cas. 735, holding that a "three or four years old steer" cannot be described as "a cow" where the statute draws a distinction between a cow and a steer by enumerating both; State v. Buckles, 26 Kan. 237, holding that a "gelding" should not be described as "one light bay horse" under a statute which specifically named both geldings and horses; State v. McDonald, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628, holding in effect that a "gelding" cannot be described as a "horse" or "colt;" Turley v. State, 3 Humph. 323, holding in effect that a "gelding" cannot be described as a "horse" where the statute enumerates both; Banks v. State, 28 Tex. 644, holding that a "mare" could not be described as a "horse" (see case as quoted infra); Swindel v. State, 32 Tex. 102, holding in effect that the description must be by the specific name, as the taking of each kind of animal named in the statutes constitutes a separate offense; Gibbs v. State, 34 Tex. 134 (to the same effect as the next preceding case); Keesee v. State, 1 Tex. App. 298 (to the same effect as the two next preceding cases); Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414, holding that a "mare" could not properly be described by the use of the term "filly;" Persons v. State, 3 Tex. App. 240, holding in effect that a "gelding" could not be described as "a certain horse (a stallion)" under a statute specifically naming both horses and geldings; Brisco v. State, 4 Tex. App. 219, holding in effect that a "ridgling" should be described as a "horse," and not as a "gelding;" Johnson v. State, 16 Tex. App. 402, holding that a "horse" could not be described as a "gelding" in an indictment under a statute in which the word "horse" was used as synonymous with the word "stallion;" State v. Brookhouse, 10 Wash. 87, 38 Pac. 862, holding that "steers" could not be described by the term "cattle;" Rex v. Birket, 4 Car. & P. 216, holding that a "lamb" could not be described as "one sheep," under a statute specifically naming the various members of the sheep family; Rex v. Cook, 1 Leach, C. C. 105, 2 East, P. C. 616, holding that where the statutes mention both "heifer" and "cow," a "heifer" could not be described by the term "cow," as the former term must have been used in contradistinction to the latter; Rex v. Loom, 1 Moody, C. C. 160, holding that where the statute specifies both lambs and sheep, "five lambs" cannot be described as "five sheep;" Rex v. Puddifoot, 1 Moody, C. C. 247, holding that a "ewe" could not be described as a "sheep," the court saying that since the statute specified both ewe and sheep the one really meant should be named in the indictment. (In connection with the above English cases, however, see the English cases in the next following paragraph). In Banks v. State, supra, the court discussed this rule and the reasons therefor as follows: "It is our duty to give to the article [statute] such a construction as will give effect and meaning to each word as nearly as can be consistently done with the object and purpose of the legislature. The statute itself, in creating and providing for the punishment of the offense, appears to fix its own meaning to the words used. It specifically describes the different species of property by the use of the words, 'horse, gelding, mare, colt, ass, or mule,' evidently discriminating between them as different species of property, and as much between horse and mare as between horse and ass or mule. The averments of the indictment must be equally specific."

But, as before stated, the rule adhered to in the next preceding paragraph has not been universally adopted, as is illustrated by the following cases, which arrive at a directly contrary conclusion, it being held that where the statute uses a term which in its generic sense would include other names used in the statute, the use of the particular term is sufficient; People v. Melandrez, 4 Cal. App. 396, 88 Pac. 372, holding that "a mare" may be described as "a horse" under a statute relating to the larceny of a "horse, mare, gelding," etc.; People v. Pico, 62 Cal. 50, holding same as next preceding case; People v. Monteith, 73 Cal. 7, 14 Pac. 373, holding that a "gelding" may be described as a horse under the statute referred to in the second preceding case; State v. Matejousky, 22 S. D. 30, 115 N. Y. 96, discussing the rule and the conflict of authorities somewhat at length, and holding that a "gelding" may be described as a "horse" under a statute enumerating both; People v. Butler, 2 Utah, 504, holding that the description "two horses" applied to "a gelding and a mare" was sufficient under a statute making the taking of a "horse, mare, gelding," etc., grand

larceny; Reg. v. Aldridge, 4 Cox, C. C. 143, holding that a "ridgeling" or "gelding" could be described as a "horse," although the statute mentions the particular species and gender; the court saying that the term "horse" was generic, and could be used to describe any animal which it covered, notwithstanding the use of more specific terms in the statute; Reg. v. M'Culley, 2 Moody, C. C. 34, 2 Lewin, C. C. 272, applying the rule adopted in the next preceding case to an indictment which described a "ewe" or a "ram" as a "sheep." And see State v. Johnson, 29 La. Ann. 717, wherein the court severely criticized, but refused to declare insufficient, an indictment charging the unlawful taking of "an animal of the cow kind," it being said that the pleader should specify the particular animal of the cow kind charged to have been stolen; and State v. Perkins, 49 La. Ann. 310, 21 So. 839, which is to the same effect, the description being "one beef of the cow kind." In this connection it was said in People v. Rico, supra, that the word "horse" was used in the statute in its generic sense, and includes all animals of the horse species, whether male or female, and that the legislature in using the words "mare," etc., did not intend to modify the common-law rule, but inserted such words possibly for more definiteness.

b. Express statutes.

In some jurisdictions statutes have been enacted which expressly provide the nature of description which must be made in an indictment for larceny.

Thus, in Texas, it has been expressly provided by statute that "the certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." Under this statute the description, "three dresses, a more specific description whereof is to the grand jurors unknown, three underskirts, three quilts, two matrasses, one blanket, two pillows, two pillowslips, two pairs of drawers, 1 pair of slippers, six dresses, six underskirts, six pairs drawers, children's clothing, six books, six plates, one coffee-pot, and one accordion, a more specific description of said articles being to the grand jurors unknown," was held sufficient in Ware v. State, 2 Tex. App. 547.

And under the statutory provision that no indictment shall be held insufficient for "any defect which does not tend to the prejudice of the substantial rights of the parties," it has been held that the description, "two calves," etc., was sufficient as against the contention that the indictment did not appraise the defendant with what he was charged with stealing, regardless of its sufficiency, in the absence of such a statutory provision. Oats v. United States, 1 Ind. Terr. 152, 38 S. W. 673.

And in Missouri it has been provided by statute that in an indictment for stealing any instrument or property it shall be sufficient to designate such instrument or property by any name or designation by which the same may be usually known. Under this statute it has been held (State v. Hall, 85 Mo. 669) that an indictment for larceny of a "deed" might describe the instrument as such, and that it was unnecessary to name the grantee.

And in Oregon it has been provided that when a crime involves the taking of an animal, the indictment is sufficiently certain as to description if it describes the animal by the common name of its class. Applying this statute it was held in State v. Brinkley, 55 Or. 134, 104 Pac. 893, 105 Pac. 708, that the description, "a calf," in an indictment for larceny, was not insufficient as too uncertain.

And in Georgia a statutory provision that an indictment for larceny of a horse "must designate the nature, character, and sex of the animal, and give some other description by which its identity shall be ascertained," has been construed in the following cases: Taylor v. State, 44 Ga. 263, wherein it was said that the description, "one chestnut sorrel horse," etc., was sufficient (but see the following case); Brown v. State, 86 Ga. 633, 13 S. E. 20, holding that the judge went too far in reaching the conclusion set out in the preceding case, and that the description, "one dark bay horse, with one white spot on the end of his nose and one small white spot in his forehead," was insufficient in that it did not give the defendant full and fair notice of the "nature, character, and sex" of the animal as required by statute; Teal v. State, 119 Ga. 102, 45 S. E. 964, holding sufficient under the statute the description, "one horse of the female sex, said animal being a dark bay mare, and having a white spot in her forehead, and about 12 years old, weighing about one thousand pounds, and commonly called by the name of 'Etta,'" etc.

And Georgia has a statutory provision that an indictment for larceny of cattle "shall sufficiently describe the animal falling under the description of cattle . . . so that it may be ascertained and identified by the owner." Under this provision it has been held that the sex of an animal need not be alleged. See Burch v. State, 4 Ga. App. 384, 61 S. E. 503; and Gibson v. State, 7 Ga. App. 692, 67 S. E. 838. In the latter case the court held sufficient the description, "one cream-colored jersey cow," etc.

In at least one jurisdiction it has been provided by statute that "when it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, property, and ownership, if known, shall be sufficient. Under this statute the description, "an animal of the horse species," was held sufficient, but the court said that it would have been better and safer to have said merely "a horse." Smythe v. State, 17 Tex. App. 244. So the description, "on horse," was held sufficient in Barner v. State, — Tex. Crim. Rep. —, 20 S. W. 559. And the

court in Johnson v. State, 42 Tex. Crim. Rep. 103, 58 S. W. 69, held sufficient the description, "one watch of the value of fifty-five dollars; one pair of shoes of the value of one dollar; and one razor of the value of two dollars," as against the contention that the "kind" of watch, etc., should have been stated.

Where an offense is charged in one clause of a statute and an exception is stated in a subsequent clause or statute, the indictment need not describe the property so as to show that the subject of the larceny does not fall within the exception, but otherwise if the offense and exception are contained in the same clause. See Matthews v. State, 24 Ark. 484, holding that an indictment charging the stealing of a "hog" was sufficient although it did not aver that the hog was either under twelve months old, or was marked, where the taking of a hog either under one year of age or marked, under a statute other than the one under which the indictment was laid, would not be larceny; and Perry v. State, 37 Ark. 54, wherein the same conclusion was reached as to an indictment charging the theft of "one heifer yearling," etc. G. J. C.

NEBRASKA SUPREME COURT.

WILLIAM G. KORAB, Plff. in Err.,
v.
STATE OF NEBRASKA.

(93 Neb. 66, 139 N. W. 717.)

Indictment — receiving stolen property — sufficiency of description.

An information for receiving stolen property does not state facts constituting an offense, where the property is described only as "the personal property of John Lightfoot of the value of $48, then lately before stolen," and after a verdict of guilty on such an information, it is error to overrule a motion in arrest of judgment.

Headnote by ROSE, J.

(January 31, 1913.)

ERROR to the District Court for Boyd County to review a judgment convicting defendant of receiving stolen property. Reversed.

The facts are stated in the opinion.

Messrs. **W. T. Wills** and **M. F. Harrington**, for plaintiff in error:

Before a man can be placed upon trial for a felony, he must be informed of the real charge against him; he must know what the state claims he did.

Hutchinson v. State, 72 Ark. 640, 83 S. W. 331; State v. Nelson, 27 R. I. 31, 60 Atl. 589; State v. Kosky, 191 Mo. 1, 90 S. W. 457; Gabriel v. State, 44 Fla. 57, 32 So. 779; State v. Patrick, 79 N. C. 655, 28 Am. Rep. 340; State v. Morey, 2 Wis. 494, 60 Am. Dec. 439; State v. Dawes, 75 Me. 51; Merwin v. People, 26 Mich. 298, 12 Am. Rep. 314; State v. McClung, 35 W. Va. 280, 13 S. E. 654; State v. Cason, 20 La. Ann. 48.

Messrs. **Grant G. Martin** and **Frank E. Edgerton** for the State.

ROSE, J., delivered the opinion of the court:

In a prosecution by the state William G. Korab, defendant, was convicted of receiving stolen property valued by the jury at $38, and for that offense was sentenced to

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Note. — Sufficiency of description of property in an indictment or information for receiving stolen property.

The general rules applicable to the question under consideration in the present note are stated at some length in the notes to Jones v. State, ante, 71, and People v. Hunt, 36 L.R.A.(N.S.) 933, which respectively treat the general question of the sufficiency of the description of property in an indictment for larceny; and the question of the sufficiency of the description of money in an indictment for larceny. Recapitulation is therefore deemed unnecessary, as the rules governing the descriptions in indictments for larceny seem applicable to indictments for receiving stolen goods.

As to the sufficiency of the description of property in an indictment for robbery or larceny from the person, see note to People v. Nolan, 34 L.R.A.(N.S.) 301.

The present note does not cover the question of the necessity for or sufficiency of averments of value, or ownership, possession or title, it being assumed for present purposes that the descriptions in those respects are sufficient.

In the first place, in an indictment for receiving stolen goods, the property which was received, and not that which was stolen, must be described. See Gabriel v. State, 44 Fla. 57, 32 So. 779, holding that the description, "two cases of cigars," did not describe a quantity of loose cigars, the description given being that of the property which was taken and the quantity of loose cigars that which was received.

But with respect to what is necessary in describing the property alleged to have been received, various rules have been announced.

Thus, it has been said that the goods alleged to have been received must be described with certainty and accuracy. Under this broad rule it was held in People v. Wiley, 3 Hill, 194, that written instruments which were in the form of simple contracts could not be described as bonds.

And the property must be so described that the court and jury can say whether the stolen property proved to have been re-

serve in the penitentiary a term of not less than one nor more than seven years. As plaintiff in error he now seeks a reversal of his conviction.

The information was made by the county attorney of Boyd county, Nebraska, and charged: "William G. Korab, late of the county aforesaid, on the 14th day of March, A. D. 1912, in the county of Boyd and the state of Nebraska, aforesaid, unlawfully and feloniously did receive the personal property of John Lightfoot of the value of $48, then lately before stolen, taken, and carried away, with the intent of him, the said William G. Korab, to defraud said John Lightfoot, he then and there well knowing the said personal property to have been stolen."

Defendant did not bring up a bill of exceptions. The only assignment of error available to him here is the overruling of a motion in arrest of judgment. "That the facts stated in the indictment do not constitute an offense" is a statutory ground for sustaining such a motion. Criminal Code, § 493. Were the facts stated sufficient to charge a felony? The inquiry is directed to the description of the property.

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ceived was the same as that upon which the indictment was founded. Applying this rule the following descriptions have been held sufficient: "Five finger rings" (Atchison v. State, 90 Ark. 457, 119 S. W. 651); "25 lbs. weight of tin" (Reg. v. Mansfield, Car. & M. 140). And the following parenthetically stated descriptions have been held insufficient: Brown v. State, 116 Ga. 559, 42 S. E. 795, 15 Am. Crim. Rep. 429 (indictment charged that "after a certain lot of brass, to wit: five thousand pounds," had been stolen, the accused received the same, "to wit: certain lot of brass fittings, to wit: four hundred pounds of the value of three hundred dollars," etc.); State v. Nelson, 27 R. I. 31, 60 Atl. 589 (indictment charging the receiving of "thirty ounces of silver metal" held insufficient where the silver had advanced through several stages of manufacture, and was in the form of what was familiarly known as "blanks"). And see KORAB v. STATE. And see also State v. Murphy, 6 Ala. 845, as set out infra.

And upon the ground that stolen articles alleged to have been received must be so described as to put the accused on notice of the charge he has to meet so that he may prepare his defense, it has been held that an indictment which charged that "after a certain lot of brass, to wit: five thousand pounds," had been stolen, the accused received the same, "to wit: certain lot of brass fittings, to wit, four hundred pounds of the value of three hundred dollars," etc., was insufficient (Brown v. State, supra); that the description, "neat cattle," standing alone, is insufficient (State v. Fields, 70 Kan. 391, 78 Pac. 833); and that the description, "thirty ounces of silver metal," was insufficient where the silver had been advanced through several stages of manufacture, and was in the form commonly known as "blanks" (State v. Nelson, supra); but that the description, "one gold coin of the value of $10, one bill, purporting to be issued by the Monmouth National Bank, of the value of $10, and one bill, purporting to be issued by some national bank, of the value of $5," etc., was proper and sufficient (Williams v. People, 101 Ill. 382); and that the description, "twenty-two pairs of striped pants, not all of the same color but all striped, each pair of the value of five dollars and all of the value of one hundred and ten dollars of the goods," etc., was sufficient (State v. Smith, 88 Iowa, 1, 55 N. W. 16); and that the description, "twelve hundred cigars of the value of forty-two dollars," was sufficient (State v. Kosky, 191 Mo. 1, 90 S. W. 454); and that the description, "thirty thousand San Felice cigars of the value of fifteen hundred dollars, one case dry goods of the value of six hundred dollars, of the aggregate value of twenty-one hundred dollars, of the goods," etc., was sufficient (State v. Smith, 250 Mo. 350, 157 S. W. 319). And see KORAB v. STATE. In State v. Kosky, supra, the court said: "As a general rule, property alleged to have been stolen should be described with as much certainty as the circumstances connected with the theft will permit, but a minute description is not necessary. The description must be sufficient, however, to apprise the defendant of what property he is charged with stealing."

And the description in an indictment for receiving stolen goods must not be so indefinite and uncertain as to prevent the defendant from pleading the verdict in bar of a subsequent prosecution for unlawfully receiving the same articles or goods. See Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494, holding the description, postage stamps stolen from the United States postoffices, standing alone, to be insufficient; State v. Nelson, 27 R. I. 31, 60 Atl. 589, holding that silver which had been advanced through several stages of manufacture so that it was in the form commonly known as "blanks" could not be described as "thirty ounces of silver metal;" and Reg. v. Mansfield, Car. & M. 140, holding that "ingots of tin" could be described as "25 lbs. weight of tin." And see State v. Murphy, 6 Ala. 845, as set out infra.

And it has been held that it is sufficient to describe the property alleged to have been received in general terms under statutes, the language of which is general. Sellers v. State, 49 Ala. 357, holding that an indictment charging that defendant "received or concealed cotton of the value of forty dollars," etc., described the property with sufficient certainty.

And it has been said that, in an indictment for receiving stolen property, it is not necessary to describe the property alleged to have been received with such cer-

It is described in the information as "the personal property of John Lightfoot of the value of forty-eight dollars, then lately before stolen." The prosecutor intended to charge defendant with violating the following statutory provisions: "If any person shall receive or buy any goods or chattels of the value of thirty-five dollars or upwards, that shall be stolen or taken by robbers with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary no more than seven years, nor less than one year." Criminal Code, § 116.

An information for larceny may contain also a count for receiving the stolen property. Criminal Code, § 419. Since both offenses may be charged in the same information, the rules for determining the sufficiency of the description in charging larceny apply substantially in a prosecution for the single offense of receiving stolen property. In this state the law has been stated thus: "In an indictment or information for larceny the property alleged to have been stolen should be de-

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tainty and definiteness as to identify it from other property of the same class. See Miller v. State, 165 Ind. 566, 76 N. E. 245, wherein it was held that an indictment which recited the stealing of "brass of the value of $25 of the personal goods, etc., and that accused did "feloniously buy and receive said brass," etc., sufficiently described the property alleged to have been received.

But it has been held that it is not sufficient to merely describe the property alleged to have been received as "the goods" of a certain person, etc. See Wells v. State, 90 Miss. 516, 43 So. 610, wherein in so holding it was said that "it is essential in an indictment for receiving stolen property to describe the property with the same particularity as is required in an indictment for larceny." And see KORAB v. STATE.

And in Kearney v. State, 48 Md. 16, it was held that the description, "four pieces of printed paper commonly called 'United States five-twenty bonds' of the issue of the year eighteen hundred and sixty-five, each of the value of one thousand dollars, current money of the bonds, goods, and chattels of," etc., was fatally defective in that there was no averment in positive terms that the pieces of paper "were bonds or certificates of indebtedness issued or 'granted by or under the authority of the United States.'"

And it has been held that, in an indictment for receiving a stolen animal which was dead when received, the indictment must describe it as dead. See Hutchinson v. State, 72 Ark. 640, 83 S. W. 331, holding that an indictment charging the receiving of a stolen "hog" did not describe the receiving of a hog which had previously been killed. But see Rex v. Puckering, 1 Moody, C. C. 242, wherein it was held that a dead lamb could be described by the appellation "lamb," it being immaterial to the prisoner's offense and punishment whether it be dead or alive. This conclusion was reached as against the contention that the use of the term "lamb" implied that the animal in question was alive.

And it has been held that an indictment for receiving stolen money should state the number and denomination of the coins alleged to have been stolen, or that the same is unknown. State v. Murphy, 6 Ala. 845, holding that an indictment charging the felonious receiving of "sundry pieces of silver coin, made current by law . . . amounting altogether to the sum of five hundred and thirty dollars and fifteen cents," did not describe the money with sufficient particularity under the rule that, in indictments for receiving stolen goods, the goods should be described with such certainty as will enable the jury to decide whether the chattel proved to have been stolen is the very same as that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offense charged, and enable the defendant to plead his acquittal or conviction of a subsequent indictment relating to the same chattel; Burney v. State, 87 Ala. 80, 6 So. 391, holding an indictment for receiving stolen money described as "two hundred dollars in gold coin" insufficient in that it did not aver either the number and denomination of the coins, or that the same was unknown to the grand jury;" Baggett v. State, 69 Miss. 625, 13 So. 816, holding insufficient a description which merely stated the character of the money and the amount, the court saying that while it could not see the reason or wisdom of the requirement, the well-established rule was that the denomination or a particular description was essential, in the absence of an averment that such particulars could not be given because to the grand jury unknown. Of course under a statute providing that in an indictment for receiving stolen money the kind, number, denomination, or kind need not be specified, a general description is sufficient. See Stone v. Com. 24 Ky. L. Rep. 10, 67 S. W. 841, holding that an indictment for receiving "feloniously stolen money of the value of $100 and of other values, knowing the same to be stolen," was sufficient, the court saying that the statute declares sufficient such an "extremely vague and indefinite description," and that the court could not disregard it.

In a few instances a distinction has been drawn between descriptions of the same articles or material in different forms of existence. Thus, it has been said that when property alleged to have been unlawfully received is in its raw or unmanufactured state it may be described by its name and as so much in quantity, weight, or measure; but that if it be worked up into a specified article, and remain so at the time when

scribed with sufficient particularity to enable the court to determine that such property is the subject of larceny; to advise the accused with reasonable certainty of the property meant, and enable him to make the needful preparations to meet such charge at the trial." Barnes v. State, 40 Neb. 545, 59 N. W. 125. This is the general rule. An eminent text writer says: "As in larceny, so in receiving, the transaction is identified by the description of the stolen things and their ownership; namely, the thing stolen must be described in the same manner as in larceny." 2 Bishop, New Crim. Proc. 4th ed. § 982. In the present case the description, "personal property of John Lightfoot of the value of forty-eight dollars," did not enable the court to determine that the property was the subject of larceny, nor advise defendant with reasonable certainty of the property meant, so as to enable him to make the needful preparation to meet the charge at the trial. The information, according to the correct rule and the one supported by the weight of authority, was insufficient to charge defendant with the felony denounced by the statute. Merwin v. People, 26 Mich. 298,

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stolen, it must be described by the name by which such specific article is generally known. Applying this rule it was held in State v. Horan, 61 N. C. (Phill. L.) 571, that a piece of cast iron which was the top of an iron box, but which had been broken from the box, could be properly described as "one pound of iron." And again in Reg. v. Mansfield, Car. & M. 140, it was held that ingots of tin could be described as "25 lbs. weight of tin," the court saying: "If this had been some article that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed; as if a piece of cloth were called so many pounds of wool,—because it has ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds weight of iron." And see State v. Nelson, 27 R. I. 31, 60 Atl. 589, as set out supra.

The following descriptions in indictments for receiving stolen goods have been held sufficient, without statement of either the objection made thereto or the rules under which they were found sufficient: "One ten dollar greenback bill, lawful money of the United States, a better description of which is to the grand jury unknown" (Rowland v. State, 140 Ala. 143, 37 So. 245); wagons theretofore stolen from the O. W. Company (Newton v. Com. 158 Ky. 4, 164 S. W. 108); "thirty yards of cloth, of the value of one dollar and twenty cents each yard: thirty yards of cloth, of the value of one dollar and forty cents each yard; fifteen yards of cloth, of the value of one dollar and thirty cents each yard; one hundred yards of cloth, of the value of one dollar each yard; and one coat, of the value of sixteen dollars; of the goods," etc. (Com. v. Campbell, 103 Mass. 436); "two cases containing thirty-five pairs of shoes," etc., held a sufficient description of the shoes so as to include them in the property received (State v. Sakowski, 191 Mo. 635, 90 S. W. 435, 4 Ann. Cas. 751); "two horses and thirty mares and twenty geldings," etc. (State v. Hanna, 35 Or. 195, 57 Pac. 629); L.R.A.1915B. "a cook stove," etc. (Com. v. Johnson, 133 Pa. 293, 19 Atl. 402).

If a particular and definite description is not known to the prosecution, any failure to give a fuller and better description than that given may be excused in some instances by an allegation that a more particular description is unknown. This exception arises from necessity, resulting from the many instances where a particular description is unknown, in all of which a failure of justice would necessarily attend an enforcement of the rule requiring a definite description. In the following case an averment of lack of knowledge was held to cure any otherwise insufficiency in the description: Campbell v. State, — Miss. —, 17 So. 441 ("lot of brass castings of the value," etc., "a more particular description of which is to the grand jurors unknown").

But an otherwise insufficient description cannot be cured by an averment that a more particular description is to the grand jury unknown, where the grand jury has or can obtain a more definite knowledge of the facts, such allegations being permissible from necessity only. See Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494, wherein in holding (Hook, Circuit Judge, dissenting) that an indictment for receiving stolen postage stamps of a certain aggregate value was insufficient in that it did not allege the number and denomination of the stamps alleged to have been stolen, the court said: "If offices had been broken into, the government agencies knew the facts, and specific and definite allegations could easily have been made, both as to the number and the denomination of the stamps stolen and from what offices stolen. It is of great importance that the criminal laws be enforced against violators of the law, and technicalities should not be used as a shield for criminals. But it is of equal importance that the liberty of citizens should be a matter of concern, and, before a person is put on trial for a felony, an indictment should be returned against him, and that such indictment be allegations of fact, and not of recitals 'which are to the grand jury unknown,' such allegations are permissible from necessity only when the grand jury does not have, and cannot obtain, a knowledge of the facts." G. J. C.

12 Am. Rep. 314; State v. Kosky, 191 Mo. 1, 90 S. W. 454; Gabriel v. State, 44 Fla. 57, 32 So. 779; Brown v. State, 116 Ga. 559, 42 S. E. 795, 15 Am. Crim. Rep. 429; Wells v. State, 90 Miss. 516, 43 So. 610. The facts stated in the information being insufficient to charge an offense, the motion in arrest of judgment should have been sustained. It necessarily follows that the sentence must be reversed, and the cause remanded for further proceedings.

Letton, J., not sitting.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ELENOR M. NUNN
v.
ABIGAL M. EHLERT.

(218 Mass. 471, 106 N. E. 163.)

Will — attestation — concealment of signature.

Requesting witnesses to sign a paper designated as testator's will, the signature on which is concealed, is not sufficient to render their signatures a proper attestation and validate the will.

(September 10, 1914.)

REPORT by the Supreme Judicial Court for Middlesex County for the opinion of the full bench of a question arising upon appeal from a decree of the Probate Court, disallowing the will of Thomas Nunn, deceased, which had been reversed by the single justice. Reversed.

The facts are stated in the opinion.

Messrs. **Frank Owen White** and **Robert Nason**, for appellant:

It is not necessary for the subscribing witnesses or any subscribing witness to see the signature.

Ela v. Edwards, 16 Gray, 91; Meads v. Earle, 205 Mass. 553, 29 L.R.A.(N.S.) 63, 91 N. E. 916; Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536.

It is not necessary that the witnesses know from the testator himself, or from any other source, that the instrument they sign is a will.

Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Windham v. Chetwynd, 1 Burr. 421; Bond v. Seawell, 3 Burr. 1775; Wallis v. Wallis, cited in 4 Burn, Eccl. Law, 127; White v. British Museum, 6 Bing. 310; Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367; Hogan v. Grosvenor, 10 Met. 56, 43 Am. Dec. 414; Wright v. Wright, 7 Bing. 457, 5 Moore & P. 319, 4 Car. & P. 389.

Any act or declaration that carries an affirmance that it is his will is equally effectual as a direct statement to that effect.

Nickerson v. Buck, 12 Cush. 332.

Messrs. **Mayberry, Hallowell, & Hammond**, for appellee:

As a matter of law, an "attesting" witness under our statute must have seen, or must have at least been able to see, that the

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Note. — Wills: necessity that witnesses see testator sign, or that they see his signature.

This is a continuation of the note to Dougherty v. Crandall, 38 L.R.A.(N.S.) 161, which contains the earlier cases discussing this question.

Under American statutes.

Supplementing note in 38 L.R.A.(N.S.) 164.

As stated in the earlier note, the execution of a will is governed by statute; and consequently, in determining the question under discussion, reference must always be made to the statutory requirements in force at the time when and the place where the will is executed.

It is well settled, both by English and American decisions, states the court in Notes v. Doyle, 32 App. D. C. 413, that the subscribing witnesses to a will need not see the testator sign the will, provided he acknowledges the signature to each of them.

So it is held in Herring v. Watson, — Ind. —, 105 N. E. 900, that one who makes a will need not sign it in the presence of the witnesses, provided he acknowledges his signature in their presence.

In Iowa it is not necessary that witnesses should see the testator subscribe the will. Nixon v. Snellbaker, 155 Iowa, 390, 136 N. W. 223.

Under a statute requiring that the testator subscribe the instrument in the presence of at least two creditable witnesses, a codicil was, in McKee v. McKee, 155 Ky. 738, 160 S. W. 261, held improperly executed where a witness, being in a room adjoining that in which testatrix was sick in bed, did not see her sign, although witness heard testatrix dictate the codicil, heard her request the nurse to have witness come in and witness the instrument, and in fact knew almost as much about what occurred in the room of the testatrix as if she (witness) had been in there. The court stated that it was the purpose of the statute to so provide for the execution and attestation as to eliminate all possible danger of fraud or deception; in other words, to so require the execution and attestation as that the testator might certainly know that the paper which he signed was the self-same paper which was attested, and to enable the attesting witnesses to know that the paper they attested was the same paper

will was signed; that is to say, when he is bearing witness it must at least have been possible for him to have seen the testator's signature, whether he actually saw it or not.

Hogan v. Grosvenor, 10 Met. 54, 43 Am. Dec. 414; Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367; Tilden v. Tilden, 13 Gray, 110; Hall v. Hall, 17 Pick. 373; Barnes v. Chase, 208 Mass. 490, 94 N. E. 694; Marshall v. Mason, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340; Blake v. Blake, L. R. 7 Prob. Div. 102, 51 L. J. Prob. N. S. 36, 51 L. J. Ch. N. S. 377, 46 L. T. N. S. 641, 30 Week. Rep. 505; Hudson v. Parker, 1 Rob. Eccl. Rep. 14; White v. British Museum, 6 Bing. 320.

There is no evidence that the will was signed before the Marshalls signed it.

Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367; Ela v. Edwards, 16 Gray, 91; Blake v. Blake, L. R. 7 Prob. Div. 102, 51 L. J. Prob. N. S. 36, 51 L. J. Ch. N. S. 377, 46 L. T. N. S. 641, 30 Week. Rep. 505; Barnes v. Chase, 208 Mass. 490, 94 N. E. 694; Fischer v. Popham, L. R. 3 Prob. & Div. 246, 44 L. J. Prob. N. S. 47, 33 L. T. N. S. 231, 23 Week. Rep. 683; Pearson v. Pearson, L. R. 2 Prob. & Div. 451, 40 L. J. Prob. N. S. 53, 24 L. T. N. S. 917, 19 Week. Rep. 1014; Shaw v. Neville, 1 Jur. N. S. 408; Ilott v. Genge, 4 Moore, P. C. C. 265; Swinford's Goods, 38 L. J. Prob. N. S. 38, L. R. 1 Prob. Div. 630, 20 L. T. N. S. 87, 17 Week. Rep. 536.

The signature intended by the testator as the final signature was the signature at the end, and that was not properly attested.

Marshall v. Mason, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340; Schouler, Wills, 151.

Loring, J., delivered the opinion of the court:

This appeal from a decree of the probate court comes before us upon a report by a single justice of this court, which sets forth all the evidence introduced before him. The single justice found that the testimony of each subscribing witness was "entirely credible and not open to doubt," and made a finding that the instrument was properly

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signed by the testator. Any material deviation from the manner of execution required by the statute must necessarily be fatal to the validity of the instrument. In this case neither the testatrix nor the witness saw the other sign the paper. After the testatrix signed it she sent it by a nurse into the next room for the witness to sign. After the witness signed the paper, the nurse brought it back and delivered it to testatrix, who examined it and said it was all right.

In Michigan the statute does not specify that the testator sign in the presence of the witnesses. Consequently where a testatrix re-executed her will by retracing her signature with a dry pen, although one of the witnesses did not see her do so, it was held in Re Kohn, 172 Mich. 342, 137 N. W. 735, sufficient for the testatrix to acknowledge that the signature was hers. The court stated the rule that "the testator need not sign the will again; for if he acknowledges his signature before the required number of witnesses, with the proper formalities, this is good for either re-execution or an original execution." If the testator acknowledges and asserts to the attesting witnesses that the signature is his, a prima facie presumption arises that it was affixed when and in form required by law; but if the evidence on the trial shows to the contrary, the will cannot be sustained.

It is held in Re Herring, 152 N. C. 258, 67 S. E. 570, that while it is necessary that testator should either sign his name in the presence of witnesses, or should acknowledge his signature thereto in their presence, it is not necessary that the testator acknowledge his signature in express words. He may acknowledge it by acts and conduct. Brown, J., concurring, said: "In states like ours where the statute is similar to the statute of frauds, the decisions of the English courts are justly esteemed as authority, and they hold that an acknowledgment of a will may be manifested by the acts and conduct of the testator and the circumstances surrounding him at the time the witnesses attest the same, and that the express verbal acknowledgment by the testator of a visibly apparent signature is unnecessary."

Under Revisal 1905, § 3113, providing that "a written will with witnesses must have been prepared in the testator's lifetime and signed by him or some other person in his presence and by his direction and subscribed in his presence by two witnesses at least," it is held in Watson v. Hinson, 162 N. C. 72, 77 S. E. 1089, that it is not necessary that the testator should sign the will in the presence of the witnesses; that it is sufficient that the will be acknowledged by the testator in their presence, the will being physically present and identified. To the same effect is Table Rock Lumber Co. v. Branch, 158 N. C. 251, 73 S. E. 164, and Re Bowling, 150 N. C. 507, 64 S. E. 368.

In New York state the statutory requirement is that the testator shall subscribe the will in the presence of each of the attesting witnesses, or shall acknowledge his signature to each of them.

Under this statute a will was held validly executed in Re Levengston, 158 App. Div. 69, 142 N. Y. Supp. 829, where, after writing and signing the will, testator called witness to his desk, where he had written it, and, showing him the instrument, asked him to sign it, saying it was his last will and testament, whereupon witness, who saw testator's signature, did as instructed in the presence of the testator.

executed and that it ought to be admitted to probate as the will of Thomas Nunn. By the terms of the report, if the finding was wrong the decree of the probate court (disallowing the will) is to be affirmed. But if the finding is sustained, that decree is to be reversed and a decree entered admitting the instrument to probate.

A fac simile of the will is made part of the report. The will was written on ordinary foolscap paper; that is to say, on paper folded at the top and with lines ruled upon it. The whole paper is in the handwriting of the deceased. A copy of the ending of it is set forth in the footnote.[1] The *in testimonium* clause begins at the foot of the first page and ends on the second line of the second page. The attestation clause begins on the next line and fills five lines and a part of the sixth line. On the next line below and on the right hand side of that line occur the words "[Signed] Thomas Nunn." On the three lines next below that line and on the left-hand side of those lines are the names: "Mrs. Mary E. Marshall. John Marshall. Thomas G. Andrews." On the same line with "Thomas G. Andrews," and on the right hand side of that line, are the words "Thomas Nunn."

According to Mrs. Marshall's testimony it appeared that a few days before she and her husband signed the instrument here in question the deceased had asked her if she and her husband would sign his will; that later on he came into their kitchen and took the will out of his pocket; that "it was

[1] In testimony whereof I hereunto set my hand and in the presence of three witnesses declare this to be my last will and testament, this first day of March, A. D. 1908. Thomas Nunn of Malden in the said commonwealth.

On this first day of March, 1908. Thomas Nunn of Malden in said commonwealth, sign the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three at his request and in his presence hereto subscribe our names.

[Signed] Thomas Nunn.
Mrs. Mary E. Marshall.
John Marshall.
Thomas G. Andrews. Thomas Nunn.

Where a will is not signed by the testator before an attesting witness, but it is produced by testator with testator's signature visible thereon, and testator then acknowledges to the witness that the instrument is testator's will, a distinct acknowledgment of the testator's signature is necessarily involved in the testator's acknowledgment of the will and request to witness same. The best recollection of an attesting witness that two signatures were on the will when he signed is sufficient to establish that he saw testator's signature. Re Nussbaum, 144 N. Y. Supp. 443.

Where a witness did not see testator's name subscribed to the will, and did not know whether it was there, but the signature was in plain sight, and the witness could not have signed where he signed without being in a position to see testator's signature, the will, so far as this witness was concerned, was held validly executed. Re Bassett, 146 N. Y. Supp. 842.

The actual exhibition and disclosure by the testatrix to the witnesses of both will and signature, accompanied with a declaration of the testamentary character of the instrument, is a sufficient acknowledgment of the signature within the requirements of the statute. Re Holmberg, 83 Misc. 245, 145 N. Y. Supp. 846.

But the court refused to probate a will in Re Harty, 148 N. Y. Supp. 1052, where it appeared that neither witness saw testatrix sign her name, that one was not positive as to whether or not he observed her signature, and the other signed as a witness after a lapse of nearly three years. The court observed that the signing or acknowledgment by the testator, and the publication and the attestation of the witnesses, must be successive, continuous, and contemporaneous acts, and the lapse of over two years after the instrument was signed by one witness before it was signed by the other exceeds all reasonable limitations.

So, where a witness does not see testator sign, the failure of the testator to acknowledge his signature is fatal under the statute. Re Roe, 82 Misc. 565, 143 N. Y. Supp 999.

So, a will is invalidly executed where one of the witnesses did not see testator's signature at the end of the will, but saw only the attestation clause, and it was positively testified by the witness that the only thing he saw was testator's name written into the attestation clause. The will was not signed in the presence of either of the witnesses. To be validly executed, the subscription, not the will, must have been acknowledged to each of the witnesses. An acknowledgment to one will not do. Re Keeffe, 155 App. Div. 575, 141 N. Y. Supp. 5, affirmed in 209 N. Y. 535, 102 N. E. 1104.

Under a statute requiring that all testaments shall be signed by the testator, which signature shall be made, or the making thereof acknowledged, by him, and the writing declared to be his last will in the presence of two witnesses, his name in the caption can only be made his signature to a will by acknowledging it as such, where he does not write it in the presence of the witnesses. So, his name in the attestation clause can be his signature to a will where he writes it in the presence of the witnesses if, and only if, it is his intention to make it his signature for the purpose of the execution of the will, instead of writing a more formal and disconnected signature; in other words, instead of the usual and familiar "signing." In Re Phelan, 82 N. J. Eq. 316, 87 Atl. 625. J. D. C.

L.R.A.1915B.

folded up;" that as he turned it over she saw handwriting on it and recognized the writing as the writing of the deceased, but could not "recognize any word;" that they were sitting on opposite sides of a table, and the deceased "reached" the folded paper across to her and she signed; that he held on to the paper while she signed; that it was folded "just so I could sign comfortably," and so that she saw nothing above where she put her name. She saw no signature below the edge made by the folding of the paper. She further testified that she then got up out of the chair in which she sat while signing her name; that her husband sat down and signed his name, and that the deceased held on to the paper folded as above described until both had signed. He then blotted the signatures, put the paper in his pocket, and went away. She further testified that when she caught sight of the writing while the paper was being turned over she did not distinguish any words or see any signature. This testimony was corroborated by that of her husband. He was explicit in his testimony that no change was made in the arrangement of the paper while his wife and he signed, and that the deceased did not point to any signature in the will. In his testimony he said, "I don't remember seeing any signature." It should be added that after his death the instrument now presented as the will of the deceased was found in his box in a safety deposit vault.

This case, therefore, presents the question whether a will is duly attested when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will.

Our statute of wills (in substance a re-enactment of the statute of frauds [Stat. 29, Car. II., chap. 3, § 5 [2]]) is in these words: "Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal"—with some additions not necessary to be stated. Rev. Laws, chap. 135, § 1.

In Chase v. Kittredge, 11 Allen, 49, 63, 87 Am. Dec. 687, a statement was made of the meaning of the word "attested" in what is now Rev. Laws, chap. 135, § 1. The decision in Chase v. Kittredge was that a subscribing witness cannot sign before the testator has signed. In making that decision Mr. Justice Gray delivered an exhaustive opinion upon the acts required by statute to make a valid will. In the course of that opinion he said: "The statute not only requires them [the witnesses] to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when, after the testator's death, the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has made it his written will."

Chief Justice Robertson gave a similar definition of the word "attest" in Swift v. Wiley, 1 B. Mon. 114, 117. He said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write on the same paper the names of the witnesses, for the sole purpose of identification."

See, in this connection, Reed v. Watson, 27 Ind. 442, 447; Gerrish v. Nason, 22 Me. 438, 441, 39 Am. Dec. 589; Brooks v. Barrett, 7 Pick. 94, 98.

If, however, the matter were *res integra*, the conclusion reached in the cases cited above would be the conclusion which would have to be reached by a due construction of the statute of wills. Rev. Laws, chap. 135, § 1. The statute requires that the deceased shall be a person of full age and sound mind, that his will shall be reduced to writing, and that the writing shall be signed by him (or by a person in his presence and by his express direction), and that it shall

[2] Stat. 29, Car. II., chap. 3, § 5, is as follows: "From and after said four and twentieth day of June, all devises and bequests of any lands or tenements devisable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same, or by some other person in his presence by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses or else they shall be utterly void and of none effect."

be "attested and subscribed in his presence by three or more competent witnesses." The subscription of the paper by the witnesses identifies the instrument. What, then, does the statute mean when it requires in addition that the instrument shall be "attested" by the witnesses? To attest means to bear witness. When the statute requires that the witnesses shall attest, what is it that they are to bear witness to? Plainly, to those facts to which they have to testify when put on the stand as attesting witnesses, namely, that those things existed and were done which the statute requires must exist and be done to make the writing a valid will. The rule that the will must be proved by the attesting witnesses, if they can be produced (as to which see Chase v. Lincoln, 3 Mass. 236; O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788), is founded on this assumption. In Chase v. Lincoln, ubi supra, this court said at page 237: "The legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the three witnesses, to be given to the jury. They must therefore all be produced, if living, and under the power of the court."

Taken literally, Rev. Laws, chap. 135, § 1, requires that the instrument in writing shall be "signed" by the deceased (or by a person in his presence and by his express direction), in the presence of the witnesses. But as matter of construction it was early established that an acknowledgment by the deceased in the presence of the witnesses of a previous signature was equivalent to signing the instrument in their presence. Chief Justice Shaw, in his charge to the jury in Hall v. Hall, set forth in 17 Pick. 373, 375 (and quoted in full on this point later on in this opinion), made a statement in substance to that effect. In Dewey v. Dewey, 1 Met. 349, 352, 35 Am. Dec. 367, Mr. Justice Dewey said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with the request that the person should attest as a witness, is clearly sufficient."

Gray, J. in Chase v. Kittredge, ubi supra, said: "The statute requires that the will shall 'be in writing and signed by the testator,' and shall be 'attested and subscribed, in the presence of the testator, by three or more competent witnesses.' He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it."

And the law is settled to the same effect in other jurisdictions. A collection of cases may be found in a note in 38 L.R.A. (N.S.) 164.

It may be taken to be settled, therefore, first, that the attestation required by Rev. Laws, chap. 135, § 1, consists in the witnesses seeing that those things exist and are done which the statute requires must exist or be done to make the written instrument in law the will of the deceased; second, that although the act required by Rev. Laws, chap. 135, § 1, is that the will shall be "signed" by the deceased, yet as matter of construction an acknowledgment by the deceased of a previous signature, made in the presence of the attesting witnesses, is equivalent to signing in their presence.

With these two propositions established we come to the question presented in the case at bar, namely: Is there an acknowledgment by the deceased of a previous signature where the signature at the time is hidden from the witnesses? Chief Justice Shaw put that (the case of a hidden signature) as an example of an instance where without question there was not an acknowledgment by the deceased of his signature. In his charge to the jury, set forth in Hall v. Hall, already referred to, he said: "That to maintain the issue on the part of the executor, and to establish the will, it was necessary to prove that the testatrix signed the will in presence of the witnesses, or that she acknowledged the signature as hers in their presence; and that they severally signed it as witnesses in her presence; and that such acknowledgment was a sufficient compliance with the statute. But in the latter case such acknowledgment may be shown, either by proof of an express acknowledgment and declaration that the signature to the will is hers, or by such facts as will satisfy the jury that she intended to make such declaration or recognition of her signature. If a mere reference is made to a paper, especially if produced by another person, and not held in her own custody, or if it is folded up, and there is no pointing to or referring to the signature, if she publishes, declares, and acknowledges such document to be her will, this is not such an acknowledgment of the signature as will supersede the necessity of an actual signature in the presence

of the witnesses, and will not warrant the jury in finding that it was duly signed in the presence of the witnesses."

And the law is settled in accordance with this view in England (Hudson v. Parker, 1 Rob. Eccl. Rep. 14; Blake v. Blake, 7 Prob. Div. 102, 51 L. J. Prob. N. S. 36, 51 L. J. Ch. N. S. 377, 46 L. T. N. S. 641, 30 Week. Rep. 505), in New York (Re Mackay, 110 N. Y. 611, 1 L.R.A. 491, 6 Am. St. Rep. 409, 18 N. E. 433. Re Laudy, 148 N. Y. 403, 42 N. E. 1061), in Minnesota (Tobin v. Haack, 79 Minn. 101, 81 N. W. 758), and in Oregon (Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455). An opposite conclusion was reached in Re Dougherty, 168 Mich. 281, 38 L.R.A.(N.S.) 161, 134 N. W. 24, Ann. Cas. 1913B, 1300.

Apart from authority, it is manifest that a person does not acknowledge a signature to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed. While an acknowledgment of a signature then exhibited to the witnesses is equivalent to signing in their presence, an acknowledgment to the witnesses of the fact that a signature has been made is not the equivalent of signing in their presence. It follows that where the signature is hidden there is not the equivalent of the statutory requirement that the writing shall be "signed" in the presence of the attesting witnesses.

It is true that Hudson v. Parker, 1 Rob. Eccl. Rep. 14, and Blake v. Blake, L. R. 7 Prob. Div. 102, 51 L. J. Prob. N. S. 36, 51 L. J. Ch. N. S. 377, 46 L. T. N. S. 641, 30 Week. Rep. 505, were decided under Stat. 1 Vict. chap. 26, § 9,[3] which in terms requires that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses." But is of no consequence whether the conclusion (that the signature must be made by the testator in the presence of the witnesses, or acknowledged by him in their presence) is reached as matter of construction (as in Rev. Laws, chap. 135, § 1) or as matter of express enactment (as it is under 1 Vict. chap. 26, § 9). The conclusion, however reached, being the same, cases in both jurisdictions are equally in point.

It is the contention of the proponent that however this question might have been decided if the matter had been *res integra*, the point is concluded by the case of Dewey v. Dewey, 1 Met. 349. It will be necessary to examine that case with some particularity. The instrument propounded in that case as the will of the deceased (Timothy Dewey by name) was subscribed by Medad Fowler, Josiah Fowler, and Silas Root as witnesses. There was no question as to the sufficiency of the attestation on the part of Silas Root. The question presented in that case was that of the sufficiency of the attestation by Medad and Josiah Fowler. Medad Fowler testified that his name, which was upon the will, "appeared to be his handwriting, but that he had 'no recollection anything about it.'" His son, Josiah Fowler, testified that the deceased asked him and his father to sign a paper which he called his will, "and not to read it." He "thought he did not see . . . Timothy sign it; but the deponent and his father signed it as witnesses, without reading it. Deponent did not recollect seeing a word of writing on the paper, which he 'thought, at the time, was not right, or as it should be.'" At the trial, after the testimony of the subscribing witnesses had been given, the case was taken from the jury, and, by agreement of the parties, was left to the determination of the full court. The opinion begins in these words: "The only question raised in this case is whether this will was duly attested," and ends with these: "It seems to us, upon the whole evidence, that the will was duly signed by the testator, and being thus signed, he by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of it to authorize the three witnesses to attest and subscribe the same as witnesses thereto, in accordance with the provisions of the statute."

There was no suggestion that the signature of the deceased was hidden from Medad and Josiah Fowler when they subscribed the will as witnesses. The case at bar, therefore, is not concluded by the decision made in Dewey v. Dewey. Not only is that true, but there is nothing in the opinion which is decisive of this case. When Mr. Justice Dewey said that the deceased "by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of" the will, he must be taken to have meant that the deceased, by his acts, if not by his declarations, sufficiently recognized and acknowledged the previous signature made by him. In an earlier part of his

[3] Stat. 1 Vict. chap. 26, § 9, is as follows: "And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

opinion Mr. Justice Dewey had said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient. Stonehouse v. Evelyn, 3 P. Wms. 254; Grayson v. Atkinson, 2 Ves. Sr. 456, 1 Dick. 158. So, a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to authorize their attestation to it, and to make it a good will."

A declaration by the testator that a paper bearing his signature, then exhibited to the witnesses, is his will, is a sufficient acknowledgment of the signature to authorize the attestation of the will. That was the case to which Mr. Justice Dewey's statement was addressed. Whether such a declaration would be sufficient if the signature were hidden from the witnesses was not before the court in Dewey v. Dewey; and what was said there cannot be taken to have been said with reference to such a case.

There is one point on which the decision in Dewey v. Dewey, is not clear, and that is the view which the court should be held to have taken with respect to the testimony of Josiah Fowler. Josiah Fowler did not testify that he did not see the signature of the deceased when he and his father signed as subscribing witnesses. What he did testify to was that he "did not recollect seeing a word of writing on the paper." The distinction is plain. As Mr. Justice Dewey said on pages 353 and 354 of 1 Met.: "The question is not whether this witness [he was then speaking of Medad Fowler] now recollects the circumstance of the attestation, and can state it as a matter within his memory. . . . The real question is whether the witness did in fact properly attest it [the will]."

It is what was done in fact which is to be looked to in determining whether the attestation is good or not. Testimony of a witness, given at the time that the instrument is offered for probate, that he does not recollect that a certain act was done, is a different thing from testimony that that act was not done. In Dewey v. Dewey the full court were finding the facts as well as ruling upon the law. Whether they intended to find that although Josiah Fowler did not recollect seeing the signature of the deceased, that signature was seen by him and his father, Medad Fowler, or whether the full court meant to find that the signature was not in fact seen by either of them, is not clear. Of these two it is not necessary to determine which is to be taken to have been the view of the court in Dewey v. Dewey. Whichever is the true view of that opinion, it is not decisive of the question which has to be decided here. The court could have found that Medad and Josiah saw the signature of the deceased, but did not recollect that fact when they testified; or, if they found that Medad and Josiah did not see it, there is authority for the proposition that where the testator exhibits his signature to the witnesses and asks them to subscribe their names as witnesses, the attestation is valid because he has in fact acknowledged his signature to those witnesses, even though the witnesses did not in fact see it. In such a case he has exhibited his signature to them, and that, coupled with a request that they should sign as witnesses, is an acknowledgment of his signature. In such a case it is not necessary that the signature exhibited to them by the testator should have been seen by the witnesses. That was the ground on which Blake v. Blake, L. R. 7 Prob. Div. 102, 51 L. J. Prob. N. S. 36, 51 L. J. Ch. N. S. 377, 46 L. T. N. S. 641, 30 Week. Rep. 505, was decided by the court of appeal in 1882. It was there said that it is enough that the signature which was acknowledged could have been seen by the witnesses. That is vital. Whether it was in fact seen by them is not a matter which is decisive.

Cases like Ela v. Edwards, 16 Gray, 91, where it is held that a will can be allowed on proof of the authenticity of the signatures of the deceased and of the attesting witnesses when these witnesses are all dead or for any other reason cannot be produced, do not conflict with the conclusion reached by us in the case at bar. These are not cases holding that the ultimate fact to be proved is not a signing by the deceased or the acknowledgment by him of a previous signature then exhibited to the witnesses. They are cases deciding how that fact may be proved when the attesting witnesses are dead, or for other reasons cannot testify; and they hold that in such cases the ultimate fact to be proved may be proved by circumstantial evidence aided by the doctrine *omnia rite esse acta præsumuntur*.

Another case relied upon by the proponent is Meads v. Earle, 205 Mass. 553, 29 L.R.A.(N.S.) 63, 91 N. E. 916. That case came before this court upon a report from which it appeared that the instrument propounded as her will was written by the deceased (who was a school-teacher) without advice. It was not signed in the usual place between the attestation clause and the *in testimonium* clause, but the single justice found as a fact that the deceased, when she wrote her name at the head of the blank, intended that to be her signature to the

will. It was also found by the single justice that the deceased "by words and conduct acknowledged and declared the will before the subscribing witnesses and that the subscribing witnesses signed the attestation clause in her presence, at her request, and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature." In the opinion of the court in that case it was said: "The will was therefore properly signed. Lemayne v. Stanley, 3 Lev. 1. And the signature was properly attested. Dewey v. Dewey, 1 Met. 349, 35 Am. Dec. 367, and cases cited; Adams v. Field, 21 Vt. 256."

Nothing further was said as to the validity of the attestation. Whether there was or was not a valid attestation of that will does not seem to have been an issue which was tried before the single justice, and it is certain, from an examination of the brief presented by the contestant to the full court, that no question on that point was made here. The only objection to the will made by the contestant in his argument before the full court was to the finding of the single justice that when the deceased wrote her name at the head of the will she intended that to be her signature to the will. No other attack upon the validity of the execution of the will was made before this court.

The proponent also has relied upon Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536. That was a case where the attestation was held valid although the previous signature of the deceased was hidden from the subscribing witnesses when the deceased asked them to sign, saying that the paper was his will. But the Illinois act (Ill. Rev. Stat. chap. 148, § 2) does not provide that the testator shall acknowledge a previous signature. The Illinois act provides that the attesting witnesses must declare on oath "that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledge the same to be his or her act and deed." It was held as matter of construction of that statute that what is to be acknowledged by the deceased is that the paper signed by the subscribing witnesses is his will.

It is hard to understand what the attestation of a will consists in if the contention of the proponent is right. The subscription of the witnesses identifies the paper. But the statute, in requiring that the will must be "attested," means that something more must be done than the identification of the paper by the subscribing of the witnesses. It cannot be that the requirement that the will should be "attested" means that the testator shall inform the witnesses that the paper is his will. The contrary is settled law, at least, in this commonwealth. Hogan v. Grosvenor, 10 Met. 54, 43 Am. Dec. 414; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Tilden v. Tilden, 13 Gray, 110. If the subscribing witnesses need not know that the paper subscribed by them is the will of the deceased, it is hard to understand what is required by the word "attested" in addition to the word "subscribed," if the definition of "attested" given in Chase v. Kittredge and the other cases cited above is not correct. On this point the argument of the proponent has given us no aid.

It follows that when the deceased hides from the subscribing witnesses the signature which is upon the instrument previously signed by him, and goes no further than to ask the subscribing witnesses to sign the paper placed before them, even if that request be accompanied by a statement that the paper is his will, there is no acknowledgment by the deceased of his signature, and so no valid attestation of his signature by the subscribing witnesses. All that is acknowledged by the deceased in that case is that the paper is his will. In such a case there is no acknowledgment by the deceased that the signature on the paper (if there be a signature upon it) is his signature. We are of opinion that the charge of Chief Justice Shaw in Hall v. Hall, 17 Pick. 373, set forth above, and the decisions made in Hudson v. Parker, 1 Rob. Eccl. Rep. 14; Blake v. Blake, supra: Re Mackay, 110 N. Y. 611, 1 L.R.A. 491, 6 Am. St. Rep. 409, 18 N. E. 433; Re Laudy, 148 N. Y. 403, 42 N. E. 1061; Tobin v. Haack, 79 Minn. 101, 81 N. W. 758; and Richardson v. Orth, 40 Or. 252, 66 Pac. 925, 69 Pac. 455, are correct. It follows that there was no valid attestation of the will of Thomas Nunn in the case at bar.

It is undoubtedly the fact that Thomas Nunn thought that he had made his will, and it is a matter of regret, under these circumstances, to have to come to the conclusion that the paper which he signed, thinking that it was his will, is not in law his will. But that regret arises in every case in which a deceased person has failed to comply with those requirements which, as a matter of public policy, the legislature has thought proper to exact in case a person wishes to dispose of his property by will. The legislature might have provided (as it has been held that the legislature of Illinois did provide) that if the paper was signed by the deceased, it would be enough if he acknowledged it to be his will in the presence of the persons who signed the paper as witnesses. But that is not the provision which was adopted in Rev. Laws,

chap. 135, § 1, and the earlier acts of which this is the re-enactment.

It follows that by the terms of the report, the decree of the Probate Court must be affirmed.

It is so ordered.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. FRANK MURPHY
v.
HENRY WOLFER, Warden of the State Prison at Stillwater.

(127 Minn. 102, 148 N. W. 896.)

Sentence — life — commutation — good conduct.

A prisoner sentenced to the state prison for life, whose sentence is commuted to one for a term of years, is entitled to diminution of that sentence by reason of good conduct commencing on the day of his arrival in prison, and not from the time of commutation of his sentence.

It is the practice of this court to refuse to issue writs of habeas corpus in ordinary cases and unless the circumstances are exceptional. In view of the importance of the case and the importance of an early final determination of it, this original proceeding is entertained.

(October 2, 1914.)

APPLICATION for a writ of habeas corpus to secure relator's release from custody to which he had been committed after conviction of murder in the second degree. Relator discharged.

The facts are stated in the opinion.

Mr. Harold J. Richardson, for relator:

A commutation is a substitute for the original sentence, so that the legal status of a prisoner, after his sentence has been

Headnote by HALLAM, J.

Note. — Time allowance to prisoner whose sentence has been commuted from life to a term of years.

The definition of a "commutation of a sentence," given by the court in STATE EX REL. MURPHY v. WOLFER, is the one that is generally accepted. Thus, in Bouvier's Law Dictionary the term is defined as "the change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides." This definition is quoted in American & English Encyclopædia of Law, and has been stated in varying forms by the courts in many cases. (See cases cited in 29 Cyc. 1561, footnote 7.) But it is also said that "commutation of imprisonment allows a prisoner to acquire, by good behavior, a right to take a shorter term of imprisonment than that imposed by his original sentence." 3 Am. & Eng. Enc. Law, 365, footnote 7, citing Abbott's Law Dict. The question raised by this note involves both kinds of commutation, *i. e.*, that granted by the pardoning power and that earned by the good behavior of the prisoner.

Where a number of years have been served by one sentenced for life when the sentence is, by the pardoning power, commuted to a definite term of years, three questions at once arise: (1) Is the prisoner entitled to any statutory commutation in addition to that granted by the pardoning power? (2) Is he entitled to statutory commutation for good behavior based upon only the time served after the sentence was reduced to a term of years? (3) Is he entitled to statutory commutation for good behavior based upon the whole time of his imprisonment?

Where the pardoning authority clearly indicates in the grant of commutation what additional reductions, if any, in the length of the sentence, are to be made for good conduct, the question raised by this note should be settled thereby. Sound reason and one authority (Re Hall, infra) support this proposition. But see Re McMahon, infra.

Where the grant of commutation simply fixes the length of the term of imprisonment and is silent as to any statutory commutation for good conduct, any statute granting such commutation of sentences for a term of years would, under the reasoning in STATE EX REL. MURPHY v. WOLFER, be applicable so as to further reduce the length of the commuted sentence. This, of course, answers the first question, supra, in the affirmative. The answer to the other two questions must depend upon the construction of the particular statute under which the statutory commutation is claimed.

The first question has been answered in the negative. Re Hall, 34 Neb. 206, 51 N. W. 750. But the decision turns upon the language used by the pardoning power in the grant, it being, "I . . . do hereby commute the sentence . . . from life to nine years of actual time in said penitentiary, and when he shall have served nine years' actual time in said penitentiary, he shall be discharged." And the court, while holding that the prisoner must serve nine full years without any reduction for good behavior, because of the language used in the grant, approves of the same line of reasoning that is used in STATE EX REL. MURPHY v. WOLFER, and no doubt would have reached the same conclusion had there been no indication that the governor intended otherwise.

In Re McMahon, 125 N. C. 38, 34 S. E. 193, the court answers the first question in the affirmative, but limits it by answering the second question also in the affirmative, and the third in the negative. This position was taken notwithstanding the fact that the grant by the pardoning power com-

commuted, is exactly the same as it would have been if the sentence had been originally the same as the substituted one.

24 Am. & Eng. Enc. Law, 522, 597; Re See-see-sah-ma, 5 Ops. Atty. Gen. 370; Opinion of Atty. Gen. (Minn.) Oct. 16, 1913; Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep 563; Ex parte Collins, 94 Mo. 22, 6 S. W. 345; Ex parte Victor, 31 Ohio St. 206; Re Hall. 34 Neb. 206, 51 N. W. 750.

The statute providing for a diminution of sentence by good conduct is self-acting, if the prisoner's conduct meets the conditions of the statute, and such will be the presumption if the prison record shows no unexcused delinquencies recorded against him.

Opinion of Justices, 13 Gray, 618.

Mr. C. Louis Weeks, Assistant Attorney General, for respondent:

"Good time" is earned from month to month, and is earned solely by virtue of the prisoner's conduct and status from month to month.

Re Kness, 58 Kan. 705, 50 Pac. 939.

Relator could not earn any good time.

Re McMahon, 125 N. C. 38, 34 S. E. 193; Chattahoochee Brick Co. v. Goings, 135 Ga. 529, 69 S. E. 865, Ann. Cas. 1912A, 263; Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047.

A pardon does not have any retroactive effect, it does not and cannot wipe out the fact of guilt, nor can it change the status of the person pardoned, except as to the future.

Cook v. Middlesex, 26 N. J. L. 326, affirmed in 27 N. J. L. 637; Roberts v. State, 160 N. Y. 221, 54 N. E. 678, 15 Am. Crim. Rep. 561; Re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234.

The effect of the commutation, which was granted by the board of pardons because of its constitutional power to grant pardons, was, so far as the powers of the board were concerned, to put an end to the period of relator's imprisonment when he should have served thirty years.

Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563; Rich v. Chamberlain, 107 Mich. 381, 65 N. W. 235; Re Convicts, 73 Vt. 414 56 L.R.A. 661, 51 Atl. 10.

Hallam, J., delivered the opinion of the court:

On October 23, 1893, the relator, Frank Murphy, was sentenced to the state prison for life. On October 30, 1893, he commenced serving his term, and he has ever since been imprisoned. On July 24, 1914, the state board of pardons commuted the sentence to imprisonment for the term of thirty years. During the time of relator's imprisonment his conduct has been such that, if his sentence had been originally for the term of thirty years, he would now be entitled to his liberty, under the law relating to the diminution of sentences by reason of good conduct in prison. The only question in the case is whether the relator is entitled to credit by reason of good conduct prior to the commutation of his sentence.

The statute provides:

"Every convict sentenced for a definite

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muted a life sentence to one of "twelve years, subject to his right to commutation for good behavior." The court held that this language meant that the statutory commutation should be based upon only the time served after the date of the grant, and fortified the conclusion by the fact that if it meant otherwise, the prisoner would have had but twenty-three days to serve after the date of the grant. But, in reference to this language, the court said: "It only expresses what we hold the law to be. If it was not the law, the governor could not make it the law. He has no lawmaking power, and we cannot suppose and do not suppose that he undertook to make any law applicable to the petitioner." This might be regarded as *dictum* but for the fact that it apparently was the decisive argument for the court's interpretation of the governor's language. The statement, whatever its weight in the particular case, is not a sound rule for general application, since it is apparent that fixing definitely the extent of the commutation is purely a function incidental to the exercise of the pardoning power, and is in no sense the exercise of lawmaking power. The court did not and could not deny that the governor had the power to fix the term at such length that the prisoner would have been entitled to his release in twenty-three days after the date of the grant. Suppose that he intended to do so, and in order to make clear that intention, he added to the intended term the exact amount of time to which he supposed the prisoner would be entitled, under the law, for good behavior, thus actually fixing the term longer than the intended term by that amount, and then specifically directed that the credits for good behavior be given. If it should later appear that the governor was mistaken in supposing the prisoner to be entitled to credits under the law, the latter should in all fairness receive the equivalent thereof as included in the grant by the pardoning power. In such case, it is clear that there was no exercise by the governor of legislative power, and it is but splitting hairs to say that under the law the prisoner cannot receive credit for time earned by good behavior, but he may have credit for the same length of time as part of the grant under the pardoning power. J. W. M.

L.R.A.1915B.

term other than life . . . may diminish such term as follows:

"First—For each month, commencing on the day of his arrival, during which he has not violated any prison rule or discipline, and has labored with diligence and fidelity, five days.

"Second—After one year of such conduct, seven days for each month.

"Third—After two years of such conduct, nine days for each month.

"Fourth—After three years, ten days for each month for the entire time thereafter."

Gen. Stat. 1913, § 9309.

There is very little in the decided cases that throws much light upon the construction of this statute. A few principles applicable to the case are, however, well settled. It is well settled that a commutation of a sentence is a substitution of a less for a greater punishment. After commutation, the commuted sentence is the only one in existence, and the only one to be considered. After commutation, the sentence has the same legal effect, and the status of the prisoner is the same, as though the sentence had originally been for the commuted term. Johnson v. State, — Ala. —, 63 So. 163; Re Hall, 34 Neb. 206, 209, 51 N. W. 750; Re See-see-sah-ma, 5 Ops. Atty. Gen. 370; Lee v. Murphy, 22 Gratt. 789, 799, 12 Am. Rep. 563; Ex parte Victor, 31 Ohio St. 206, 208. It should logically follow that when a prisoner's sentence is reduced from a life sentence to "a definite term other than life," he is brought within the language of the statute allowing a diminution of such a definite term for good time. This view is sustained by the decision in Re Hall, 34 Neb. 206, 51 N. W. 750, and it seems to us correct in principle.

The contention of the state is not that the prisoner is not entitled to credit for "good time" at all, but that the "good time" credited to him is to be computed from the time of the commutation of his sentence. We find no warrant in the language of the statute for this construction. The statute is explicit as to the time when the computation of credit for good conduct commences. When credit for "good time" is allowed to a prisoner at all, it commences, by the express terms of the statute, "on the day of his arrival" in prison. In Re McMahon, 125 N. C. 38, 34 S. E. 193, a case which seems to sustain the contention of the state, the statute construed differs from ours in this particular.

The view of the state further appears to be that the theory of the allowance of good time is that it is something which, if ever credited at all, must be credited from month to month as it is earned, and that, inasmuch as it could not be credited in this manner as long as the prisoner was serving a life sentence, it is not available in diminution of the commuted sentence. This is not the theory of the statute. Good time is not really credited to the prisoner at all until enough has been earned to give him his liberty. Up to that time all benefit to the prisoner on account of good time is liable to forfeiture by reason of a provision that the board of control, "in view of the aggravated nature and frequency of offenses, may take away any or all of the good time previously gained." Gen. Stat. 1913, § 9309. Nor is it true that good time cannot under any circumstances be credited from time to time to a person serving a life sentence. Another statute provides that "no convict serving a life sentence shall be paroled until he has served thirty-five years, less the diminution which would have been allowed for good conduct had his sentence been for thirty-five years." Gen. Stat. 1913, § 9319.

We do not, however, regard these considerations of primary importance. We base our decision on the proposition that the fair construction of § 9309 is that every prisoner serving a sentence for a fixed term of years, whether it be an original or a commuted sentence, is entitled to a diminution of that sentence by reason of good conduct "commencing on the day of his arrival" in prison. It follows that the relator has completed his sentence and is entitled to be discharged from prison.

In this case the original writ of habeas corpus was issued out of this court, running to the respondent in Washington county. This court, as well as the district court, may, subject to certain restrictions, issue an original writ of habeas corpus. Gen. Stat. 1913, § 8284. We are not unmindful of the decision in Re Doll, 47 Minn. 518, 50 N. W. 607, to the effect that the statute contemplates that the application for the writ should be addressed to a court or judge in the county where the prisoner is restrained, if there be one present and willing to act, and it has been the practice of this court to refuse to issue writs of habeas corpus in ordinary cases and unless the circumstances are exceptional. But in this case relator and respondent joined in consent to the commencement and determination of this proceeding in this court, and, in view of the importance of this case and the importance of an early final determination of the question presented, since several other similar cases await the result of this one, this original proceeding is entertained.

Relator discharged.

Brown, Ch. J., took no part.

KANSAS SUPREME COURT.

JESSE B. HINTHORN, Appt.,
v.
HUGH H. BENFER.

(90 Kan. 731, 136 Pac. 247.)

Landlord and tenant — landing for common stairway — duty.

1. A narrow porch or landing of an outside stairway used and intended for the use of different tenants of a building, and connected with a common hallway, is part of the stairway itself, and necessarily in the possession and control of the landlord, and he is bound to exercise reasonable care to render it safe for the use which he invites others to make of it.

Headnotes by PORTER, J.

Trial — jury question.

2. Whether the landlord in this case was guilty of negligence in failing to discover the defective condition of the landing was a question of fact for the jury, and it was error to sustain a demurrer to the evidence.

(November 8, 1913.)

APPEAL by plaintiff from a judgment of the District Court for Brown County in defendant's favor in an action brought to recover damages for the death of plaintiff's wife, alleged to have been caused by defendant's negligent construction and maintenance of a porch railing. Reversed.

The facts are stated in the opinion.

Messrs. **Sample F. Newlon** and **S. M. Brewster**, for appellant:

The landlord is liable for injuries that

Note. — Liability of landlord for defect in porch or steps used in common by different tenants, or giving access to common hall.

The present note is confined to one feature of the question as to the liability of the lessor of premises for personal injuries occasioned by defects therein; that is, to injuries caused by a defective porch or steps leading to a porch. The important question in such case, of course, is whether or not the porch or steps leading thereto were used in common by different tenants. The more general question as to the liability of the landlord to tenants, or persons assumed to have the same rights as tenants, for injuries from defects in leased premises, is treated in notes in 34 L.R.A. 829, 34 L.R.A. (N.S.) 798, and 48 L.R.A.(N.S.) 917, including, the right of a tenant to recover for personal injuries received through the landlord's breach of covenant to repair. The question as to the duty of the landlord to repair that portion of a building remaining in his possession is considered in a note in 14 L.R.A. 238, and the question as to the duty of the landlord to keep plumbing in proper repair is discussed in a note in 36 L.R.A.(N.S.) 907. As to the liability of a landlord to third persons for condition of premises in possession of the tenant, see note in 50 L.R.A.(N.S.) 286, and as to his liability for injuries or damages by falling articles caused by the condition of the leased premises, see note in 50 L.R.A.(N.S.) 312.

Liability as affected by nature of defect, whether latent or patent.

As to property used in common by different tenants, there is no obligation resting on any of the tenants to inspect it to determine whether or not it needs repairs, for unless the defect is so apparent that it is negligence to continue its use, every tenant has a right to rely upon the landlord to exercise reasonable care and skill to ascertain defects and repair them. HINTHORN v. BENFER.

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The owner of premises has been held not liable for injuries caused by an obvious defect in an appurtenance to a tenement described as a platform, used in common by different tenants, where it did not appear that the defect was other or different than it was when the tenant took possession of the premises. In this case, it was declared to be the duty of the landlord to keep the platform and common passageways in a condition as good as they were at the time of hiring, and to inform the tenant of any hidden defect therein which could not be discovered by the exercise of reasonable diligence, and of which the owner ought, for his proper protection, to have been informed (injury to child of tenant). Moynihan v. Allyn, 162 Mass. 270, 38 N. E. 497.

In Lynch v. Swan, 167 Mass. 510, 46 N. E. 51, 1 Am. Neg. Rep. 265, as to doorsteps of a tenement used by all the tenants as a means of entrance, which were under the control of the owner, and at the time of the letting were apparently sound and strong, but in fact defective, which fact was unknown to the tenant, but was or ought to have been known to the landlord, the landlord was held liable for injuries occasioned the tenant by the defect.

And in this state it has been held that where a temporary step used in common by different tenants was not entirely safe, but it might be used by the tenants if they exercised special care, and the owner permitted the step to remain for some time, and failed to keep it in as good condition as when he leased the premises, he was liable to the wife of one of the tenants for personal injuries received while making use of the steps. Ward v. Blouin, 210 Mass. 140, 96 N. E. 61.

The owner of an apartment house who raised the house, thereby increasing the distance between the floor of the porch and the steps, without informing his tenants, or by a barrier or some other means giving them notice of this change, is liable to a tenant injured by falling because of the change in the distance, although the accident occurred in the daytime, the condi-

occur through failure to exercise ordinary care in keeping up and repairing the common stairways and porches.

Dollard v. Roberts, 130 N. Y. 269, 14 L.R.A. 238, 29 N. E. 104; Andrus v. Bradley-Alderson Co. 117 Mo. App. 322, 93 S. W. 872; McGinley v. Alliance Trust Co. 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153; Leonard v. Gunther, 47 App. Div. 194, 62 N. Y. Supp. 99; Siggins v. McGill, 72 N. J. L. 263, 3 L.R.A.(N.S.) 316, 111 Am. St. Rep. 666, 62 Atl. 411, 19 Am. Neg. Rep. 385; Peil v. Reinhart, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; Neyer v. Miller, 19 Jones & S. 516; Gillvon v. Railly, 50 N. J. L. 26, 11 Atl. 481; Donohue v. Kendall, 18 Jones & S. 386; McGinley v. Alliance Trust Co. 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153; Feinstein v. Jacobs, 15 Misc. 474, 37 N. Y. Supp. 345.

There was evidence to go to the jury tending to show the landlord negligent in permitting the railing to become in the condition in which it was at the time of the accident.

Denver v. Dean, 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30; Furnell v. St. Paul, 20 Minn. 117, Gil. 101; Indianapolis v. Scott, 72 Ind. 197; Rapho Twp. v. Moore, 68 Pa. 404, 8 Am. Rep. 202; Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757; Weber v. Creston, 75 Iowa, 16, 39 N. W. 126; Joliet v. McCraney, 49 Ill. App. 381; McCarthy v. Syracuse, 46 N. Y. 194.

Deceased was not guilty of contributory negligence, although she had knowledge of the condition of the premises.

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tions not being such as to apprise the tenant of the change. Oliver v. Stoltenberg, — Cal. App. —, 142 Pac. 108.

—snow or ice.

The owner of premises leased to different tenants who used in common as a passageway a porch is bound to keep it in repair. This duty to repair, however, does not include the removal of snow and ice which may accumulate in the passageway and render its use difficult or dangerous, unless the accumulation is caused by the negligent act or omission of the owner. Thus, where the owner of such premises, in order to carry water from the eaves of the porch, used a conductor pipe, and negligently permitted it to get out of repair, so that it leaked and flowed upon the floor of the passageway, and a tenant slipped upon it and was injured, he was liable for such injury. Watkins v. Goodall, 138 Mass. 533.

And see DeMateo v. Perano, 80 N. J. L. 437, 78 Atl. 162, sustaining a judgment against the owner of a tenement house for injuries caused a tenant from an accumulation of ice on the floor of a porch used in common by different tenants, where this accumulation was caused through the negligence of the owner, there being no contributory negligence on the part of the injured person.

When porch or step may be said to be used in common—in general.

It has been held that a narrow porch or landing giving access to an outside stairway used and intended for use by different tenants as a means of entering and leaving the premises, as a matter of law is within the control and dominion of the owner, and it is his duty to use reasonable care to keep the same in repair, and safe for the use intended, and if a tenant is personally injured by reason of defects in this portion of the property, caused by the negligence of the owner in this regard, the latter is liable to respond for damages thereby occasioned. HINTHORN v. BENFER.

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Compare with Kearines v. Cullen, 183 Mass. 298, 67 N. E. 243, 14 Am. Neg. Rep. 66, holding that a step leading to the front door of each apartment of a two-apartment tenement is in the possession of each of the tenants, one half belonging to each, where the step extends from the door of the one tenement to the door of the other tenement, and hence the owner is not liable to the wife of one of the tenants, injured by reason of defects therein.

Where a platform and the back stairs connected with it were used in common by the various tenants of the building, it has been held that the duty of keeping a railing to said platform in as good condition as it appeared to be at the time of leasing the premises to the complaining tenant was imposed upon the person in whose control it remained,—the owner of the property. Maionica v. Piscopo, — Mass. —, 104 N. E. 839.

But the owner of an apartment house is not liable to a child of one of the tenants for injuries received by falling from a platform while taking in clothes, where the fall was caused by the breaking of a railing, owing to a defect therein, where the portion of the platform where the injury occurred constituted a part of the tenement hired by the parents of the injured child, although stairs connecting the various tenements with the yard went from one platform to the other, but the common use of the platforms was confined to so much of them as was occupied by the stairs and was reasonably incident thereto, and did not include that portion of the particular platform which was defective. Phelan v. Fitzpatrick, 188 Mass. 237, 108 Am. St. Rep. 469, 74 N. E. 326.

And where a platform or porch has attached to it a stairway leading to a back yard of a tenement, and different tenants, in using it, had no occasion for passing over a certain portion thereof, a tenant who makes use of such portion for a rain barrel does so as a mere licensee, and not by virtue of the lease, and hence the owner of the premises is not liable for an injury re-

Peil v. Reinhart, 127 N. Y. 381, 12 L.R.A. 843, 27 N. E. 1077; Lee v. Ingraham, 106 App. Div. 167, 94 N. Y. Supp. 284; Lindsey v. Leighton, 150 Mass. 285, 15 Am. St. Rep. 199, 22 N. E. 901; Palmer v. Dearing, 93 N. Y. 7; M'Martin v. Hannay, 10 Sc. Sess. Cas. 3d series, 442; Donohue v. Kendall, 18 Jones & S. 386; Feinstein v. Jacobs, 15 Misc. 474, 37 N. Y. Supp. 345; Ward v. Dampskibselskabet Kjoebenhaven, 136 Fed. 502; Dewald v. Kansas City, Ft. S. & G. R. Co. 44 Kan. 586, 24 Pac. 1101, 3 Am. Neg. Cas. 447; Chicago, R. I. & P. R. Co. v. Hinds, 56 Kan. 758, 44 Pac. 993; McGinley v. Alliance Trust Co. 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153.

Messrs. **C. F. Reavis** and **Means & Archer**, for appellee:

If the evidence on the part of the plaintiff failed to disclose any negligence on the part of the defendant, it was the duty of the court to direct a verdict in his favor.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Toledo, W. & W. R. Co. v. Brannagan, 75 Ind. 490; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66.

The landlord is held only to the exercise of ordinary care, and owes no legal duty to make search for latent defects, but is in fact responsible only for such defects as are apparent, or as could have been known to a prudent man in the exercise of ordinary care.

Whiteley v. McLaughlin, 183 Mo. 160, 66 L.R.A. 484, 81 S. W. 1094, 16 Am. Neg. Rep. 458; Hines v. Willcox, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113, 78 S. W. 1112.

Before a landlord can be liable to a tenant for an injury sustained by the lack of repair on premises leased by the tenant, there must have been a contract between the parties, making it the duty of the landlord to keep the premises in repair.

Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Ward v. Fagin, 101 Mo. 669, 10 L.R.A. 147, 20 Am. St. Rep. 650, 14 S. W. 738; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; Shute v. Bills, 191 Mass. 433, 7 L.R.A.(N.S.) 965, 114 Am. St. Rep. 631, 78 N. E. 96; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Moore v. Parker, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975, 10 Am. Neg. Rep. 268; Bailey v. Kelly, 86 Kan. 914, 39 L.R.A. (N.S.) 378, 122 Pac. 1027.

Porter, J., delivered the opinion of the court:

To recover damages for the death of his wife, a tenant sued his landlord, alleging that her death was caused by the carelessness and negligence of the defendant in the construction and maintenance of the railing of a porch on the demised premises. The court sustained a demurrer to the plaintiff's evidence, and rendered judgment against him for costs, from which he appeals.

The defendant owned a two-story stone

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ceived by such tenant through a defect in that portion of the platform. Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. 280, 17 Am. Neg. Rep. 54. But see infra, Widing v. Penn Mut. L. Ins. Co.

Compare with Farley v. Byers, 106 Minn. 260, 130 Am. St. Rep. 613, 118 N. W. 1023, holding that a porch was used in common by the tenants of the upstairs of a flat, and hence the landlord was liable for injuries to one of the tenants from a defect therein, where the porch extended across the rear of the building, and was connected with a back stairway and also with a hallway running between the apartments, and accessible by a front entrance stairway. By the terms of the lease the injured tenant had the privilege of using the hall, porch, and stairways. And see Williams v. Dickson, 122 Minn. 49, 141 N. W. 849, also holding the lessor liable for an injury occasioned by a defective railing to a stairway leading to a back porch very similar to the one described in the preceding case.

—as a question for the jury.

It may be a question for the jury whether or not a veranda from which a tenant's wife fell, and the stairway leading thereto, were used jointly and in common by the tenants

of the apartments to which it was attached, and were intended so to be, by such tenants and the owner thereof, and whether or not the owner retained the custody and control of such veranda and stairway for the joint use of these tenants. Maslin v. Childs, 146 App. Div. 174, 130 N. Y. Supp. 902. To the same effect is Loucks v. Dolan, 211 N. Y. 237, 105 N. E. 411. In this case the entrance from the street to a two-apartment flat was by steps to a piazza, then through a door to a common vestibule, from which different doors led to the different apartments.

Where property is leased as an entirety.

The owner of premises who leases them as an entirety without retaining control over any portion of them is not liable for personal injuries received by a subtenant from a defect in a balcony used by the different tenants in common. Smith v. State, 92 Md. 518, 51 L.R.A. 772, 48 Atl. 92, 9 Am. Neg. Rep. 286.

Negligence of lessor as question for the jury.

Ordinarily the question whether or not the owner of the premises leased to different tenants, who retains control of a portion of

building in the city of Hiawatha. The lower part was occupied for store purposes; the upper part was divided into two tenements, separated by a hall running north and south, the house fronting north. The plaintiff rented the east side, and the other side was occupied by another tenant of the defendant. The only way to enter the premises was by two stairways, one on the north, and one on the south; both leading to the hall which ran the whole length of the building. At the south and rear end of the hall a door opened upon a porch or landing place, from which a stairway led to the ground. The hall and both stairways were used by the tenants in common. The rear porch was 5 feet wide north and south, and 9 feet long east and west. The railing on the west side of this landing consisted of a 2x4 nailed to two uprights, one of which was fastened to the wall of the building. There was testimony tending to show that the end of the rail which rested upon the upright next to the building had become rotted and to some extent decayed, and that the nails by which it was fastened were rusted, The plaintiff and his family had occupied the premises as tenants of the defendant for more than ten years. On the night of the accident the plaintiff's wife took a broom, and went out to sweep the snow from this porch. The evidence tended to show that she fell against or in some way came in contact with the railing, that it gave way, and she fell to the ground, and was killed.

The defendant claims that for two reasons the demurrer was rightly sustained. First, it is claimed the evidence shows conclusively that the porch or landing place was not in the common use of both tenants, but that each tenant had the use and possession of one half thereof; and that, since the landlord is under no obligations to repair premises in the possession and control of the tenant, he cannot be held liable in this case. There was some evidence by the plaintiff that it was customary for his family to make use of that portion of the porch on their side of the doorway for the purpose of storing wood and household utensils, and that the other side was used in the same way by the other tenant. It is conceded that, if the place was used as a common porch by both tenants, then it was in the possession and control of the landlord, and he was bound to exercise reasonable care to keep it in a safe condition. We have no hesitation in holding that this narrow porch or landing was as much in the common use of both tenants as was either the hall or the stairway itself. The mere fact that the tenants divided the use of the floor of the porch for the purpose of keeping some of their household effects separated was not, in our opinion, sufficient to show that half of the porch was in the possession of one tenant and half in the other. The stairway, which appears from the photograph in evidence to have been

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them, used in common by the different tenants, has been guilty of negligence in failing to discover defects therein, is a question for the jury. HINTHORN v. BENFER.

And see Widing v. Penn. Mut. L. Ins. Co. 95 Minn. 279, 111 Am. St. Rep. 471, 104 N. W. 239, holding to be for the jury the question whether or not a lessor of premises occupied by different tenants for domestic purposes exercised proper care in maintaining in a reasonably safe condition a railing upon a porch in the rear of the premises, although the apartments of the tenant suing for the injury to her child, caused by the defective railing, were not attached to this porch, but she was allowed privileges thereon for placing wood and other conveniences. This conclusion was reached although the child was injured while playing thereon. No point was made in this case of the question whether or not the property was used in common by the different tenants. Compare with Flaherty v. Nieman and Phelan v. Fitzpatrick, supra.

Where injured person is a mere visitor.

A person injured by defective steps used in common by different tenants, when on the premises to attend a wake in the apartments of one of the tenants, cannot recover

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from the owner the damages sustained thereby, where it does not appear that she was there by invitation, since in such case she is a mere licensee to whom the owner owes no greater duty than to refrain from setting traps or pitfalls in her way, and from negligently doing injurious acts to her prejudice. Hart v. Cole, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644.

But it has been held that a landlord who maintains outside steps and a platform for the use in common of tenants of different parts of her building is liable for personal injuries to a person, caused by a defect in the platform while passing over it on a visit to one of the tenants, made on his express invitation to come on a particular day, for a particular purpose. Coupe v. Platt, 172 Mass. 458, 70 Am. St. Rep. 293, 52 N. E. 526. The liability of the owner of the premises was enforced in this case on the theory that the person injured stood in the same position as the tenant.

And see Williams v. Dickson, 122 Minn. 49, 141 N. W. 849, in which the owner of premises, for a defect in a stairway leading to a porch used in common by different tenants, was held liable to a servant of one of the tenants, who was injured thereby.

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about 4 feet wide, led from the center of the landing, leaving a space on either side of about 2½ feet. The hall and stairway are conceded to have been for the common use of both tenants, and it seems unreasonable to hold that the narrow space on either side of the passageway leading from the hall to the stairway was not as much in the possession and control of the landlord as were the stairs and hallway themselves. Where a portion of the building is let, and the tenant has rights of passageway over stairs and entries in common with the landlord and other tenants, the landlord is bound to exercise reasonable care to render the halls and stairways safe for the uses which he invites others to make of them. McGinley v. Alliance Trust Co. 168 Mo. 257, 56 L.R.A. 334, 66 S. W. 153; Readman v. Conway, 126 Mass. 374; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295. The facts speak for themselves; the law is so well settled that it is unnecessary to cite other authorities.

The other ground upon which it is said the demurrer was sustained is that the alleged defect conclusively appears from the evidence to have been a latent one, and therefore no negligence of the defendant was shown. Some stress is laid upon the fact that the plaintiff in his petition, possibly for the purpose of avoiding the imputation of contributory negligence, alleged that the defective condition of the railing was unknown to himself or his wife, and that it was not apparent from an examination of the railing. In addition to this statement in the petition, the plaintiff testified that he thought the railing was safe; that there was nothing to indicate to him that it was unsafe; and that he presumed it would have been necessary to remove the rail before its decayed condition could have been discovered. He testified, however, that he never had made any examination of its condition before the accident. He was asked by the court this question: "Looking at it, would you say there was anything that night from mere observation that would enable anybody to determine the actual condition it was in? A. No, sir, I think not." The direct question was asked him: "Could that have been discovered, in your judgment, without removing the rail from the post? A. I don't believe it could have been."

It is altogether probable that this was the principal ground upon which the court sustained the demurrer. We think it was error, and that the question of whether the defendant was guilty of negligence in not discovering the defective condition of the railing was one which should have been submitted to the jury. If this were a question of pleading, and the old rule was literally enforced that the averments of the pleading are always to be construed against the pleader, possibly a different question would arise (Losch v. Pickett, 36 Kan. 216, 222, 12 Pac. 822; 31 Cyc. 81); but we think the language of the pleading means, giving it a liberal construction, that the defect could not have been discovered by a casual examination. The petition does allege that defendant could have discovered it by the exercise of reasonable care on his part. It is very clear that there was no such obligation resting on the plaintiff or his wife to inspect the railing for the purpose of discovering whether it needed repair as rested upon the defendant. They were under no obligations to repair and were warranted in using the premises, unless the defect was one which was so apparent that it was negligence to continue such use. There was no obligation on their part to look further. On the other hand, as to that part of the building used in common by both tenants, the landlord was necessarily in control, for the reason that he maintained it for the common use of both tenants, and he was bound to see that reasonable care and skill were exercised to render it reasonably fit for the uses for which it was intended. The evidence tends to show that no alteration or repairs had been made in the railing from the time the porch was constructed, ten or twelve years before; that about three months previous to the accident plaintiff told the defendant the stairway needed fixing. Defendant said he knew that it ought to be fixed, and he would attend to it. There was nothing said about the railing or the porch. Some time thereafter the defendant made some repairs to the stairway and to the floor of the porch. Conceding that plaintiff is bound by his unequivocal statements that the defect could only be discovered by such an examination as required that the railing be lifted up, he was at least entitled to have the question submitted to the jury whether defendant was not guilty of negligence in failing to make such an inspection and examination as would have disclosed the defective condition of the railing.

The judgment will be reversed, and a new trial ordered.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK, Respt.,
v.
PETER J. DUFFY, Appt.

(212 N. Y. 57, 105 N. E. 839.)

Courts — publication of designation of terms.

1. Under a statute requiring an appellate court to fix on or before December 1st in each year the time and place for holding trial terms, and file the same in the office of the secretary of state, designations of additional terms need not be so filed, so as to come within the operation of another statute requring publication by such secretary, for a specified time, of appointments filed with him.

Criminal law — appeal — failure to publish term of court — effect.

2. A conviction will not be reversed because notice of the designation of the term of court at which the trial was had was not published as required by law, if no rights of accused were prejudiced thereby.

Evidence — other crimes in series.

3. Upon trial of a police officer for taking bribes to protect a gambling house, where it is shown that the house was transferred from one police precinct to another, and that the one paying for protection was notified that accused would collect the money after the transfer in place of the one who formerly did so, evidence is admissible of collections made by the predecessor

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Note. — Evidence of other crimes in prosecution for bribery.

This note supplements, as to the crime of bribery, the note to People v. Molineux, 62 L.R.A. 193. For earlier cases as to bribery, see pages 217, 297, and 299 of that note. That note is supplemented as to various other specific crimes in notes referred to in Index to L.R.A. Notes, "Evidence," § 275.

In a prosecution of a chief of police for asking for, accepting, and receiving a bribe to permit certain persons to operate houses of prostitution, it was proper to admit evidence as to other houses and persons to show the corrupt relations existing between defendant and one of the conspirators and the criminal intent of their relations on defendant's part. State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

So, in a prosecution for attempting to bribe a policeman to not make an arrest, evidence that a similar offer was also made to another policeman at about the same time, in connection with the same arrest, is admissible, both being in effect one transaction. Haller v. State, — Tex. Crim. Rep. —, 162 S. W. 872.

Where the wording of the alleged offer of a bribe is such as to make the intent material, evidence of other transactions of a similar character is admissible to enable the jury to determine the intent of defendant in using such language. Carden v. State, 62 Tex. Crim. Rep. 545, 138 S. W. 598.

In People v. Furlong, 127 N. Y. Supp. 422, it was held proper to admit testimony tending to show that defendant committed other acts of corruptly receiving money from the informer, it being relevant to show intimate and apparently confidential relations existing between the informer and defendant, the parties to the corrupt agreement charged.

In People v. Glass, 158 Cal. 650, 112 Pac. 281, a prosecution for bribery of a supervisor to influence his vote on the granting of a telephone franchise, it was held that, while evidence of payments to other supervisors was admissible to show identity of the plan and motive and to trace a larger bribe fund of which the particular bribe charged was a part, it was error to admit such evidence and refuse to instruct the jury that the evidence was to be considered by them for those limited purposes only.

In State v. DuLaney, 87 Ark. 17, 112 S. W. 158, 15 Ann. Cas. 192, where defendant was charged with being an accessory to the bribery of himself in connection with a certain bill which came before the legislative committee of which he was chairman, it was held that evidence was admissible of a general agreement made between defendant and witness that defendant would secure such action on all railroad bills as witness desired, for a certain consideration, and that other bills coming before the committee in which witness was interested should be handled as witness desired, for considerations to be fixed upon in each case, though the witness did not personally pay defendant for his action on the bill charged (a telephone bill), it appearing that witness was interested in that bill and that it was covered by the general agreement. This evidence was held to be admissible to show that the crime charged was within the scope of the purpose for which it was claimed defendant and witness conspired, and to explain and corroborate other testimony which bore directly upon the commission of the crime charged.

In Roden v. State, 5 Ala. App. 247, 59 So. 751, where defendant was charged with attempting to bribe an officer to permit him to carry on an illegal sale of liquors without interference, it was held that the evidence of acts similar to the one relied upon for conviction and directly connected with that act was admissible to show the intent with which the act charged was committed.

In People v. Furlong, 140 App. Div. 179, 125 N. Y. Supp. 164, (judgment affirmed on opinion below in 201 N. Y. 511, 94 N. E. 1096), where one was indicted for asking for, receiving, or agreeing to receive a bribe with reference to a general course of corrupt official action, it was held that evidence of his action upon a specific matter coming within the agreement was admissible as supporting the charge set forth in the indictment.

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and by accused from other persons, as tending to show that the collection charged was one of a continued series of events the prior ones of which served to explain and illuminate the one charged.

Same — later offense.

4. Upon trial of a police officer for collecting bribes from gamblers for police protection, where the offense charged is one of a series of similar offenses, evidence is admissible of a collection made later than that on which the indictment is founded.

Same — other offenses — purpose.

5. Upon trial of a police officer for taking a bribe from a gambler for police protection, and in which the only direct evidence is that of the one who gave the bribe, who is an accomplice, evidence of payments by other persons to accused and another officer, who surrendered the taking of the collection to accused, is admissible as tending to show the purpose for which the collection charged was made.

(Collin, J., dissents.)

(June 9, 1914.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part I., convicting him of bribery. Affirmed.

The facts are stated in the opinion.

Messrs. **Abraham Levy, Henry W. Unger, L. J. J. Schwartz,** and **Albert Blogg Unger,** for appellant:

The trial of the defendant was illegal, as the session at which he was tried was not a duly constituted term of court.

People v. Sullivan, 115 N. Y. 185, 21 N. E. 1039; People v. Nugent, 57 App. Div. 542, 67 N. Y. Supp. 1035; Northrup v. People, 37 N. Y. 203; People v. Moneghan, 1 Park. Crim. Rep. 570; 21 Enc. Pl. & Pr. 609; People v. Veld, 154 App. Div. 752, 139 N. Y. Supp. 788; Shannon v. People, 5 Mich. 71.

Testimony of the witnesses Lennon, Quackenbush, and Wilkins as to payments made by them to the defendant was inadmissible.

People v. Molineux, 168 N. Y. 305, 62 L.R.A. 193, 61 N. E. 286; Stout v. People, 4 Park. Crim. Rep. 71; People v. Marrin, 205 N. Y. 275, 43 L.R.A.(N.S.) 754, 98 N. E. 474; People v. Harris, 209 N. Y. 70, 102 N. E. 546; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017.

The court erred in admitting in evidence their testimony as to payments made by them to Patrolman Fox, and as to a course of dealings between them and Fox.

It was error to permit the witness Fox to testify against the defendant, to and from the contents of certain police blotters, not themselves in evidence, the entries therein being made in the absence, and without the knowledge or sanction, of the defendant (Vichos v. Cuttler, 133 App. Div. 230, 117 N. Y. Supp. 366; People v. Cox, 21 Hun, 47; Reed v. New York C. R. Co. 45 N. Y. 574; People v. Burnham, 120 App. Div. 388, 106 N. Y. Supp. 57; Mattison v. Mattison, 203 N. Y. 79, 96 N. E. 359); and to permit the witnesses Richard Duffy, MacGrath, and Farrell to testify as to entries made in police books (People v. Burnham, and Mattison v. Mattison, supra).

Mr. **Robert S. Johnstone,** with Mr. **Charles S. Whitman,** for the People:

The term of court at which the defendant was tried was duly and legally constituted.

People v. Sullivan, 115 N. Y. 185, 21 N. E. 1039; People v. Youngs, 151 N. Y. 210, 45 N. E. 460; People v. Petrea, 92 N. Y. 128; People ex rel. Weick v. Warden, 117 App. Div. 154, 102 N. Y. Supp. 374, 188 N. Y. 549, 80 N. E. 1118; People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780; People v. Ebelt, 180 N. Y. 470, 73 N. E. 235; People v. Herrmann, 149 N. Y. 190, 43 N. E. 546.

The evidence of Lennon, Quackenbush, and Wilkins was properly admitted.

Wigmore, Ev. §§ 9, 27, pp. 31, 88; People v. Majone, 1 N. Y. Crim. Rep. 86, 91 N. Y. 211; People v. Place, 157 N. Y. 584, 52 N. E. 576; People v. Shea, 147 N. Y. 78, 41 N. E. 505; People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; Rex v. Bond. 21 Cox, C. C. 252. [1906] 2 K. B. 389, 75 L. J. K. B. N. S. 693, 70 J. P. 424, 54 Week. Rep. 586, 95 L. T. N. S. 296, 22 Times L. R. 633; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017; People v. Peckens, 153 N. Y. 576, 47 N. E. 883; People v. Van Tassel, 156 N. Y. 561, 51 N. E. 274; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; People v. Doty, 175 N. Y. 164, 67 N. E. 303; People v. Dolan, 186 N. Y. 4, 116 Am. St. Rep. 521, 78 N. E. 569, 9 Ann. Cas. 453; People v. Cahill, 193 N. Y. 232, 20 L.R.A.(N.S.) 1084, 86 N. E. 39; People v. Marrin, 205 N. Y. 275, 43 L.R.A.(N.S.) 754, 98 N. E. 474; People v. Katz, 209 N. Y. 311, 103 N. E. 305; People v. Weber, 130 App. Div. 593, 115 N. Y. Supp. 453; Rex v. Ball, 6 Crim. App. Rep. 31; 1 Wigmore, Collection of Classical Quotations, pp. 226, 267; Reg. v. Wyatt, 20 Cox, C. C. 462, [1904] 1 K. B. 188, 73 L. J. K. B. N. S. 15, 68 J. P. 31, 52 Week. Rep. 285, 20 Times L. R. 68; Rex v. Smith, 92 L. T. N. S. 208, 69 J. P. 51, 20 Cox, C. C. 804; Reg. v. Ollis, 19 Cox, C. C. 554; Reg. v. Rhodes, 19 Cox, C. C. 182, [1899] 1 Q. B. 77, 68 L. J. Q. B. N. S. 83,

62 J. P. 774, 47 Week Rep. 121, 79 L. T. N. S. 360, 15 Times L. R. 37; People v. Everhardt, 104 N. Y. 591, 11 N. E. 62.

It was not error to permit the witness Fox to refresh his recollection from the police blotters.

Bigelow v. Hall, 91 N. Y. 145; 1 Wigmore, Ev. § 759; Huff v. Bennett, 6 N. Y. 337; Howard v. McDonough, 77 N. Y. 592; Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

The facts shown by the entries in the police blotters were material and relevant, and were properly received in evidence.

New York v. Second Ave. R. Co. 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017.

Hiscock, J., delivered the opinion of the court:

The defendant, who as a police sergeant, was indicted for, and convicted of, the crime of bribery in receiving a bribe or collecting "hush money" from one Roth as a consideration for allowing the latter to maintain in the city of New York a gambling resort in defiance of the law. Although the defendant, both by his own testimony and otherwise, denied the charge, the evidence as a whole presented for the jury a fair question of fact whether he was guilty or innocent; and of the various reasons assigned by his counsel why the judgment should be reversed only two seem to us to require discussion, and the facts will be stated only so far as may be necessary for their consideration and decision.

The first contention is that the term of court at which the defendant was tried and convicted was not legally convened and organized, and the second one is that evidence was improperly received tending to show the commission by the defendant and another of other similar crimes. These contentions will be considered in the order stated.

In November, 1912, the justices of the first appellate division concededly in accordance with law appointed a series of trial terms of the supreme court to be held in and for the county of New York, and amongst them a term commencing on the 1st Monday in June, 1913, and duly assigned Mr. Justice Page to hold said term. There is no question that a list of these appointments was duly filed with the secretary of state and a copy thereof published as required by § 33 of the executive law.

Thereafter, also concededly in accordance with law, said justices designated Mr. Justice Goff in the place of Mr. Justice Page to preside at said term of court. The justice so last designated duly convened the court and held the same until June 12th, when an order was entered on the minutes of the court adjourning the term without day. June 18, 1913, the justices of the appellate division made a new order, a copy of which is not printed in the record, but by which it seems permissible to assume that they appointed a new trial term commencing Monday, June 23d, and assigned Mr. Justice Seabury to hold the same. It was at the term commencing on the last-mentioned day that the defendant was tried and convicted, and the complaint against the legality of the term seems to be confined to the assertion that it was not lawfully held because no notice of the appointment of said term was or could be published once a week for three consecutive weeks before the term commenced, as it is asserted was necessary under the provisions of § 33 of the executive law (Consol. Laws, chap. 18), which reads: "The secretary of state must immediately publish a copy of an appointment, filed with him, . . . in the newspaper printed in Albany in which legal notices are required to be published . . . of a term or terms of the supreme court . . . at least once in each week, for three successive weeks before the holding of a term in pursuance thereof."

It seems to be assumed by the defendant's counsel that the justices of the appellate division did, and had the right to, appoint this as a new term of court under § 84 of the judiciary law (Consol. Laws, chap. 30), which provides: "The justices of the appellate division in each department may fix the times and places for holding special and trial terms therein, and assign the justices of the departments to hold such terms; . . . and may from time to time make additional appointments and designations, or change or alter those already made. The justices of the appellate division in the first department shall on or before the first day of December in each year, fix a time and place for holding special and trial terms of the supreme court in the first judicial district, and assign the justices to hold the same, such designations to be filed in the office of the secretary of state."

We do not think that the objection to the legality of this term is well founded, for various reasons.

In the first place, there does not appear to have been any omission to comply with the terms of the statutes governing the subject. Section 33 of the executive law only, and of necessity, requires publication of a "copy of an appointment" which by law is filed with the secretary of state. Section 84 of the judiciary law requires the filing in the office of the secretary of

state of "such designations" as said section requires the justices to make on or before the 1st day of December in each year, and so far as I can discover there is no law, whether it be an intentional omission or not, which required to be filed with the secretary of state a copy of an appointment of the extra or additional term which was appointed to be held in June, and at which the defendant was tried.

But if it should transpire that through failure to discover some other applicable statutory provision there is some flaw in this answer to defendant's contention, another effective one may be made on the broad merits of the proposition which he argues.

The defendant was not indicted at the term of court referred to, but at a preceding term, the legality of which is undisputed. He had timely notice of the term at which he was tried, and there is no doubt that the jury before whom he was tried was selected from a panel summoned under and in accordance with the provisions of a valid statute. The court itself was appointed by the appellate division which had power to appoint it, and all of its proceedings were conducted in accordance with the due forms of law as prescribed by the Constitution and by the statute. It is not claimed that the defendant's rights were in any manner diminished or prejudiced by the alleged omission of which he complains, and under such circumstances his objection of a purely technical nature and outlining no real harm to him, even if otherwise well made, will not be upheld for the purpose of reversing the judgment. People v. Youngs, 151 N. Y. 210, 45 N. E. 460; People ex rel. Weick v. Warden, 117 App. Div. 154, 102 N. Y. Supp. 374, affirmed on opinion below in 188 N. Y. 549, 80 N. E. 1118; People v. Sullivan, 115 N. Y. 185, 21 N. E. 1039; People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780; People v. Ebelt, 180 N. Y. 470, 73 N. E. 235.

We next proceed to the consideration of the other error alleged by the defendant, that evidence of the commission of other crimes by him, as well as by another person, was improperly admitted. The evidence thus referred to was of very substantial importance, and if it was improperly admitted a serious error was committed, which calls for a reversal of the judgment.

The facts necessary for the consideration and determination of this assignment of error are as follows:

The indictment charged defendant with collecting a bribe on or about September 3, 1912, from one Roth, as a consideration for unlawfully allowing him to maintain a gambling house, and subsequently by amendment this date was changed to September 10, 1912. The gambling rooms maintained by Roth were at all times situated in the 6th inspection police district. Prior to July 1, 1912, they were also located in the 43d police precinct, but on said last-mentioned date they became included in a new precinct defined as number 37. The defendant was a sergeant of police, assigned to duty in this last precinct. During most of the time covered by the evidence, one Fox was a patrolman assigned to duty in the earlier 43d precinct.

Evidence was received, the competency of which cannot be seriously challenged, that at about the date when the creation of the new precinct became effective, defendant sought an interview with Fox, and asked him for a list of the places from which he had been collecting, telling him that he was going to collect from them in the future. The defendant said to Fox:

"I want a list of the places from which you have been collecting from, that were formerly in the 43d precinct, that go into the new 37th precinct; I want the names of the persons from whom you received the money; I want the time that you receive it and the amount;" that he wanted this information because he was going to collect from them in the future.

Fox gave him the list of places, with names and details as requested, and the defendant wrote them down in a memorandum book. This list comprised the names or designations of six individuals, with the location of their respective "places" and the respective amounts and monthly dates of collections made from them. Amongst the names so included were those of Roth and of three other individuals, Quackenbush, Lennon, and Wilkins, who the jury had a right to find were also keepers of gambling resorts. Then was given the evidence complained of and which may be divided into two classes. Roth and the three other persons mentioned were allowed to testify that, for a considerable period prior to the formation of the new precinct, they had respectively made monthly payments to Fox, which the jury could find were bribes for police protection. The other class of evidence consisted of testimony given by said individuals other than Roth, that during the period ensuing the formation of the new precinct, down to and in one case after the date of the bribe mentioned in the indictment, they made monthly payments to the defendant, and which payments it is assumed the jury could also find were bribes for police protection.

In addition to this evidence, and as of importance in the consideration especially

of that relating to the antecedent payments to Fox, testimony was given that every one of these individuals, either at or before the time when he made his first payment to defendant, was notified in substance, either by Fox or by the defendant himself, that the latter in respect of these collections was to take Fox's place; the witness was "transferred" by Fox to defendant, or told that Fox was not coming around any more, and that Duffy would come around after that, and to "take care of him."

In the light of this other evidence I think it was perfectly proper to give evidence of the prior collections made by Fox if it was proper to give evidence of other collections by defendant than the one charged in the indictment. This evidence, in the light of the testimony concerning the change in precincts, of defendant's request of Fox for a list of the collections which the latter had been making while the old precinct continued, and that the defendant was to become the successor of Fox in making these collections from people transferred into the new precinct, plainly tended to show that what defendant did thereafter in the way of making collections was a continuance of the same practice which Fox had maintained, and therefore the collections made by Fox served to explain and indicate the purpose, and the character, and the relationship, of the collections which the defendant thereafter made. The entire evidence tended to show that the collections made by Fox and defendent were part of one continued series or system of events, defendant simply being substituted for Fox, and therefore the prior events in that series served to explain and illuminate the other and subsequent acts performed by defendant.

Therefore we come to the underlying question whether it was proper to prove the commission by defendant of other crimes in the collection of bribes than the one for which he was indicted.

It is well established as a general rule that evidence may not be given to show that a person on trial for one crime has committed other ones. The fundamental application and purpose of this rule is to forbid and prevent the conviction of an accused person for one crime through proof that he had committed other ones, wherefrom the inference might be drawn that because he had thus committed other offenses he was more liable to commit the one in question. People v. Shea, 147 N. Y. 78, 98, 41 N. E. 505.

But as is to be expected in the case of any general rule, universal application has not prevailed, but exceptions have been engrafted which do permit evidence of the commission by the accused of other crimes than the one for which he is being tried. Some of these exceptions are familiar, and they will not be enumerated. The one claimed to be applicable to this case is less familiar. It permits proof of a plan or scheme to commit a series of crimes including the one for which the accused is being tried, and, as tending to show the existence of such plan or scheme, it allows testimony of the commission of crimes other than the one charged, but so related in character, time, and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged. The evidence was admitted by the trial judge on this theory, and, while the contrary is urged, I think it was fairly limited to this purpose, and by this theory and exception to the general rule the propriety of its admission is to be tested. In deciding whether it did come within the exception, it will be permissible for convenience briefly to summarize it at this point in connection with the related and explanatory testimony.

Fox for months had been systematically collecting bribes or "hush money" from a lot of keepers of disorderly resorts, which included Roth and the three witnesses whose evidence has been criticized. The resorts kept by these people were transferred into a new precinct where defendant was on duty, and coincident with this transfer he asked Fox for a list of people from whom collections had been made, and announced his purpose and plan thenceforward to collect from them. This list includes the complaining witness and the witnesses in question, and the evidence discloses him thenceforth as actually engaged in making monthly collections from the latter, which are contemporaneous with, and in every respect similar in nature and purpose to, the collection which he is charged in the indictment with having made from Roth.

Measured by the tests of ordinary experience and common sense, there cannot be any doubt that this evidence that the defendant was collecting bribes of certain lawbreakers in his precinct, in connection with the other supplementary evidence which was produced, tended to establish a systematic plan for the collection of graft which would naturally include Roth who, at the same time, in the same quarter, and under the same circumstances, was pursuing the same kind of an unlawful business. Independent of any evidence, it might naturally be believed that payment of "hush money" would not be enforced against only a part of known wrongdoers, but would be enforced from all similarly situated. But

in this case the other evidence makes this conclusion quite inevitable. Defendant obtains a list of former bribe givers and announces a plan thenceforth to collect from them. The list includes the person named in the indictment and certain others. As already stated, their cases in respect of this matter are in all respects precisely similar. Thereafter it appears that he is making these collections from certain persons on the list, and the inference is surely permissible that the plan already outlined is not only in existence, but in actual operation, and that it includes and foretells the collection for which defendant was indicted.

The force and competency which reason and ordinary logic thus give to this evidence are, I think, fully sustained by the authorities. Wigmore, Ev. §§ 102, 304; Whart. Crim. Ev. 9th ed. §§ 32, 38; Com. v. Blood, 141 Mass. 571, 575, 6 N. E. 769; State v. Schnettler, 181 Mo. 173, 189, 190, 79 S. W. 1123; People v. Molineux, 168 N. Y. 264, 291, 305, 306, 62 L.R.A. 193, 61 N. E. 286; People v. Dolan, 186 N. Y. 4, 10, 116 Am. St. Rep. 521, 78 N. E. 569, 9 Ann. Cas. 453.

See also as tending less directly to support the admission of such testimony, Com. v. Scott, 123 Mass. 222, 236, 25 Am. Rep. 81; Hester v. Com. 85 Pa. 139; Rex v. Fisher [1910] 1 K. B. 149, 152, 79 L. J. K. B. N. S. 187, 102 L. T. N. S. 111. 74 J. P. 104, 26 Times L. R. 122, 17 Ann. Cas. 462; Rex v. Ball [1911] A. C. 47, 75 J. P. 180, 104 L. T. N. S. 48, 27 Times L. R. 162, 55 Sol. Jo. 190, 22 Cox, C. C. 370, 80 L. J. K. B. N. S. 691.

Wigmore states the rule:

"The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of a plan is always used in daily life as the basis of an inference to the act planned." Section 102.

"When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than mere similarity, which suffices for evidencing intent. The object here is . . . to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act. . . . The effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. . . . The result is to show (by probability) a positive design which in its turn is to evidence (by probability) the doing of the act designed. The added element, then, must be, not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." Section 304.

In the Molineux Case, 168 N. Y. 305, 62 L.R.A. 256, 61 N. E. 299, Judge Werner, writing concerning the general rule excluding evidence of the commission of other crimes than that with which the accused is charged, and recognizing the exceptions to the rule specified as one of these exceptions, evidence of a common plan or scheme, thus says: "It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both."

And he quotes with approval Underhill on Criminal Evidence to the effect that "generally, when several similar crimes occur near each other, either in time or locality, as, for example, several burglaries or incendiary fires upon the same night, it is relevant to show that the accused, being present at one of them, was present at the other if the crimes seem to be connected. Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received." p. 305.

In the Dolan Case, 186 N. Y. 10, 116 Am. St. Rep. 521, 78 N. E. 570, 9 Ann. Cas. 453, where the defendant was on trial for uttering a forged note, evidence was permitted of the utterance by him of a series of other notes, and Judge Werner again writing said in reference to this evidence: "There is also another ground upon which this evidence was competent. All the notes referred to in the evidence were made at about the same time. In each case they were made payable to the defendant and indorsed by him. During the period covered by all the notes the defendant was endeavoring to raise sufficient funds to meet his obligations, and in each case he used the name of some builder with whom he had done

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business and with whose affairs he was familiar. This combination of circumstances was sufficient to establish a common plan and identity of method so connected as to have a strong tendency to overcome any claim of innocent intent in the uttering of the note charged in the indictment. The evidence bearing on these other notes served to show that the defendant was endeavoring to meet his obligations as they became due, by making a fraudulent and intentional use of the names of contractors with whom he had business relations. The same general features were present in all of the transactions which seem to have been the product of one general scheme. These facts and circumstances were sufficient, we think, to bring the case within the exceptions to the general rule that excludes proof of extraneous crimes." p. 10.

It is especially complained that one of the witnesses was allowed to testify to payments made to defendant subsequent to the date of the one charged in the indictment. I think there are various reasons why this evidence is not subject to a valid exception, and, even if it should be held that it was incompetent, I think we would be required to assume that, in the presence of competent evidence of all of the other unlawful payments made, the question of defendant's guilt or innocence was not materially affected by evidence of this particular payment.

I also believe that all of the evidence complained of was competent for another reason. The indictment charged, and the prosecution was bound to establish, that the defendant collected the money specified as the unlawful price of protecting a disorderly resort from police interference. The only direct evidence of the actual payment of the money was given by Roth, who made it. It not only was not conclusively explicit as to the purpose and intent with which it was given to and received by the defendant, but in addition Roth was an accomplice and a discredited witness. Under these circumstances, connected as it was by other evidence, I think that the testimony of other payments made to Fox and the defendant was competent as tending to show the purpose for which the latter made from Roth the collection specified in the indictment. For the reason stated, I think that the judgment of conviction must be affirmed.

Werner, Cuddeback, Miller, and Cardozo, JJ., concur.

Willard Bartlett, Ch. J., concurs on last ground stated in opinion.

Collin, J., dissents.

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NORTH DAKOTA SUPREME COURT.

W. D. GILE, Respt.,
v.
INTERSTATE MOTOR CAR COMPANY, Appt.

(27 N. D. 108, 145 N. W. 732.)

Principal and agent — deposit — recovery.

1. Defendant, a distributer of Interstate automobiles for the state of North Dakota, entered into a written contract with plaintiff by which the latter agreed to purchase and pay for at least 50 cars at specified dates during the life of the contract, and to deposit with defendant the sum of $1,250, being $25 on each car to be applied by defendant on the purchase price of each when sold. In consideration thereof defendant allotted to plaintiff during the life of the contract, nearly one year, the exclusive right to solicit purchasers of and to sell such cars in ten designated counties of the state, and obligated itself to furnish cars

Headnotes by FISK, J.

Note. — Automobile distribution contracts.

I. Whether contract of agency or sale, 110.
II. Validity as affected by provision for canceling.
  a. In general, 110.
  b. Effect of provision granting dealer exclusive territory, 112.
  c. Effect of recital of "$1" as consideration, 113.
III. Validity as affected by indefinite description of machines to be furnished under the contract, 113.
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V. Breach of contract by dealer.
  a. Handling another car, 113.
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VI. Breach by manufacturer by selling automobiles in dealer's territory.
  a. In general, 114.
  b. Where sale is to resident in dealer's territory, but is made at another place, 114.
VII. Measure of damages for breach by manufacturer.
  a. Loss of prospective profits.
    1. In general, 114.
    2. Right to consider sales made by manufacturer in dealer's territory in computing latter's damage, 116.
    3. Estoppel of manufacturer to deny that dealer would would have made sales he made, 117.
VIII. Measure of damages for breach by dealer, 117.

to plaintiff when ordered at certain specified discounts from list prices. Plaintiff promised to diligently and faithfully advertise such cars in and to work such territory during the life of such contract, and to do certain other things tending to promote and to effectuate the objects of the contract. Plaintiff advanced to defendant the deposit aforesaid, and entered upon the performance of the agreement. During the entire life of the contract both parties in good faith attempted to fulfil the same. Defendant was ready, able, and willing to perform on its part, but plaintiff did not succeed in making any sales during the entire period, and as a consequence was unable to and did not take and pay for any of such cars. Shortly after the termination of such contract by lapse of the period designated therein for its existence, plaintiff brought this action to recover such deposit as for money had and received by defendant to his use, claiming a right to the repayment thereof upon the ground that the consideration had wholly failed. Held, for reasons stated in the opinion, that he cannot recover.

Same — implication of promise to return.

2. In order to maintain such action it is incumbent on plaintiff to establish facts from which the law raises an implied promise on defendant's part to repay such money, and such a promise will never be implied except where it appears that in equity and good conscience defendant ought not to be permitted to retain the same.

Contract — execution — lack of mutuality — effect.

3. Whether the contract lacked mutuality and was therefore voidable and unenforceable while it remained wholly executory is not controlling. The contract was not illegal or unlawful, and the parties having acted under it during the entire period of its existence, it cannot, so far as executed, be questioned, and it must to such extent control and measure the rights of the respective parties.

Damages — deposit — agency contract — penalty.

4. The stipulation in the contract authorizing the retention by defendant of such deposit as liquidated damages for plaintiff's breach thereof held not in the nature of a penalty, because from the nature of the case it would be extremely difficult, if not impossible, to fix the actual damages.

I. Whether contract of agency or sale.

In many respects contracts establishing sales agencies, for the sale at retail of automobiles, are in a class by themselves, although as a rule the questions raised with reference thereto may be and are, disposed of by the application of well-settled principles of law. While these contracts differ in some respects, in their general features they are very similar. Ordinarily they resemble more closely contracts of sale than they do agency contracts, and as a rule, the effect of the contract is not to establish the relation of principal and agent between the parties. Com. v. Banker Bros. Co. 38 Pa. Super. Ct. 101, affirmed in 222 U. S. 210, 56 L. ed. 168, 32 Sup. Ct. Rep. 38.

Although styled an agency agreement, a contract granting an exclusive right to sell automobiles within a certain territory for a designated period of time is a contract of sale, where it clearly forbids the buyer acting for and in behalf of the seller, and requires him to make a deposit upon each car ordered and to pay cash for the cars delivered. Bendix v. Staver Carriage Co. 174 Ill. App. 589.

II. Validity as affected by provision for canceling.

a. In general.

It is of course an elementary rule of contract law which is applicable to contracts of the character under consideration, that an executory contract for future sale and delivery is not enforceable, unless by its terms there is mutuality of obligation and certainty of subject-matter. Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499.

Many contracts establishing an agency for the sale of automobiles contain provisions entitling one or both of the parties to terminate the contract by giving written notice of intention so to do. Construing a provision of this character it has been held that where a manufacturer of automobiles, in entering into a contract establishing an agency for the sale of automobiles, reserves the arbitrary right to cancel the contract at any time, the contract is lacking in mutuality, and hence is not enforceable, since there is no express obligation on the part of the company to sell and deliver any automobiles on the order of the dealer. Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324.

And a provision in a contract establishing a sales agency for the sale at retail of automobiles, that it may be canceled for just cause by either party, renders the contract invalid for want of mutuality, since this provision is in effect similar to a reservation of an arbitrary right to cancel the contract at any time, for no means are provided to ascertain the particular cause or causes thereby intended by the parties. Oakland Motor Car Co. v. Indiana Automobile Co. supra.

A clause in an automobile agency contract that, in the event that the company should fail to deliver one or more automobiles in accordance with the foregoing scale, it may at its option return the agent's deposit on such car or cars, or deliver such car or cars as soon thereafter as it reasonably can, it being distinctly understood and agreed, however, that no liability whatsoever shall attach to or be asserted against the company in case of its failure to deliver any of said automobiles for any cause whatsoever, leaves it entirely optional with

Money received — agent's deposit — recovery.

5. Plaintiff having breached the contract while defendant performed the same as far as plaintiff permitted it to do so, the former cannot recover such deposit as for money had and received.

Pleading — construction.

6. Defendant, by his answer and proof, did not seek to recover damages against the plaintiff under the contract, but he merely pleaded and proved such actual damages, as far as they were susceptible of proof, as defensive matter tending to show a want of equity in plaintiff's claim.

(Goss and Burke, JJ., dissent.)

(February 13, 1914.)

APPEAL by defendant from an order of the District Court for Nelson County granting a new trial after a directed verdict in its favor in an action to recover money had and received. Reversed.

The facts are stated in the opinion.

Mr. Scott Rex, for appellant:

Plaintiff received full value for his money, and consequently cannot maintain an action for money had and received to get it back.

Krump v. First State Bank, 8 N. D. 75, 76 N. W. 995; Logan v. Freerks, 14 N. D. 127, 103 N. W. 426; Martin v. Royer, 19 N. D. 504, 125 N. W. 1027; Siems v. Pierre Sav. Bank, 7 S. D. 338, 64 N. W. 167; 15 Am. & Eng. Enc. Law, 2d ed. 1096; 27 Cyc. 849; 30 Cyc. 1322; Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331; Fox v. Monahan, 8 Cal. App. 707, 97 Pac. 765; Todd v. Bettingen, 109 Minn. 493, L.R.A.1915, —, 124 N. W. 443.

Plaintiff, having defaulted under the contract, cannot assert or predicate any rights under it which are based on his own default, and cannot escape from this prohibition by changing the form of action to money had and received.

Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97; Clark v. American Developing & Min. Co. 28 Mont. 468, 72 Pac. 978; Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Way v. Johnson, 5 S.

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the manufacturer whether or not it will deliver any automobiles thereunder, and hence the contract lacks mutuality. Goodyear v. H. J. Koehler Sporting Goods Co. 159 App. Div. 116, 143 N. Y. Supp. 1046.

A contract with a dealer in automobiles to purchase a specified number of cars and make a deposit thereon with a condition that, if he failed to sell, the deposit money would be refunded, and reserving the right to cancel the contract by returning the deposit money, does not constitute an absolute sale of the cars. Laciar v. Jackson Motor Co. 147 N. Y. Supp. 584.

And where as part of a contract for an agency to sell automobiles within a certain territory, the buyer orders a number of automobiles and makes a deposit to apply thereon, which is construed to be liquidated damages for breach by him of his contract, this order for automobiles will be construed in connection with a provision permitting either party to terminate the contract at any time by written notice. And where the buyer terminates the contract before the delivery of the cars ordered, he does not breach the contract by refusing to receive these cars; since the right to terminate the contract related not only to the agency agreement, but also to this order for cars, and the order was therefore terminated by the notice. White Co. v. American Motor-Car Co. 11 Ga. App. 285, 75 S. E. 345.

But upon this point compare with GILE v. INTERSTATE MOTOR CAR CO., denying the right of a dealer to recover a deposit made upon a contract of this character, containing a provision in effect that the automobile company reserved the right to change all prices and discounts mentioned in this contract upon two weeks' notice in writing duly mailed to the dealer, and also that no order for automobiles shall be binding upon said distributers unless it clearly specify kinds and styles, dates of shipment, etc., and unless it is accepted by the distributer at least thirty days prior to date of delivery. This decision is based upon a further provision in the contract that if the contract to take and pay for cars is unfulfilled by the dealer, the distributers may retain the amount of any deposits remaining to his credit, as liquidated damages for the breach.

A stipulation in a contract of this character, "that the party of the first part does in no wise agree to ship any of its products to the party of the second part, and that if during the period of this contract orders for automobiles, accompanied by deposits, are sent in and accepted by the party of the first part, that they are accepted with the express understanding that prices and discounts are subject to change before shipment is made, in which event, however, the party of the second part shall be notified, and he shall, at his option, have the right to cancel such order for automobiles, and to demand and receive back from said party such deposits as he may have previously made thereon,"—does not give to the automobile company the right for any cause, or for no cause at all, to refuse to fill orders for automobiles it had accepted and promised to fill; since the stipulation was intended only to give the defendant control over general conditions and contingencies, and was not intended for use as a weapon of fraud or of individual oppression. When the dealer sold an automobile at list price he had a right to expect that his order would be accepted, and when accepted, that it would be filled, except for the happening of some contingency as provided for in this L.R.A.1915B.

D. 237, 58 N. W. 552; Maloy v. Muir, 62 Neb. 80, 86 N. W. 916; York v. Washburn, 118 Fed. 316; Warvelle, Vend. & P. § 926; McKinney v. Harvie, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; Downey v. Riggs, 102 Iowa, 88, 70 N. W. 1091; McManus v. Blackmarr, 47 Minn. 331, 50 N W. 230; Lawrence v. Miller, 86 N. Y. 131; Hanschka v. Vodopich, 20 S. D. 551, 108 N. W. 28; Thomas v. McCue, 19 Wash. 287, 53 Pac. 161; Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331.

Failure on plaintiff's part to sell any cars, and his financial irresponsibility, were as effectual notice of his inability to carry out the contract under § 5219 as it was possible for him to have given.

Bell v. Hatfield, 121 Ky. 560, 2 L.R.A. (N.S.) 529, 89 S. W. 544; Krebs Hop Co. v. Livesley, 55 Or. 227, 104 Pac. 3; 35 Cyc. 584; Kingman & Co. v. Hanna Wagon Co. 176 Ill. 545, 52 N. E. 328; Weymouth v. Goodwin, 105 Me. 510, 75 Atl. 61.

Where the contract is for goods which are to be purchased or procured by the seller, the measure of damages is ordinarily the difference between the contract price and what it would cost the seller to procure them.

35 Cyc. 594; American Contract Co. v. Bullen Bridge Co. 29 Or. 549, 46 Pac. 138; Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; Canfield v. Orange, 13 N. D. 622, 102 N. W. 313; Young v. Met-

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clause. Dildine v. Ford Motor Co. 159 Mo. App. 410, 140 S. W. 627.

A contract by an automobile manufacturing company, "conditions permitting," to supply automobiles of its manufacture for sale within a designated territory, and reserving the right to terminate the contract upon ten days' notice, has been held on demurrer to support a petition by the dealer, who was the other party to the contract, for damages for breach thereof, based upon the failure of the company to furnish automobiles ordered at a time when the contract had not been terminated by notice as therein provided. In reaching this conclusion, the court was influenced by the fact that the buyer had paid to the seller a deposit to apply upon cars to be ordered; and the doctrine is asserted that an offer to sell on certain terms without consideration therefor is unilateral and may be withdrawn before acceptance, but after acceptance, and while still open, an agreement to buy ceases to be unilateral, and becomes bilateral and binding. Buick Motor Co. v. Thompson, 138 Ga. 282, 75 S. E. 354.

A contract guarantying the exclusive right to sell automobiles within a certain territory, and agreeing to furnish cars as ordered, and requiring the buyer to purchase a certain number of cars, to maintain a place for their exhibit and sale, and to pay a deposit upon each car, and containing a provision for the termination of the contract by the automobile company for a breach thereof by the other party, is not unilateral. And although the additional cars to be furnished by the seller are not described, the contract constitutes a continuing offer by the automobile company to sell cars of its manufacture, which the buyer may order within a specified time, and it cannot be withdrawn by the former within the life of the contract, unless for violation of its terms by the buyer. Bendix v. Staver Carriage Co. 174 Ill. App. 589.

b. Effect of provision granting dealer exclusive territory.

Where a contract reserves the right in the automobile company to return the deposit

paid and cancel the contract at any time it chooses, the fact that the contract also gives to the other party thereto exclusive right to sell in certain territory, does not, in any sense, render the contract executed, or cure the defect of want of mutuality. Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324.

And although a contract establishing a selling agency for automobiles refers to the defendant as the manufacturer and the plaintiff as the dealer, and grants to the dealer the exclusive right of sale of certain automobiles and parts thereof within a designated territory, it is lacking in mutuality where it contains a provision that the contract may be canceled for just cause by either party giving notice, and the further provision that any order for automobiles sent in by the dealer shall not be binding upon the manufacturer unless accepted by it within a certain number of days prior to the date of delivery. The contract being unilateral, no action can be maintained against the automobile company for breach thereof by declining and refusing to deliver automobiles thereunder. Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499.

And see Goodyear v. H. J. Koehler Sporting Goods Co. 159 App. Div. 116, 143 N. Y. Supp. 1046, holding that the defect of want of mutuality in a contract of this character is not cured by the appointment of the dealer as the manufacturer's exclusive agent for the sale of the automobiles within a designated territory. And see also White Co. v. American Motor-Car Co. 11 Ga. App. 285, 75 S. E. 345. But compare with Buick Motor Co. v. Thompson; Bendix v. Staver Carriage Co.; and Dildine v. Ford Motor Co.,—supra.

A contrary conclusion as to the effect of such a provision is reached in GILE v. INTERSTATE MOTOR CAR CO., wherein the court reasons that the grant of exclusive territory is something of value parted with by the manufacturer and enjoyed by the dealer, and where the manufacturer does not refuse to fulfil the the contract on his part, the dealer cannot assert the want of con-

culf Land Co. 18 N. D. 441, 122 N. W. 1101; 13 Cyc. 49.

Where the sum stipulated in a contract is less than the actual damage, it cannot be held to be a penalty.

Krausse v. Greenfield, 61 Or. 502, 123 Pac. 392, Ann. Cas. 1914B, 115.

Messrs. **Frich & Kelly**, for respondent:

Plaintiff could not after September 1, 1911, require a delivery of the 50 automobiles to him under the contract, nor could the defendant make delivery thereof and compel plaintiff to accept and pay for the cars.

Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; Sweetser v. Mellick, 4 Idaho, 201, 38 Pac. 403.

The action of money received is equitable in its nature, and is based, not on an express promise, but on the fact of the receipt of money by one from another through the medium of oppression, imposition, extortion, or deceit, or by mistake of fact, or without consideration, or on a consideration that has failed from which the law implies a promise to repay.

Ashton v. Shepherd, 120 Ind. 69, 22 N. E. 98; Richter v. Union Land & Stock Co. 129 Cal. 367, 62 Pac. 39; Tilford v. Roberts, 8 Ind. 254; Davis v. Marston, 5 Mass. 199; Dill v. Wareham, 7 Met. 438; Morrison v. Larrison, 1 Marv. (Del.) 211, 40 Atl. 1107; Field v. Banks, 177 Mass. 36, 58 N. E. 155; Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121; Luce v. New Orange Industrial Asso. 68 N. J. L. 31, 52 Atl. 306; Bier v. Bash,

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sideration for the contract because of a lack of mutuality.

c. Effect of recital of "$1" as consideration.

The mere recital in the contract, "and of $1 each to the other paid," imports no consideration, and does not cure the defect of want of mutuality caused by the reservation therein, in the manufacturer of automobiles who is a party thereto, of the arbitrary right to cancel the contract at any time. Velie Motor Car Co. v. Kopmeier Motor Car Co. supra.

III. Validity as affected by indefinite description of machines to be furnished under the contract.

It has been asserted that an order for the shipment of a number of automobiles to be filled as specified is too indefinite for enforcement. Wheaton v. Cadillac Automobile Co. 143 Mich. 21, 106 N. W. 399.

And it has been held that where an automobile company manufactures different kinds of automobiles, its mere agreement to sell a certain number of its automobiles as ordered by the other party to the contract does not sufficiently designate the subject-matter of the contract to give the other party thereto a right of action for damages for its breach by the termination thereof by the automobile company by giving written notice; and this is true although some automobiles have been ordered and furnished thereunder, there, however, being no unfilled order at the time of the termination of the contract. Oakland Motor Car Co. v. Indiana Automobile Co. supra.

It has been held, however, that if the offer to sell automobiles does not describe the automobiles, but is generally to furnish automobiles upon order without specifically describing them, then the giving of an order for a certain automobile included in the offer, before it is withdrawn or terminated, makes a definite and fixed contract as to the automobile ordered. Buick Motor Co. v. Thompson, 138 Ga. 282, 75 S. E. 354.

And see Bendix v. Staver Carriage Co. 174 Ill. App. 589, holding a contract by an automobile manufacturing company with a dealer, giving him the exclusive right to sell its automobiles within a certain territory, and agreeing to furnish him with cars of its manufacture as he may need them in his business, although the cars are not otherwise described, constitutes a continuing offer to sell such cars of its manufacture as the dealer may order within a specified time, and it cannot be withdrawn by the manufacturer without rendering himself liable for damages, where the dealer performs on his part.

IV. Validity under antimonopoly laws.

A retail sales agency contract which in effect confers the exclusive agency for the sale of a certain make of automobiles in a restricted territory for a short period of time does not violate the antimonopoly laws of Texas. Nickels v. Prewitt Auto Co. — Tex. Civ. App. —, 149 S. W. 1094.

V. Breach of contract by dealer.

a. Handling another car.

A provision in a contract of this character, that the dealer is to devote his energies to the sale of automobiles, means such efforts as, in the exercise of sound judgment, will be likely to produce the most profitable results to the manufacturer, in view of the nature of the business and the extent of territory to which the contract relates. Such an agreement is not breached by the agent handling another make of automobile if it is so dissimilar that it is not a competing car. Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 N. E. 221.

b. Retirement of member of firm.

A contract establishing a selling agency for the sale of automobiles and an agreement to sell a certain number of automobiles is an entirety; and the retirement from the firm of dealers with whom the

186 N. Y. 565, 79 N. E. 1101; Randlet v. Herren, 20 N. H. 102; Warder, B. & G. Co. v. Myers, 70 Neb. 15, 96 N. W. 992; Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686; Dring v. St. Lawrence Twp. 23 S. D. 624, 122 N. W. 664; Scheer v. Clinton Falls Nursery Co. 20 N. D. 1, 124 N. W. 1115.

Where the actual damages are readily ascertainable by the application of appropriate rules of law, the stipulated damages will be treated as a penalty, and the complaining party limited in his recovery to his actual damages.

Condon v. Kemper, 13 L.R.A. 671, and note, 47 Kan. 126, 27 Pac. 829; Wilkes v. Bierne, 31 L.R.A.(N.S.) 937, note; Squires v. Elwood, 33 Neb. 126, 49 N. W. 939; J. I. Case Threshing Mach. Co. v. Fronk, 105 Minn. 39, 117 N. W. 229.

Defendant has suffered no actual damages, and has no just claim on the deposited money.

McCormick Harvesting Mach. Co. v. Balfany, 78 Minn. 370, 79 Am. St. Rep. 393, 81 N. W. 10; Mead v. Rat Portage Lumber Co. 93 Minn. 343, 101 N. W. 299; D. M. Osborne & Co. v. Martin, 4 S. D. 297, 56 N. W. 905; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; Canham v. Plano Mfg. Co. 3 N. D. 229, 55 N. W. 583; 35 Cyc. 531.

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contract was made, of a partner whose partnership in the firm was the influencing consideration for the contract, entitles the manufacturer to cancel the contract. Wheaton v. Cadillac Automobile Co. 143 Mich. 21, 106 N. W. 399.

VI. Breach by manufacturer by selling automobiles in dealer's territory.

a. In general.

A contract making a person exclusive agent for the sale of automobiles in a specified territory is entitled to the same construction as a contract by which the agent is given the sole and exclusive sale of automobiles of the principal within the prescribed territory. In either case the right given is exclusive of the principal as well as of other agents. Garfield v. Peerless Motor Car Co. 189 Mass. 395, 75 N. E. 695.

Where a contract of this character expressly provides that if the agent receives inquiries from territory not his own he shall promptly refer them to the automobile company, this provision, coupled with his appointment as exclusive agent for a certain territory, implies that all inquiries from his territory shall be referred to him. Ibid.

b. Where sale is to resident in dealer's territory, but is made at another place.

The residence of the purchaser of an automobile, and not the place where the sale is made, is the test by which to determine whether or not a contract establishing a sales agency for the exclusive sale of automobiles has been violated by sales of automobiles to persons residing therein. Ibid.

A provision in an automobile sales agency contract, that the automobile company gives the exclusive and sole right to sell a designated make of automobiles in a certain territory for a limited period of time, vests in the dealer the exclusive right to sell in the territory referred to, during the life of the contract, and prohibits sales during such time by the manufacturer to persons residing within that territory, although the sale is made at some other place. Nickels v. Prewitt Auto Co. supra.
L.R.A.1915B.

A contract making a person the exclusive agent of an automobile company for the sale within certain territory of its automobiles is breached by the action of the automobile company in personally selling cars to persons residing within that territory, although the sale is not made within the territory. Illsley v. Peerless Motor Car Co. 177 Ill. App. 459.

VII. Measure of damages for breach by manufacturer.

a. Loss of prospective profits.

1. In general.

Loss of prospective profits may be recovered for a breach of a contract of this character, breached by the action of the automobile company by selling cars within the territory, when it appears to have been within the contemplation of the parties as a probable result of the breach, and where it is susceptible of proof by evidence reasonably certain, and not resting chiefly on speculation, conjecture, or surmise. And it is not necessary that the damages, in order to be recoverable, shall be calculable with mathematical accuracy, for there may be elements which can be determined only by approximation, and which may be in some degree contingent or matter of opinion; and yet the damages as a whole may be measured by a standard as definite as those, in the nature of things, courts and juries must be guided by in reaching results in many instances. Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 N. E. 221.

Loss of profit may have been found to have been within the contemplation of the parties to a contract of this character as the result of its breach, where the margin of gross profit was fixed definitely by the contract at a percentage on the list price of the automobiles, and the contract requires a minimum order of cars at a stated price. Under such circumstances loss of profits may be inferred as likely to flow as a reasonable and probable consequence of a failure to perform by the automobile company, or by its sale of cars within the prohibited territory in violation of the terms of the contract, for deprivation of a specific sum of money from the sale of each car

And the rule is the same where damages for breach, and not the price of the goods sold, is sought to be recovered by the seller.

Thick v. Detroit, U. & R. R. Co. 137 Mich. 708, 109 Am. St. Rep. 694, 101 N. W. 64; Norrington v. Wright and Sweetser v. Mellick, supra; Gardner v. Caylor, 24 Ind. App. 521, 56 N. E. 134; Offutt v. Wells, 42 Ala. 199; Newbery v. Furnival, 56 N. Y. 638; Neis v. Yocum, 9 Sawy. 24, 16 Fed. 168; Parish v. United States, 8 Wall. 489, 19 L. ed. 472; Smoot's Case, 15 Wall. 36, 21 L. ed. 107; Ames v. Moir, 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. Rep. 311; 35 Cyc. 534, and notes; Fountain City Drill Co. v. Lindquist, 22 S. D. 7, 114 N. W. 1098; Scheer v. Clinton Falls Nursery Co. 20 N. D. 1, 124 N. W. 1115.

Fisk, J., delivered the opinion of the court:

On October 8, 1910, the parties entered into the following written agreement:

This agreement, made this 8th day of October, A. D. 1910, at Lakota, North Dakota, between the Interstate Motor Car Company, party of the first part (hereinafter known as the distributers), and W. D. Gile,

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wrongfully sold would cause naturally a net financial detriment to the dealer. Ibid.

Compare with Isbell v. Anderson Carriage Co. 170 Mich. 304, 136 N. W. 457, holding that the breach of a contract by a manufacturer of automobiles, giving the other party thereto the exclusive agency for the sale of such automobiles within a prescribed territory, compensation to be based upon commissions on each automobile sold, where the breach was the wrongful and fraudulent termination of the contract by the manufacturer, does not entitle the dealer to recover the loss of prospective profits, although it was shown that the manufacturer, after terminating the contract, had sold a large number of automobiles within the ordinary life of the contract. The court was influenced in reaching this opinion by a provision in the contract to the effect that the manufacturer might terminate it if the manner of conducting the selling agency was not satisfactory, providing the dealer after receiving sixty days' notice of dissatisfaction did not remedy the matter complained of. The court said that the effect of this clause was to render the contract executed only for the period of time it had actually run, and for the balance of the time it was executory, and hence the plaintiff was entitled to recover damages only for the time it was executed, if it was wrongfully canceled. This decision seems to be at variance with those already considered, and particularly with Wier v. American Locomotive Co. 215 Mass. 303, 102 N. E. 481. As to the essential facts, these cases are very similar. In each case the contract related to the sale of automobiles of a kind whose reputation had not yet been established, and in each case the other party to the contract was a dealer who had not established a reputation or business as a dealer in automobiles. The only important difference between the two cases is that in the Michigan case the contract contained a provision entitling the automobile company to cancel the contract if the business of the dealer was not run to his satisfaction, providing notice of such dissatisfaction was given to the dealer, and the latter, within a certain time, did not remedy the matter complained of. This provision the court construed as giving the automobile company the arbitrary right to cancel the contract if based upon any dissatisfaction with the management by the dealer of his business, without reference to whether the dissatisfaction was reasonable or unreasonable, real or fancied, provided the automobile company acted in good faith. In reaching this conclusion, the court apparently overlooked the effect upon this general clause of the provision requiring notice to the dealer of dissatisfaction, and giving the latter sixty days in which to remedy the matter. Construing the clause as a whole, it would seem clear that it was not intended thereby to provide for the right of the defendant automobile company to terminate the contract if, according to its own fancy and judgment, the business was not conducted to its satisfaction. This provision tends strongly to indicate that the dissatisfaction of the automobile company must be reasonable and justified, and that it was not intended that whimsical, arbitrary, or impossible exactions might thereby be imposed upon the dealer, as to the manner in which he should conduct the business. The very limitation upon the manufacturer of right to complain, by giving the dealer the right to change his mode of business in order to obviate the objections made, within sixty days from notice of dissatisfaction, would seem to require a construction that the dissatisfaction of the automobile company must be based upon reasonable objections and reasonably within the power of the dealer to remedy, and such as might reasonably be within the contemplation of the parties at the time of entering into the contract. This clause, therefore, should not affect the rule as to the measure of damages recoverable. In this connection it is also to be observed that the actual number of automobiles sold by the manufacturer within the territory granted the dealer was held to be no evidence upon which to base the damages recoverable, because it did not, and could not, appear that the plaintiff would use the same methods as the defendant in procuring such sales. This holding is answered by the rule already referred to, that the defendant, under such circumstances, is estopped to deny that the plaintiff would have made such sales.

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party of the second part (hereinafter known as the dealer), witnesseth:

(1) That the distributers hereby grant unto said dealer the right to sell Interstate cars in the following described territory, to wit: Williams, McKenzie, Billings, Bowman, Burke, Montraile, Dunn, Stark, Hettinger and Adams counties. (The Interstate Motor Car Company reserves the right to cancel any of the above counties if no agency appointed on or before June 1, 1911, by the dealer.)

(2) The distributers hereby agree to sell to the dealer Interstate cars with standard catalogue equipment at a discount of 20 per cent from list price thereof. The price of Interstate cars, in standard "Touring," "Roadster," or "Demi-Tonneau" types, with full lamp equipment, magneto, horn, and tools, shall be $1,750 f. o. b. factory at Muncie, Indiana.

(3) The distributers reserve the right to change all prices and discounts mentioned in this contract, upon two weeks' notice in writing, duly mailed to the dealer.

(4) No order for automobiles, automobile parts, or attachments shall be binding upon said distributers unless said order shall clearly specify kinds and styles, dates of shipment, etc., and unless it is accepted by the distributer at least thirty days prior to date of delivery, and all such orders and acceptances shall be in writing and subject to delays caused by strikes, fires, or other causes beyond manufacturer's control.

(5) The failure of the distributers to enforce at any time any of the provisions of this agreement, or to exercise any option which is herein provided, or to require at any time performance by the dealer of any of the provisions hereof, shall in no way be construed to be a waiver thereof, nor in any way affect the validity of this contract or any part thereof, or the right of the distributers to hereafter enforce the same.

(6) The distributers shall not be liable for any failure of performance on its part when said failure of performance shall be due to fire, strike, insurrection, or any other cause beyond its control.

(7) It is expressly understood and agreed that the title to each and every automobile, and to all automobile parts furnished to said dealer, under the terms of this agreement, shall be and remain in the distributers' name until same is paid for in full, in cash.

(8) It is further agreed that the distributers shall not be liable to the dealer for any loss or damage to automobiles or other goods furnished under this contract, while the same are in the custody and pos-

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2. Right to consider sales made by manufacturer in dealer's territory in computing latter's damage.

The measure of damages for a breach of a contract making a person exclusive agent for the sale of automobiles within a designated territory, breached by the sale of automobiles within such territory by the manufacturer, is the profits which the plaintiff was deprived of by the sales made within his territory. This is determined by the number of such sales; since it is the duty of the manufacturer to refer to his agent having a right to exclusive territory, all inquiries for cars within his territory, and the presumption is if that had been done the agent would have made the sales. Sparks v. Reliable Dayton Motor Car Co. 85 Kan. 29, 116 Pac. 363, Ann. Cas. 1912C, 1251.

It may fairly be inferred that for the breach of a contract establishing an exclusive sales agency for the sale of automobiles within a designated territory, where the compensation of the dealer is a commission upon the list price of cars sold, that the parties contemplated as the measure of damages for a breach thereof by the wrongful act of the manufacturer in making sales within this territory, the amount which the dealer would have received if he had made the sale or sales, and this to be based upon the list price although the manufacturer sold for less than that amount. L.R.A.1915B.

Wier v. American Locomotive Co. 215 Mass. 303, 102 N. E. 481.

Proof may be given of a trade usage by which one having the exclusive territory for the sale of automobiles is entitled to a commission on sales made within his territory, without reference to whether or not the sales are made by or through him, and including sales made by his principal. Garfield v. Peerless Motor Car Co. 189 Mass. 395, 75 N. E. 695.

In Randall v. Peerless Motor Car Co. 212 Mass. 352, 99 N. E. 221, it is held proper for the jury to take into consideration, in fixing the amount of damages recoverable by a dealer from a manufacturer of automobiles for the breach of a contract giving him the exclusive agency for a sale of automobiles within a certain territory, the number of cars actually sold by the defendant during the life of the contract, and those of other makes sold by the plaintiff and others, together with evidence as to the expense of conducting the plaintiff's business. And it is said that this and other evidence may furnish knowledge extensive enough to be a basis for inference as to the number of cars the plaintiff might have sold but for the wrongful act of defendant.

And it has been held in this connection that the net profits of a retail automobile dealer are arrived at by deducting all the expenses of carrying on the business,—the cost of employees, advertising, keeping the cars in repair, shop and garage, and of

session of any railroad, express company, or other common carrier in transit.

(9) All claims on account of material must be made by the dealer within sixty days after the delivery of automobiles, etc., to the dealer's customers, and upon any such material being submitted to the manufacturer properly tagged, giving the motor number of the automobile from which the same was taken, the name and address of the owner, and the date of sale when new, and the date when said part was taken from said automobile, or gratuitous exchange of part was made, and such other information as may from time to time be prescribed by the manufacturer, manufacturer agrees to replace such parts gratis, if, upon examination of the same, it shall, in the opinion of the manufacturer, be found to be defective in workmanship and material; the freight or express charges on said part so returned to the manufacturer for credit or replacement must in all cases be prepaid by the dealer; and all claims on account of defective tires, rims, coils, radiators, and other equipment not manufactured by the Interstate Automobile Company, must be made by said dealer to the respective manufacturers of such tires, rims, coils, radiators, and other equipment.

(10) The dealer hereby orders and agrees to take and pay for not less than 50 Interstate cars of the types, and on the dates as hereinafter, indicated:

	Touring Car.
Jan. 1911	Three
Feb. 1911	Three
Mar. 1911	Three
Apr. 1911	Six
May, 1911	Nine
June, 1911	Twelve
July, 1911	Eight
Sep. 1911	
Oct. 1911	
Nov. 1910	Three
Dec. 1910	Three

(11) The dealer has deposited with the distributers the sum of $1,250 to apply at the rate of $25 per car on the cars ordered as above; said sum will be credited by the distributers to the dealer, and will be repaid as cars are delivered and paid for, at the same rate, except that any or all of said deposit may, at the option of the distributer, be credited against any parts or open account due the distributers from the dealer, and the balance, if any, will be credited *pro rata* on each car taken. The balance of the price of each, over and above the amount prepaid and credited against it as aforesaid, shall be paid at the time of shipment or on presentation of sight draft with bill of lading attached.

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everything incidental to the business, should be deducted in ascertaining the damages a retail dealer is entitled to recover for the wrongful termination of his contract; and while the jury may consider the number of automobiles sold, they should also take into consideration the fact that the successor to such dealer had a very much larger retail selling force than such dealer had. French v. Pullman Motor Car Co. 242 Pa. 136, 88 Atl. 876.

But it has been declared that the measure of damages for the breach of a contract making the plaintiff the exclusive agent for the seller in the sale of automobiles within a designated territory, breached by the sale of automobiles to persons residing within such territory, is the actual damages suffered, and this must be proven by the plaintiff. It is not sufficient for him to prove that sales have been made by the manufacturer, unless he also proves it to be a custom or usage to pay the agent the prescribed commission upon cars sold within his territory. In the absence of such proof, to recover substantial damages based upon such sales, he must show that the sales might have been made by him had the manufacturer not made same. Illsley v. Peerless Motor Car Co. 177 Ill. App. 459.

And see Isbell v. Anderson Carriage Co. 170 Mich. 304, 136 N. W. 457, commented upon at length. But see infra 3, as to estoppel of manufacturer to deny that dealer would have made sales he made.

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3. Estoppel of manufacturer to deny that dealer would have made sales he made.

A manufacturer of automobiles who, after making another his exclusive agent within a prescribed territory for the sale of his automobiles, breaches his contract by making sales within such territory, in an action against him for damages for such breach, is estopped by his wrongful conduct to assert that the plaintiff would not have made such sales. Schiffman v. Peerless Motor Car Co. 13 Cal. App. 600, 110 Pac. 460; Sparks v. Reliable Dayton Motor Car Co. 85 Kan. 29, 116 Pac. 363, Ann. Cas. 1912C, 1251; Wier v. American Locomotive Co. 215 Mass. 303, 102 N. E. 481; Cofield v. E. A. Jenkins Motor Car Co. 89 S. C. 419, 71 S. E. 969; contra see Isbell v. Anderson Carriage Co. supra.

VIII. Measure of damages for breach by dealer.

The measure of damages recoverable by a jobber in automobiles for breach of contract by a dealer in automobiles to purchase a certain number of automobiles is not the difference between the contract price and the market price, but the amount of profits, if any, lost by the breach, and the burden is upon him to prove same. Tedford Auto Co. v. Horn, — Ark. —, 168 S. W. 133.

Where a dealer in automobiles makes a deposit upon automobiles which he agrees

(12) The dealer further agrees:

(a) That he will maintain at all times the manufacturer's list price for automobiles and parts, and that he will not by rebates, allowances, donations, or by other means, evade the spirit of this clause.

(b) That at the end of each week the dealer will report to the distributers the names and addresses of all purchasers of Interstate cars, together with factory number of same.

(c) That he will faithfully represent and advertise such automobiles; make all reasonable efforts to promote and increase the sales thereof; keep in stock at least one of Interstate manufacture, for the sole purpose of demonstrating and exhibiting to prospective purchasers, and maintain the same in good order and repair.

(d) That he will respond promptly to all inquiries respecting the purchase of said automobiles; keep the distributers fully informed as to the number of inquiries for, and sales of automobiles within said territory, and any other matters affecting the interests of the distributers in connection with this agreement; sell all vehicles covered by this agreement and all their parts and attachments at the selling prices, according to lists thereof to be furnished by said distributers; that he will do nothing that will in any way infringe, impeach, or lessen the value of any of the patents under which the manufacturer makes such vehicles; and will not sell nor offer for sale, directly or indirectly, any new automobiles or motor cars, except the following lines, the sale of which, by the dealer, is hereby approved by the distributers.

(g) That if this contract to take and pay for cars is unfulfilled by the dealer, the distributers may retain the amount of any deposits remaining to his credit, as liquidated damages for the breach thereof.

(h) That all parts ordered shall be shipped C. O. D.

(i) That he will not materially change any car manufactured by the manufacturer, nor assign this contract or any rights hereunder, without the written consent of the distributers.

(j) That he will not sell any new car manufactured by the manufacturer of Interstate cars, or any parts or accessories thereof, in any territory other than that above described, except that, should any person or persons residing elsewhere come unsolicited to the dealer's place of business, sales may be made for the delivery of cars off the floor: Provided, however, That

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to purchase under a contract giving him the agency thereof in a certain territory, and the contract is not canceled by the other party during its life, the dealer is entitled to recover a deposit made upon the automobiles, although he did not buy the automobiles according to the contract, where no damages as a result of the breach were proved by the seller. Ibid.

Where the purchaser of a specific number of automobiles under an agency contract deposited a certain sum of money to apply upon the purchase price, and received one car but never received the other cars stipulated for, due to his failure to furnish shipping directions, and thereafter the manufacturer exercised a privilege reserved in the contract, to cancel it, he cannot, after thus canceling the contract, apply the balance of the money deposited upon the purchase price of the car already shipped and settled for, on the theory that he is entitled to the full list price of the car without deducting any discount therefrom, because of the failure of the dealer to enable him to ship the other cars by furnishing shipping directions before the contract was canceled. Drake v. White Sewing Mach. Co. 133 App. Div. 446, 118 N. Y. Supp. 178, affirmed without opinion in 199 N. Y. 595, 93 N. E. 1120.

Where there is a provision in an agency contract for the sale at retail of automobiles, by which the dealer agrees to purchase a certain number of cars for a certain discount from the list price, a further provision that in event of his failure to take that number of cars, a different discount is provided for, does not constitute a stipulation for liquidated damages, and does not preclude a recovery from the dealer of actual damages based on his failure to take the number of cars contracted for. Klauder v. C. V. G. Import Co. 61 Misc. 255, 113 N. Y. Supp. 716.

An agreement establishing a retail sale agency for the sale of automobiles, and an agreement by the dealer to purchase five cars "optional," together with the payment of a sum of money by the latter, a portion thereof to apply upon the purchase price of the five cars and the balance upon the first car delivered, constitute a binding contract for the sale of the five cars, and the dealer is liable in damages to the manufacturer for his breach of agreement to order and receive said cars. Alden v. Kaiser, 121 Minn. 111, 140 N. W. 343.

And see GILE v. INTERSTATE MOTOR CAR CO., holding that where, under a contract establishing a sales agency for the sale of automobiles, the dealer orders a certain number of cars and makes a deposit upon the purchase price, which the automobile company may retain as liquidated damages for breach of the contract by the dealer to take and pay for cars, the dealer is not entitled to recover any part of this deposit where he fails to take the cars specified, and during the life of the contract the manufacturer does not refuse to ship any cars ordered, although the contract contains a provision that no order for automobiles shall be binding upon the distributers unless accepted at least thirty days prior to date of delivery. A. G. S.

should any reduction in price, rebate, donation in the form of freight charges, extra equipment, or other special inducement, expressed or implied, be offered to effect such sale, the same shall be construed as a violation of the spirit of this contract, and the distributers may, after hearing both sides, arbitrarily so decide and require the dealer to pay the full or any part of the discount to the dealer in whose territory the buyer may have his legal residence.

(13) It is mutually understood and agreed:

(a) That this contract shall be interpreted and construed according to the laws of the state of North Dakota.

(b) That this contract shall expire by its own limitation on September 1, 1911, or may be canceled by either party upon thirty days' written notice, given to the other by registered letter, and such cancelation of this contract shall operate as a cancelation of all orders for automobiles, automobile parts, or attachments which may have been received from said dealer, and which have not been shipped prior to the date when such cancelation takes effect, but shall not cancel any standing accounts for automobiles, parts, etc.

(c) That after the termination of this agreement for cause or as above prescribed, the continuance of the sale of such automobiles, or the referring of inquiring by the distributers to the dealer, shall not be construed as a renewal of this agreement for any specified period of time; but all orders accepted by the distributers, and all sales made by the dealer after such termination of this contract, shall be governed by the terms and conditions thereof.

This agreement to be valid must bear the signatures of the president and secretary of the Interstate Motor Car Company.

In witness whereof, the said parties hereto have signed this agreement the day and year first above written.

Interstate Motor Car Co.,
(The Distributers.)
Geo. L. Barrett, President.
————, Secretary.
W. D. Gile.
(The Dealer.)

Pursuant to the terms of such contract plaintiff deposited with defendant the sum of $1,250. Whether such deposit was in cash or by the transfer to defendant of certain personal property is not here material. That the contract in this respect was complied with by plaintiff is conceded. It is also conceded that plaintiff during the entire life of such contract exercised, unmolested, the right conferred on him by such instrument of canvassing the territory therein, consisting of ten counties in the northwestern portion of this state, for prospective purchasers of Interstate cars, and that defendant in good faith lent him friendly assistance in such work. It is also undisputed that plaintiff failed to secure a single order, and that as a consequence he not only failed to order and pay for 50 cars, which he agreed to do by the terms of such contract, but he did not order or pay for any of such cars whatever. It cannot be questioned but that such contract was fairly and in good faith entered into by both parties, and that they both in good faith endeavored to perform the same; also that the only breach thereof was occasioned by plaintiff's inability and failure (whether through incompetency or otherwise being immaterial) to find purchasers so as to enable him to order and pay for the 50 cars aforesaid. During the entire time in which such contract was in force, no attempt was made by either party to rescind, cancel, or treat the contract at an end for any reason whatsoever; both apparently treating the same as in all respects a valid and enforceable contract. The evidence also tends to show that during all such period of time defendant held itself ready, able, and willing to furnish such cars as plaintiff might order, upon the terms stated in the contract.

Shortly after the expiration of the contract, and on September 25, 1911, this action was commenced to recover, as the complaint alleges, as for money had and received, the sum of $1,000, being the amount claimed by plaintiff to have been deposited with defendant under such contract. Defendant answered, setting up the contract aforesaid, and alleging that the sum claimed in the complaint was deposited with it pursuant to such contract, alleging plaintiff's breach thereof, and asserting its right to retain such deposit as liquidated damages pursuant to the terms of the agreement; and also alleging facts tending to show that by plaintiff's breach defendant suffered damages in a sum in excess of the amount of such deposit. Such answer also alleges by way of counterclaim a cause of action in its favor and against plaintiff upon a promissory note for $350 and interest, executed and delivered by defendant to plaintiff on October 8, 1910. At the conclusion of the testimony the trial court directed the jury to return a verdict in defendant's favor, both on the cause of action alleged in the complaint and on the defendant's counterclaim aforesaid. Thereafter the trial court granted plaintiff's motion for a new trial, and from the order defendant appeals.

The sole error assigned is the granting of

the new trial. The grounds for making such order appear in a memorandum decision set out in the abstract, and in substance are that error was committed in directing the verdict for defendant, because of lack of proof that defendant ever offered to deliver the cars to the plaintiff under the contract; the court saying: "If plaintiff had refused to accept the cars before time of delivery and acceptance had arrived, defendant would not be required to offer to perform as a prerequisite to relief by recovery of damages." The learned trial court evidently misconstrued defendant's answer wherein it alleged such damages merely as defensive matter, and not by way of counterclaim. Defendant did not seek to recover such damages under the contract on account of plaintiff's breach thereof, but it merely sought to plead and show such damages by way of defense. In other words, it was not incumbent on it to allege such matters at all, for the same or any other facts tending to show a want of equity in plaintiff's claim were provable under the denials in the answer. 27 Cyc. 881, and cases cited in note 16.

In Hawks v. Hawks, 124 Mass. 457, in speaking on this subject the court, among other things, said: "The general denial called on the plaintiff to prove not only the receipt of the money by the defendant, but that he received it under circumstances which gave the plaintiff a right to recover it. The defendant was entitled, under his answer, to establish any facts which would disprove the plaintiff's case. It was open to him to show that he did not receive the money, and that, if he did receive it, he was under no obligation to pay it to the plaintiff."

In the first opinion we reached a conclusion favorable to respondent. A rehearing was ordered, and the case has been reargued, and upon further consideration we feel constrained to depart from the views formerly expressed, and to now hold that the order granting such new trial was erroneous. The following reasons prompt us to arrive at this conclusion.

The action being for money had and received, it concededly follows that no recovery can be had by plaintiff without showing facts from which the law raises an implied promise on defendant's part to repay to plaintiff such deposit. In order to raise such an implied promise, it is elementary that facts must be shown from which it is made to appear that in equity and good conscience defendant ought not to retain such deposit. Plaintiff has established such a showing, provided his premise be sound that he has received no consideration for such deposit, or that such consideration has wholly failed. Numerous authorities are cited by him where recoveries were sustained because of failure of consideration. Such authorities no doubt announce a correct rule, but are they applicable to the facts in the case at bar? We think not. It seems to be the contention of respondent's counsel that such contract merely amounts, in substance and effect, to an executory agreement for the purchase and sale of 50 automobiles, and that such deposit was exacted and paid as and for a part payment in advance on the purchase price, in the nature of a guaranty or earnest money for the faithful performance thereof by respondent, the same to be credited at the rate of $25 on each car when purchased, and that defendant breached such contract by failing to deliver or tender for delivery to plaintiff any of the cars. That as a consequence plaintiff received no consideration for the deposit, or that such consideration has wholly failed through the fault of defendant. The fallacy of such contention is made apparent from an inspection of the contract and a review of the evidence. What, in brief, are the salient features of this contract In consideration of plaintiff's promise to purchase and pay for at least 50 Interstate cars at stated times, and to advance to defendant such deposit of $1,250 to be applied on the purchase price as above stated, defendant granted to plaintiff, for a specified period of time, the exclusive right to sell such cars in ten counties of the state, and obligated itself to furnish such cars as plaintiff might order at certain discounts from list prices. This, in the eye of the law, was a valuable right. That it ultimately proved to be valueless to him does not justify the claim that such right was of no value in the eye of the law. If plaintiff had been successful in securing purchasers of cars, such right or privilege might have resulted in great benefit and profit to him. He was not restricted to the sale of 50 cars. No limitation as to the number was stipulated. How, therefore, under any possible theory, can he properly ignore this important provision of the contract, and successfully assert that the entire consideration for this advance payment or deposit has failed because no cars were in fact sold? Was not the grant of this large territory something of value which defendant parted with, and did not plaintiff during the entire period enjoy such right to the exclusion of defendant and others? That he did must be conceded. Therefore, unless it can be said that defendant refused to carry out the contract in respect to furnishing cars when ordered, or in some other respect breached the contract on its part,

how can a court say that, in equity and good conscience, defendant ought to repay such deposit? We assert, without the fear of successful contradiction, that no court ever held under such facts that an implied promise was created by law on defendant's part to make such repayment. It is only in cases where the contract has been breached by the vendor that the vendee has been held entitled to recover payments made on the purchase price, with the exception of cases involving facts and legal principles not present nor applicable in the case at bar. It cannot be denied that defendant, during the entire life of the contract, did everything it could reasonably be expected to do to carry out its provisions. On the contrary, the proof discloses that the plaintiff breached the contract by failing and neglecting to purchase 50 cars, or any cars, as he had promised and agreed to do. True, he in good faith attempted to fulfil the contract, and for some reason failed, but does this fact redound to his benefit by raising an equity in his favor? Are we to announce a precedent that he who enters into a losing bargain not induced by the fraud or the deceit of the other party, and who exercises rights conferred on him thereunder during the entire life of the contract, may thereafter successfully assert that, in equity and good conscience, he is entitled to a return of all that he parted with under the agreement? Such a precedent would, we fear, stand alone in the jurisprudence of this country.

Nearly a century ago the supreme court of New York, in the case of Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384, used the following language, the correctness of which has, we think, never been challenged: "It may be asserted, with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations, according to the contract, has never been suffered to recover for what has been thus advanced or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have themselves rescinded the contract. It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

The same court in a recent case announced a rule which seems to be applicable on principle to the case at bar, although in that case it was alleged that the defendant wrongfully breached the contract. The facts were that plaintiff took out five policies of life insurance with the defendant company, and after the policies had been in force for some time the defendant forfeited the same for nonpayment of a premium, and plaintiff asked to recover, as for moneys had and received by defendant to plaintiff's use, all premiums paid by her on the policies. The court held she could not recover, saying, among other things: "The question which arose upon the motion of the defendant's counsel for dismissal of the complaint was solely with regard to the plaintiff's right to recover in assumpsit as for money had and received by the defendant to her use, the premiums paid, and we concur in the justice's decision that the plaintiff had mistaken her remedy. Granting that upon the defendant's breach the plaintiff could treat the contract, with regard to each of the policies, as determined, it does not follow that the defendant was bound *ex æquo et bono*, to restore the premiums received by it, for which, in part at least, the plaintiff had had value in the risk assumed by the defendant. Plainly the plaintiff could not predicate a rescission of the contract of the defendant's breach without restitution by her of what she had received under the contract; and a contract of life insurance being essentially indivisible, in point of performance, by either of the parties thereto, . . . such restitution was, in the nature of things, impossible. . . . The case at bar should be distinguished from the case where the failure of consideration for the premiums paid is entire, in that the risk to be assumed by the insurer under the policy never attached; the policy being avoided for noncompliance with a condition precedent, fraud, or other causes." Skudera v. Metropolitan L. Ins. Co. 17 Misc. 367, 39 N. Y. Supp. 1059.

The contention that this deposit cannot be retained because the stipulation in the contract authorizing its retention is in the nature of a penalty which the law abhors and the Code expressly prohibits is untenable for the reason that the actual damages caused by plaintiff's breach of the contract are not susceptible of proof, and consequently the contract comes within the exception provided for in § 5370, Rev. Codes, 1905, which provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be the

amount of damage." If, as respondent's counsel argue, the contract was one merely for the purchase and sale of 50 automobiles, their contention would have merit. But as we have before stated, and as the instrument clearly provides, this is but one feature of the bargain. We are not at liberty to segregate this stipulation from the balance of the contract, and say that it is the entire agreement. As a consideration for the exclusive right granted him to sell Interstate cars in these ten counties, and the defendant's undertaking to furnish cars as ordered at certain stipulated discounts from list prices, plaintiff agreed not only to purchase and pay for at least 50 cars, but he also agreed, among other things, to "faithfully represent and advertise such automobiles, make all reasonable efforts to promote and increase the sales thereof, keep in stock at least one of Interstate manufacture, for the sole purpose of demonstrating and exhibiting to prospective purchasers," etc. Clearly, therefore, it was within the contemplation of the parties that more than 50 cars might be placed in such territory by plaintiff, under the contract; and, further, that defendant would or might derive benefits thereunder in addition to profits which it might make on sales of cars by plaintiff during the life of the contract. The parties, we think, had the right, therefore, to agree upon liquidated damages, for it is obvious that "from the nature of the case it would be impracticable or extremely difficult to fix the actual damage" caused to defendant by a breach thereof. But in any event plaintiff is not entitled to recover such deposit, even if it be treated as a penalty instead of liquidated damages, for the proof shows that the actual damages suffered by defendant on account of plaintiff's failure to perform exceed the amount of such deposit. Krausse v. Greenfield, 61 Or. 502, 123 Pac. 392, Ann. Cas. 1914B, 115; Bilz v. Powell, 50 Colo. 482, 38 L.R.A.(N.S.) 847, 117 Pac. 344.

This brings us back to the original question as to whether the stipulated consideration going to plaintiff has failed. Just how and in what manner it has failed we are wholly at a loss to comprehend. Plaintiff, as before stated, operated under it during the entire term. That he accomplished nothing of substantial benefit to him or to the defendant is not in the least controlling. It must be admitted that defendant parted with a consideration by conferring upon plaintiff the right to solicit and make sales of cars in these ten counties during the year, and it must also be conceded that such consideration has not, and of course cannot, be restored to it by plaintiff. Nor can defendant be placed *in statu quo*.

L.R.A.1915B.

The theory upon which our first decision was based was that no consideration was received by plaintiff, because the contract was wholly executory and lacked mutuality. Consequently it was a mere *nudum pactum*. We relied upon and erroneously misapplied certain authorities, including Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324, and Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499. These cases are not in point, for the plain reason that under their facts it appears that no part of the contracts had been executed and no benefits had been taken or consideration parted with thereunder.

In the Velie Case the manufacturer sued the dealer for damages for the latter's failure to perform the contract; he having repudiated the contract shortly after it was entered into.

In the Oakland Case the dealer sued the manufacturer to recover for loss of profits occasioned by the latter's repudiation of the contract shortly after it was entered into. Both decisions are predicated upon the fact that the contract was executory.

The case at bar is to be differentiated from those cases in the important facts that, even conceding that the contract at the time it was made was nonenforceable because of lack of mutuality, nevertheless the parties saw fit during the entire life of the contract to treat it as a valid and subsisting contract, governing the rights of the parties. This, of course, they had a perfect right to do, for it is not contended that the contract was illegal and such a one as the parties could not recognize and carry out. To the extent, therefore, that the parties acted under and performed the same, it is valid and enforceable, and must measure their respective rights. See Peoples v. Evens, 8 N. D. 121, 77 N. W. 93; Fuller v. Rice, 52 Mich. 435, 18 N. W. 204; Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285; Peeples v. Citizens' Nat. L. Ins. Co. 11 Ga. App. 177, 74 S. E. 1034; Grove v. Hodges, 55 Pa. 504, 2 Mor. Min. Rep. 698.

The theory upon which this court in its first opinion decided the case was not urged or relied upon by plaintiff's counsel, either in the district court or in their printed brief in this court, but upon oral argument on rehearing they adopted such theory for the first time. The fallacy of such theory is, we think, quite apparent when we consider the fact that both parties recognized and acted under the contract during its entire existence. If the contract was wholly executory on both sides, and voidable for lack of mutuality, an entirely different sit-

uation would be presented; but plaintiff saw fit to avail himself of the privileges awarded him under the contract, and because he was unsuccessful in making sales of cars he now seeks to recover back what he parted with under the contract, although compelled to admit that defendant lived up to the contract in all respects in so far as plaintiff enabled it to do so.

The trial court was, we think, clearly in error in holding that defendant failed in its proof. It had no burden of proof to meet in order to defeat plaintiff's recovery. It did not seek to recover damages under the contract, but it merely sought to defeat plaintiff's recovery of such deposit by showing that it was actually damaged by plaintiff's breach to an amount greater than the deposit, thereby disproving any equity in plaintiff's claim. We think the proof amply sufficient for such purpose; but granting, for the sake of argument, that it failed, still plaintiff cannot recover in any event on the conceded facts, for the reason, as above stated, that he has failed to show that in equity and good conscience he is entitled to a return of the payments made by him. He breached the contract, while defendant faithfully complied therewith as far as plaintiff would permit it to do. Furthermore, as before stated, plaintiff is not in a position, even if willing, to restore to defendant what it parted with under the contract, so as to put it *in statu quo*.

"The action for money had and received proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. And the other party to the contract must be placed in as good a position as he was before the contract was entered into." 27 Cyc. 871, and cases cited. How can plaintiff at this late date disaffirm the contract which has lived its allotted life, during which time both parties acted under it? That plaintiff's action to recover such deposit as money had and received will not lie under the undisputed facts is elementary. In support of our views we deem the citation of authorities unnecessary, but see generally the article entitled "Money Received," in 27 Cyc. 847–885. It is idle to contend from this record that defendant was in default in any respect. At no place in his testimony does plaintiff make any such claim. On the contrary, he testified in effect that defendant's officers, so far as he could judge from what they said and did, were anxious to have him make good under the contract, and that he did not know as they ever at any time put any hindrance in his way of making good under the contract. Certainly, in the light of the admitted fact that plaintiff wholy failed to secure purchasers of cars, and was unable to take and pay for any, no duty rested upon defendant of tendering delivery. Respondent evidently realized at the trial that he was confronted with a serious question under the facts regarding his right to recover such deposit as money had and received, for he sought to prove a conversation with Barrett at the time the written contract was executed, to show, contrary to the express stipulation of such contract, that Barrett assured him in effect that such stipulation meant nothing, and that any balance of such deposit remaining at the end of the season was to be returned to respondent. There are two answers to such theory: First, this testimony was objected to and was clearly inadmissible as tending to vary the terms of the written contract; and, second, plaintiff's action, being for money had and received, is necessarily predicated upon an implied promise to repay such money. If an express promise existed, the action should be based thereon. Furthermore, of what value as a guaranty of respondent's faithful performance of the contract would such deposit be if, as respondent undertook to prove, the same, or any balance remaining of such fund, was to be returned unconditionally?

The order appealed from is reversed.

Goss, J., dissenting (February 20, 1914):

With due deference to the opinion of the majority, the writer cannot concur therein. The real equities of this case seem to me to have been ignored and misplaced, while the decision in effect causes equity to work a forfeiture, something it abhors. This result has come from what seems to me to be the erroneous assumption that the contract in question was such in law, and created legal obligations, instead of it being plaintiff's mere written offer, acceptable by its very terms only by performance and to the extent only of actual performance, and until performed wholly unilateral, and in any event terminable practically at the will of the parties and therefore without performance never legally obligating either party to abide by its terms; that consequently, in a strict legal sense, it had no lifetime nor term of existence, nor period for performance, and, having none, it could not lapse, and the failure to cancel it by either party could neither retroactively, as in effect held, nor otherwise, change the legal status of the parties. From the viewpoint of the writer the majority opinion has magnified mere privileges permitted into legal rights granted, and from that as a basis deduced resulting erroneously assumed obligations.

In the early summer of 1911, Gile worked

his territory to procure purchasers, but a crop failure occurred in all the territory covered in his contract. Of the uselessness of expending effort in attempting sales under such circumstances defendant had notice, as is apparent from its telegram in evidence, dated July 18th, sent from Lakota to the plaintiff at Williston, and requesting him to come down there to make sales where, because of rains, the prospects were better. It is true that the contract was never canceled, as plaintiff could have done at any time, according to its terms, on thirty days' notice, if in fact it ever obligated plaintiff at all. But the reason for noncancelation fully appears in the testimony. Plaintiff testified: "I told Mr. Barrett at the time that 50 cars was an awful lot to contract for, and what an awful bunch of money; and he says, 'You have a large territory, and if you need the cars why you are sure you will get what is in the contract;' 'but,' he says, 'it doesn't make any difference whether you take any of them or not;' and the money was to be credited on the contract as I ordered the cars in it, and the balance at the end of the season was to be turned over to me. He says: 'I want to know that you are going to work that territory.'" Defendant led plaintiff to believe, at the very inception of the contract, that his money would be returned if the cars were not taken, and this belief was but reasonable, for under the terms of the contract itself the deposit was to be returned to plaintiff as a credit on cars as taken, and if the contract was canceled by defendant the money must also be returned. These provisions render the forfeiture clause of the contract ambiguous and susceptible of explanation by proof of an express oral construction given it by the parties contemporaneous with its execution and delivery, as to the return or nonreturn of the deposit money under the facts before us. This testimony is therefore admissible for its bearing upon the reason why the contract was allowed to lapse without cancelation, if importance be given the fact of failure to cancel. Not that this is important in the opinion of the writer. But it seems that so much importance has been placed thereon in the majority opinion that apparently the decision has turned on plaintiff's failure to exercise his right of cancelation, while the reason for such failure has been utterly ignored. It is evident that plaintiff relied implicity upon receiving fair instead of unconscionable business treatment from defendant. That his deposit of $1,250 would be held back by it as forfeited he evidently never contemplated for a moment.

The main opinion assumes, as a premise for the conclusion reached, that by this alleged contract plaintiff procured a right he did not prior thereto possess, to wit, the right to canvass and make sales in certain territory, and this presumably was of some value, and as such was a consideration sufficient to support the promise of plaintiff to canvass said territory, and make sales therein, and as rendering the contract mutual, and as based upon a sufficient and adequate existing consideration. It is true that if there was a right granted by defendant to plaintiff, even though of little value, it will support the contract and amount to a valid consideration; the law not weighing the adequacy of consideration, but assuming that the parties have done so in entering into the agreement. But let us see whether at this time defendant parted to plaintiff with anything of value, either as a forbearance or a grant. Assuming this contract to be wholly executory, which question assumed is treated later, its validity and binding force as a contract, dependent upon whether a valuable consideration has been passed, must be determined as of the time when it is made. See § 207 of vol. 1 of Elliott on Contracts (1913), under a discussion of valuable consideration, reading: "Whether the contract rests upon a valuable consideration must be determined by the conditions as they exist when it is made, not as they may be at some subsequent time,"—citing Casserleigh v. Wood, 56 C. C. A. 212, 119 Fed. 308. Continuing from the same author: "In the absence of any sufficient consideration, the law supplies no means and affords no remedy to compel the performance of a simple executory agreement made without consideration; such a contract is a nude pact, and not binding in law, no matter how strongly it may appeal to the conscience,"—citing many cases. And this is but the gist of the reasoning of our own court in Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051, and Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544.

With this in mind, an examination of the contract entered into October 8, 1910, shows a delivery of a designated number of cars each month for nine months, beginning November, 1910, to be made by defendant. Had the contract expressly stipulated defendant should deliver, and had plaintiff given orders October 8th for the November instalment of three cars, they were not deliverable until such time in November as defendant should elect, and it could therefore have made delivery November 30th and literally complied with the terms of the contract. Hence November 30th was the first date at which a delivery was due or defendant be in default, assuming the con-

tract to be binding. Viewing it as of the date when the parties were entering into it, October 8th (the rule under above authorities), as a contract, the first instalment of which was not to be performed until November 30th, or fifty-two days after the date of the agreement, with a reservation in defendant of "the right to change all prices and discounts mentioned in this contract upon two weeks' notice in writing, duly mailed to the dealer" (¶ 3), and the other reservation to both parties that the contract (section b of ¶ 13) "may be canceled by either party upon thirty days' written notice given to the other by registered letter, and such cancelation of this contract shall operate as a cancelation of all orders for automobiles . . . which have not been shipped prior to the date when such cancelation takes effect," certainly on the signing of this agreement no obligation then arose against either party in favor of the other, as either could have forthwith canceled without assigning cause, and such cancelation would have, according to its terms, canceled the entire so-called contract, including any privilege conferred by defendant upon plaintiff to canvass the territory or any part of it, as well as that portion of the agreement contemplating the purchase and sale of 50 cars, including the three cars mentioned in the first instalment. Hence, in order for an obligation to arise under this instrument, it must be created from something taking place after it has been executed, and this in itself is the test of as well as a conclusive demonstration of want of mutuality of contract at the time of the execution and delivery of the instrument in question. Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324; Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499. All that defendant needed to do to thus avoid liability was to raise the prices in the first instance, under the third paragraph, to the full amount of the list price, and fail to fill the orders. Or it could have delayed filling the orders or transmitting them to the company, and given the 30-day notice of cancelation required by ¶ 13, and unquestionably it would have been exonerated from all liability. Oakland Motor Car Co. v. Indiana Automobile Co. supra; Wheaton v. Cadillac Automobile Co. 143 Mich. 21, 106 N. W. 399. And what was true immediately after the signing of the contract was true throughout the entire so-called lifetime of it. 121 C. C. A. 319, 201 Fed. 499; Cummer v. Butts, 40 Mich. 322–325, 29 Am. Rep. 530; Velie Motor Car Co. v. Kopmeier Motor Car Co. supra.

At no place in the contract has the defendant obligated itself, in all events, to deliver plaintiff a single car; and, of course, it not being bound, the plaintiff is not. And it is immaterial whether this purported contract be considered one of agency or of purchase and sale, or both, of cars; it is equally unenforceable in either event at any time for want of mutuality of contract. 114 C. C. A. 284, 194 Fed. 324–331. The principle is well stated in the note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 540, at pages 543 et seq.: "If there is no promise at all by one party, or if, though both have promised something, the promise of one is void, the promise of the other has no consideration to support it, and is therefore void. This is what we mean by 'want of mutuality in contract.' There can be no binding bilateral contract unless both of the parties are bound. There must be mutual binding promises, for mutuality of obligation is essential to supply the element of consideration. The rule of law that a promise is a good consideration for a promise requires that there should be an absolute mutuality of engagements so that each party may have an action upon it, or neither will be bound. Stiles v. McClellan, 6 Colo. 89. The promises to constitute a consideration for each other must be concurrent, or become obligatory at the same time; otherwise each will be without consideration at the time it is made, and both will therefore be *nuda pacta*. Nichols v. Raynbred Hobart, 88b.; Keep v. Goodrich, 12 Johns. 397; Tucker v. Woods, 12 Johns. 190, 7 Am. Dec. 305; Buckingham v. Ludlum, 40 N. J. Eq. 422, 2 Atl. 265; Utica & S. R. Co. v. Brinckerhoff, 21 Wend. 139, 34 Am. Dec. 220." The right of arbitrary cancelation being reserved to both parties, neither was bound to perform. 121 C. C. A. 319, 201 Fed. 499, 114 C. C. A. 284, 194 Fed. 324; 40 Mich. 322, 29 Am. Rep. 530; American Agri. Chemical Co. v. Kennedy, 103 Va. 171, 48 S. E. 868; McKinley v. Watkins, 13 Ill. 140; Houston & T. C. R. Co. v. Mitchell, 38 Tex. 85; section 10, under title "Contracts," in Decen. Dig. and §§ 21–40 under same title in Century Dig. citing many cases. For a case construing an automobile contract very similar to this, see Oakland Motor Car Co. v. Indiana Automobile Co. 121 C. C. A. 319, 201 Fed. 499, which case would be parallel in fact had the plaintiff immediately made the sales and submitted the orders and defendant company exonerated itself from liability by canceling under the stipulation contained in ¶ 13. It was there held that the right of arbitrary cancelation utterly destroyed the mutuality of contract and left no cause of action against the distributers. Of course, if this contract fails to bind the

distributers, defendant company, it fails in mutuality, and the dealer Gile is also absolved from liability. In the face of these provisions neither party under this contract can be bound while the contract remains executory, as it is. See also Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Maynard v. Brown, 41 Mich. 298, 2 N. W. 30; Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611; Cool v. Cuningham, 25 S. C. 136; Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. 110; Lowber v. Connit, 36 Wis. 176; 9 Cyc. 327; Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324. Under similar contentions made in the Velie Case to those here, that the right to canvass for sales enjoyed was valuable and remedied a lack of mutuality, the Federal circuit court says: "Unless the defendant [occupying our plaintiff's position] received a consideration for its undertakings by being given the exclusive right to sell within given territory, the contract lacks mutuality. But it will be seen that such right, if any, was made subject to plaintiff's right to arbitrarily, and without assigning any cause, cancel the contract. Defendant might well decline to go to the expense and trouble of advertising and developing the territory named, when its rights might at any time be terminated. Whatever construction should be given to the contract, whether it be one of sale or of agency, while it remains executory there must be mutuality. . . . Taking into consideration the whole contract, we are of the opinion that by reason of want or mutuality the contract is, under the circumstances, unenforceable."

This contract before us is skilfully drawn with the very object of avoiding obligating defendant to do anything. Hence I assert with confidence that this so-called contract was not a contract in law when executed and delivered, as it was wholly wanting in consideration. Not that there was any failure of consideration, but an utter lack of consideration. If it is necessary to cite authority to sustain and distinguish between a failure of consideration and a lack of mutuality in contract, see the able discussion of the subject in §§ 301-308, vol. 1 of Page on Contracts, under the heading of "Apparent Considerations Which Are Nonexistent," under which, at § 303, lack of mutuality is treated in part as follows: "Mutuality of obligation may be lacking in at least three different classes of cases. In the first, there does not purport to be any right conferred or forborne in return for the promise; in the second, there may be some apparently valid promise which, on analysis, does not by its terms fix any legal liability on the party making it; and, in the third, the promise offered as a consideration does by its terms attempt to fix a real liability, but by reason of some extrinsic fact, as incapacity of the party making the promise, the illegality of the thing promised, and the like, no enforceable liability attaches. These three classes of cases are not distinct in principle, but only in the manner in which the lack of consideration is more or less disguised." The agreement in question is vulnerable under both first and second subdivisions. At § 304 the authority continues: "Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise. This is what is often meant by saying that promises must be mutual. Illustrations of this principle are an agreement that a manufacturer will sell all his goods in a given locality through A, who is to get a specified commission, A not agreeing to do anything with reference to such sales; an employer's continuing a previous employment without being bound to continue it for any period of time; a promise to employ A where A is not bound to continue in the employment for any given period; a promise to do work assigned to the promisor where the adversary party is not bound by the promise to assign any work or to pay any compensation if no work is assigned,"—analogous to the agreement in question, and giving similar examples with cases cited in abundance, among which are Peek v. Peek, 77 Cal. 106, 1 L.R.A. 185, 11 Am. St. Rep. 244, 19 Pac. 227; Vogel v. Pekoc, 157 Ill. 339, 30 L.R.A. 491, 42 N. E. 386; St. Louis, I. M. & S. R. Co. v. Matthews, 64 Ark. 398, 39 L.R.A. 467, 42 S. W. 902, which with notes support the text. See also Elliott on Contracts, §§ 208-210. Notice, also, in the text the significance of the words "rights, liabilities, and obligations," as distinguished from mere license, privilege, or permission, as these latter must be the basis for any claim of defendant under recoupment or equitable defense, whichever the claim for retention of the deposit may be held to be. If said instrument did not by its terms and at the time of its execution and delivery place plaintiff under a legal obligation or a legal duty, and at the same time grant to defendant a resulting right to be breached or violated by nonperformance, he has no standing in court on the defense made. This is but another way of stating that, if there was no contract or contract obligation, defendant could not be damaged, as he had no legal right that plaintiff breached. If these fundamentals

be true, all discussion in the opinion of failure of consideration is as needless as it is inaccurate; likewise all comment therein about the contract being voidable is misleading, because there was no contract; likewise the discussion at some length of the legality of the subject-matter of contract, to the effect that the subject-matter was one that could legally be contracted about, is beside the case because no contract that the law recognizes as such was entered into in regard thereto. Equally inappropriate is the citation of authority on the right of rescission of contract, such as the cases cited of Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384; Skudera v. Metropolitan L. Ins. Co. 17 Misc. 367, 39 N. Y. Supp. 1059; Peoples v. Evens, 8 N. D. 121, 77 N. W. 93; Fuller v. Rice, 52 Mich. 435, 18 N. W. 204; Pfeiffer v. Norman, 22 N. D. 168, 38 L.R.A.(N.S.) 891, 133 N. W. 97; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285; Peeples v. Citizens' Nat. L. Ins. Co. 11 Ga. App. 177, 74 S. E. 1034; Grove v. Hodges, 55 Pa. 504, 2 Mor. Min. Rep. 698,—because of no contract existing to rescind.

The decision of this case in the first instance turns upon whether a valid contract came into existence upon the signing and delivery of the only written agreement in the case, depending in turn on whether there was then a want of mutuality of contract, the equivalent of whether any consideration ever passed for the purported agreement (that is, whether or not that agreement by its terms was wholly lacking in or devoid of consideration), and hence in law a nullity so far as the basing thereon of legal rights or obligations or resulting liabilities for breach are concerned. I believe the agreement, at the time of its execution and delivery, was not a contract, but a mere offer, acceptable only by actual performance, and then only to the extent of such performance, inasmuch as the alleged contract is a separable one as to each monthly instalment of cars, taking the contention most favorable to defendant. "In some jurisdictions, however, such an agreement has been regarded, not as an offer, but merely as an expression of willingness to negotiate. Where such theory obtains, sending in an order for goods at the specified rates is not an acceptance of a prior offer, but is itself an offer which may be rejected,"—quoting from Page on Contracts, § 307, citing Page, Contr. § 26, and Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77. See also Hoffman v. Maffioli, 104 Wis. 630, 47 L.R.A. 427, 80 N. W. 1032; Weaver v. Burr, 31 W. Va. 736, 3 L.R.A. 94, 8 S. E. 743; Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796

On rehearing had, after the former holding of this court that the agreement was nonenforceable because of want of mutuality, respondent's counsel contended that the executory contract, so-called, had become executed, and that, inasmuch as the same had been suffered to lapse uncanceled, it must be treated as a valid contract. This theory has been adopted in the majority opinion. Let us analyze it. Concede, as must be done under the unanimous holding of authority, that when signed this instrument did not amount to a contract for want of mutuality of consideration. Manifestly lapse of time alone, with no performance, could not of itself remedy a lack of mutuality and so make a contract. But admittedly full performance would cure want of mutuality, and that which had not amounted to an executory contract would be considered as an executed one, and whereas, because of want of mutuality, no obligations had theretofore existed to perform, that defect may be eliminated by performance, and the agreement become an executed contract. To what extent has this contract been executed? The answer necessitates a consideration of § 5365, Rev. Codes 1905, defining executed and executory contracts, in connection with § 5311, further qualifying such statutory definition. The former section reads: "An executed contract is one, the object of which is fully performed; all others are executory." The object of contract, within § 5311, is defined to be: "The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do." Our statutory definition of executed and executory contracts is identical with and was probably taken from what is now § 1661 of Kerr's Anno. Codes of California. If we treat this agreement as containing both an agency and a sale feature, a contention most favorable to respondent's contention, nevertheless we find that title has not passed to a single automobile or part concerned in such sale feature, and the transfer of title has been held to be the test in California under their Code, § 1661. Until transfer of title of the subject-matter of a contract of sale, the contract remains executory under said section. See Lassing v. James, 107 Cal. 348, 40 Pac. 534; Yukon River S. B. Co. v. Gratto, 136 Cal. 538, 69 Pac. 252; Cardinell v. Bennett, 52 Cal. 476. For the holdings and definitions of executed and executory contracts, see Knudston v. Robinson, 18 N. D. 12, 118 N. W. 1051; Fox v. Kitton, 19 Ill. 519; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Fletcher v.

Peck, 6 Cranch, 87–136, 3 L. ed. 162–177; Cincinnati, H. & D. R. Co. v. McKeen, 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 36–46; Adams v. Reed, 11 Utah, 480, 40 Pac. 720; State, Jersey City & B. R. Co., Prosecutors, v. Jersey City, 31 N. J. L. 575, 86 Am. Dec. 240; Keokuk v. Ft. Wayne Electric Co. 90 Iowa, 67, 57 N. W. 689; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249. South Dakota, in construing this identical statute in Mettel v. Gales, 12 S. D. 632, 82 N. W. 181, says: "Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no longer bound by a contractual tie." See Words & Phrases, vol. 3, under titles "Executed Contract" and "Executory Contract."

It certainly cannot be seriously contended that this so-called contract is other than executory as to the purchase and sale of cars, as not a single car has been ordered or delivered or handled under it. Defendant complains that plaintiff has wholly defaulted in such respect, which alone is wholly inconsistent with a partial or complete performance. As to the agency feature of the purported contract, wherein, as stated in the majority opinion, plaintiff had agreed to "faithfully represent and advertise such automobiles . . . keep in stock at least one of Interstate manufacture for the sole purpose of demonstrating and exhibiting to prospective purchasers," etc., as well as the appointment of subagencies mentioned under ¶ 1 of the agreement, under the evidence the contract is equally totally unperformed. In the majority opinion the injury resulting from this default is made the sole basis for upholding the enforcement of the penalty on the ground that damages suffered because of such defaults are so "impracticable or extremely difficult" to ascertain and assess that they may be stipulated to be liquidated under the exception to the general rule for stipulated damages and under § 5370, Rev. Codes 1905. In other words, if the majority holding is based upon the contract becoming executed by what was done by advertising and soliciting in attempting to carry it out, and in the absence of any sales, and it is conceded that no sales were made, then it is inconsistent with that portion of the main opinion necessary to support the liquidated damage feature based, not on performance, but on default in such respect. To be consistent the opinion throughout must treat this, the agency feature of the contract, as executory or executed, one or the other. It cannot treat it, as it has, as executed for the purpose of curing a lack of mutuality in contract, and at the same time, as a peg upon which to hang a claim of liquidated damages, find it executory. If executed as to its agency provisions, an utter impossibility, of course, without it being executed as to sales, as one feature cannot be separated from the other, no damage for failure to establish agencies and advertise has accrued, because the agencies must have been established and the advertising must have been done. However, under the evidence and the pleadings as well, the agency feature as well as the sale part of the so-called contract has never in any particular been carried out, unless we say that a mere good-faith endeavor, with nothing really accomplished toward actual performance, amounts to a performance and renders an executory contract executed, and thereby renders what was not a contract, because of want of mutuality, an executed contract under which the law will measure the rights arising from acts done, not mere promises to perform. It must be conceded that the law is that performance under a unilateral contract can bind for any purpose only to the extent of the performance had. This seems to be undisputed doctrine of the authorities. Gray v. Hinton (C. C.) 2 McCrary, 167, 7 Fed. 81; American Refrigerator Transit Co. v. Chilton, 94 Ill. App. 6; Morrow v. Southern Exp. Co. 101 Ga. 810, 28 S. E. 998; Dayton, W. V. & X. Turnp. Co. v. Coy, 13 Ohio St. 84. In the latter case the party occupying the defendant's position here actually had the equities with him; but the court said, in replying to the same contention here made, that the parties had treated the contract as valid, as follows: "We have been asked by the counsel for the plaintiff, if we found there was no mutuality in the contract, still to look at the conduct of the defendant,—his purpose in the execution of the instrument. But we do not see how we can look at the conduct of the defendant with any other view than to ascertain whether he has entered into a contract. In such a case as this it is not our province to decide as to the propriety of the conduct of the party. We have only to inquire whether he has incurred a legal obligation."

That this contract is not executed, but executory, is squarely decided by Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051, in an opinion by Judge Morgan, in an action for specific performance where mutuality of contract and alleged performance were presented for determination. It was there contended that by an offer of performance and tender "the nonmutuality of the contract is rendered immaterial." The court held: "Since Robinson could not enforce specific performance against Knudtson under the facts of this case, specific per-

formance could not be enforced by Knudtson against Robinson. There must be mutuality of obligation and remedy between the parties before specific performance is enforceable against either, except in cases where there has been performance by the party seeking to enforce specific performance. . . . 'Performance' is a word of settled meaning, and means the doing or completing of an act; 'an offer to perform' and 'performance' are not synonymous in meaning. Without performance the party seeking enforcement of the contract is not within the provisions of the statute when he has tendered performance or simply shown a willingness to perform. Crumbly v. Bardon, 70 Wis. 385, 36 N. W. 19; Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515." It is significant that not a single authority is cited on this question in the majority opinion, which does not even discuss the statutory provisions above quoted, but evidently relies wholly upon the effect of a lapse of time with no principle of estoppel involved, making a contract out of something that, up until the last day of the so-called period of time mentioned in the purported agreement, was not a contract, but unenforceable as wholly lacking in mutuality of contract. Reduced to a nutshell, these parties have signed a written instrument, binding neither, granting certain privileges, but neither obligating the other, and therein stated that such privileges shall remain, subject to prior arbitrary cancelation, from October 8, 1910, to September 1, 1911. Nothing was done toward performance except useless effort accomplishing nothing toward actual performance. After September 1, 1911, that which was prior to that time merely written permission or privilege, by lapsing and becoming nonexistent, has by something little short of legerdemain ripened into a legal contract. With due respect to the opinion of a majority of my associates, it is impossible for me to see how this result can be achieved under the evidence in this case, and conform to settled principles and fundamentals.

My contentions are summarized into the following statement: When the purported contract is analyzed with reference to these fundamental principles of contract, under all authorities and under the stipulated terms and conditions of the purported contract itself, I can reach no other conclusion than that the written instrument, when executed and delivered, was wholly lacking in mutuality of contract in that no consideration passed, and that no obligations of either party to the other were created, inasmuch as neither party procured under this instrument any legal right or assumed any legal duty or obligation to the other; that lapse of time alone could not in such respect change the legal status of the parties in the slightest degree, no principle of estoppel being involved; that performance, on the contrary, could bring into existence for the first time between these parties, so far as this instrument is concerned, rights and resulting legal obligations, but only to the extent of performance, partial or full; that a part performance could bind neither party to make full performance, but would obligate the parties so far as rights arose under such part performance, as, for example, the delivery of the first, or November month, instalment of cars to plaintiff on his order would obligate him to pay for them, but would not obligate him as to any of the remaining 47 cars mentioned in the instrument, and a similar delivery and acceptance of 30 cars would bind the parties to that extent, but no further. But under the evidence, as well as the pleadings, no performance whatever has been had. Instead an attempt was made in good faith by plaintiff to sell cars with the intent on his part that he would perform this so-called contract, and defendant had some cars on hand with which to have filled any order for cars he might have submitted, and no cancelation of the contract was had, but the same permitted by sufferance of the parties to remain uncanceled until it lapsed. Under these circumstances, I can conceive of no legal principle which cures the want of mutuality of contract and creates a contract with its resulting obligations. Defendant was never legally bound to deliver cars or do anything else, and plaintiff was never bound to sell cars or do anything else, and hence he was never legally obligated to defendant. With no obligation or right possessed by defendant and owing it by plaintiff, there was nothing to breach upon which damage can be predicated. Under these circumstances, the defendant has received from plaintiff this deposit of $1,250, for which he has given no consideration whatever, nor has he parted therefor to plaintiff with anything of value in the eye of the law, nor has he forborne anything because he has not obligated himself to forbear. Instead he stands before a court shorn of a defense. His purported defense, at the most, epitomized, is equivalent to asserting that in return for this money he merely permitted plaintiff to believe himself possessed of a right to canvass for and perhaps sell cars in certain territory, while in law he never gave him such a right nor parted with such right, and at any time he could defeat plaintiff's attempt at sales, at his whim or caprice, by refusing to deliver the cars

plaintiff was attempting to sell. Such an unconscionable plea, which in justice at least should be unavailing, is by the majority opinion upheld and a forfeiture enforced of what is clearly a penalty. As stated in the opinion, this action for money had and received possesses equitable characteristics, and to that extent the plaintiff is in a court of equity, a court of conscience, and this, as a reviewing court, is the same. Would any member of this bench consider it a conscionable transaction with a fellowman to forfeit or, to use the softer word, retain a like amount of another's money under the same circumstances as disclosed in this record? The answer to this must suffice to establish the forfeit as either conscionable or unconscionable, equitable or inequitable, from the standpoint of which we must view plaintiff's attempted recovery as for money had and received and alleged to have been received under such circumstances that equity and good conscience should order its return. Fair dealing must not only brand plaintiff's position as conscionable and right, but defendant's as unconscionable, if not worse. Under the law and the facts plaintiff should recover.

Burke, J.:
I concur in the foregoing dissent.

Goss, J., further dissenting:

Since the foregoing majority and dissenting opinions have been filed, but before the remittitur has been transmitted from this court, the writer has observed an article in the February, 1914, number of the Michigan Law Review, vol. 12, at page 321, and brought the same to the attention of all members of this court. Therein is a discussion of the mutuality of contract as applied to automobile contracts, and is in accord with the foregoing dissent, as the writer reads said discussion. The article cites the following additional authorities: Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015, supporting the principle that a contract "may be unilateral in its inception and become valid by the performance of it by the party originally not bound by it." And Buick Motor Co. v. Thompson, 138 Ga. 282, 75 S. E. 354, where the plaintiff, though not bound to do anything by the words of the contract, accepted it and sold some cars which defendant failed to deliver. The court held that, though unilateral at its inception, the contract became binding when plaintiff acted under it, but only so far as he had acted, being as to the balance still unilateral. Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324, is cited in the article, which also reviews at length another very recent case apparently parallel in all particulars with the case before us, even to the lapsing of the contract, wherein a recovery was permitted as is here sought, while the dissenting opinion in that case is to that extent authority for the conclusions of the majority in the case at bar. The case is that of Goodyear v. H. J. Koehler Sporting Goods Co. 159 App. Div. 116, 143 N. Y. Supp. 1046, November 14, 1913, Supreme Court, Appellate Division. In the Goodyear Case 6 automobiles had been taken and paid for out of 20 contracted for, with scheduled dates of delivery, upon which contract an advanced part payment to be credited back at $35 per car, had been paid, as here, and the contract had expired by limitation on August 1, 1911, after having been in force and performed under for an entire year from August 25, 1910. A demand for repayment of the deposit money was made by plaintiff January 22, 1912, after the contract had by its terms lapsed August 1, 1911. The contract, similar to the one before us, stipulated a right in the distributer, the defendant, to terminate or cancel the contract on notice, and "that no liability whatsoever shall attach to or be asserted against the company in case of its failure to deliver any of said automobiles for any cause whatsoever." The contract in the case at bar is in effect equally broad, leaving performance optional with defendant. The contract there embodied the agency feature, as here, and the same was relied upon by the defendant, as here, as curing the want of mutuality. There was likewise a stipulated right of retention of the deposit as liquidated damages, which was invoked. For these facts see the dissent reciting them. The gist of the decision is as follows: "By this clause [exempting the distributers from liability] it was left entirely optional with defendant whether or not it would deliver any automobiles at all, and if it refused to deliver any it became subject to no penalty or damages. It seems to me that it would be difficult to find a clearer case of a contract imposing an obligation on one party and no obligation whatever on the other. I am unable to see that the appointment of plaintiff as defendant's agent cured the lack of mutuality, because the position of agent to sell automobiles was an empty thing unless backed up by an enforceable agreement on defendant's part to deliver such automobiles as plaintiff might be able to sell." This is exactly the position taken in the foregoing dissent, and the facts are, beyond question, on all fours with the case at bar. And recovery of the deposit of $490

on the remaining 14 cars not taken was affirmed. Concerning the dissent in Goodyear v. H. J. Koehler Sporting Goods Co. the writer of the article in the Michigan Law Review, vol. 12, p. 322, says that it would "result in making a new contract for the parties." To my mind the majority opinion in the case at bar has made a new contract for the parties to this case on which recovery is denied.

Contracts between motor car companies and distributers and dealers involve new applications of old principles, and to that extent new precedent is made. I cannot but feel that our court has announced a doctrine not only unsupported by authority, but contrary to every holding on the subject, and one that establishes a precedent that must some time be repudiated. However, the majority holding contains a copy of the adjudged contract approved in this state and held enforceable even to forfeiture provisions. It is difficult to see how an automobile distributer can ask for anything more to his liking than this approved form of contract. The subsequent growth of the law on this subject will be interesting.

ARKANSAS SUPREME COURT.

TOM HUNT, Appt.,
v.
STATE OF ARKANSAS.

(— Ark. —, 169 S. W. 773.)

Rape — assault to commit — impotency as defense.

1. Impotency because of senility is no defense to a charge of assault with intent to commit rape.

Evidence — cross-examination to test credibility.

2. One accused of assault with intent to rape may, in case he takes the stand as a witness, be asked on cross-examination whether or not he had been convicted of a similar offense, and whether or not he was guilty of it, for the purpose of affecting his credibility, and the provisions of the statute with respect to impeachment of a witness are not applicable.

(September 28, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Greene County convicting him of assault with intent to commit rape. Affirmed.

The facts are stated in the opinion.

Messrs. **Lamb, Caraway, & Wheatley,** for appellant:

Where an assault is defined by statute or by the courts to be an attempt, coupled with "present ability," to commit violence, an impotent person, whether the condition be permanent or temporary, cannot be guilty of an assault with intent to commit the crime of rape.

Pratt v. State, 49 Ark. 179, 4 S. W. 785; Anderson v. State, 77 Ark. 37, 90 S. W. 846; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Nugent v. State, 18 Ala. 521; State v. McCune, 16 Utah, 170, 51 Pac. 818; Paul v. State, 100 Ala. 136, 14 So. 634.

It was error to require defendant to testify with reference to his arrest and conviction in Randolph county.

Vance v. State, 70 Ark. 272, 68 S. W. 37; Thrash v. State, 79 Ark. 347, 96 S. W. 360; Turner v. State, 100 Ark. 199, 139 S. W. 1124; Stanley v. Ætna Ins. Co. 70 Ark. 107, 66 S. W. 432; Hankins v. State, 103 Ark.

Note. — Impotency or senility as defense to prosecution for rape or assault with intent to commit rape.

The liability of an infant for rape and the lesser crimes not amounting to rape is discussed in the note to State v. Yeargan, 36 L.R.A. 203.

Rape.

The rule is stated broadly in Wharton's Criminal Law, vol. 1, 11th ed. § 690, that impotency is a sufficient defense to an indictment for the consummated crime of rape, but not for an assault with intent to rape. See also to the same effect, Territory v. Keyes, 5 Dak. 244, 38 N. W. 440, and State v. Bartlett, 127 Iowa, 689, 104 N. W. 285.

Where the testimony tended to show that about the time of an alleged attempt to carnally know a child under ten years of age, the physical system of the accused was greatly weakened and debilitated from drink, it was held in Nugent v. State, 18 Ala. 521, that the effect of the drunken condition of the accused upon his physical capacity to commit the crime was a matter to be considered by the jury in coming to their conclusion whether the prisoner did the act with which he is charged. The court observed that it is true that the drunken condition of the accused would neither in a moral nor legal point of view excuse or palliate the crime if in fact committed, but drunkenness may not only render one entirely incapable of committing the crime with which the prisoner is charged, but it may, by the prostration of his system, render him less capable of committing it. A certain degree of excitement from drink may increase the passion, the cravings of which lead to the commission of such unnatural and monstrous crimes, but drunkenness may be so excessive as to render the party partially or totally incapable of committing it. The evidence

28, 145 S. W. 524; Benton v. State, 78 Ark. 284, 94 S. W. 688.

Mr. William L. Moose, Attorney General, and John P. Streepey, Assistant Attorney General, for the State.

McCulloch, Ch. J., delivered the opinion of the court:

This is an appeal from the judgment of conviction of the crime of assault with intent to commit rape. Appellant was seventy-four years of age at the time the crime was alleged to have been committed, and the accusation is that the assault was made upon a young woman in the city of Paragould. The testimony is conflicting, but is sufficient to warrant the finding that he made the assault with intent to have carnal knowledge of said female forcibly and against her will. The evidence of the injured female is that she resisted successfully, and that the appellant finally desisted before the consummation of the enforced act of intercourse.

Appellant's testimony tended to show that on account of his extreme age and failing powers he had lost all desire for sexual intercourse, and was physically unable to consummate such an act. In the trial of the case, his attorney asked the court to give an instruction to the jury to the effect that the offense was not complete unless the accused was capable of consummating the act of intercourse,—in other words, that impotency was a defense to the charge of assault with intent to commit rape. Our statute defines an assault as "an unlawful attempt, coupled with present ability to commit a violent injury on the person of another." Kirby's Dig. § 1583.

That definition has been applied by this court in determining the essential elements of the crime of assault to commit murder; the court holding that "both the intention and the ability to commit a battery are necessary to constitute an assault." Pratt v. State, 49 Ark. 179, 4 S. W. 785.

Professor Wharton, in his work on Criminal Law, 11th ed. vol. 1, § 690, lays down the rule broadly that impotency is a sufficient defense to an indictment for the consummated crime of rape, though not for an assault with intent to rape. In another part of the same volume (§ 223) he says: "If there be juridical incapacity for the consummated offense (*e. g.*, infancy), there can be no conviction of the attempt; and therefore a boy under fourteen cannot, according to the prevalent opinion, be convicted of an attempt to commit a rape as principal in the first degree. It is otherwise when the incapacity is merely nervous or physical. A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defense to the indictment for the attempt. At

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tended to show that the prisoner was greatly weakened by drink; this was a circumstance to be considered by the jury however light they might have esteemed it.

Assault with attempt to rape.

The court in Territory v. Keyes, supra, adopts the rule that in assault with intent to rape impotency is no defense, at least unless it be coupled with the further proof that the defendant himself knew of that impotency; then it might be admissible in evidence to go to the question of intent, but no further. The court observed that as an assault, as defined by the Code, does not imply an ability to consummate the attempted act, impotency cannot be a defense to the charge of an assault with intent to commit the crime of rape.

See also HUNT v. STATE, holding that mere impotency on account of failing powers from old age is no defense to the crime of assault with intent to rape.

Evidence of impotency.

In a prosecution for rape it is always competent to show the size and the age of defendant, and the knowledge of the witnesses in respect thereto; and particularly is this true when the evidence bears directly upon his capacity to commit the crime charged. State v. Armstrong, 167 Mo. 257, 66 S. W. 961.

In a prosecution for rape, State v. Stevens, 133 Iowa, 684, 110 N. W. 1037, the defendant testified that he had been injured in his private parts, and had had his side crushed about sixteen years previously by coal falling in a mine, and that he had suffered a similar injury about seven years previously to the trial, and that, as a result, he had been without sexual desire since the first injury, and incapable of indulging in sexual intercourse. It was held that where one accused of rape interposes impotency as a defense, he is not entitled to have the jury personally examine his private parts. In this case the county attorney suggested that the jury might not be able to determine anything from an inspection, but that no objection would be urged against such an examination by one or more physicians.

In a prosecution for rape by a man fifty years old, it was held in State v. Bailey, 31 Wash. 89, 71 Pac. 715, that it was for the jury to pass upon the truthfulness of the testimony of accused as to his impotency, when considered with all other facts and circumstances in evidence before them. The court further held that where the only testimony upon the subject of accused's impotency was that of the person himself who was charged with rape, a verdict of guilty

the same time there must be apparent capacity."

Mr. Bishop also lays down the rule that impotency is no defense to the charge of assault with intent to commit rape. The decisions on this subject are neither abundant nor clear, but we are convinced that the rule stated above by the learned textwriters is the sound one, and that mere impotency on account of failing powers from old age is no defense to the crime of assault with intent to rape. The essence of the crime is the violence done to the person and feelings of the injured female. Complete consummation of the act of sexual intercourse is not essential even to the crime of rape; a partial penetration, without emission, being sufficient even to make the crime of rape. It follows, therefore, that the crime of assault with intent to commit a rape may be complete, even though the perpetrator lacks physical vigor to consummate the act.

Appellant testified in his own behalf, and on cross-examination counsel for the state drew out the fact that several years ago appellant had been convicted of a similar offense, alleged to have been committed on the person of another woman, and sought to draw out from him an admission that he had committed the offense. Appellant admitted that he had been so convicted, but denied that he was guilty of the charge. Objection was made to this line of examination, and an exception was duly saved, and is now pressed as grounds for reversal.

Counsel for appellant rely upon the statute of this state (Kirby's Digest, § 3138, as amended by Acts 1905, p. 143), which declares that "a witness may be impeached by the party against whom he is produced by contradictory evidence by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or morality renders him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown, by the examination of a witness, or record of a judgment, that he had been convicted of a felony."

That statute has no application to the cross-examination of a witness for the purpose of testing his credibility. On the contrary, it has been held that the defendant in a criminal prosecution, when he takes the witness stand, places himself in the attitude of any other witness, and that he may be interrogated concerning specific acts of his own for the purpose of testing his credibility. Hollingsworth v. State, 53 Ark. 387, 14 S. W. 41. He cannot be asked about a mere accusation or indictment (Benton v. State, 78 Ark. 284, 94 S. W. 688); but for the purpose of testing his credibility he may be asked about a judgment of conviction (Vance v. State, 70 Ark. 272, 68 S. W.

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would not be disturbed when there was evidence tending to establish the material facts showing guilt.

In a prosecution for statutory rape by a man sixty-eight years old, the wife of accused testified that he was incapable of having sexual commerce with a woman. This she knew from her intimate relations with him. Upon rebuttal physicians were, in State v. Walke, 69 Kan. 183, 76 Pac. 408, held properly permitted to testify as experts that a man at that age who had lost sexual desire as to his wife might still have such desire and ability to consummate it upon other and younger women.

Burden of proof.

Where one convicted of the statutory offense of rape upon his twelve-year-old daughter interposed the defense that, having paralysis, it was physically impossible for him to commit the crime, it was held in People v. Row, 135 Mich. 505, 98 N. W. 13, that the court did not err in refusing to charge that the burden of proving that defendant was competent to have sexual intercourse was on the people, or in charging that it was for the jury to say whether the defense set up by defendant had been established. The court remarked that it was not the normal condition for a man to have paralysis, or for a man of the age (age not stated) of respondent to be incapable of having sexual intercourse.

In a prosecution for assault with intent to commit rape, it is held in Jeffers v. State, 20 Ohio C. C. 294, 10 Ohio C. D. 832, that where an accused person denies that he committed the crime charged, and offers testimony tending to show that by reason of drunkenness he was incapable of committing such an offense, it is error to charge the jury that the burden is upon him to show want of capacity to commit the crime by reason of drunkenness, as such a charge would shift upon him the burden of proving that he did not commit the crime. This view seems to be in accord with the modern doctrine as to burden of proof as regards matters set up by defendant in defense, and of the relation of presumption and burden of proof, and in harmony with the better view that the burden of proof never shifts to defendant in such sense as to deprive him of the rule of reasonable doubt as to any matter which, like physical impotency, tends to negative his guilt. See in this connection notes to State v. Scott, 36 L.R.A. 721, and Adair v. State, 44 L.R.A.(N.S.) 119, as to "Presumption and burden of proof as to sanity in criminal cases;" and notes to Com. v. Palmer, 19 L.R.A.(N.S.) 483, and Culpepper v. State, 31 L.R.A.(N.S.) 1166, "Applicability of rule of reasonable doubt to self-defense in homicide." J. D. C.

37). Such matters are collateral to the issue, and affect only the credibility of the accused as a witness, but are nevertheless competent for that purpose.

We are therefore of the opinion that there is no error in the record; and, as the evidence was legally sufficient to sustain the conviction, the judgment must be affirmed.

KANSAS SUPREME COURT.

T. B. MARTIN
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

(92 Kan. 595, 141 Pac. 599.)

Railroad — duty to keep cattle guards effective.

1. It is the duty of a railway company to exercise reasonable or ordinary care to keep its cattle guards from becoming so filled with snow and ice as to make it possible for animals to cross them, and for negligent failure in this respect the company is liable for injuries to animals thus getting upon its right of way.

Trial — jury — care of cattle guards.

2. Where a railway company has erected and maintained good and lawful fences and sufficient cattle guards to prevent stock from getting upon its right of way, the question whether it was negligent in failing to keep its cattle guards from becoming so filled with snow and ice as to make it possible for animals to cross the same depends upon the facts and circumstances, and is a question for the jury to determine under proper instructions.

Costs — attorneys' fees — negligence.

3. In an action to recover for animals injured on the right of way, where the facts are as stated in the preceding paragraph, and plaintiff recovers on the sole ground of the negligence of the railway company in failing to remove snow and ice from its cattle guards, the plaintiff is not entitled to an allowance for attorneys' fees.

(Burch and Smith, JJ., dissent.)

Headnotes by PORTER, J.

(June 6, 1914.)

Note. — Duty of railroad company to keep its cattle guards in condition.

This note is supplemental to a note on the same subject, appended to Yates v. Chicago, St. P. M. & O. R. Co. 36 L.R.A.(N.S.) 997.

Where required by statute.

Supplementing note in 36 L.R.A.(N.S.) 998.

As shown in the earlier note, where there is a duty resting upon a railroad company to construct and maintain cattle guards, if it is negligent in this regard, and by reason thereof a cattle guard becomes so defective that it does not prevent stock from passing over it upon the right of way, and the stock is there injured or killed, the railroad company is liable to the owner for the loss thereby occasioned him.

Thus, a railroad company is liable for injuries to animals where the proximate cause of the injury was its negligence in failing to keep free from dirt and sand the spaces between the slats constituting a cattle guard. Geerds v. Ann Arbor R. Co. — Mich. —, 147 N. W. 505.

And it is negligence to permit a cattle guard to become filled with dirt and cinders to an extent allowing the easy passage of animals over it. McCullough v. Wabash R. Co. 160 Mo. App. 342, 142 S. W. 357.

In order for the plaintiff to recover in a case of this kind it is necessary for him to establish not only that the cattle guard was insufficient, but that the cattle were killed because of its insufficiency. If a properly constructed cattle guard would not have kept the cattle from going upon the right of way, then there is no connection between the defective guard and the death of the L.R.A.1915B.

cattle. Ratliff v. Union P. R. Co. 86 Kan. 938, 122 Pac. 1023.

If a cattle guard is suitable and sufficient to prevent ordinary stock, or stock to some extent unruly, from getting on the railroad right of way, then it complies with the statute, and no recovery can be had for loss of stock, based upon its insufficiency. Stewart v. Bloomington, C. & D. R. Co. 180 Ill. App. 608.

As to snow and ice.

Supplementing note in 36 L.R.A.(N.S.) 999.

Where a railroad company negligently fails to keep a cattle guard in repair by permitting it to become partly filled with gravel and cinders, and with lately fallen snow, and permitting the beveled edges of the slats composing the guard to become worn and beaten down, the company is liable to the owner of animals which cross the guard while in this condition, and are killed on its right of way. Lake Erie & W. R. Co. v. Voliva, 53 Ind. App. 170, 101 N. E. 338.

And see MARTIN v. ATCHISON, T. & S. F. R. Co. holding that if the railway company negligently fails to exercise reasonable or ordinary care to keep a cattle guard from becoming filled with snow and ice to the extent that stock cross it onto the right of way, and are there injured or killed, the railroad company is liable to the owner for the damage suffered by him.

Effect of contributory negligence of owner.

Supplementing note in 36 L.R.A.(N.S.) 1000.

That the plaintiff in an action to recover

APPEAL by defendant from a judgment of the District Court for Hamilton County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's stock. Reversed.

The facts are stated in the opinion.

Messrs. **William R. Smith, Owen J. Wood, and Alfred A. Scott**, for appellant:

Defendant was not liable as a matter of law.

Blais v. Minneapolis & St. L. R. Co. 34 Minn. 57, 57 Am. Rep. 36, 24 N. W. 558; Stacey v. Winona & St. P. R. Co. 42 Minn. 158, 43 N. W. 905; Wait v. Bennington & R. R. Co. 61 Vt. 268, 17 Atl. 284; Wood v. Union P. R. Co. 88 Kan. 480, 129 Pac. 193.

Mr. **George Getty** also for appellant.

Messrs. **U. T. Tapscott and Edgar Foster** for appellee.

Porter, J., delivered the opinion of the court:

The railway company appeals from a judgment in plaintiff's favor for $400 damages and $100 attorneys' fees. The action was to recover the value of stock killed by one of the trains of the defendant. The stock escaped from plaintiff's inclosure, went upon the highway, and entered the defendant's right of way over a cattle guard at a highway crossing. They were killed by a passenger train on January 27, 1912, at 4:30 in the afternoon. There was about 6 inches of snow on the ground. The petition alleged that the defendant knowingly and negligently permitted its cattle guards at this place to become and remain in bad condition; that there was not a sufficient fence or cattle guard where the stock got on the right of way to prevent stock from crossing from the public highway to the right of way. The jury made a number of special findings, among which are that the width between the wing fences and between the cattle guards where the public road in question crosses the defendant's railway was 59 feet and 6 inches; that two mares and one mule belonging to plaintiff crossed over the cattle guards west of the highway. They find that the railway of the defendant was inclosed with a good and lawful fence at the place where the animals crossed; that the cattle guards

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damages for injuries to horses from a defective cattle guard undertook, without any help, while riding one horse and leading another, to drive the horses that were killed along with others over the highway, is not a defense, for it does not show such an abandonment as to defeat the right to recover. At most it merely shows contributory negligence, and contributory negligence is not a defense. Lake Erie & W. R. Co. v. Voliva, supra.

So, where a railroad company is negligent in failing to keep in good condition a cattle guard, in an action against it for injuries to animals, attributable thereto, it is no defense that the owner of the animals was guilty of contributory negligence in permitting them to graze or run at large on the highway. Geerds v. Ann Arbor R. Co. — Mich. —, 147 N. W. 505.

If the injured animal passed upon the railroad track in consequence of the neglect of the railroad company to maintain a sufficient cattle guard to prevent it from passing from the highway to defendant's right of way, and the animal is killed on the right of way, the plaintiff is entitled to recover without regard to any question of negligence in leaving the animal to run at large. Chapin v. Ann Arbor R. Co. 167 Mich. 648, 133 N. W. 512.

Evidence—burden of proof and circumstantial evidence.

The burden of proof to establish the acts of negligence charged rests upon the plaintiff. The accident itself raises no presumption of negligence. Midland Valley R. Co. v. Bryant, 37 Okla. 206, 131 Pac. 678.

The burden of proof is upon the plaintiff in an action to recover damages for injuries to his stock, based upon the alleged negligence of the defendant in constructing and maintaining a cattle guard, to show all the facts necessary to establish his case. He must establish by proof the allegation of his petition that the injured animal entered defendant's right of way over the defective cattle guard. McCullough v. Wabash R. Co. 160 Mo. App. 342, 142 S. W. 357.

And that the breach by defendant railroad company of the statutory duty of maintaining a proper cattle guard was the cause of the injury to his horse upon the right of way. This proof may consist entirely of circumstantial evidence. Miller v. Chicago, M. & St. P. R. Co. 180 Mo. App. 209, 167 S. W. 1160.

The fact that there is direct proof in favor of defendant that the animal killed was struck while in the highway does not entitle the defendant to a directed verdict, although there is no direct proof to the contrary, where, however, there is circumstantial evidence indicating that the animal had crossed the defective cattle guard before he was struck. McCullough v. Wabash R. Co. supra.

—competency.

It is competent to permit evidence that cattle passed readily back and forth over the guard in question before the happening of the accident complained of, where it is also shown that the guard was in the same condition as at the time when the accident happened. Chapin v. Ann Arbor R. Co. supra.

If there is evidence tending to show the size, length, depth, and construction of cat-

were not defective, but were allowed to become obstructed by snow; and that the defendant was negligent in not keeping the guards clear of snow. These findings present the issue in the case which we regard as controlling. The railway company demurred to the evidence, and, after the verdict, moved for judgment in its favor on the findings of the jury, and now contends that the court erred in overruling the demurrer and the motion for judgment.

The defendant relies first upon a decision in the recent case of Wood v. Union P. R. Co. 88 Kan. 477, 129 Pac. 193, 194, in which the court said: "Section 5 of the stock law of 1874 (Gen. Stat. 1909, § 7005) excepts from the operation of that act any railway company whose road is inclosed with a good and lawful fence to prevent animals from being on the road. As it is impracticable, if not impossible, to fence across the railroad track, it has frequently been held that the inclosure of the track is complete when the fences on either side are connected at proper places with wings and cattle guards sufficient to prevent the animals from going upon the track, but in such instances, under that statute, a cattle guard is deemed a portion of the fence, and the failure to provide a sufficient guard is equivalent to the failure to provide a sufficient fence." p. 480.

Their contention is that, as a cattle guard is deemed a portion of the fence, a railroad company is under no more obligation to remove snow from a cattle guard

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tle guards from which the jury, for themselves, may determine their sufficiency, testimony that stock has crossed over them is competent as tending to show their insufficiency. Midland Valley R. Co. v. Bryant, supra.

Evidence by experienced railroad men that a particular cattle guard is of standard make and in general use on first-class railways has been held competent as tending to show that a cattle guard was sufficient and suitable to turn stock. Stewart v. Bloomington, C. & D. R. Co. 180 Ill. App. 608.

And it is competent for the defendant to show that the cattle guard complained of was constructed in a manner approved by the state railroad commission, and the plaintiff may rebut this testimony by showing that there was a marked difference between the cattle guard in question and the kind of guard approved by the commission. Chapin v. Ann Arbor R. Co. supra.

—sufficiency.

"Evidence showing or tending to show that the guard in question was made of wood; that there was no pit under it; that the spaces between the rails or slats, out of which it was made, had become partly filled with gravel and cinders; that the beveled edges of the slats had become worn and beaten down; that snow had fallen, not only on the night before the horses in question were killed, but that snow had fallen the night previous, and had not been removed; that on the morning, and at the time the horses passed over said cattle guard, there was a well-beaten track over it, on and over which the horses passed; that some of appellant's trackmen had passed over this same guard but a short time before the horses passed over it, and that such trackmen made no effort to clean the snow therefrom," warrants the jury in finding that at the time the horses killed passed over the guard, the defendant was not maintaining and keeping it in the condition contemplated by the statute under which the action was brought, and that, on account of the defendant's failure to discharge the duty imposed upon it by such statute, the plaintiff's horses entered upon the railroad right of way. Lake Erie & W. R. Co. v. Voliva, 53 Ind. App. 170, 101 N. E. 338.

That cattle guards are defective is not established merely by evidence that the plaintiff's animals crossed them, or that other animals had also crossed them, there being also testimony that the guards were the most improved and approved guards in general use by the railroads in this country, since the statute requiring railroad companies to fence their roads does not exact that a railroad cattle guard, to be sufficient, must be so constructed and maintained as to interpose an absolutely unsurmountable and impassable barrier against the encroachment of stock, without exception and under all conditions. It cannot be said that a railroad company is an insurer of the efficacy of its cattle guards under all circumstances, such as against frightened or breachy animals. On the contrary, a railroad company has discharged its duty when it installs and keeps in good repair such guards as are of the most improved and approved kind in use by railroads. Midland Valley R. Co. v. Bryant, 37 Okla. 206, 131 Pac. 678.

Negligence of railroad company and sufficiency of guard as questions for jury.

It is for the jury to say whether the cattle guard is defective and insufficient, and hence not reasonably fit for the use for which the statute commanded it should be constructed, where it is so constructed as to give solid and substantial support to animals attempting to cross upon it. Miller v. Chicago, M. & St. P. R. Co. 180 Mo. App. 209, 167 S. W. 1160.

And it is for the jury to determine whether or not the cattle guard is suitable and sufficient to turn stock, and whether or not the railroad company was negligent in failing to provide a sufficient and suitable cattle guard. Stewart v. Bloomington, C. & D. R. Co. 180 Ill. App. 608. A. G. S.

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than from both sides of fences, and that the statute has been complied with when a cattle guard, wing fences, and fences in proper condition are provided. They insist that to place a further burden on the defendant requires an "ingenious and erroneous interpretation of the legislative intent." The argument is that, when snow extends any considerable distance along the right of way, it would require a great number of additional employees to keep cattle guards clear, and that this would impose an unfair and unreasonable burden upon the railway company, and that the value of the services, compared to the cost necessarily imposed, would be grossly incommensurate with the paramount duty which the company owes to the public; that usually it would require a waste of energy or money to require the removal of snow from all cattle guards in order "to provide a contingent benefit for the trespassing cattle of negligent and careless owners." A case directly in point which is relied upon is Blais v. Minneapolis & St. L. R. Co. 34 Minn. 57, 57 Am. Rep. 36, 24 N. W. 558, where it was said: "Reasonable care and diligence do not require a railway company, unless under exceptional and extraordinary circumstances, to remove the natural accumulations of snow and ice from cattle guards." (Syl.)

The doctrine was followed and applied in Stacey v. Winona & St. P. R. Co. 42 Minn. 158, 43 N. W. 905, where it was held that it was error to refuse to charge the jury, as requested, that the railway company was not negligent in failing to remove snow and ice from cattle guards. Another case cited is Wait v. Bennington & R. R. Co. 61 Vt. 268, 17 Atl. 284, 287, where it was said that "the statute . . . cannot mean that a guard must be so built that under no circumstances could an animal cross it, but under all ordinary circumstances it is sufficient to prevent cattle and other animals from getting upon the track." p. 280.

Counsel for plaintiff cite no cases to the contrary, but they argue that this court should consider the different conditions existing in states like Minnesota and Vermont and those which prevail in Western Kansas, where it is said that very little snow falls, and cattle may graze through the entire season. It is insisted that the burden of removing what little snow might fall on cattle guards in Western Kansas would not be great; that a 6 inch snow might fall in that section twice in three years; but, if snow seldom falls in that locality sufficient to block the cattle guards, that might be a circumstance for the consideration of a jury in determining whether it was reasonable to expect a railway company to keep enough men in its employ to remove it when it should fall. It happens occasionally, even in this state, that snow falls or drifts up to a level with an ordinary fence, or to such an extent that the fence, though a lawful one, furnishes no obstruction to stock.

Owing to the danger to persons and property being transported on the railway from collisions of trains with trespassing animals, as well as danger to the animals themselves, the statute makes the railway company liable, irrespective of any negligence on the part of the company, provided the stock gets upon the right of way at a place where the road is unfenced, and "where it can and ought to be fenced." Hopkins v. Kansas P. R. Co. 18 Kan. 462, 465. The statute contains a provision that it shall not apply to any railway company whose road is inclosed with a good and lawful fence to prevent animals from coming on the right of way. Gen. Stat. 1909, § 7005. Here the railway company had erected what the jury find to be a good and lawful fence, and the judgment can only be upheld upon the theory that the defendant was negligent, as a matter of law, in failing to remove the snow from its cattle guards.

A large number of "snow and ice" cases from courts of various states may be found cited in a note in 36 L.R.A.(N.S.) 997, where it is said that the weight of authority holds it to be the duty of a railway company to keep its cattle guards in repair, and that this imposes upon it the duty to exercise reasonable or ordinary care to keep its cattle guards from becoming so filled with snow and ice as to make it possible for animals to cross them, and for negligent failure in this regard the company is liable for injury to animals thus crossing them.

The case at bar seems to have been tried upon the theory that the mere fact that a cattle guard is filled with ice and snow sufficient to permit cattle to cross it amounts to negligence in law for which the company is liable, if, by reason thereof, animals get upon the track and are injured. This is not the law. Whether a railway company was negligent in failing to remove the snow and ice depends upon the facts and circumstances disclosed by the evidence in each particular case, and is a question for the jury to determine under proper instructions.

In Grahlman v. Chicago, St. P. & K. C. R. Co. 78 Iowa, 564, 5 L.R.A. 813, 43 N. W. 529, it was held, in substance, that the company is not required to keep its cattle guards free from snow regardless of circumstances, but must use ordinary care and

diligence in this respect. The Minnesota court, in a recent case, seems to have modified the doctrine announced in Blais v. Minneapolis & St. L. R. Co. supra, upon which the defendant relies, and, while that court adheres to the rule that railway companies are not required under all conditions to keep cattle guards free from snow and ice, it holds that whether they must, in the exercise of reasonable care, do so, depends on the circumstances of each particular case. In Yates v. Chicago, St. P. M. & O. R. Co. 115 Minn. 496, 36 L.R.A.(N.S.) 997, 132 N. W. 994, it was said in the syllabus: "Whether a railway company must, in the exercise of reasonable care, keep its cattle guards clear of ice and snow, depends on the location and elevation of the tracks, the character of the weather, the prevalence of storms, the use of the adjacent crossings or vicinity for the passage of animals, and all facts and circumstances relevant to the matter."

The rule seems to be supported by reason and authority. Schuyler v. Fitchburgh R. Co. 65 Hun, 622, 47 N. Y. S. R. 741, 20 N. Y. Supp. 287.

In Grahlman v. Chicago, St. P. & K. C. R. Co. supra, an instruction was upheld, in substance, as follows: "That the law did not require defendant to keep its cattle guards free from snow, regardless of circumstances, but did require it to use ordinary care and diligence to do so; that it was not required to excavate the snow from the cattle guard, unless it had notice that it was filled, or might have had notice by the use of ordinary care in looking after its road; and that it would have a reasonable time, after notice, to do so; also that the law did not require defendant's servants to subject themselves to extreme exposure in excavating the snow." (Syl. ¶ 1).

In one of the cases cited by the defendant, Wait v. Bennington & R. R. Co. 61 Vt. 268, 17 Atl. 284, the court applied the same rule, and held that the question of negligence was for the jury. In Indiana, B. & W. R. Co. v. Drum, 21 Ill. App. 331, it was held that a railway company is not liable for the consequences of storms which fill the cattle guards with snow and ice until a reasonable time has elapsed thereafter in which to remove the same.

It is contended that the court should have decided the question whether the herd law was in force. The court submitted it to the jury, and they made a finding that the law was not in force. Inasmuch as the jury determined the fact correctly, it is of no consequence whether it should have been submitted to them or decided by the court. The defendant's contention that chapter 175 of the Laws of 1879 repeals by implication chapter 128 of the Laws of 1874 cannot be sustained. The law of 1874 gives the county board authority, in its discretion, to repeal the herd law or vacate it, while the law of 1879 authorizes them to suspend its operation. The two statutes are not inconsistent. The various provisions of the two are to be considered together, and constitute the herd law of the state. State ex rel. Taylor v. Missouri P. R. Co. 76 Kan. 467, 92 Pac. 606; State v. Jepson, 76 Kan. 644, 92 Pac. 600. The fact that the petition presented to the board of county commissioners erroneously stated the statute under which the herd law had been originally adopted is not important. It otherwise sufficiently described the original order, and, upon the petition, the board had jurisdiction to vacate the order.

In the present case the court instructed the jury, in substance, that, if they found from the evidence that defendant failed to construct cattle guards which were reasonably sufficient to prevent animals from coming upon its right of way, or that defendant permitted its cattle guards to become obstructed so as to enable animals to pass over them, and that the plaintiff's stock crossed over the same and were killed, the verdict should be for the plaintiff. This, as we have seen, was erroneous, and a new trial must be ordered upon the issue of whether the defendant's failure to remove the snow and ice from the cattle guards in question was, under all the facts and circumstances, negligence. Two questions may be regarded as finally determined: one against the defendant, namely, that the herd law was not in force in the county, and the other in favor of the defendant, that it had erected and maintained a lawful fence and sufficient cattle guards at the highway where the animals entered the right of way; and these issues are not to be retried.

Plaintiff's cause of action, therefore, resting, not upon the statute, but upon the alleged negligence of the defendant, he would not in any event be entitled to an allowance for attorneys' fees. The defendant filed a motion for a new trial, and also one for judgment on the special findings. The court properly overruled the last motion, but should have sustained the former.

The judgment will be reversed, and the cause remanded for a new trial upon the issue of negligence.

Johnston, Ch. J., and Mason, Benson, and West, JJ., concur.

Burch, J., dissenting:

I fear my brother physicians have merely

thrown a case of noncompliance with a statute into negligence, and then have prescribed for the negligence.

The trial court stated the plaintiff's cause of action to the jury as follows: "(8) You are instructed that it is admitted by plaintiff that the fences of defendant along its right of way at and in the vicinity where animals in question were killed were not out of repair, and that his only contention is that the cattle guards of defendant were insufficient, and did not prevent the animals in question, belonging to plaintiff, from crossing from the public road over into the right of way of defendant."

The statute applicable to such a case was given and interpreted in the following instructions:

"(3) Section 7001 of the General Statutes of 1909 provides that 'every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each and every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not.' Section 7005 of the General Statutes of 1909 provides: 'This act shall not apply to any railway company or corporation, or the assignee or lessee thereof whose road is inclosed with a good and lawful fence to prevent such animals from being on such road.'

"(4) Under the sections above quoted, it is the duty of the railroad company to place proper cattle guards on the sides of the public highways on its right of way to prevent animals from going upon its right of way, and, if you find from the evidence that the defendant failed to construct cattle guards at the points in question which were reasonably sufficient to prevent animals from wandering on its right of way, or that defendant permitted said cattle guards to become obstructed so as to enable the passage of animals over same, and that horses and mule of plaintiff crossed over the cattle guards in question, on the right of way of defendant, and were killed by a passing train belonging to defendant, defendant is liable for the full value of such horses and mule as went over the cattle guard in question and on the right of way of defendant, irrespective of the fact as to whether such killing was caused by the negligence of the defendant or not, and the fact that the plaintiff might have been guilty of contributory negligence is no defense, and your verdict should be for the plaintiff.

"(5) A cattle guard that is only apparently good, or that will only apparently prevent animals from going on the right of way, will not excuse a railroad company from liability to the owner of the animals which pass over or through such cattle guards and upon the right of way, and are killed or injured by a passing train."

There was no contention that the snowfall which obstructed the cattle guards was excessive or unusual, or not naturally to be anticipated, and consequently the instructions were, in my opinion, correct and applicable to the facts.

The jury returned, among others, the following special findings of fact:

"(12) Was the railway of the defendant inclosed with a good, sufficient, and lawful fence at or near the place where the animals were struck by the engine of No. 12? Ans. Yes; but the cattle guard was allowed to become obstructed on the day of damage."

"(14) State if any proper cattle guard would have prevented plaintiff's stock from getting on to the right of way at the place in question. Ans. Yes.

"(15) If you find that the cattle guards in question were defective, then state in what respect they were so defective. Ans. They were not defective, but were allowed to become obstructed by snow.

"(16) If you find that the defendant railway company, its officers, agents, or employees, were negligent, then state in what respect they were negligent. Ans. By not keeping the guards clear of snow."

Reading finding No. 14 with the others, and reading all the findings in the light of the instructions and with the general verdict, it seems to me the jury meant to say that, while the cattle guards answered to that name in all respects, and so were not defective, they did not prevent stock from getting upon the defendant's right of way when allowed to become obstructed by snow. They were summer season cattle guards, and defective at all, but, if allowed to become obstructed with snow, were not proper or sufficient for the purpose of preventing stock from going upon the defendant's tracks.

Harmony is the imperative word in cases of this kind, and, considering the findings in the manner suggested, the cattle guard did not properly complete the fence after the snow had fallen, and a violation of the statute was established.

Regarding the case as one involving neg-

ligence, instead of compliance with the statute, the opinion of the court is fine.

Smith, J., dissenting:

I dissent on the ground that the appellee alleged negligence on the part of the railroad company as its ground of recovery, and that there is no evidence showing how long before the cattle passed over the cattle guard it was that the snow fell. The snow may have fallen within an hour before the cattle passed over the cattle guard, and in such case it would require an extraordinary degree of diligence to hold that the railroad company must have removed the snow and ice from the cattle guard within that time.

I think there is no showing of negligence.

MAINE SUPREME JUDICIAL COURT.

WILLIAM McCARTHY
v.
BANGOR & AROOSTOOK RAILROAD COMPANY.

(— Me. —, 90 Atl. 490.)

New trial — incredible evidence — railroad crossing accident.

A verdict for plaintiff in an action to recover damages for injuries arising out of a collision at a railroad crossing, in which plaintiff relies on absence of signal and lookout by the railroad company, will be set aside where the testimony of plaintiff, who was familiar with the crossing and knew the train was due, as to looking and listening, is incredible from the fact that the train could have been seen had he looked, or heard had he listened.

(May 7, 1914.)

MOTION by defendant for a new trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Motion sustained.

The facts are stated in the opinion.

Messrs. **P. C. Keegan, Powers & Archibald, and Stearns & Stearns** for defendant.

Messrs. **John B. Pelletier and F. W. Halliday** for plaintiff.

Savage, Ch. J., delivered the opinion of the court:

The plaintiff, a boy of fourteen years, while driving a milk cart in the highway across the defendant's railroad, was struck by the locomotive of a train and severely injured. In this action, in which he seeks to recover the damages sustained by him on account of the injuries, he counts on the defendant's negligence in the following par-

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Note. — Credibility and effect of testimony of person injured at a railroad crossing that he looked and listened, where he must have detected the train had he looked or listened.

As to the power of the court to disregard testimony because contrary to scientific principles, see the notes to Fleming v. Northern Tissue Paper Mill, 15 L.R.A. (N.S.) 701, and Wichita Ice & Cold Storage Co. v. Sheppard, 28 L.R.A.(N.S.) 648.

As has been said by one court in discussing the present question, where the determination of an issue of fact depends upon the credibility of witnesses, and where a jury would be justified in coming to a conclusion either way, according to the credence to be given the testimony on the respective sides,—the issue is for the jury, even though the court is convinced as to where the truth lies. And even where the surrounding circumstances merely make the story of the witness improbable, it is still the right of the litigant to have the issue thereby raised submitted to the jury. But this cannot be so where the undisputed evidence shows that the story told by a witness, upon a material issue, cannot by any possibility be true, or when the testimony of a witness is inherently impossible. Blumenthal v. Boston & M. R. Co. 97 Me. 255, 54 Atl. 747.

So it is agreed that testimony of the person injured that he looked and listened, but saw no train, must fall before undisputed evidence which clearly shows that had he looked or listened, he would have detected the train in time to avoid the accident. In either event, the plaintiff cannot recover, for, as has been said, it seems that but one of two inferences can be drawn in such circumstances: either such person did not look or listen, or else he detected the approach of the train and took his chances on getting across the tracks, in either case being guilty of contributory negligence. Gipson v. Southern R. Co. 140 Fed. 410; Hoffman v. Peoria, B. & C. Traction Co. 164 Ill. App. 270.

To preclude recovery as a matter of law on either theory, the evidence must be conclusive. Where there is any uncertainty as to whether the person injured could have seen or heard the train, and he testifies that he did not see or hear it, although he looked or listened, the question of his contributory negligence is for the jury. Arkansas C. R. Co. v. Williams, 99 Ark. 167, 137 S. W. 829; Chicago, R. I. & P. R. Co. v. Batsel, 100 Ark. 526, 140 S. W. 726; St. Louis & S. F. R. Co. v. Wyatt, 79 Ark. 241, 96 S. W. 376; Loftus v. Pacific Electric R. Co. 166 Cal. 464, 137 Pac. 34; Zibbell v. Southern P. Co. 160 Cal. 237, 116 Pac. 513; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661.

But, as said before, where the evidence

ticulars only: That the train was "driven negligently and carelessly by said defendant;" that no whistle was blown before reaching the crossing; that the defendant was unmindful of its duties to the plaintiff; and that the defendant "was negligent, careless, and unmindful of its duty, in that it did not keep a careful lookout for such danger, that it did not use the care of a reasonable and prudent man under such circumstances." The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial.

In argument the plaintiff contends that the defendant's servants upon the locomotive were negligent in not keeping a careful lookout when approaching the crossing, which is claimed to have been a blind and dangerous one, and that they did not sound the whistle and ring the bell while approaching the crossing, as required by statute and by common prudence. Seven witnesses testified for the plaintiff, in effect, that the whistle was not blown, and that the bell was not rung; four for the defendant to the contrary. Not to be on the lookout, and not to blow the whistle and ring the bell in approaching a blind crossing, is certainly negligence.

But it is unnecessary to analyze the testimony respecting the defendant's negligence. Even if we thought, as we do not, that the jury were justified in finding that the defendant's servants were negligent, and that their negligence was a cause of the collision, we are forced by the evidence to the conclusion that the plaintiff was guilty of contributory negligence, and that he cannot recover damages in any event.

In the first place, it is proper to observe that the plaintiff, though a boy, was an intelligent one, and his own testimony shows beyond question that he perfectly appreciated the danger, such as it was, of being run

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unmistakably shows that if the plaintiff had looked and listened he would have heard the train, it is uniformly held that the injured person's testimony that he did look and listen does not create a conflict of evidence which warrants the submission of the question of his contributory negligence to the jury; and in such circumstances either a verdict is directed for the defendant, or if one is rendered for the plaintiff, the same is set aside. Southern R. Co. v. Smith, 40 L.R.A. 746, 30 C. C. A. 58, 52 U. S. App. 708, 86 Fed. 292; Chicago & N. W. R. Co. v. Andrews, 64 C. C. A. 399, 130 Fed. 65, writ of certiorari denied in 195 U. S. 628, 49 L. ed. 351, 25 Sup. Ct. Rep. 787; Gipson v. Southern R. Co. 140 Fed. 410; St. Louis & S. F. R. Co. v. Cundieff, 96 C. C. A. 211, 171 Fed. 319; Peters v. Southern R. Co. 135 Ala. 533, 33 So. 332; Zibbell v. Southern P. Co. 160 Cal. 237, 116 Pac. 513 (*arguendo*); Loftus v. Pacific Electric R. Co. 166 Cal. 464, 137 Pac. 34 (*arguendo*); Chicago & E. I. R. Co. v. Kirby, 86 Ill. App. 57; Chicago, P. & St. L. R. Co. v. De Freitas, 109 Ill. App. 104; Chicago & A. R. Co. v. Vremeister, 112 Ill. App. 346; Lake Erie & W. R. Co. v. Stick, 143 Ind. 449, 41 N. E. 365; Pittsburgh, C. C. & St. L. R. Co. v. Fraze, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576; Cleveland, C. C. & St. L. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 153; Payne v. Chicago, R. I. & P. R. Co. 39 Iowa, 523; Bloomfield v. Burlington & W. R. Co. 74 Iowa, 607, 38 N. W. 431; Blumenthal v. Boston & M. R. Co. 97 Me. 255, 54 Atl. 747; Northern C. R. Co. v. Medairy, 86 Md. 168, 37 Atl. 796, 3 Am. Neg. Rep. 411; Phillips v. Washington & R. R. Co. 104 Md. 458, 65 Atl. 422, 10 Ann. Cas. 334; Maryland Electric R. Co. v. Beasley, 117 Md. 270, 83 Atl. 157; Miller v. Truesdale, 56 Minn. 274, 57 N. W. 661 (*obiter*); Kelsay v. Missouri P. R. Co. 129 Mo. 362, 30 S. W. 339; Payne v. Chicago & A. R. Co. 136 Mo. 562, 38 S. W. 308; Hook v. Missouri P. R. Co. 162 Mo. 569, 63 S. W. 360; Waggoner v. Chicago, B. & Q. R. Co. 152 Mo. App. 173, 133 S. W. 68; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180, 12 Am. Neg. Cas. 249 (even where person's testimony that he looked and listened is corroborated); Stetson v. Baltimore & N. Y. R. Co. 77 N. J. L. 121, 71 Atl. 113; Dolfini v. Erie R. Co. 178 N. Y. 1, 70 N. E. 68; Fiddler v. New York C. & H. R. R. Co. 64 App. Div. 95, 71 N. Y. Supp. 721; Swart v. New York C. & H. R. R. Co. 81 App. Div. 402, 80 N. Y. Supp. 906, affirmed without opinion in 177 N. Y. 529, 69 N. E. 1131; Carroll v. Pennsylvania R. Co. 12 W. N. C. 348; Moore v. Philadelphia, W. & B. R. Co. 108 Pa. 349; Pennsylvania R. Co. v. Bell, 122 Pa. 58, 15 Atl. 561; Marland v. Pittsburgh & L. E. R. Co. 123 Pa. 487, 10 Am. St. Rep. 541, 16 Atl. 624; Blight v. Camden & A. R. Co. 143 Pa. 10, 21 Atl. 995; Hauser v. Central R. Co. 147 Pa. 440, 23 Atl. 766; Myers v. Baltimore & O. R. Co. 150 Pa. 386, 24 Atl. 747; Urias v. Pennsylvania R. Co. 152 Pa. 326, 25 Atl. 566; Holden v. Pennsylvania R. Co. 169 Pac. 1, 32 Atl. 193; Canfield v. Baltimore & O. R. Co. 208 Pa. 372, 57 Atl. 763; Paul v. Philadelphia & R. R. Co. 231 Pa. 338, 80 Atl. 365, Ann. Cas. 1912B, 1132; Gulf, C. & S. F. R. Co. v. Wilson, — Tex. Civ. App. —, 60 S. W. 438; Carter v. Central Vermont R. Co. 72 Vt. 190, 47 Atl. 797; Labelle v. Central Vermont R. Co. 87 Vt. 87, 88 Atl. 517; Cawley v. LaCrosse City R. Co. 101 Wis. 145, 77 N. W. 179; White v. Chicago & N. W. R. Co. 102 Wis. 489, 78 N. W. 585; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; Marshall v. Green Bay & W. R. Co. 125 Wis. 96, 103 N. W. 249; White v. Minneapolis, St. P. & S. Ste. M. R. Co. 147 Wis. 141, 133 N. W. 148 (*arguendo*). L. A. W.

L.R.A.1915B.

over at the crossing. He was engaged in driving a milk cart upon a milk route, and had been so engaged for nine months prior to the accident. And each day he had driven over this crossing twice. This case and indeed his own evidence show that he was perfectly familiar with all the surroundings of the crossing, and with the consequent dangers. He know when he approached the crossing that it was about train time. He says he stopped his team twice before reaching the crossing to look and listen for the train. He says he saw nothing and heard nothing. One stopping place was about 150 feet from the track, and the other was at a point about 50 feet from the track. The railroad for more than half a mile in the direction from which the train was coming was perfectly straight. But the plaintiff says he could not see the approaching train on account of trees and bushes growing on the right of way, and on account of a bank left in grading at the side of the highway. At this point the railroad passes through a cut, and the highway is graded down an incline to cross at grade. By reason of these obstructions to view, the plaintiff says he could not, and that he did not, see the train until he actually was on the crossing, and that then the train was not more than 50 feet away. And another witness testified that a train could not be seen until one was on the crossing. The plaintiff contends that, not only were there standing trees standing on the right of way, but that some of them leaned over towards the track so low as to obstruct vision up and down the track. The defendant's right of way at this point was 300 feet wide.

The defendant contends that the plaintiff had an unobstructed view of the railroad track when he was 50 feet from the track. There is much dispute about this. Assuming the crossing to be as blind and dangerous as the plaintiff describes it, there was all the greater need of watchfulness on the plaintiff's part. The more dangerous the crossing, the more need of care. At ordinary crossings a burden is put upon the traveler to be observant, to look and listen, and to stop, if need be. Much more at a blind crossing. The plaintiff, if his testimony is true, appreciated the necessity of watchfulness, even of stopping, for he says he stopped twice, with an interval of 100 or 125 feet.

Now, if the plaintiff stopped last at a distance of 20 or even 50 feet from the track, and actually listened, it is, in the opinion of the court, incredible that he should not have heard the noise and roar of the onrushing train,—a train coming, as the plaintiff argues, at the speed of 60 miles an hour, but more probably at a speed of 35 miles an hour. The train was then only a few hundred feet away. The track was straight. No climatic conditions are shown to have interfered with hearing. From the facts so far stated, it seems to us impossible that he should not have heard, if he stopped still and listened. And as he approached the track the train came nearer, and inevitably the noise was louder. But there is an additional fact. Following behind the plaintiff's milk cart, before the crossing was reached, was a two-horse team hauling a jigger load of empty potato barrels. The driver was a boy. That boy left his own team trailing unguided behind and got into the milk cart with the plaintiff. Both boys testify that, when the milk team was stopped the last time before reaching the crossing, the two-horse team passed by them. They both testify that while riding together they were talking. Whether the boys were intent upon their conversation so that they did not hear the coming train, or whether there was a rattle of empty potato barrels so that they could not hear, the case does not disclose. These are suggestions merely of what may account for their not hearing. But true it is that they passed on, both of them apparently oblivious of the danger, until they got onto the crossing. Under the existing conditions, if the plaintiff did not listen with ear and mind both, he was negligent. If he listened, but was prevented from hearing the train by the rattling of the barrels or any other noises, there was all the more need of making certain before attempting the crossing. If, contrary to his testimony, he did hear, but attempted to make the crossing before the train, in such a place as he describes this to be, he was negligent. We think the case shows beyond question that, if the plaintiff had looked just before the horse went onto the crossing, he would have seen the train where it then was. The defendant contends that he could have seen it when 3 rods back. We think the necessary conclusion is that he did not listen, or that, listening, he did not hear the train because of other noises, which under the circumstances required further watchfulness, or that he did hear and took the chances of crossing.

We do not forget that the plaintiff and his boy companion each testified that he did listen, and did not hear the train. We think the story is not credible, except upon the contingency of preventing noises, of which there is no evidence. An inherently incredible story is not made credible by being sworn to. Nor can it be allowed to serve as the foundation of a verdict.

Blumenthal v. Boston & M. R. Co. 97 Me. 255, 54 Atl. 747.

Before leaving this branch of the case, we will add that plan and photographs were used at the trial, and are before us. If they correctly show the situation at the time of the accident, they demonstrate that the plaintiff could have seen the train when he was 50 feet from the crossing if he had looked. It is admitted that some trees had been cut on some part of the right of way, and some gravel had been moved, between the time of the accident and the time when the plan was made and photographs taken. The plaintiff contends that these changes materially altered the appearance of the locality as to ability to see the train. This was controverted. Although we are strongly impressed with the belief that the plaintiff could have seen the train at some distance from the track, yet, inasmuch as there had been some change before the plan and photographs were made, we do not base our conclusion upon the failure of the plaintiff to see the train before he reached a point a few feet from the track. In any event, as we have already said, there was a point where, if he had looked, he could have seen the train and stopped his team before he entered upon the track.

We have not overlooked the plaintiff's contention that when, as assumed, the usual signals are not given, a traveler will not be held to that degree of negligence that he would had the company discharged its duty. Romeo v. Boston & M. R. Co. 87 Me. 540, 33 Atl. 24. It is unquestionably true that the traveler has a right to expect the company to give the usual signals, and may take into consideration to some extent the absence of signals; but such want of signals does not relieve the traveler of all care. Hooper v. Boston & M. R. Co. 81 Me. 267, 17 Atl. 64; Romeo v. Boston & M. R. Co. supra. Not to listen, or, having listened and heard, to attempt to cross a blind crossing without seeing, where the plaintiff says a train could not be seen until the traveler was on the track, is clearly a want of requisite care, even if it be true that no crossing signals were given.

The law is well settled. And we add for illustration various expressions of the justices of this court respecting the duties of travelers at railroad crossings. "The rule is now firmly established in this State, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen. But if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence." Chase v. Maine C. R. Co. 78 Me. 346, 5 Atl. 771; State v. Maine C. R. Co. 76 Me. 357, 49 Am. Rep. 622. "It is not enough to establish negligence and an accident. It must also be shown that the negligence was the cause of the accident. An omission to ring the bell or sound the whistle could not have been the cause of the accident if the deceased had notice of the approach of the train by other means. Our belief is that the deceased did have such notice, that he could not have been so unobservant as to neither see nor hear the approach of that train, and consequently that the alleged negligence in omitting to ring the bell or sound the whistle could not have been the cause of the accident. But if he did not have such notice, if he drove onto that crossing in total ignorance of the approach of a train, then the conclusion seems to us inevitable that he must have been exceedingly negligent in the use of his eyes and his ears." State v. Maine C. R. Co. supra. "It is almost incredible that, if they had listened carefully, they should not have heard the rumbling and jolting of the approaching cars, which so many others distinctly heard. If the noise of their carriage and of the pattering rain upon its top rendered it difficult to distinguish the sounds, it was their plain duty to stop the team and obtain a better opportunity to hear. . . . No reasonably prudent man under such circumstances would have neglected so to do." Smith v. Maine C. R. Co. 87 Me. 339, 32 Atl. 967. "If . . . [the traveler] be alert and watchful for the passing train, he can usually check his own speed quickly enough to avoid a collision. The obvious peril of collision at such crossings requires that the traveler upon the common road, when approaching a railroad crossing, should exercise a degree of care commensurate with the peril. He should bear in mind that he is approaching a railroad crossing, and that a train or locomotive may also at the same time be approaching the same crossing at great speed. He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near. He should, when near or at the crossing, look and listen,—not simply with physical eyes and ears, but with alert and intent mind,—that he may actually see or hear if a train or locomotive be approaching. He should not venture upon the track or crossing until it is made reasonably plain that he can go over without risk of collision." Giberson v. Bangor &

A. R. Co. 89 Me. 337, 36 Atl. 400. The traveler "must therefore, to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by any other appropriate means, the approach of trains, and to seasonably avoid collision with them. He can usually avoid collision readily, easily, and promptly if he be properly careful and alert while approaching the crossing." Day v. Boston & M. R. Co. 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771, 12 Am. Neg. Rep. 452.

In view of the principles of which the foregoing cases are illustrations, and applying them to the facts in this case, it is clear that the plaintiff was guilty of contributory negligence in attempting to cross the track as he did. And this being so, he was not entitled in law to a verdict in his favor. It must be set aside.

Motion sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LIBERTY TRUST COMPANY
v.
FRANK B. TILTON, Appt.

(217 Mass. 462, 105 N. E. 605.)

Bills and notes — payee as holder in due course.

The payee named in a promissory note who purchases it complete in form before maturity, in good faith and without notice of any infirmity in title or otherwise, may enforce it under the negotiable instruments law as one to whom it was negotiated as a holder in due course, against an indorser whose instructions as to a coindorser and as to the amount to be filled in the blank left for that purpose were not followed by the one to whom it was intrusted for delivery; and he is not within the section of the act providing that as between immediate parties the delivery, to be effectual, must be by or under authority of the party making, drawing, accepting, or indorsing as the case may be.

(May 19, 1914.)

APPEAL by defendant from an order of the Appellate Division of the Municipal Court of Boston dismissing a report to it for decision of an action on a promissory note, which was submitted upon an agreed statement of facts. Affirmed.

The facts are stated in the opinion.

Mr. **Albert Mehlinger**, for appellant:

A note becomes a contract only upon effectual delivery.

Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Lawrence v. Bassett, 5 Allen, 140; Hill v. Dunham, 7 Gray, 543; Mason v. Gardner, 186 Mass. 515, 71 N. E. 952; Fearing v. Clark, 16 Gray, 74, 77 Am. Dec. 394; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923; Young v. Hayes, 212 Mass. 525, 99 N. E. 327.

Incompleteness of contract, by reason of incapacity of one of the original parties, or

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Note. — Right of an innocent payee to recover on a note signed in blank and intrusted to a third person who exceeds his authority in filling up blanks before delivery to payee.

This question was treated somewhat at length in the note to Vander Ploeg v. VanZuuk, 13 L.R.A.(N.S.) 490, wherein the earlier cases and the rules deducible therefrom will be found.

The common-law rule that an innocent payee or other person in whose hands a note first has its inception as a contract may recover against one who signed the same in blank and delivered it to a third person who filled up the blanks in a manner different from or in excess of his authority, upon the ground that the payee is a bona fide holder and entitled to protection as such, was adhered to in the recent case of White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208, wherein it was held that one who signed as surety a note blank as to amount, under an agreement with the maker that it should be filled in for an amount not to exceed a specified sum, and the maker filled in the blank in an amount greatly in excess of the agreed sum, was liable to a payee who took without notice of the violation of the agreement as to amount, the court saying that in such case he was a bona fide holder, even though he knew that the note was signed in blank; and in Wilkes v. Pope, 4 Ga. App. 36, 60 S. E. 823, holding that a person who signs a blank note and delivers it to another person designating the payee to be filled in constitutes such other person his agent for the filling of the blank, and is liable to a bona fide holder of the note who became such before maturity, although the agent violated the understanding by filling in as payee the name of a person other than the one designated. And see the strong *dicta* to the same effect in Reddick v. Young, 177 Ind. 632, 98 N. E. 813; and in Linick v. A. J. Nutting & Co. 140 App. Div. 265, 125 N. Y. Supp. 93. And the common-law rule, as above stated, was recognized in the case of Hermann v. Gregory, 131 Ky. 819, 115 S. W. 809.

But under the so-called uniform negotiable instrument law a direct conflict among the cases seems to have arisen. This is evidenced by Vander Ploeg v. VanZuuk, supra, which, on the one hand, holds that the payee of a note under circumstances such as are under consideration herein is not a holder in due course, and by LIBERTY

by reason of ineffectual delivery for failure to obtain additional signatures, or for other violation of authority, is a defense even against a holder in due course, and even between remote parties.

Baxendale v. Bennett, 40 L. T. N. S. 23; Awde v. Dixon, 6 Exch. 869, 20 L. J. Exch. N. S. 295; Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Sheffer v. Fleischer, 158 Mich. 270, 122 N. W. 543; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Swanke v. Herdeman, 138 Wis. 654, 120 N. W. 414; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212; Sharp v. Allgood, 100 Ala. 183, 14 So. 16; Keener v. Crago, 81 Pa. 166; Perry v. Patterson, 5 Humph. 133, 42 Am. Dec. 424; McCormick Harvesting Mach. Co. v. Faulkner, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163; Green v. Gunsten, 154 Wis. 69, 46 L.R.A.(N.S.) 212, 142 N. W. 261.

The law, in giving peculiar sanction to negotiable paper in order to secure its free circulation and to protect bona fide holders for value who receive it before maturity, does not go to the extent of holding a party liable on a contract into which he never entered, and to which he has not given his assent.

Wade v. Withington, 1 Allen, 561.

On this principle a holder in due course could not recover on an altered instrument, according to original tenor, because the original contract no longer existed, or was not executed; nor according to tenor as altered, because no such contract was made. This was changed by § 141 of chapter 73, regarding alteration, but not regarding filling in.

Fay v. Smith, 1 Allen, 477, 79 Am. Dec. 752; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Thorpe v. White, 188 Mass. 333, 74 N. E. 592.

A person taking a note from a payee indorsed by a third person takes it chargeable with knowledge that it is an accommodation indorsement.

J. G. Brill Co. v. Norton & T. Street R. Co. 189 Mass. 431, 2 L.R.A.(N.S.) 525, 75 N. E. 1090.

A person who negligently permits the instrument to pass out of his custody is not liable for negligence to a holder in due course.

Costelo v. Barnard, 190 Mass. 260, 3 L.R.A.(N.S.) 212, 112 Am. St. Rep. 328, 76 N. E. 599.

The plaintiff and the defendant have equal rights to trust to the honesty of others concerned with the instrument, and he who receives the instrument takes the risk of the honesty of the party handing it to him.

Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67.

The payee of a check who gives value for it to a third person not the drawer omits such precaution as to render him, the payee, liable to the bank honoring the check, where the drawer's signature is forged.

National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Mr. **E. M. Shanley** for appellee.

TRUST CO. v. TILTON, which reaches the opposite conclusion. No other American case, however, seems to have passed directly upon this question.

The doctrine of estoppel laid down in Lloyd's Bank v. Cook [1907] 1 K. B. 794, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182, which is set out and discussed in both LIBERTY TRUST CO. v. TILTON and the note in 13 L.R.A.(N.S.) 490, is limited in the subsequent case of Smith v. Prosser [1907] 2 K. B. 735, 77 L. J. K. B. N. S. 71, 97 L. T. N. S. 155, 23 Times L. R. 597, 51 Sol. Jo. 551, 11 Ann. Cas. 191, wherein it was held, distinguishing the Lloyd's Bank Case, that the maker in blank of promissory notes, the custody of which had been delivered to the maker's attorney to be filled up and issued only upon orders from the maker, was not estopped from denying the validity of the notes as between himself and the holder whose name had been filled in as payee by the attorney without authority, who purchased them honestly and in good faith without notice of the attorney's fraud. The court distinguished the Lloyd's Bank Case upon the ground that in that case the instruments were intrusted to the agent with authority to fill up and issue the same, while in the present case there was no negotiable instrument, because the maker neither issued it nor authorized anyone else to issue it as a negotiable instrument.

Smith v. Prosser, supra, was followed and relied upon in Ray v. Willson, 45 Can. S. C. 401, affirming 24 Ont. L. Rep. 122, which affirmed 16 Ont. Week. Rep. 578, where the essential facts were practically identical with those in the Smith Case. In Ray v. Willson, Davies, J., said that the true construction of the bills of exchange act, so far as the protection of holders in due course is concerned, "limits the protection to cases where the signer intended the instrument signed by him to become a bill or note, and authorized its issue for that purpose," and continued as follows: "Where that intention is proved, it matters not whether his instructions to the person he delivered it to were exceeded or not. He is liable upon it. If, on the contrary, that intention is disproved, and it is shown that the instrument signed was not intended to be issued or become a bill or note, but was left for safe custody in some agent's hands to await further instructions as to its issue, he is not liable if the bill or note is fraudulently issued by the agent or holder without such further instructions."

Rugg, Ch. J., delivered the opinion of the court:

One Perley G. Tilton signed a note to the order of the plaintiff and presented it complete in every respect except its amount, which was blank, to the defendant, Frank B. Tilton, who, for the accommodation of Perley G. Tilton, signed it in blank on the back upon the express representation and agreement by Perley G. Tilton that the defendant's signature should not be operative nor the instrument be delivered unless and until one Leonard Grant also should sign on the back, and that then it should be filled out for $200, and no more. Leonard Grant did not sign the instrument, the amount of $400 was filled in, and the instrument, without the knowledge or authority of the defendant, and in violation of the agreement between him and Perley G. Tilton, was delivered complete in form to the plaintiff, the payee, who took it for value in good faith and without knowledge of the agreement between the maker and defendant. The question is whether the defendant is liable to the plaintiff.

This point has not been decided in Massachusetts.

It is plain that before the enactment of the negotiable instruments act the plaintiff could recover. The payee could be a bona fide holder for value without notice. Boston Steel & I. Co. v. Steuer, 183 Mass. 140, 143, 97 Am. St. Rep. 426, 66 N. E. 646, and cases cited. The signing in blank authorized the filling of the blank by the one to whom the signer delivered it, although the specific directions might not have been followed. Androscoggin Bank v. Kimball, 10 Cush. 373. This is the general common-law rule. See cases collected in Hartington Nat. Bank v. Breslin, 88 Neb. 47, 31 L.R.A.(N.S.) 130, 128 N. W. 659, Ann. Cas. 1912B, 1008–1011; Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 13 L.R.A.(N.S.) 490, 492, 124 Am. St. Rep. 275, 112 N. W. 807. But although the point now in issue has not been decided expressly in this commonwealth, in principle it is covered by Boston Steel & I. Co. v. Steuer, supra. In that decision this case was put: The maker handed a check complete in every respect to her husband upon express instructions to deliver to the payee on her own account, but the check fraudulently was handed by the husband to the payee in payment of a debt due from him to the payee, and it was accepted in good faith by the payee. It was held that the payee under these circumstances was a holder in due course within Rev. Laws, chap. 73, § 69. That case has been followed on the point that the payee of a negotiable instrument may be a holder in due course, as in J. G. Brill Co. v. Norton & T. Street R. Co. 189 Mass. 431, 437, 2 L.R.A.(N.S.) 525, 75 N. E. 1090, and Lowell v. Bickford, 201 Mass. 543, 545, 88 N. E. 1. See also Fillebrown v. Hayward, 190 Mass. 472–480, 77 N. E. 45. The point there decided, *viz.*, that a payee may recover of a party whose signature was put upon the instrument in its complete form, but whose instructions as to the delivery of the instrument have not been followed, does not reach precisely the facts in the present case. The point there decided in substance was that under Rev. Laws, chap.

And in Equitable Trust Co. v. Lyons, 72 Misc. 49, 129 N. Y. Supp. 79, where a blank promissory note was executed and placed in the hands of another than the maker, but without authority to fill the blanks, it was held that one who became the holder after it was wrongfully filled up by the person in whose possession the maker had placed it could not recover against the maker, because of the provision of the negotiable instrument law that such an instrument, to be enforceable, "must be filled up strictly in accordance with the authority given."

In Perry v. Pye, 215 Mass. 403, 102 N. E. 653, the court, construing the provision of the Canadian bill of exchange act that where an instrument is signed in blank it carries prima facie authority to fill it up in any amount, but that in order to be enforceable it must be filled up "strictly in accordance with the authority given," held that where the maker of a note signed it in blank and placed it in the hands of an agent with authority to fill in the amount, etc., and delivered the same to the payee in renewal of a certain note, the maker was liable to the payee, although the agent filled in the note in an amount slightly less than the amount actually due on the old note.

In the closely analogous case of Hartington Nat. Bank v. Breslin, 88 Neb. 47, 31 L.R.A.(N.S.) 130, 128 N. W. 659, Ann. Cas. 1912B, 1008, which is cited in LIBERTY TRUST Co. v. TILTON, it was held that a bank which takes a note with an unfilled blank for the payee's name, in payment of a mortgage debt, and fills the blank with its own name, when the note had been executed and intrusted to a third party to use to pay for a meat market, with instructions to fill the name of the seller in the blank, cannot recover against the maker, because of the provision of the negotiable instrument law that, to render enforceable a note executed with an unfilled blank, the blank must be filled up strictly in accordance with the authority given. This decision, however, does not turn upon the question as to whether or not the payee was a holder in due course, but upon that provision of the statute making him a party to the note "prior to its completion," so as to require conformity to the provision requiring that the blank be filled in strict accordance with "the authority given."

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73, § 33, where the instrument when signed by the party sought to be charged was complete as to its form, a payee might be a holder in due course, although the delivery was contrary to the instructions.

The effect of that decision was to hold that the words "immediate parties" as used in § 33, *viz.*, "as between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument," did not necessarily include the payee. Hence, "immediate parties" in that connection excludes a party who is a holder in due course. In such case these words must be confined to parties who are "immediate" to the conditions or limitations placed upon the delivery in the sense of knowing or being chargeable with notice of them. A payee who is a holder in due course is not an immediate party in the sense of that section. This result follows from holding that a payee may be a "holder in due course" as defined in § 69, because he could become such holder only on condition "(4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument." Thus he could not be such holder unless the paper was "negotiated" to him. Therefore the word "negotiated" was held to describe the means by which a payee might acquire a note. It was given its common legal significance of concluded by bargain or agreement. Palmer v. Ferry, 6 Gray, 420, 423; Everson v. General Acci. F. & L. Assur. Corp. 202 Mass. 169, 172, 88 N. E. 658. A promissory note complete as to form and payable to a named person may be negotiated to that person by being sold to him or taken by him for value. This is the common and popular signification of the word. It was the sense in which it was used in the law merchant before the negotiable instruments act. Its meaning has not been changed by the act. That was in substance the decision in Boston Steel & I. Co. v. Steuer, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

The soundness of that decision in this respect is confirmed by other provisions of the act. "Negotiation" is defined by § 47, whereby it is provided that "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof." "Holder" is defined in § 207 to be "the payee or indorsee of a bill or note who is in possession of it." The remaining sentence of § 47, *viz.*, "If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery," was not intended to include all the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of the preceding sentence. Plainly under these two sections a negotiable instrument payable to a named payee is negotiated when the physical possession of it is handed for value to the person named as payee. One effect of the last sentence of § 47 is to describe the method by which the person who first becomes holder may pass title. It does not comprehend all the ways by which an instrument may be negotiated.

The word "negotiate" being defined thus in the act, and being given a definition in conformity to that attached to it by the common law before the passage of the act, it must be held to have the same meaning throughout the statute, in the absence of a strongly countervailing context requiring a different signification. There is nothing in § 31 to indicate that it there was used in any different sense. That a payee becomes the owner of a note by negotiation was in the thought of the court when it was said in Thorpe v. White, 188 Mass. 333, at page 334, 74 N. E. 592: "The note was put in circulation as a contract on delivery to the payee, who, upon acquiring title by its negotiation, thus regularly became a holder within the provisions of Rev. Laws, chap. 73, § 69."

The defendant, not otherwise a party to the instrument, having signed in blank before delivery, became liable as indorser to the payee. Section 81.

It requires no discussion to show that under the circumstances here disclosed § 32 of the act has no bearing. The defendant transferred actual possession of the incomplete instrument to Perley G. Tilton. Thus it was "delivered" within the meaning of that section so far as the defendant was concerned. Section 207.

The conclusion follows that the payee named in a promissory note, who purchases it complete in form for value before maturity, in good faith and without notice of any infirmity in title or otherwise, is a person to whom it has been negotiated as holder in due course, notwithstanding it was signed in blank by the party to be charged, whose instructions as to the filling of blanks

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and the delivery have not been followed by the one to whom it was intrusted by him in its incomplete state.

This result is contrary to the reasoning of Herdman v. Wheeler [1902] 1 K. B. 361, 71 L. J. K. B. N. S. 270, 80 L. T. N. S. 48, 50 Week. Rep. 300. But doubt has been thrown upon that case by Lloyd's Bank v. Cooke [1907] 1 K. B. 794, 76 L. K. B. N. S. 666, 96 L. T. N. S. 715, 23 Times L. R. 429, 8 Ann. Cas. 182. That was a case in its essential facts exactly like the one at bar. The defendant signed his name on a blank piece of paper which he intrusted to another person with authority to fill it up for a certain amount payable to the order of the plaintiffs, and deliver it as security for an advance. The note was filled up for a larger amount than was authorized and the plaintiffs advanced on it without notice. Without passing upon the soundness of the rule laid down in Herdman v. Wheeler, it was held that the defendant was estopped at common law from denying liability. Under this decision in its practical results the law of England, by invoking the doctrine of estoppel, is on the same basis as if Herdman v. Wheeler were overruled on this point.

The conclusion here reached is at variance also with Vander Ploeg v. Van Zuuk, 135 Iowa, 350, 13 L.R.A.(N.S.) 490, 124 Am. St. Rep. 275, 112 N. W. 807. But that decision, rendered since Boston Steel & I. Co. v. Steuer, supra, recognizes its inconsistencies with our case. Desirable as is uniformity of interpretation touching the negotiable instruments act by courts of the several states where it is in force, which is declared in Union Trust Co. v. McGinty, 212 Mass. 205, 208, 98 N. E. 679, Ann. Cas. 1913C, 525, we remain content with the principles laid down in Boston Steel & I. Co. v. Steuer. The rational application of that principle decides this case. See in this connection 59 University of Pa. L. Rev. 477; Manussier v. Wright, 158 Ill. App. 214; Union Trust Co. v. McCrum, 145 App. Div. 409–412, 129 N. Y. Supp. 1078, affirmed in 207 N. Y. 721, 101 N. E. 1124.

It was declared both in Herdman v. Wheeler and in Vander Ploeg v. Van Zuuk that the judges were "very reluctant to come to the conclusion" there reached. We feel that the result to which we are led by a chain of reasoning not developed in either of those cases is in conformity with the terms of the act, and, being in accordance with the common law, is highly desirable as not upsetting the general understanding and practice of the commercial world.

No error is shown upon the record.

Order dismissing report affirmed.

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UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PETITION OF GUY W. ROUSE, Mortgage Trustee.

RE BERNARD F. OTTENWESS et al., Bankrupts.

(126 C. C. A. 90, 208 Fed. 881.)

Bankruptcy — priority of claims — mortgagees coming in as general creditors.

A chattel mortgagee whose mortgage is invalid as a preference under the bankruptcy act, but who, had not the bankruptcy proceedings intervened, would have had a lien superior to that of an earlier unrecorded mortgage, is not for that reason entitled to priority of payment over the earlier mortgagee, who has proved his claim as a general creditor.

(November 11, 1913.)

Note. — Bankruptcy: may a lien which is voidable under § 60, subdivisions a or b, or void under 67, subdivisions c or f, be allowed any effect under §64b (5).

Having regard for the cardinal rule that seemingly inconsistent provisions of a statute must, if possible, be so construed as to give effect to all, it seems clear that § 64b(5) of the bankruptcy act of 1898, which provides for priority in distribution of the bankrupt's estate to "debts owing to any person who, by the laws of the state . . . is entitled to priority," does not save priority to liens which are voidable under § 60 subdivisions a or b as preferences, or are null and void under the provisions of § 67 subdivisions c or f, relating to liens obtained in legal proceedings, etc.

And as a matter of fact it not only is not a forced construction, but is a logical one, to limit § 64b(5) to debts which do not fall by the express terms of the bankruptcy act; and to deny, as is held in RE ROUSE, the efficacy of that section to preserve the priority of a lien falling within the condemnation of § 60a or b, even as against another lien, over which it was given priority by a state statute.

RE ROUSE, however, seems to be the only case to have passed directly upon this particular phase of the question, although the some conclusion reached in that case seems inferable from the decision reached in Bean v. Orr, 105 C. C. A. 137, 182 Fed. 599, wherein, in discussing the status under the bankruptcy act of a mortgage lien which under state law was entitled to priority, the court said that the lien would be protected in bankruptcy under § 64b(5) "if valid." And see the statement in Re Lewis,

PETITION for revision of an order of the District Court of the United States for the Southern Division of the Western District of Michigan denying to the creditors secured by a trust mortgage a certain priority in the distribution of the assets of the bankrupt's estate. Affirmed.

The facts are stated in the opinion.

Argued before Warrington and Knappen, Circuit Judges, and Sater, District Judge.

Mr. L. D. Averill, with Messrs. Hyde, Earle, & Thornton and Wilson, Wilson, & Rice, for petitioner:

The trustee takes the estate of the bankrupt in the condition it was in on the day of bankruptcy.

Re Fish Bros. Wagon Co. 21 Am. Bankr. Rep. 149; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

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99 Fed. 935, 4 Am. Bankr. Rep. 51, wherein, in discussing a question analogous to that under consideration herein, it was said that "although the laws of a state giving priority to certain debts are by § 64b, clause 5, introduced into the scheme of the present bankrupt act, yet such state laws are introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the bankrupt act itself." For a stronger reason this argument would apply to liens which are struck down by the express terms of the bankruptcy act.

As regards the application of the provision of § 64b(5) for the purposes of saving a priority in distribution to liens obtained by legal proceedings and which fall within the express terms of § 67 of the bankruptcy act, by which they are declared null and void, it seems that the former provision is concerned only with priorities on distribution, and is not concerned with liens struck down by the provision of § 67. If the act were not given this construction, § 64b(5) and § 67 would be inconsistent, but as the provisions can both be given logical effect, there is no occasion for assuming that Congress intended that the former provision of the act should nullify the latter, or *vice versa*.

And this conclusion has the support of judicial opinion.

Thus, in Re The Copper King, 143 Fed. 649, 16 Am. Bankr. Rep. 148, it was expressly held that a lien for costs in an attachment suit which, under the California statute, constituted a prior claim, would not, under § 64b(5) of the bankruptcy act be accorded priority on distribution, where the lien of the attachment was rendered void by § 67f because obtained within four months prior to the bankruptcy of the debtor, the court saying that "in view of the fact that an attachment lien obtained within four months prior to the filing of the petition, which includes the lien for costs in the attachment proceeding, is dissolved by subdivisions 'c' and 'f' of § 67 of the bankruptcy act (30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449), it is not reasonable to conclude that Congress intended by subdivision 5 of § 64b to make the claim for costs, the lien of which is thus destroyed, a preferred debt."

And in Re Allen, 96 Fed. 512, 3 Am. Bankr. Rep. 38, it was held that a lien upon property acquired pursuant to state statute in an attachment suit commenced within four months of the filing of a petition in bankruptcy was not entitled to priority of payment under § 64 of the bankruptcy act, but was dissolved by the adjudication in bankruptcy under § 67, subdivisions c and f. And see Re Young, 96 Fed. 606, 2 Am. Bankr. Rep. 673, which seemingly holds to the same effect.

Another decision which supports the theory that § 64 does not save priority to liens stricken down by § 67 is Re Burton Bros. Mfg. Co. 134 Fed. 157, 14 Am. Bankr. Rep. 218, wherein it was said that the adjudication of bankruptcy dissolved the lien in question which had been acquired by levy of execution upon the bankrupt's property, but that had the creditor perfected a lien given him by state law and which did not fall within the disfavor of the bankruptcy act, the priority accorded such liens by state law would have been preserved to him.

And in Re Beaver Coal Co. 110 Fed. 630, 6 Am. Bankr. Rep. 404, affirmed in 51 C. C. A. 519, 113 Fed. 889, it was claimed that a lien for costs in an attachment proceeding which under the Oregon law was entitled to priority of payment was preserved and entitled to priority under § 64b-(5) of the bankruptcy act, and not void under § 67f, because the judgment upon which the lien was dependent was obtained within four months prior to the filing of the petition in bankruptcy, and the referee held that the lien was not preserved, but this was reversed upon the ground that the lien was not void under § 67f, because the attachment action was commenced before the four months' period, thus eliminating any necessity for a decision of the question raised before the referee. And upon a previous hearing in this case (107 Fed. 98) it was said that it did not admit of argument from a provision (§ 64b(5)) of the bankruptcy act recognizing priorities created by state law, that Congress intended that a claim arising thereunder should have priority in the face of an explicit provision (§ 67) avoiding it.

And it seems inferable from the opinion in Re Cramond, 145 Fed. 966, 17 Am. Bankr. Rep. 23, that liens which fall within § 67f are not preserved by § 64b (5), so as to be accorded priority in payment.

And see Re Laird, 48 C. C. A. 538, 109 Fed. 550, wherein it was said by way of discussion that a lien accorded a preference by state statute will be respected, and is entitled to priority of payment if it "is not one avoided by the act [Federal bankruptcy act]."

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Mr. **Martin H. Carmody**, for claimant Clemens Huxoll:

The mere act of taking physical possession of the bankrupt estate does not constitute an actual established lien that can be given effect under the bankruptcy act.

Re Martin, 113 C. C. A. 627, 193 Fed. 841; Crucible Steel Co. v. Holt, 98 C. C. A. 101, 174 Fed. 127; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

The secured creditor who voluntarily surrenders his security, before the same has been determined by suit, may then prove his debt in bankruptcy, receive dividends thereon, and exercise all rights of a general creditor.

Re Connor, 1 Low. Dec. 532, Fed. Cas. No. 3,118; Re Kipp, Fed. Cas. No. 7,836; Re Leland, 7 Ben. 156, Fed. Cas. No. 8,230; Re Evans, Fed. Cas. No. 4,552; Collier, Bankr. 8th ed. p. 595; Loveland, Bankr. 4th ed. p. 612.

The holder of such an unrecorded mortgage may surrender his security, and then prove his claim as a general creditor, and share *pro rata* in the assets of the bankrupt estate with the other general creditors.

Re Doran, 148 Fed. 327; Post v. Berry, 23 Am. Bankr. Rep. 699; Re Ewald, 135 Fed. 168; Re Huxoll, 113 C. C. A. 637, 193 Fed. 851.

The mortgage filing statute of Michigan is not within the purview of § 64b (5) of the bankrupt act, and therefore does not create a priority in favor of the subsequent creditors.

Re Bennett, 82 C. C. A. 531, 153 Fed. 673; Re Worcester County, 42 C. C. A. 537, 102 Fed. 808; Re Jones, 151 Fed. 108; Re Huxoll, 113 C. C. A. 637, 193 Fed. 851.

Mr. **Fred P. Gelb** for the trustee in bankruptcy.

Knappen, Circuit Judge, delivered the opinion of the court:

On February 1, 1909, Ottenwess & Huxoll, copartners, on beginning business, gave to one Clemens Huxoll a chattel mortgage upon their bakery plant and outfit in Grand Rapids, Michigan. The mortgage was not filed, as required by the Michigan statute, until November 30th following. On December 2, 1909, the firm gave to Guy W. Rouse, as trustee, a mortgage upon the bakery property, to secure ratably the claims of all creditors who had become such between February 1st and November 30th. This naturally excluded Clemens Huxoll. The trustee took immediate possession under his mortgage. Five days later bankruptcy petition was filed against the firm, and in due course adjudication was had. Clemens Huxoll waived the lien of his mortgage (except as to the bankrupt's exemptions), and was allowed a claim as general creditor for the amount of the mortgage debt, with interest. The district court postponed his claim to that of the other creditors.

On the review in this court the question of Clemens Huxoll's lien upon the bankrupt's exemptions, as well as the effect of the trust mortgage, were expressly passed without consideration, because reserved therefrom by the record then before us. It was here in effect held that (unless by virtue of the trust mortgage) subsequent creditors had no actual lien upon the mortgaged property at the time bankruptcy occurred, and that therefore Clemens Huxoll was entitled to share ratably with the general creditors.[1] The question regarding the bankrupts' exemptions has since been disposed of, and is not before us.

The referee has found that the trust mortgage constituted a preference under the bankruptcy act. The district judge took the same view, and this conclusion is not challenged here. The mortgage trustee, however, contended below and contends here that by virtue of his mortgage and possession thereunder, before and at the time of bankruptcy, he had, under the Michigan mortgage filing statute, a lien enforceable under the bankruptcy act, as prior to the claims of Clemens Huxoll, and that this prior lien was not avoided by the bankruptcy. The district judge took the view that when the trust mortgage fell, because of its invalidity under the bankruptcy act, all liens founded upon it fell with it; and accordingly denied to the creditors secured by the trust mortgage priority over Huxoll. The correctness of this conclusion is the only question presented for review.

We think the district court was clearly right. Section 60b of the bankruptcy act declares that a preferential transfer by the bankrupt while insolvent, made within four months before bankruptcy proceedings, and received with reasonable cause to believe a preference intended, "shall be voidable by the trustee, and he may recover the property or its value from such person." True, this section does not, as does § 67f, which relates to levies obtained by legal proceedings against an insolvent within four months of bankruptcy, declare in terms that the lien should be discharged; but such discharge is plainly and necessarily implied in the quoted declaration of § 60b. As well said by the district judge: "The lien of a preferential mortgage is as much within the ban of the bankruptcy act as are liens ob-

[1] Re Huxoll, 113 C. C. A. 637, 193 Fed. 851, 857.

tained by attachment, garnishment, or legal proceedings."

In Re Martin, 119 C. C. A. 363, 201 Fed. 37, Judge Warrington, speaking for this court, impliedly put preferential conveyances in the same class in this regard as liens obtained through legal proceedings. While the effect of a preferential transfer under § 60b of the act was not there involved, the language there used expresses our understanding of the rule applicable to such cases as well.[2] The doctrine that the bankruptcy trustee "stands in the shoes of the bankrupt" has no application to transactions which the trustee is, by the express terms of the act, authorized to avoid.

The mortgagee trustee, however, insists that, inasmuch as by the Michigan filing statute[3] his mortgage was given priority over the earlier unrecorded mortgage to Huxoll, this priority must be recognized in the bankruptcy courts, by virtue of § 64b(5) of the act, which gives priority in distribution to "debts owing to any person who, by the laws of the state or of the United States, is entitled to priority;" the argument being that the filing statute is not a "general insolvency law," and so is not repealed by the bankruptcy act.[4]

It is true that the Michigan mortgage filing statute is not a general insolvency law, and that it is not repealed by the bankruptcy act, and further, as applied to a mortgage not under the ban of the bankruptcy statute, the priority given by the state filing statute would be respected by the bankruptcy courts. But it is an unthinkable proposition that an instrument declared wholly voidable by the express terms of the act should yet be, through the operation of the state filing statute, accorded a prior lien. The argument of inconsistency between this conclusion and our former decision rests upon a misapprehension of our former opinion, which, as already stated, took no account of the trust mortgage. Moreover, as the giving of the trust mortgage was, under § 3a(2), an act of bankruptcy, the natural construction of that section is that the mortgage is "avoided as a whole when the trustee takes the goods."[5]

We are not impressed with the contention that the equities of the case demand a reversal of the district court's order. The mortgage to Huxoll secured him alone; that to the trustee excluded him. There is no claim of fraudulent intent in delaying the filing of Huxoll's mortgage, nor was there any wrong in taking the trust mortgage. The lien of the Huxoll mortgage was discharged because it violated the public policy of the state, as embodied in its mortgage filing statute; the lien of the trust mortgage is held invalid because, as a preferential transfer within the four-months period, it contravenes the national policy, as embodied in the bankruptcy act. Huxoll thus loses his preference over subsequent creditors, and the latter are equally denied priority over Huxoll; but both he and they are recognized as creditors, and share ratably.

The order complained of is affirmed, with costs.

[2] See also in this connection, Re Huxoll, 113 C. C. A. 637, 193 Fed. 851, 855; Re Martin, 113 C. C. A. 627, 193 Fed. 841; Henderson v. Mayer, 225 U. S. 631, 636, 56 L. ed. 1233, 1235, 32 Sup. Ct. Rep. 699.

[3] Comp. Laws Mich. 1897, § 9523, as amended by Act No. 332 of the Public Acts of 1907.

[4] For illustrations of the application of § 64b (5), see Re Jones (D. C.) 151 Fed. 108; Re Bennett (C. C. A. 6th C.) 82 C. C. A. 531, 153 Fed. 673, Henderson v. Mayer, 225 U. S. 631, 637, 56 L. ed. 1233, 1235, 32 Sup. Ct. Rep. 699.

[5] Randolph v. Scruggs, 190 U. S. 538, 47 L. ed. 1170, 23 Sup. Ct. Rep. 710, where the above-quoted language was used in holding that no lien existed under a common-law assignment declared an act of bankruptcy by another subdivision of the same § 3a.

MINNESOTA SUPREME COURT.

I. T. WRIGHT et al., Appts.,
v.
H. K. MAY, Respt.

(127 Minn. 150, 149 N. W. 9.)

Auctioneer — license — citizen.

The statutes of this state (Gen. Stat. 1913, §§ 6083 to 6088), providing that the county board or auditor may license any voter in its county as an auctioneer, and providing a penalty for selling property by auction without such license, violate neither § 2, art. 4, of the Constitution of the United States, § 1 of the 14th Amendment to the Constitution of the United States, or § 2, art. 1, of the state Constitution. Nor are they invalid as delegating legislative power to the county board or county auditor.

(October 9, 1914.)

APPEAL by plaintiffs from an order of the District Court for Yellow Medicine County sustaining a demurrer to the com-

Headnote by BUNN, J.

Note. — For discrimination against nonresidents by statute or municipal ordinance imposing license or occupation tax, see note to State v. Williams, 40 L.R.A.(N.S.) 279.

plaint in an action brought to recover an agreed price for services as auctioneers performed by plaintiffs for defendant at his request. Affirmed.

The facts are stated in the opinion.

Messrs. **Johnson & Lende**, for appellants:

Sections 6083 and 6088 of the General Statutes of Minnesota, 1913, are invalid.

State ex rel. Greenwood v. Nolan, 108 Minn. 170, 122 N. W. 255; State v. Montgomery, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; Templar v. State Examiners, 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Simrall v. Covington, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; State v. Gardner, 58 Ohio St. 599, 41 L.R.A. 689, 65 Am. St. Rep. 785, 51 N. E. 136; State v. Hinman, 23 Am. St. Rep. 22 and note, 65 N. H. 103, 18 Atl. 194; State v. Pennoyer, 65 N. H. 113, 5 L.R.A. 709, 18 Atl. 878; People v. Warren, 13 Misc. 615, 69 N. Y. S. R. 167, 34 N. Y. Supp. 942; Fraser v. McConway & T. Co. 82 Fed. 257; Re Ah Chong, 6 Sawy. 451, 2 Fed. 733; State v. Conlon, 65 Conn. 478, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519; Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; Hager v. Walker, 129 Am. St. Rep. 257, note f; Ex parte Deeds, 75 Ark. 542, 87 S. W. 1030; Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857; Pacific Junction v. Dyer, 64 Iowa, 38, 19 N. W. 862; Simrall v. Covington, 90 Ky. 444, 9 L.R.A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; Saginaw v. Saginaw Circuit Judge, 106 Mich. 32, 63 N. W. 985; St. Louis v. Consolidated Coal Co. 113 Mo. 83, 20 S. W. 699; Thompson v. Ocean Grove Camp Meeting Asso. 55 N. J. L. 507, 26 Atl. 798; Nashville v. Althrop, 5 Coldw. 554; Clements v. Casper, 4 Wyo. 494, 35 Pac. 472; Ex parte Thornton, 4 Hughes, 220, 12 Fed. 538; State v. Great Northern R. Co. 100 Minn. 445, 10 L.R.A. (N.S.) 250, 111 N. W. 289; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758

Mr. **T. J. Law** for respondent.

Bunn, J., delivered the opinion of the court:

Plaintiffs, who were residents of South Dakota, performed services for defendant at his request as auctioneers. Defendant resides in Yellow Medicine county, Minnesota, and the services were performed in the sale in that county of personal property of defendant. This action was brought to recover $64.02, the agreed price of such services. A demurrer to the complaint was sustained, and plaintiffs appealed.

The sole question involved is the constitutionality of Gen. Stat. 1913, §§ 6083 to 6088. Section 6083 provides that the county board or auditor may license any voter in its county as an auctioneer. Section 6088 provides: "If any person shall sell or attempt to sell any property at auction without being licensed as an auctioneer as herein provided, he shall be guilty of a misdemeanor."

It is plain that plaintiffs, being residents of South Dakota, were not and could not be licensed as auctioneers as provided by the act. If the statutory provisions referred to are constitutional, plaintiffs concede they are not entitled to recover for their services. If the provisions are unconstitutional, it is clear that the complaint states a cause of action.

The constitutional provisions which it is claimed the law violates are: Section 2, art. 4, of the Constitution of the United States, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; § 1 of the 14th Amendment, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws; § 2, art. 1, of the Constitution of Minnesota, providing that "no member of this state . . . shall be . . . deprived of any of the rights or privileges secured to any citizen thereof."

The law in question denies the right or privilege of engaging in the occupation of auctioneer to all but voters. It excludes nonresidents of the state and residents who are aliens.

It is conceded that the business or calling of an auctioneer is one that is subject to legislative regulation. It is equally true, on the other hand, that the business is a lawful and useful one. **Mankato v. Fowler**, 32 Minn. 364, 20 N. W. 361; **Duluth v. Krupp**, 46 Minn. 435, 49 N. W. 235; Minneota v. Martin, 124 Minn. 498, 51 L.R.A. (N.S.) 40, 145 N. W. 383. The right to regulate and license the business of auctioneering does not include the right to prohibit, but, as stated by Mr. Justice Holt in the case last cited, "It is nevertheless true that frequently individuals must subordinate their rights to a certain extent to the demands of the public welfare."

As pointed out in the opinion in the Martin Case, the occupation of the auctioneer, like that of the peddler, is liable to abuse, and in our large cities has become more or

less of a nuisance, requiring regulation to the point of restraint.

Granting to the legislature, as we must, the right to regulate and control the vocation of auctioneering, to require a license and the payment of a substantial fee therefor, to limit the number of persons employed in such business, to require a bond, and an accounting, we see that regulation may go far without transgressing any constitutional safeguard of the rights of the individual. However, the right of the individual to engage in the business may not be taken from him under the guise of regulation. Nor may the legislature authorize a license to one man and deny it to another, unless there is some reasonable ground for the distinction, unless, in short, licensing the second might reasonably result in harm to the public.

There are important distinctions between the business of an auctioneer and that of a peddler. The auctioneer does not sell his own goods; he acts, in making a sale at auction, primarily as the agent of the seller; when the property is struck off he becomes also the agent of the purchaser, at least to the extent of binding him by his memorandum of sale. 4 Cyc. 1041. He is liable to the seller for a loss due to his negligence, or to his deviating from instructions, as well as for money paid him by purchasers. He is liable to a purchaser under certain circumstances. We can see good ground for refusing a license to a resident of another state in the difficulty that might be encountered in compelling him or his bondsmen to respond in case he rendered himself liable to either seller or purchaser. The case of State ex rel. Greenwood v. Nolan, 108 Minn. 170, 122 N. W. 255, in which an ordinance of the city of Hastings requiring a license of "itinerant merchants and transient venders," exempting from its operation residents of the city, was held unconstitutional, is therefore not controlling.

Nor are other cases where laws have been held invalid that discriminated against nonresidents when there were plainly no evils to correct and no reason to apprehend injury to the public by freely permitting nonresidents to engage in the business within the state. Such are the authorities cited in the brief of plaintiff, and in the opinion in the Nolan Case. We are unable to say that the legislature had no grounds for the discrimination made against nonresidents, or that the classification was arbitrary, and hold that the law does not, in this respect, violate the Federal Constitution or the 14th Amendment.

A more difficult question is whether the exclusion of resident aliens renders the act violative of the 14th Amendment of the United States Constitution or § 2, art. 1, of the state Constitution. The 14th Amendment applies to aliens as well as citizens. A statute arbitrarily forbidding aliens to engage in ordinary kinds of business to earn their living would be unconstitutional. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. But where the calling or occupation is one which, though lawful, is subject to abuse, and likely to become injurious to the community, there is good authority for holding that the state may limit it to its own citizens and deny the right to all others. Com. v. Hana, 11 L.R.A.(N.S.) 799 and note (195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 Ann. Cas. 514). In the case cited, the supreme court of Massachusetts upheld a law of that state restricting the granting of peddlers' licenses to citizens and those who have declared their intention to become such. In Trageser v. Gray, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905, it was held that a state could deny to persons not citizens of the United States the right to sell spirituous liquors within its borders. These cases are cited with approval in Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281, in which it was held that a statute of Pennsylvania, making it unlawful for unnaturalized foreign born residents to kill wild game except in defense of person or property, and to that end making the possession of shotguns and rifles unlawful, was not unconstitutional under the due process and equal protection provisions of the 14th Amendment. Mr. Justice Holmes, after stating the right of the state to classify with reference to the evil to be prevented, said: "The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. . . . Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. . . . If we might trust popular speech in some states it was right; but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

It is at this point that the court refers to Trageser v. Gray and Com. v. Hana.

There are authorities apparently to the contrary. Templar v. State Examiners, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610; State v. Montgomery, 94 Me. 192, 80

Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117. The former case held unconstitutional a law which prohibited issuing a barber's license to an alien, the latter a law like the one held valid in Com. v. Hana.

While we are not able to see plainly that resident unnaturalized aliens were "the peculiar source of the evil" that the legislature desired to prevent when it enacted the law in question, nevertheless it may have been so. To again quote Mr. Justice Holmes: "This court ought to be very slow to declare that the state legislature was wrong in its facts. . . . It is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

It may be that the evil or some part of it lay in the fact that foreigners, without the interest in the welfare of the state and county that the citizen has, perhaps irresponsible, were acting as auctioneers, to the harm of the public.

For a decision pointing out the evils which laws licensing and regulating the business have been enacted to correct, we refer to People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964. With some hesitation we reach the conclusion that denying to aliens the right to act as auctioneers does not contravene the due process or equal protection provisions of the 14th Amendment, or the provisions of article 1, § 2, of the state Constitution. This conclusion is at least not weakened by the fact that the law in question has stood without question for fifty years. It is strengthened by the idea that under the act an auctioneer may, to a certain extent, be considered as an administrative officer of the state. People ex rel. Schwab v. Grant, supra. In this respect the cases upholding laws prescribing citizenship as a requirement for admission to the bar are analogous. See authorities cited in note to Com. v. Hana, 11 L.R.A.(N.S.) 799. Our statute (Gen. Stat. 1913, § 4946) makes citizenship and residence in the state a prerequisite to the admission to the bar of graduates of law schools. We may also call attention to Gen. Stat. 1913, § 4964, providing that no certificate for a certified public accountant shall be granted to any person other than a citizen of the United States, or person who has in good faith declared his intention of becoming such citizen.

The claim is made that the law is unconstitutional because it delegates legislative power to the county board or auditor. The argument is based upon the use of the word "may." It is contended that the statute grants to the county board and the auditor the absolute and arbitrary power to license or refuse to license as an auctioneer any voter who applies and pays the fee. It is probably true that there is some discretion in the licensing officer, but this does not amount to a delegation of legislative power. It is rather an administrative or executive function, and a delegation of such functions does not violate the constitutional provision. Dunnell's Dig. § 1600, and cases cited.

We hold that the law in question is valid, and that the demurrer was rightly sustained.

Order affirmed.

NEW MEXICO SUPREME COURT.

HENRY C. MYLIUS, Appt.,
v.
HATTIE CARGILL.

(— N. M. —, 142 Pac. 918.)

Judgment — foreign — awarding children — effect.

1. A judgment of a court of a sister state awarding the custody of minor children in a divorce proceeding is not *res judicata* in a proceeding before a court of this state, except as to facts and conditions before the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently to the foreign decree, it has no controlling force, and our courts are not bound thereby in awarding such custody.

Evidence — sufficiency.

2. Findings and evidence briefly examined, and held sufficient to warrant the action taken in awarding the custody of two infant daughters to the mother.

(July 29, 1914.)

Headnotes by PARKER, J.

Note. — Extraterritorial effect of judgment awarding custody of children upon divorce of parents.

This note is supplementary to the note to Re Alderman, 39 L.R.A.(N.S.) 988.

While, as stated in the earlier note, there is some apparent conflict in the cases which pass upon the extraterritorial effect of a judgment awarding the custody of children upon a divorce of the parents, the better rule, and one supported by, or with which are reconcilable, a majority, at least, if not most, of the cases, seems to be that, in the absence of fraud or want of jurisdiction affecting its validity, a judgment divorcing a husband and wife and awarding the custody of children of the marriage should be given full force and effect in other states, as to the right to the custody of the children at the time and under the circumstances of its rendition, although, as held in MYLIUS v. CARGILL, the decree has no controlling

APPEAL by petitioner from a judgment of the District Court for Chaves County in favor of respondent in a habeas corpus proceeding to obtain the custody of petitioner's minor children. Affirmed.

The facts are stated in the opinion.

Messrs. O. O. Askren and J. C. Gilbert, for appellant:

Since there was no specific condition of the divorce decree requiring H. C. Mylius to keep said minors in his personal custody, there was no violation of the decree in this respect under the law.

Markwell v. Pereles, 95 Wis. 406, 69 N. W. 798.

The two new conditions mentioned by the court are not sufficient to deprive the petitioner and parent of his legal right to the custody of his children and wards.

Lovell v. House of the Good Shepherd, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660; Clarke v. Lyon, 82 Neb. 625, 20 L.R.A. (N.S.) 171, 118 N. W. 472; Farrar v. Farrar, 75 Iowa, 125, 39 N. W. 226; Hopkins v. Hopkins, 39 Wis. 167; Welch v. Welch, 33 Wis. 534; Eckhard v. Eckhard, 29 Neb. 457, 45 N. W. 466; Norval v. Zinsmaster, 57 Neb. 158, 73 Am. St. Rep. 500, 77 N. W. 373; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202.

The ward has no right to choose or select its own guardian in a case of this kind, and thereby defeat a former decree in the premises.

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effect in another state as to facts and conditions arising subsequently to its rendition, and the courts of the latter state may, in proper proceedings, award the custody otherwise than in accordance with the original decree, upon proof of matters subsequent to the decree, which justify such inconsistent award in the interest of the welfare of the children, which should be the predominant consideration at all times and under all circumstances.

As said in Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860: "A decree in a divorce suit awarding the child to one of the parents is prima facie evidence of the legal right to its custody; and that judgment will be given effect in habeas corpus proceedings, unless it is shown that since the judgment the child has been neglected or mistreated, or the parent has become unfit to be its custodian. . . . The same rule applies whether the judgment is sought to be enforced in the state of its rendition or in a sister state."

And, accordingly, a decree of divorce regularly granted in another state (Texas), awarding the custody of a child of the marriage to the father, is conclusive in Georgia, as between the parties thereto, as to the father's right to the possession of the child at the time of its rendition, though not for all time; and in a subsequent habeas corpus proceeding by the mother, to obtain the possession of the child, her evidence as to the unfitness of the father, or as to his mistreatment or neglect of the child, must be confined to matters transpiring subsequently to the divorce decree. Ibid.

And where, after the rendition of a divorce decree by a court of record of general jurisdiction in Nebraska, awarding the custody of a minor son of the parties to the father, and impliedly prohibiting the latter from removing the son from the jurisdiction of the court, the father did remove the son to another state (Montana), in contempt and violation of the prohibition contained in the decree, whereupon the mother, upon the ground of such contempt and violation, filed in the Nebraska court a petition praying that the decree be so modified as to award the custody of the son to her, and the court, after the appearance of the father and his filing an answer resisting the petition, and after a hearing, modified the decree in accordance of the prayer of the petition,—the modified decree concludes the rights of the parties, upon subsequent habeas corpus proceedings by the mother to obtain possession of the son in Montana, to which state the father has again removed him in violation of the modified decree, unless there has been a change in the fitness or condition of the mother, or other circumstances have occurred since the amendment was made, which require the Montana court, in the interest of the son, to order otherwise. State ex rel. Nipp v. District Ct. 46 Mont. 425, 128 Pac. 590.

And a decree in a divorce suit granting the wife a divorce and awarding to her the custody of the children of the marriage, which decree was rendered in another state (Indiana) by a court of general jurisdiction having jurisdiction of the parties and cause of action before it by process and pleading, is valid and binding on the parties in West Virginia, in its award of the custody of the children, even though so much of it as grants the divorce may be invalid, and the children may not have been within the jurisdiction of the court at the time of the institution of the suit or entry of the decree. Anderson v. Anderson, — W. Va. —, 81 S. E. 706.

But while a divorce decree rendered in another state (Oklahoma) by a court having jurisdiction of the parties and their child, whereby the custody of the child is awarded to the plaintiff, its father, is entitled to be given full faith and credit by the courts of Texas so long as the material circumstances existing at the time of the decree remain unchanged, it is not *res judicata* as to such custody, where since the decree there has been a material change in the situation and condition of the parties as to their fitness as custodians of the child; and it is not binding upon the Texas courts, where a new state of facts between the parties in relation to the child has arisen subsequently to the prior adjudication. Ex parte Boyd, — Tex. Civ. App. —, 157 S. W. 254.

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2 Nelson, Div. & Sep. § 975; 2 Bishop, Marr. Div. & Sep. § 1205; Church, Habeas Corpus, § 447; Comp. Laws 1897, § 1461; Bustamento v. Analla, 1 N. M. 255.

The court erred in failing to find that petitioner was entitled to the custody of said minor children from the evidence introduced in said cause.

1 Whart. Confl. L. § 239f; 2 Bishop, Marr. Div. & Sep. § 1189; Church, Habeas Corpus, § 451; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202; Wakefield v. Ives, 35 Iowa, 238.

Messrs. **W. C. Reid, J. M. Hervey, George S. Downer, and A. G. Pierrot,** for appellee:

The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicil, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found.

Woodworth v. Spring, 4 Allen, 321; Re New York Foundling Hospital, 9 Ariz. 105, 7 L.R.A.(N.S.) 306, 79 Pac. 231.

The decree is not, however, a bar to a subsequent proceeding to modify a decree of divorce upon proof that the situation and character of the parties have so changed as to render it to the interest of the child that it be committed to the care of its mother.

Ex parte Boyd, — Tex. Civ. App. —, 157 S. W. 254; People ex rel. Allen v. Allen, 40 Hun, 611; Re Alderman, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; Wilson v. Elliott, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946.

The courts, in disposing of the custody of minor children, should have for their main guide the general welfare of the children.

Waring v. Waring, 100 N. Y. 570, 3 N. E. 289; Lyle v. Lyle, 86 Tenn. 372, 6 S. W. 878; Bryan v. Lyon, 104 Ind. 227, 54 Am. Rep. 309, 3 N. E. 880; Welch v. Welch, 33 Wis. 534; Eckhard v. Eckhard, 29 Neb. 457, 45 N. W. 466; Kane v. Miller, 40 Wash. 125, 82 Pac. 177; Dawson v. Dawson, 57 W. Va. 520, 110 Am. St. Rep. 800, 50 S. E. 613; Wand v. Wand, 14 Cal. 513; Lusk v. Lusk, 28 Mo. 91; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; Stringfellow v. Somerville, 95 Va. 701, 40 L.R.A. 623, 29 S. E. 685; Re King, 66 Kan. 695, 67 L.R.A. 783, 97 Am. St. Rep. 399, 72 Pac. 263; Re Lally, 85 Iowa, 49, 16

So, a decree of divorce obtained by a husband in Wyoming,—especially at a time when his wife and their children had for some time been residing in New York,—by which decree the care and custody of the children were awarded to the mother, is not so conclusive upon the courts of New York as to bar subsequent habeas corpus proceedings by the father in the latter state, to obtain the custody of the children; but the New York court has power to investigate as to who should, at the time of such subsequent proceedings, have the care and custody of the children. Re Stewart, 77 Misc. 524, 137 N. Y. Supp. 202. While the court in this case possibly intimates (*obiter*) that the Wyoming decree would not have been binding upon it even as to the right to the custody of the children at the time and under the precise circumstances of that decree, the decision seems clearly to be limited to the point merely that the foreign decree was not a bar to an investigation by the New York court of circumstances and conditions subsequent to the decree. The court said: "We mention these things [the general relations between the state and minor children residents therein] to show that a decree of the court of another state ought not to be regarded as binding on the state itself, or the children, where their welfare is at stake, especially where it should be made to appear to this court that since the Wyoming decree of divorce was rendered conditions have developed which make the mother an improper person to have charge of their maintenance and education. This is what the relator's counsel advises the court is the real ground of his application for the custody of the children. . . That decree was undoubtedly predicated and conditioned upon the continued good conduct of the defendant. That condition underlies all decrees of this character. If she has violated its conditions to such a degree as imperils the welfare of the children, then it becomes the duty of the court to act. From whatever source the proper information is laid before it, it becomes the duty of the court to inquire into the truth of the allegations made, to ascertain the facts, and then make such a disposition of the matter as the case requires."

And a divorce decree which awards the custody of children of the marriage, if rendered through fraud, or without such jurisdiction as to entitle the divorce to recognition in other states,—as upon constructive service, without actual notice to the defendant,—may be wholly disregarded by the courts of other states in so far as it awards the custody of the children, and such courts may, upon due application and proof of fact, make such award of the custody as the welfare of the children requires.

Thus, a judgment of divorce obtained by a wife in Alabama, by fraudulent representations as to jurisdictional facts, and upon constructive service by publication, without actual notice or provision therefor to the defendant, whereby a child of the marriage is awarded to the plaintiff's custody, is not entitled to any effect in a habeas corpus proceeding by the father, in Georgia,

L.R.A.1915B.

L.R.A. 681, 51 N. W. 1155; Richards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831; 14 Cyc. 805; 29 Cyc. 1594.

After the dissolution of the marriage relation, the father should be no longer regarded as having the paramount right to the custody of the children born during the existence of the marital relation, but the mother and father stand on an equal footing, and the paramount consideration in determining whose custody children should be placed in is the interest and welfare of the children.

Wand v. Wand, 14 Cal. 513; People ex rel. Winston v. Winston, 65 App. Div. 231, 72 N. Y. Supp. 456; Israel v. Israel, 38 Misc. 335, 77 N. Y. Supp. 912; Cariens v. Cariens, 50 W. Va. 113, 55 L.R.A. 930, 40 S. E. 335; Chapsky v. Wood, 26 Kan. 652, 40 Am. Rep. 321; Nugent v. Powell, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; Corrie v. Corrie, 42 Mich. 509, 4 N. W. 213; Sheers v. Stein, 5 L.R.A. 781, and note, 75 Wis. 44, 43 N. W. 728; Church, Habeas Corpus, ¶ 442; Schouler, Dom. Rel. ¶ 248; Hurd, Habeas Corpus, ¶ 461; 29 Cyc. 1589, 1590.

Where the children are of such an age as to know their own wants, and the rights and capabilities of the parents are evenly balanced, the court may consult and abide by the wishes of the children, in determining to which of the parents the children shall be awarded.

14 Cyc. 808; Williams v. Williams, 23 Fla. 324, 2 So. 768; Umlauf v. Umlauf, 128 Ill. 378, 21 N. E. 600; Horning v. Horning, 107 Mich. 587, 65 N. W. 555; English v. English, 32 N. J. Eq. 738; Israel v. Israel, 38 Misc. 335, 77 N. Y. Supp. 912; Kane v. Miller, 40 Wash. 125, 82 Pac. 177; 21 Cyc. 330; 29 Cyc. 1596.

It was within the jurisdiction of the trial court to determine both the right of the petitioner to his writ of habeas corpus, and in the same proceeding, to make an award of the custody of the children.

Every sovereignty exercises the right of determining the status of persons found within its jurisdiction.

Re New York Foundling Hospital, 9 Ariz. 105, 7 L.R.A.(N.S.) 306, 79 Pac. 231; Woodworth v. Spring, 4 Allen, 321.

A guardian appointed for an infant by a court in one state will not, on the ground of comity, be given the custody of the child against its best interests by a court of an-

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to obtain the custody of the child. Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855.

And where a divorce decree of another state gave the custody of a child of the marriage to the father, without forbidding the removal of the child from the state or from the jurisdiction of the court, and the father has subsequently changed his domicil and that of the child by removal to another state with the child, a modification thereafter made without a valid service of process, by the court which rendered the decree, of so much thereof as awarded the custody of the child to the father, and an adjudication that the mother shall have exclusive possession of the child, being void for want of jurisdiction, are of no effect in subsequent habeas corpus proceedings instituted by the mother in the state of the domicil of the father and child, to obtain the possession of the child. Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860.

In Pinney v. Sulzen, 91 Kan. 407, 137 Pac. 987, it appeared that the petitioner and his wife, having two children, a son and a daughter, had been divorced in Iowa, the decree awarding to the husband the custody of the son, and to the wife the custody of the daughter; subsequently, the divorced wife died, leaving the daughter in the custody of her (the wife's) sister and the latter's husband, who (his wife having since died) was the respondent in a habeas corpus proceeding instituted by the father, in Kansas, to recover the custody of his daughter. Under these circumstances, the court held that, upon the death of the wife, the right to the custody of the daughter naturally and legally passed to the father, and should be given to him unless he was manifestly unfit and incapable of performing his parental obligations to the child. It also appeared that the petitioner, after the death of his divorced wife, and upon notice served on the respondent, had applied to the Iowa court which granted the divorce for a modification of the judgment so as to give him the custody of the daughter; and that, subsequently to the institution of the habeas corpus proceeding in Kansas, the Iowa decree had been amended as desired by the petitioner, the Iowa court finding that the welfare of the children demanded that both of them be given into the absolute custody of the petitioner. Regarding this, the supreme court of Kansas, in discussing the fitness of the petitioner at the time to have the custody of his daughter, as bearing upon the question whether she should be given into his custody in these proceedings, said: "It has been held that a decree of divorce of another state awarding the custody of children to a father is not conclusive in a proceeding brought by the mother in this state to obtain their custody, but that the court has the power to change the custody if the best interests of the children require it. . . . While the action of the Iowa court in modifying the decree of divorce as to the custody of Helen [the daughter] is not conclusive, it is worthy of consideration."

Generally, as to denial of custody of child to parent for its well-being, see note to Re Pryse, 41 L.R.A.(N.S.) 564. A. C. W.

other state into which the child has been taken.

Grimes v. Butsch, 142 Ind. 113, 41 N. E. 328; Com. ex rel. Sage v. Sage, 160 Pa. 399, 28 Atl. 863; Jones v. Bowman, 13 Wyo. 79, 67 L.R.A. 860, 77 Pac. 439; Re Rice, 42 Mich. 528, 4 N. W. 284; Re Stockman, 71 Mich. 180, 38 N. W. 876; New York Foundling Hospital v. Gatti, 7 L.R.A.(N.S.) 306, and note, 9 Ariz. 105, 79 Pac. 231; Woodworth v. Spring, supra.

This same principle also applies to and governs the recognition to be given by one state to the provisions of a decree awarding the custody of the child rendered in another state.

People ex rel. Allen v. Allen, 105 N. Y. 628, 11 N. E. 143; People ex rel. Hickey v. Hickey, 86 Ill. App. 20; Townsend v. Kendall, 4 Minn. 412, Gil. 315, 77 Am. Dec. 534.

Parker, J., delivered the opinion of the court:

This is a habeas corpus proceeding to obtain the custody of two minor children. Petitioner, the father, is a resident of San Antonio, Texas. The respondent, the mother, was domiciled at Toyah, Texas, and removed to Roswell, New Mexico, bringing with her the two minors. Petitioner and respondent were divorced in Texas, and respondent remarried in 1911. Shortly thereafter respondent and her husband applied to the Texas court for a modification of a former decree awarding the custody of the minors. Petitioner appeared, and a consent decree was entered by the court, fixing the rights of the parties as to the custody of the children, and providing, also, that the children should not be removed from the state of Texas without the consent of the court. On June 12, 1913, the children were delivered to the respondent as a result of her application to the Texas court for an order on the petitioner to deliver them to her. About ten days prior to September 1, 1913, the day upon which the children were to be returned to the petitioner, the respondent removed with them to Roswell, New Mexico, without the consent of the Texas court, and was keeping them there when this proceeding was instituted. A hearing was had, and the court made the following findings:

"(1) That after the decree of the district court of the fifty-seventh judicial district of Bexar county, Texas, in the case of Hattie Mylius v. H. C. Mylius, No. 29239, the said decree was violated by both the petitioner and respondent: First, by said petitioner, Henry C. Mylius, not keeping said children in his personal custody, but in the custody of an aunt, about 120 miles distant from San Antonio. Second, by petitioner interfering with said children in writing to their mother, the respondent herein. Third, by failure of petitioner to deliver said children to respondent when the time came, under the said decree, for respondent to have the custody of said children, necessitating court proceedings upon behalf of respondent to obtain said children. Fourth, that the respondent has violated said decree by bringing said children out of the state of Texas into the state of New Mexico; but the court further finds that respondent did this upon the entreaties of said children not to be taken back to the petitioner.

"(2) The court further finds that, since said decree was entered, new conditions have arisen that make it to the interest of said children to be in the custody of the respondent, their mother, to wit: First, that since said time the petitioner has threatened said children, and threatened the respondent, their mother, to said children, bodily injury if said children should insist upon staying with their mother. Second, that petitioner has frequently attempted to prejudice said minor children against their said mother by speaking of her in derogatory terms.

"(3) That the court interrogated said minor children and found that they were intelligent girls, fully capable of judging as to whether they were being treated properly or not, and that said children expressed a great desire to remain with their mother and to not be returned to their father.

"(4) The court further finds that the age and sex of said children make it, in the judgment of the court, to the interest of said children that they remain with their mother, whom the court finds to be of good character and capable and desirous of taking the proper care of said children.

"(5) The court further finds that the stepfather of said minor children is desirous of having them remain in his family, and that he is a man of such character that he can, and in the mind of the court will, give said minors proper support and care."

The court awarded the custody of the children to the respondent.

It clearly appears from the foregoing that the district court founded its judgment upon the proposition that the conditions surrounding the parties had so changed since the rendition of the Texas decree that that decree was not controlling under the full faith and credit clause of the Federal Constitution. In this the court was clearly correct.

The general doctrine on this subject is stated by Mr. Bishop as follows: "Under our national Constitution, this order is

plainly a record to which, if the court has jurisdiction, the same faith and effect permitted it in the state of its rendition must be given in every other state. And the true rule in the state of its rendition is that it is *res judicata* concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a status, rightfully, like marriage, regulated by any state in which the parties are domiciled, does the order in one state operate as an estoppel of all future inquiry in the courts of another state wherein the child has acquired a domicil." 2 Bishop, Marr. & Div. 2d ed. 1189.

The author cites the following cases: Dubois v. Johnson, 96 Ind. 6; Umlauf v. Umlauf, 27 Ill. App. 375; Jennings v. Jennings, 56 Iowa, 288, 9 N. W. 222; State ex rel. Lembke v. Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, 7 Am. Crim. Rep. 227; White v. White, 75 Iowa, 218, 39 N. W. 277; Sherwood v. Sherwood, 56 Iowa, 608, 10 N. W. 98; Teter v. Teter, 88 Ind. 494; Mercein v. People, 25 Wend. 64, 35 Am. Dec. 653; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202; Bennett v. Bennett, Deady, 299, Fed. Cas. No. 1,318.

In Wilson v. Elliott, 96 Tex. 472, 97 Am. St. Rep. 928, 73 S. W. 946, 75 S. W. 368, the identical question which is involved in this case was considered. In that case the custody of the child had been awarded to the father, and the mother had removed with the child to El Paso, Texas. The supreme court of Texas in that case said: "It follows that, in our opinion, the status of the father as a proper person to have the custody of the child at the time the decree of the territorial court of New Mexico was rendered was fixed by that decree, and that the judgment that he was entitled to such custody is *res judicata;* but that the order is not a bar to a subsequent proceeding to modify it, upon proof that the situation and character of the respective parties have so changed as to render it to the interest of the infant that it be committed to the care of the mother."

See also Ex parte Boyd, — Tex. Civ. App. —, 157 S. W. 254; People ex rel. Allen v. Allen, 40 Hun, 611; Re Alderman, 157 N. C. 507, 39 L.R.A.(N.S.) 988, 73 S. E. 126; Seeley v. Seeley, 30 App. D. C. 191, 12 Ann. Cas. 1058.

The soundness of this doctrine is apparent. The relation of parent and child is a status and may be changed with changing circumstances. The welfare of the child is always the paramount consideration for the court in awarding the custody of children to one parent or the other in cases of divorce or separation. The welfare of the child may be best subserved at one time by awarding its custody to one parent, and at another time just the opposite course should be taken. These judgments are necessarily provisional and temporary in character, and are ordinarily not *res judicata*, either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment.

2. The petitioner urges that, even admitting the proposition above stated, no sufficient showing of changed conditions was made which would authorize the court to charge the custody of the children to the mother. We do not so understand the record. It is first claimed that the proofs do not support the findings of the court. Without discussing the evidence in detail, we may say that we regard the proofs as amply to sustain the findings.

It is next urged that the findings, even if supported by the proofs, do not authorize the action taken.

These minors are females aged fourteen and eleven, respectively. They were kept by the father in Texas with his sister, about 120 miles from where he lived. He could give them, necessarily, little or none of his personal society or supervision. They expressed an earnest desire to be with their mother, and not to be returned to their father. He objected to any correspondence between them and the mother, and threatened personal violence to them and the mother if they persisted in going to her, and sought to prejudice their minds against her. These things the father had no right to do, because they tended to injure the children. And a child cannot be benefited, must be injured, if he becomes estranged from his good mother. The force being applied in that direction should be removed. The conduct of the father, as shown by the record, indicates a deep feeling of hatred and resentment towards the mother of his children. Even if justified on his part, he should not be permitted to communicate it to the children, when the mother, as shown by this record, is a good woman and capable of doing so much for her two young daughters.

Without further commenting on the evidence, it will be sufficient to say that the trial judge saw and heard the parties and talked freely with the little girls, and necessarily is in much better position than we are to determine what is best for the immediate future of these minors. Only the grossest error could move this court to overturn the careful judgment of a district judge in such cases.

It is to be further remarked that the decree entered in the case fully protects the rights of the father by providing that he

may visit the children without restriction at all proper times, and may write to them, and that said children shall without restriction be permitted at all times to write to the father. That he may further keep in touch with them, it is also provided that he may contribute to their support and education.

For the reasons stated, the judgment of the lower court will be affirmed, and it is so ordered.

Roberts, Ch. J., and **Hanna**, J., concur.

NEW YORK COURT OF APPEALS.

SELWYN & COMPANY, Respt.,
v.
LEWIS WALLER
and
LEE SHUBERT, Appt.

(212 N. Y. 507, 106 N. E. 321.)

Joint adventure — secret profits — impressing with trust.

If one of two persons who have undertaken to produce a play on joint account, sharing profits and losses and paying author's royalties, has secured a secret interest in the royalties, equity may impress upon that interest a trust for the benefit of the joint adventure, even in the absence of estoppel, against a stranger to whom an interest in the coadventurer's share had been assigned.

(September 29, 1914.)

APPEAL by defendant Shubert from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a Special Term for New York County sustaining a demurrer to the answer in an action to recover authors' royalties. Reversed.

The questions mentioned in the opinion were certified as follows:

"1. Is the first, separate, and affirmative defense contained in the answer of the defendant Shubert herein sufficient in law upon the face thereof?

"2. Is the second, separate, and affirmative defense contained in the answer of the defendant Shubert herein sufficient in law upon the face thereof?"

The facts so far as material are stated in the opinion.

Note. — As to effect of secret advantage to one member of a joint adventure, see note to Lind v. Webber, 50 L.R.A.(N.S.) 1046. Any subsequent annotation of this question will be cited in the Index to L.R.A. Notes under the title, "Joint Adventure." L.R.A.1915B.

Mr. Walter H. Pollak, with **Mr. William Klein**, for appellant:

Waller's action in concealing from Shubert his interest in the authors' royalties which their firm paid was a wrong to Shubert.

Parsons, Partn. 4th ed. 192, 193; Lindley, Partn. 8th ed. 364; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Platt v. Platt, 2 Thomp. & C. 25; affirmed in 58 N. Y. 646; Kerr, Fr. & Mistake, 4th ed. 175; Butler v. Prentiss, 158 N. Y. 49, 52 N. E. 652; Snyder v. Lindsey, 157 N. Y. 616, 52 N. E. 592; Holmes v. Gilman, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Manufacturers' Nat. Bank v. Cox, 2 Hun, 572, 59 N. Y. 659; Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29; Kelly v. Delaney, 136 App. Div. 604, 121 N. Y. Supp. 241; Kimberly v. Arms, 129 U. S. 512, 527, 32 L. ed. 764, 769, 9 Sup. Ct. Rep. 355; Maddeford v. Austwick, 1 Sim. 89; Mitchell v. Read, 84 N. Y. 556, 61 N. Y. 123, 19 Am. Rep. 252; Russell v. Austwick, 1 Sim. 52, 27 Revised Rep. 157; Hayes v. Kerr, 19 App. Div. 91, 45 N. Y. Supp. 1050; Van Deusen v. Crispell, 114 App. Div. 361, 99 N. Y. Supp. 874; Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. Supp. 285.

The plaintiff cannot in a suit at law, brought during the life of the Shubert-Waller venture, seek to enforce an interest in a specific asset of that firm obtained by assignment from one of the members only.

Crater v. Bininger, 45 N. Y. 545, 11 Mor. Min. Rep. 487; Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Esdaile v. Wuytack, 25 Abb. N. C. 474, 11 N. Y. Supp. 421; Simmons v. Murray, 1 N. Y. S. R. 85; Muller v. Cox, 15 N. Y. S. R. 393; Torrey v. Twombly, 57 How. Pr. 149; Halliday v. Carman, 6 Daly, 422; Marston v. Gould, 69 N. Y. 220; Marvin v. Brooks, 94 N. Y. 71; Wilcox v. Pratt, 125 N. Y. 690, 25 N. E. 1901; Hollister v. Simonson, 18 App. Div. 73, 45 N. Y. Supp. 426, 36 App. Div. 63, 55 N. Y. Supp. 372, 170 N. Y. 357, 63 N. E. 342; Mitchell v. Tonkin, 109 App. Div. 165, 95 N. Y. Supp. 669; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Nirdlinger v. Bernheimer, 133 N. Y. 45, 30 N. E. 561; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Booth v. Farmers' & M. Nat. Bank, 74 N. Y. 228; Hughes v. Smither, 23 App. Div. 590, 45 N. Y. Supp. 115, 163 N. Y. 553, 57 N. E. 1112; Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. Supp. 926, 111 App. Div. 923, 96 N. Y. Supp. 1132.

No obligation to pay the share of authors' royalties in suit—a share which Waller himself owned at the time he made his contract with Frohman—was imposed, could

be imposed, or was sought to be imposed, upon Waller when he and Frohman made their agreement.

Baxter v. McDonnell, 154 N. Y. 432, 48 N. E. 816.

Messrs. Ernst, Lowenstein, & Cane, for respondent:

This appeal is based on the erroneous theory that Waller was guilty of a breach of trust in not disclosing to Shubert his ownership of one fourth of the royalties.

Re Coal Economizing Gas Co. L. R. 1 Ch. Div. 182, 45 L. J. Ch. N. S. 83, 33 L. T. N. S. 619, 24 Week. Rep. 125; Skolny v. Richter, 139 App. Div. 534, 124 N. Y. Supp. 152; Densmore Oil Co. v. Densmore, 64 Pa. 43, 3 Mor. Min. Rep. 569; Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214, 40 L.R.A. 837, 74 N. W. 976.

The defendant should not be permitted to repudiate the obligations of his contract while reaping its benefits.

Nirdlinger v. Bernheimer, 153 N. Y. 652, 47 N. E. 1109; 1 Perry, Tr. 6th ed. 318; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Obermayer v. Geering, 146 App. Div. 927, 131 N. Y. Supp. 1132; Peters v. Borst, 24 Abb. N. C. 1, 9 N. Y. Supp. 789; Hapgood v. Hewitt, 119 U. S. 226, 30 L. ed. 369, 7 Sup. Ct. Rep. 193.

Miller, J., delivered the opinion of the court:

The question of law involved in this appeal arises from the following facts, to state them as briefly as possible: On the 6th day of May, 1911, Charles Frohman entered into a contract with Edward G. Hemmerde and Francis Neilson by which, in consideration of the payment to them of £300 and an agreement to pay certain stipulated authors' royalties, to be computed on the gross weekly receipts, Hemmerde and Neilson granted to Frohman the sole and exclusive right for five years to perform and have performed in the United States and Canada a play entitled "The Butterfly on the Wheel;" in December, 1911, Frohman transferred his rights under said contract to the defendant Waller, who agreed to hold the former harmless against any claim which Hemmerde and Neilson might thereafter assert against him in connection with the said agreement of May 6th; in the meantime, Hemmerde and Neilson had assigned to said defendant a 25 per cent interest in all authors' royalties earned or to be earned from any and all performances of said play in the United States and Canada under all contracts made or to be made therefor; thereafter, and on the 29th of December, 1911, the defendants Waller and Shubert entered into a contract to produce said play in the United States and Canada, "not as partners," but with a sharing of profits and losses in the percentage of 33⅓ per cent to the former and 66⅔ per cent to the latter, the former's losses in no event to exceed $2,500, and the latter agreeing to assume in his two-thirds proportion the former's obligation to Frohman under the contract for the purchase of his rights; Waller concealed from Shubert the fact of his ownership of a one-fourth interest in the authors' royalties; the play was produced as agreed upon, and the authors' royalties under the Frohman contract were paid up to some time in October, 1912, in the belief by Shubert that Hemmerde and Neilson were the sole owners thereof, but Waller secretly retained or received from the authors 25 per cent of said payments; in October, 1912, Waller assigned to the plaintiff a 22½ per cent interest in said royalties, and this action is brought to recover that proportion of the royalties alleged to have been thereafter earned. The appellant asserts that Waller's concealment was a fraud upon him, and that by reason thereof equity should impress a trust for the benefit of the joint enterprise on the interest in the authors' royalties secretly held by Waller. The two defenses demurred to are alike, except that, in the second, it is alleged, as it is not in the first, that the plaintiff obtained its assignment from Waller with the knowledge of his alleged fraud upon Shubert.

The only agreement ever made by the appellant Shubert to pay royalties was in his assumption in his two-thirds proportion of Waller's obligation to Frohman. That was an obligation to save the latter harmless from any claim of Hemmerde and Neilson. They could only have had a valid claim to three fourths of the stipulated royalties, as they had assigned the other one fourth to Waller. Apart from any question of fraud, therefore, it is impossible to discover from the facts pleaded any contract obligation of said appellant to pay more than his share of the royalties due to Hemmerde and Neilson. True, he supposed that he had agreed to pay two thirds of the royalties stipulated for in the Frohman contract, a circumstance which might bear on the materiality of the fact concealed from him by Waller, but which does not alter the fact that, according to the terms of his contract, he was obligated to pay only two thirds of any claim which Hemmerde and Neilson could assert against Frohman; namely, for the three fourths of the stipulated royalties which they still owned. Leaving out of view the weakness in the plaintiff's case, we come to the interesting question debated below, namely, whether Waller's concealment of his interest in the authors' royalties was a fraud upon

the appellant which entitled him to appeal to the jurisdiction of equity to impress a trust upon that interest for the benefit of the joint venture. Of course, that question is of importance in this case only on the assumption that the appellant did agree to pay two thirds of the royalties stipulated for in the Frohman contract, and I shall proceed on that assumption.

It may be admitted that the question lies on the boundary between the domain of law and that of ethics. A majority of the appellate division were of the opinion that no duty rested on Waller to disclose his interest, because it made no difference to Shubert, to whom the royalties were paid. That position overlooks the fact that in assuming two thirds of Waller's obligation to Frohman, Shubert was interested in knowing precisely what that obligation was, and it takes a too narrow view of the duties of parties about to engage in a joint adventure, whether as partners *inter sese* or not. It is now well settled that persons in, or about to assume, that relation, owe to each other the utmost good faith and the most scrupulous honesty. Getty v. Devlin, 54 N. Y. 403, 7 Mor. Min. Rep. 29; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355. They do not deal at arm's length. The very fact that one conceals his true interest from the other indicates a purpose to gain some advantage at the other's expense, or a belief that disclosure would influence the other in deciding whether and upon what terms to embark on the enterprise. Good faith requires that neither shall make a secret profit out of the undertaking. The rule against secret profits is not limited in its application to cases of agency, trusteeship, and the like, strictly fiduciary relations. Its application to a case like this depends on the reciprocal good faith required of joint adventurers, and more precisely upon the mutual burdens and benefits which the relation necessarily implies are to be shared in the stipulated proportions.

If Waller had acquired his interest in the authors' royalties after making the contract with the appellant, he would plainly have been bound to give the joint undertaking the benefit of it. That the concealment of his interest at the time of making the contract puts him in the same case is settled in this state by authority. Getty v. Devlin, supra. It begs the question to say that it was immaterial to the appellant to whom the royalties were paid. If the duty of disclosure existed, the law would not impose upon the party wronged the often impossible task of establishing pecuniary damage, or that he would not have embarked on the undertaking if disclosure had been made. The case is precisely the same in principle as though Waller had owned the entire interest in the authors' royalties, and, concealing the fact, had induced his coadventurer to purchase it outright from the apparent owners at a large advance over the cost to him, the familiar case of promoter's secret profits. Indeed, in some aspects, Waller's position is worse than that of the typical dishonest promoter who takes his illicit profit at the inception of the enterprise. Waller had secretly arranged to receive a percentage, not of the profits, but of the gross receipts of the business, so long as it continued, although he had stipulated to share profits and losses in stated proportions. It is unnecessary accurately to measure the extent, or precisely to determine the nature, of the injury which was, or might thus have been, done to Shubert. That injury might have resulted is obvious. It is sufficient to determine that Waller was guilty of the breach of a legal duty, of the failure to conform to the high standard of honesty and good faith which the law exacts of one partner or coadventurer towards the others. In our opinion that standard should not be lowered by putting dubious conduct outside of the domain of law, especially as exact justice can always be done by making the wrongdoer a trustee of his secret interest for himself and his associates.

Cases holding that the promoter of an enterprise may openly sell to his company or his associates on the basis of the ordinary vendor and vendee have no application. If Waller had disclosed his interest in the authors' royalties, it doubtless would have been for Shubert to inquire, if he wanted to know, what was paid for it.

The respondent does not appear to question the appellant's contention that the plaintiff acquired only what its assignor had to sell. No element of estoppel being involved, it seems plain that the plaintiff took subject to the prior equities, as well of third parties as of the original owners. At any rate, that is the settled law of this state. Bush v. Lathrop, 22 N. Y. 535; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41, 14 Am. Rep. 173; Cutts v. Guild, 57 N. Y. 229; Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490, 9 N. E. 870; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999; Central Trust Co. v. West India Improv. Co. 169 N. Y. 314, 62 N. E. 387.

Both questions should be answered in the affirmative, the orders of the Appellate Division and of the Special Term should be

reversed with costs in all courts, and the demurrers overruled with costs.

Werner, Hiscock, Chase, and Hogan, JJ., concur. Willard Bartlett, Ch. J., not voting. Cardozo, J., not sitting.

NORTH CAROLINA SUPREME COURT.

M. A. JAMES
v.
ATLANTIC COAST LINE RAILROAD COMPANY, Appt.

(166 N. C. 572, 82 S. E. 1026.)

Railroad — killing geese — evidence of negligence.

1. Geese are not within the operation of a statute making the killing of "any cattle or other live stock" on a railroad track prima facie evidence of negligence.

Evidence — failure of railroad to give signal — negligence.

2. Negligence on the part of a railroad company in killing geese on the track is not shown merely by evidence that the whistle was not blown or the bell rung at the time and place of the accident.

Railroad — killing geese — liability.

3. A railroad company is not liable for killing geese on the track because of failure to sound an alarm, unless they could have been seen by keeping a reasonable lookout, in time to avoid the injury, and the engineer failed to sound an alarm which was the proximate cause of the injury.

(Hoke and Allen, JJ., dissent.)

(October 7, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Pitt County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of nine geese by one of defendant's trains. Reversed.

The facts are stated in the opinion.

Messrs. **L. G. Cooper** and **Harry Skinner**, for appellant:

There was no evidence whatever of negligence, or that the geese were seen by the defendant's engineer, or should have been seen by him in keeping a reasonable lookout, nor that the failure to sound his whistle or alarm was the proximate cause of the injury, and it was error to refuse defendant's motion to nonsuit.

Lewis v. Norfolk Southern R. Co. 163 N. C. 33, 47 L.R.A.(N.S.) 1125, 79 S. E. 283; Moore v. Charlotte Electric R. Light & P. Co. 136 N. C. 554, 67 L.R.A. 470, 48 S. E. 822; Nashville & K. R. Co. v. Davis, — Tenn. —, 78 S. W. 1050, 33 Cyc. 1164; Wilson v. Wilmington & M. R. Co. 10 Rich. L. 52; Richardson v. Florida C. & P. R. Co. 55 S. C. 334, 33 S. E. 466; Whelan v. Baltimore & O. R. Co. 70 W. Va. 442, 74 S. E. 410; Ledbetter v. English, 166 N. C. 125, 81 S. E. 1066; Henderson v. Durham Traction Co. 132 N. C. 784, 44 S. E. 598.

There must be negligence on the part of the defendant, and the negligence must be the proximate cause of the injury, without which it would not have occurred.

Lewis v. Norfolk Southern R. Co. 163 N. C. 33, 47 L.R.A.(N.S.) 1125, 79 S. E. 283; Henderson v. Durham Traction Co. 132 N. C. 787, 44 S. E. 598; Elliott, Railroads, § 711; Cheek v. Oak Grove Lumber Co. 134 N. C. 225, 46 S. E. 488, 47 S. E. 400; Chicago, R. I. & G. R. Co. v. O'Dell, — Tex. Civ. App. —, 160 S. W. 1098; Penny v. Atlantic Coast Line R. Co. 153 N. C. 308, 32 L.R.A. (N.S.) 1209, 69 S. E. 238, 3 N. C. C. A. 379; Ramsbottom v. Atlantic Coast Line R. Co. 138 N. C. 39, 50 S. E. 448; Darien & W. R. Co. v. Thomas, 125 Ga. 801, 54 S. E. 692.

Reasonable care is that care which a man of ordinary prudence would exercise himself, and not what he ought or should; for if that be so, it would not be the act of the ordinary man himself, but an act in accordance with the opinion of others.

"Ordinary care" is synonymous with "reasonable care."

Black v. Chicago, B. & Q. R. Co. 30 Neb. 197, 46 N. W. 428; Nolan v. New York, N. H. & H. R. Co. 53 Conn. 461, 4 Atl. 106; Chicago, B. & Q. R. Co. v. Yorty, 158 Ill. 321, 42 N. E. 64; Central R. Co. v. Moore, 24 N. J. L. 824; Fallon v. Boston, 3 Allen, 38.

Ordinary care is that degree of caution which a reasonably prudent person would exercise under the existing condition.

Whisten v. Brengal, 16 Misc. 37, 37 N. Y. Supp. 813; Boulder v. Fowler, 11 Colo. 396, 18 Pac. 337; Carter v. Kansas City Cable R. Co. 42 Fed. 37; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317, 15 Am. Neg. Cas. 500.

The duty of a railroad to animals on the track is that it should exercise ordinary care to avoid injury to them after they are discovered.

Clair v. Northern P. R. Co. 22 N. D. 120,

Note. — For duty of railroad as to fowls upon track, see note to Lewis v. Norfolk Southern R. Co. 47 L.R.A.(N.S.) 1125. Any supplementary annotation subsequently made on this question may be found by consulting the Index to L.R.A. Notes under the title "Railroads," which also includes notes relating to various other phases of the liability of railroads for injuring or killing animals on the track.
L.R.A.1915B.

132 N. W. 776; McDonnell v. Minneapolis, St. P. & S. Ste. M. R. Co. 17 N. D. 606, 118 N. W. 819; Hansberry v. Chicago, B. & Q. R. Co. 79 Neb. 120, 112 N. W. 292; Illinois C. R. Co. v. Noble, 142 Ill. 578, 32 N. E. 684; Doggett v. Richmond & D. R. Co. 81 N. C. 462; Winston v. Raleigh & G. R. Co. 90 N. C. 66; Wilson v. Norfolk & S. R. Co. 90 N. C. 69; Carlton v. Wilmington & W. R. Co. 104 N. C. 365, 10 S. E. 516.

The plaintiff must not only prove negligence, but he must go further and prove that this failure was the proximate cause of the injury.

Ledbetter v. English, 166 N. C. 125, 81 S. E. 1066; Cheek v. Oak Grove Lumber Co. 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

Mr. **Julius Brown**, for appellee:

There was evidence that the train killed the geese, that there was no alarm given, and that the engineer could have seen them 300 or 400 yards. This would surely carry the case to the jury.

Wilson v. Norfolk & S. R. Co. 90 N. C. 69; Snowden v. Norfolk Southern R. Co. 95 N. C. 93; Ward v. Wilmington & W. R. Co. 109 N. C. 358, 13 S. E. 926; Lewis v. Norfolk Southern R. Co. 163 N. C. 33, 47 L.R.A. (N.S.) 1125, 79 S. E. 283.

It was the defendant's duty to keep a reasonable watch, and, on seeing the geese, to have given an alarm by blowing the whistle or ringing the bell or both, and slowing the train, and, if necessary, to stop the train.

Wilson v. Norfolk & S. R. Co. 90 N. C. 69; Pickett v. Wilmington & W. R. Co. 117 N. C. 633. 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264.

There was no error in defining the defendant's duty, or if any, it was in the defendant's favor, which it cannot take advantage of.

Wilson v. Norfolk & S. R. Co. supra; Snowden v. Norfolk Southern R. Co. 95 N. C. 93; Pickett v. Wilmington & W. R. Co. supra.

Clark, Ch. J., delivered the opinion of the court:

This is an action tried in the superior court on appeal from a justice of the peace for the negligent killing of nine geese,—four at one time and five at another. On one occasion the geese were in the field by the railroad, and after the train passed the plaintiff found four geese killed. On another occasion the geese were near the railroad track, and after the train passed five were found killed. The point where these geese were killed was at a slight curve in the track about 100 yards from a farm crossing. No witness saw the geese when they were killed, on either occasion.

There was no presumption of negligence. Rev. 2645 provides: "When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be prima facie evidence of negligence on the part of the company in any action for damages" if the action is brought within six months. This expression, "any cattle or other live stock," cannot be construed as applicable to geese or other fowls.

There was no evidence of negligence, unless it can be drawn from the testimony of the plaintiff that the whistle was not blown, and that the bell was not rung. It is probable from above evidence that the geese stepped on the track so close to the engine that the engineer could not have avoided killing them, and the burden was upon the plaintiff to show that he could have prevented it, with proper care. The mere fact that the whistle was not sounded nor the bell rung, if such was the fact, is not sufficient evidence, taken alone, to have gone to the jury, in this case.

The plaintiff relies upon the "Turkey Case" (Lewis v. Norfolk Southern R. Co. 163 N. C. 33, 47 L.R.A.(N.S.) 1125, 79 S. E. 283). But the two cases are very dissimilar. In that case the evidence was that the turkeys could have been seen at a distance of 500 yards; there was quite a drove of them and they were crossing the track. The turkey is a nervous fowl, and the jury might well have found that if the whistle had been blown the turkeys would have taken wing or have run, and therefore we held that it was error to enter a nonsuit. Geese, however, are phlegmatic and slow of movement, and the blowing of the whistle or ringing the bell would not be calculated to make them run or fly. On the contrary the approach of the train would be more likely to cause them to huddle up in conference, or to stretch out their necks to oppose the passage of the engine. In the absence of evidence showing circumstances of actual negligence, the mere fact that the whistle was not blown or the bell rung did not authorize the court to submit the case to the jury. In this case there is testimony that the geese could have been seen 300 yards, but there is no evidence that when the engine was that distance the geese were on the track, but rather that they were in the field or outside the track.

Certainly the court should have given the instruction asked by the defendant: "The burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that defendant's engineer failed to sound any alarm or whistle upon the approach to the place where the geese were killed; and you must further find that the engineer

could have seen these geese by keeping a reasonable lookout, and that the failure to sound the whistle or alarm was the proximate cause of the damage, that is, if the alarms had been sounded the damage would have been avoided, and unless you so find the facts you should answer the first issue, 'No.'"

We find in the excellent brief of defendant's counsel that this point has been before the court in another state. In Nashville & K. R. Co. v. Davis, — Tenn. —, 78 S. W. 1050, it was held that "a goose is not an animal obstruction within the application of the statute requiring the alarm whistle to be sounded and the brakes to be set to prevent an accident when an animal obstruction appears on the track." Cited 33 Cyc. 1164. "In the absence of recklessness or common-law negligence, a railroad company is not liable for the killing of geese permitted to run at large, while trespassing on the railroad track." Nashville & K. R. Co. v. Davis, supra.

The court charged that "it was the duty of the engiher to keep a reasonable lookout, and if he saw these geese on the track, or approaching the track, or negotiating any such movements as if they were likely to go upon the track, then it was his duty to give some signal."

There was no evidence of such state of facts. For all that appears, the geese waddled on the track just ahead of the engine. But if it were shown that they were on the track when the engine was 300 yards off, yet from the nature of the fowl is there any reason to assume that if the signal had been given they would have gotten off the track in time? They have too much dignity, or are too combative, to flee promptly from danger. Beaides, as Mr. Cooper well observed in his argument: "Can the engineer determine what are the negotiations of a flock of geese in a field, or even on the track, when they put their heads together?"

The difference between the characteristics of a turkey and of a goose is a matter of common knowledge. The turkey is long legged, quick of movement, and promptly responsive to a signal of danger. The goose is short legged, slow to fly or run, and resentful rather than appreciative of a warning of danger. Though of equal intelligence probably with most other fowl, this has made its name a synonym for stupidity. While a turkey on the track would be likely to save itself by flight if the whistle were sounded in time, geese would be likely to put their heads together, or at most waddle down the track away from the noise. In the absence of proof of recklessness or wantonness the defendant was not liable. Nashville & K. R. Co. v. Davis, supra.

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In Moore v. Charlotte Electric R. Light & P. Co. 136 N. C. 554, 67 L.R.A. 470, 48 S. E. 822, the court held that notice should be taken of the characteristics of a dog, and it was not required that motormen in charge of these cars should exercise the same degree of care to avoid running over a dog that the law requires of them to avoid injury to other animals. The court in that case said that dogs "are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety." The quick intelligence of the dog and the stupidity of the goose are alike natural evidence, known of all men.

We would not be understood as holding that a railroad company would not be responsible for killing geese, if negligence was shown, but we do not think that there is evidence of negligence when nothing appears except the fact that the geese were killed by a passing train, and no whistle or other alarm was sounded. As to "cattle or live stock," the statute raises a prima facie case of negligence from the fact of killing. In the turkey case the long distance at which the flock of turkeys could be seen, and the nervous and alert character of that fowl, was evidence sufficient to forbid a nonsuit, and to require that the case should be left to the jury on the issue of negligence.

Certainly as to automobiles and other private conveyances, there would be less evidence of negligence required than as to a railroad train carrying passengers and mail, or even freight for the public. The latter are not required to stop except under such circumstances as make it negligence not to do so. The former go slower, and can stop more readily or swerve from the track to avoid killing geese or chickens. But even they may chance to kill when guilty of no negligence and hence without liability.

We are cited to the classic legend in Livy (bk. xxv. chap. 47) when Rome was saved by the cackling of the geese on the Capitol. A great painter has memorialized the scene. This, however, was not due to the alertness of these birds to flee danger, but to their well-known wakefulness at night. If the Gauls had blown their trumpets, the geese, instead of promptly getting out of the way, would simply have raised more clamor and hissed the warriors on both sides.

There was not sufficient evidence of negligence to submit the case to the jury, and the nonsuit should have been granted.

Hoke and Allen, JJ., dissent.

WASHINGTON SUPREME COURT.
(Department No. 2.)

H. B. ROSE, Respt.,
v.
NORTHERN PACIFIC RAILWAY COMPANY Appt.

(— Wash. —, 143 Pac. 145.)

Carrier — boy on steps — negligence.

A fifteen-year old boy is negligent as matter of law in riding on the lower steps of a rapidly moving railroad car and engaging in exercises which cause his body to project beyond the side of the car.

(September 22, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Thurston County denying a motion for judgment notwithstanding a verdict for plaintiff, and for a new trial in an action brought to recover damages for the death of plaintiff's son while a passenger on defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. **George T. Reid, J. W. Quick, and L. B. Da Ponte**, for appellant:

One who is injured by going upon the steps of the coach of a railway train is clearly guilty of contributory negligence that defeats any right to recover damages.

Fletcher v. Boston & M. R. Co. 187 Mass. 463, 105 Am. St. Rep. 414, 73 N. E. 552, 18 Am. Neg. Rep. 125; Cincinnati, I. St. L. & C. R. Co. v. McLain, 148 Ind. 188, 44 N. E. 306; Paterson v. Central R. & Bkg. Co. 85 Ga. 653, 11 S. E. 872, 2 Am. Neg. Cas. 445; Denny v. North Carolina R. Co. 132 N. C. 340, 43 S. E. 847.

Messrs. **Hugo Metzler and Ben S. Sawyer** for respondent:

The contributory negligence of a child is a question to be determined by the jury, and not one of law for the court.

Roth v. Union Depot Co. 13 Wash. 544, 31 L.R.A. 855, 43 Pac. 641, 44 Pac. 253; Mowrey v. Central City R. Co. 51 N. Y. 666; Shearm. & Redf. Neg. 73; Steele v. Northern P. R. Co. 21 Wash. 300, 57 Pac. 820; Talkington v. Washington Veneer Co. 61 Wash. 140, 44 L.R.A.(N.S.) 1061, 112 Pac. 261; Olson v. Gill Home Invest. Co. 58 Wash. 151, 27 L.R.A.(N.S.) 890, 108 Pac. 140.

Per Curiam:

This is an action by the respondent against the appellant to recover damages for the death of the respondent's son. On August 31, 1912, the appellant, Northern Pacific Railway Company, at the instance and request of the Tenino Commercial Club, ran an excursion train from Tenino to South Bend and return. The train furnished was a vestibuled train, consisting of some seven cars. The train was not overcrowded, and the passengers, after the train was on its way, exercised considerable freedom in passing from one car to another. The vestibules were then closed, but gradually the passengers began to open them and stand in the vestibules and on the steps of the cars. According to the evidence of the train crew and that of a number of passengers called by the appellant, the train crew made dili-

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Note. — Riding on platform of railroad car as negligence.

This note is supplementary to the one in 29 L.R.A.(N.S.) 325. These notes do not include cases involving street cars, cases involving vestibule platforms, cases where the injury to one on a platform was due to an accident to the train or car, or cases where the injured person went upon the platform as the train was nearing his station. For a reference to notes and cases covering those questions, see the note to South Covington & C. Street R. Co. v. Hardy, 44 L.R.A.(N.S.) 32. Also see notes in 15 L.R.A.(N.S.) 523, and 35 L.R.A. (N.S.) 592, as to the duty of a carrier to keep its steps free from snow and ice: and notes in 34 L.R.A. 720, and 37 L.R.A.(N.S.) 518, involving injuries received while passing from car to car: both classes of cases also being excluded from the present note.

It is not contributory negligence for a passenger to ride on the platform when the train is so crowded that it is necessary for him to do so. But mere considerations of personal comfort or choice cannot justify or excuse such action. Alabama L.R.A.1915B. G. S. R. Co. v. Gilbert, 6 Ala. App. 372, 60 So. 542.

In Chicago, R. I. & P. R. Co. v. Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561, it was held that the question of contributory negligence of plaintiff in riding upon the platform of a crowded railroad car was for the jury where the evidence was conflicting as to whether he could have obtained standing room inside.

In Southern R. Co. v. Nappier, 138 Ga. 31, 74 S. E. 778, where plaintiff testified that he did not discover that the train was so crowded that he could not get inside until he got on the platform and the train was in motion, it was held that the question of contributory negligence was for the jury.

In Devine v. Chicago & A. R. Co. 177 Ill. App. 360, where it was shown that the car door was locked so that deceased could not get inside, and the platform of the car ahead was crowded, and the train was moving rapidly, the court said that the action of deceased in sitting down on the steps with his feet resting on the bottom step would seem to be reasonably prudent. It appeared that as deceased sat down he

gent efforts to keep the vestibules closed, and repeatedly warned the passengers of the dangers of standing between the cars and on the car steps while the train was in motion. Witnesses for the respondent, however, testified to facts tending to show that the crew did not give much heed to the conditions.

The respondent and his two sons were among the excursionists. The elder son was upwards of fourteen years and ten months old, and the younger of the age of nine years. On entering the car the respondent seated the boys in a passenger coach, and went forward to the smoking car. Some time thereafter the elder boy brought the younger one to the father, and requested that he take charge of him, asking for permission at the same time to go back to the other end of the car and play with the other young people on the train. The father granted the permission, and the elder boy left him. Some time thereafter the elder boy got down onto the lower step of a car at an open vestibule, and while standing with his feet on the lower steps holding with his hands onto the brass rods at the car entrance, raised and lowered his body by sliding his hands up and down the rods. When his hands went down his body would protrude for some distance out from the lower car step. While in this position the train passed over a bridge, the upper frame of which came into contact with the boy's body, throwing him from the train and killing him instantly.

It is not in evidence that any of the train crew saw the boy in this dangerous position, nor was it shown that the bridge was of unusual construction. The respondent's counsel cites the witness Anderson as testifying that the timber was unusually close, but a reading of his testimony does not bear out the claim. In answer to a direct question put to him by counsel himself, he stated that he did not "believe it was closer than any other."

The boy was of the usual development for one of his age, and nothing in his appearance indicated that he was not of average intelligence. It was shown also that he possessed more than the average knowledge of the movement and character of railway trains and of the roads over which they ran; it being shown that he had lived for a number of years in a town on the main line of the appellant railway company, over which many trains passed daily.

At the conclusion of the evidence the appellant moved for a directed verdict in its favor, based on the grounds that the evidence failed to show actionable negligence on its part, and that contributory negligence affirmatively appeared on the part of the boy who met with his death. The motion was denied, and the cause submitted to the jury, who returned a verdict in respondent's favor for $1,500. From the judgment entered therein, this appeal is prosecuted.

We think the motion for a directed verdict should have been granted. While it may be that the evidence justified submitting to the jury the question of the appellant's negligence, we think there can be no two opinions as to the contributory negligence of the boy himself. His conduct was foolhardy in the extreme. He was riding at a

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stretched out his leg to pull up his trousers, when his foot struck a girder near the track and he was thrown from the train, and the court said, there being no evidence that he knew of the presence of the girder, that it could not be held as a matter of law, or found as a conclusion of fact, that deceased did not exercise that degree of care for his own safety which a reasonably prudent man in the same situation, and with the same knowledge or means of knowledge, would have exercised under like circumstances.

In Shive v. Philadelphia & R. R. Co. 235 Pa. 256, 83 Atl. 707, where plaintiff was standing in a car door because the car was so filled that there was not room to get inside, but it appeared that there was room in the next car, just across the platform from him, it was held that he could not recover for injuries sustained when he was thrown from the car by a jolt which was not unusually hard, but was sufficient to force other passengers against him and cause him to lose his hold.

In Talbert v. Charleston & W. C. R. Co. 97 S. C. 465, 81 S. E. 182, where plaintiff left his standing room in a car and went out on the platform because it was more comfortable there, and then went down on the steps and, while leaning out looking toward the rear, was struck by a car on a side track, it was held that he was guilty of contributory negligence which would preclude recovery of damages.

In Gulf, C. & S. F. R. Co. v. Franklin, — Tex. Civ. App. —, 155 S. W. 553, where plaintiff was thrown from the platform of a crowded train, it was held that the question of contributory negligence was for the jury.

In Texas & P. R. Co. v. Lacey, 107 C. C. A. 331, 185 Fed. 225, writ of error dismissed in 229 U. S. 628, 57 L. ed. 1357, 33 Sup. Ct. Rep. 773, where the evidence on behalf of plaintiff tended to show that the train was so crowded that there was no standing room inside, that after the accident those on the platform tried to get inside but were unable to do so, and that deceased had no other place to stand or sit except upon the platform, and defendant's evidence was to the contrary, it was held that the question of contributory negligence was for the jury. R. L. S.

place on the car not intended to be ridden upon by passengers, and in addition to this engaged, while there, in exercises which greatly increased his danger. Since there was nothing in his appearance that indicated to the train crew that he was not of normal temperament and intelligence, his conduct, in determining the appellant's liability therefor, is to be measured by the average temperament and intelligence of persons of his own age and experience, not by any peculiarity of his own. It seems to us too much to say that a boy close to his fifteenth year would not know that it was dangerous to attempt to ride on the lower step of a train while it was moving with the usual speed between stations, and that a boy of much younger years would not know that it was extremely dangerous to engage in exercises such as he engaged in while in that situation.

We are not unmindful of the rule that a youth of his age is not to be held to the same degree of care that a person of mature years is held. This we have held in a number of cases, particularly in cases between master and servant, where the master has placed the servant in a dangerous situation, and in cases where children of tender years have been injured by so-called attractive nuisances. But the rule does not absolve a youth from all care. He must still exercise that degree of care commensurate with his age, and, if he fails so to do, he is guilty of contributory negligence.

The judgment is reversed and remanded, with instructions to dismiss the action.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. B. DUNN et al.
v.
BANK OF UNION et al.

S. S. STEELE et al., Appts.

(— W. Va. —, 82 S. E. 758.)

Bank — assignment of stock — liability of assignor.

1. Under § 6, art 11, Constitution (Code 1913, p. cxxii.), and § 78a III. chap. 54, Code 1913 (§ 3034), an assignor of bank stock remains liable, after transfer thereof, to the extent prescribed by said sections, for an indebtedness incurred by the bank while he was owner of such shares.

Same — renewal of deposit certificates — novation.

2. The renewal of bank deposit certificates does not operate as a novation of the original indebtedness.

Judgment — effect — persons not parties.

3. A decree is ineffectual for any purpose as against defendants who are not served with process, and who do not appear to the cause.

(June 30, 1914.)

APPEAL by plaintiff H. B. Dunn and defendants Steele et al. from a decree of the Circuit Court for Monroe County in plaintiffs' favor in a suit to enforce the statutory double liability of the stockholders of the insolvent defendant bank, and apply the same to the payment of its indebtedness. Reversed.

The facts are stated in the opinion.

Messrs. **Ross & Kahle** and **R. Kemp Morton**, for appellants:

The statutory double liability of stockholders in banks belongs to the creditors, and not to the bank.

Bolles, Bkg. 123, 124; Booth v. Dear, 96 Wis. 516, 71 N. W. 816; Colton v. Mayer, 90 Md. 711, 47 L.R.A. 617, 78 Am. St. Rep. 456, 45 Atl. 874; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; 10 Cyc. 681.

The assignee of an insolvent bank cannot enforce the statutory double liability of stockholders, in the absence of a statute conferring power so to do upon him.

Terry v. Abraham (Terry v. Merchants' & P. Bank) 93 U. S. 38, 23 L. ed. 794; Runner v. Dwiggins, 147 Ind. 238, 36 L.R.A. 645, 46 N. E. 580; Cook, Corp. § 218.

A general creditors' suit by one creditor for the benefit of all is the proper method for enforcing the statutory double liability of stockholders in banks, when no specific method has been prescribed by statute.

Zang v. Wyant, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; Carrol v. Green, 92 U. S. 509, 23 L. ed. 738; 1 Bolles, Bkg. 125.

Novation cannot be presumed, but must

Headnotes by LYNCH, J.

Note. — Liability of former stockholder for debts of corporation as affected by renewal after transfer of stock.

Generally, as to the effect of a transfer of shares of stock upon the stockholder's liability for unpaid subscription, see the L.R.A.1915B. note to Rochester & K. F. Land Co. v. Raymond, 47 L.R.A. 246.

The question of the transferee's liability on unpaid subscriptions is considered in the note to Perkins v. Cowles, 30 L.R.A. (N.S.) 283.

For the purposes of this note it is as-

be alleged and proved, and the burden of proof is on him alleging it.

3 Minor, Inst. pt. 1, p. 414; Chenoweth v. National Bldg. Asso. 59 W. Va. 657, 53 S. E. 559; Merchants' Nat. Bank v. Good, 21 W. Va. 455; 2 Dan. Neg. Inst. § 1226a; 29 Cyc. 1139; State Bank v. Domestic Sewing Mach. Co. 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E. 141; Fidelity Loan & T. Co. v. Engleby, 99 Va. 168, 37 S. E. 957; Coles v. Withers, 33 Gratt. 186.

A party to whom stock in a bank has been transferred in pledge or assigned as collateral security, and who appears on the books of the corporation as the owner of the stock, is liable to creditors for the statutory liability.

Thomp. Corp. § 4895; State v. Bank of New England, 70 Minn. 398, 68 Am. St. Rep. 538, 73 N. W. 153; South Branch R. Co. v. Long, 43 W. Va. 134, 27 S. E. 297.

The creditors of an insolvent bank are not required to marshal its assets.

Elliott v. Farmers' Bank, 61 W. Va. 651, 57 S. E. 242; Hogg, Eq. Principles, 68; Martin v. South Salem Land Co. 94 Va. 28, 26 S. E. 591.

Messrs. T. N. Read and John L. Rowan, for appellees:

The holders of the stock in the bank at the time of the issuing of the last certificates of deposit would be liable for such certificates of deposit, and the taking up of the original certificates of deposit issued to the Dunns, the paying of interest, and the issuing of new certificates, sometimes for different amounts, and other times at a different rate of interest, would be clearly a novation of the original debt represented by the original certificates of deposit.

10 Cyc. 693, note 2, 695; 2 Beach, Corp. § 604, p. 892; 21 Am. & Eng. Enc. Law, 2d ed. 663, 676; Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759; 3 Thomp. Corp. § 2246; Shellington v. Howland, 53 N. Y. 371.

By the transfer of the capital stock in a bank under the West Virginia statute, the transferee takes the stock subject to all existing indebtedness, and by such transfer the said transferee, in the proportion of his shares, succeeds to all the rights and liabilities of the prior holders of such shares.

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sumed that the stockholder, notwithstanding the transfer of this stock, remained liable for debts previously contracted unless released by the renewal. Therefore, cases denying the shareholder's liability upon the ground that the original debt was contracted after transfer of the stock or before the defendant became a stockholder are excluded. As an example of such cases reference may be had to Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077, holding that a complaint is insufficient which alleges that both renewal and renewed notes were executed before the defendant's transfer of stock, but does not show when the original debt was contracted.

And this note includes only cases in which the transfer was held or assumed to be complete and effective. As to the failure to register a transfer, due to the fault of the corporation, as affecting the continued liability of the assignor of stock, see the notes to Bracken v. Nicoll, 11 L.R.A. (N.S.) 818, and Abilene State Bank v. Strachan, 46 L.R.A.(N.S.) 608.

In Castleman v. Holmes, 4 J. J. Marsh. 1, the view was taken that when a note is renewed, a new debt is contracted, and the date of the renewal note fixes the stockholder's liability under a statutory provision making stockholders proportionally liable for the debts of the corporation. In reaching this conclusion the court said: "When a debt is continued by renewing notes, each renewal is to be regarded as a new contract. The old contract is then settled, and the old note is then generally canceled, and thus there is no other contract in existence but the new one. Its date, of necessity, then, must be the time when the debt was contracted. These transactions, of renewing debts by new notes, are equivalent to paying the existing debts, and again borrowing the money. The old debt is paid off by the new." It is to be gathered from the opinion that the question of the liability of a former stockholder who had transferred his stock before the last renewal was involved. To the same effect is Milliken v. Whitehouse, 49 Me. 527, involving a statute making the stockholder liable to the amount of his stock.

Where, after a stockholder has transferred his stock, a creditor of the corporation gives up old notes and takes new notes in their stead, for the express purpose of discharging the retiring stockholder, such stockholder is completely released from the debt. New England Commercial Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688.

And in Seymour v. Bank of Minnesota, 79 Minn. 211, 81 N. W. 1059, involving the question as to when a debt accrued for the purpose of determining whether a statute imposing double liability upon stockholders applied, or a later statute imposing single liability,—the court held that under the particular circumstances of the case the renewal of certificates of deposit created a new debt, and that the date of such renewal determined the liability of the stockholders, pointing out that the evidence showed that the bank was apparently solvent and open at the time of the renewal; that when the old certificates, which were obligations bearing interest for six months, were presented, they had ceased to bear interest by their express terms; that the holders were given the option to have their money; and that they chose to take new

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Code, chap. 54, §§ 77, 3030; W. Va. Const. § 6, art. 11; 2 Beach, Corp. § 604, p. 892; 1 Cook, Corp. § 261, note 3; 10 Cyc. 701; Nimick v. Mingo Iron Works Co. 25 W. Va. 196.

Mr. R. L. Clark also for appellees.

Lynch, J., delivered the opinion of the court:

Being then insolvent, the Bank of Union, pursuant to a resolution of its stockholders, on February 29, 1908, conveyed its property to R. L. Clark in trust for the benefit of its creditors, among whom were the plaintiffs in this suit. Promptly thereafter Clark, by bill in equity, convened the creditors and stockholders of the corporation. The object of the suit instituted by him was the ascertainment of the corporate assets, including the liability of the stockholders arising under the provisions of § 78a III. chap. 54, Code 1913 (§ 3034), usually denominated the stockholders' double liability to the creditors of an insolvent state banking institution. John Osborne and other stockholders, by answers in the nature of cross bills, charged mismanagement and spoliation by the directors, officers, and agents of the bank, and sought relief against them. But, by its decree sustaining demurrers to the bill and cross bill answers, the court denied relief against the stockholders including the directors.

Thereupon the plaintiffs in this suit, they not having theretofore appeared for any purpose to the bill by Clark, though named defendants therein, brought their bill on behalf of themselves and all other creditors of the bank who should join therein. The suit by the Dunns had for its purpose also the ascertainment of the corporate assets, the collection of the statutory double liability, and the application of both to the liquidation of the bank's indebtedness. To this suit Osborne and other defendants tendered four pleas in abatement; the first and fourth of which aver separate and distinct, and not a joint or joint and several, liability due from the bank to plaintiffs; and the second and third of which aver the pendency and purpose of the Clark suit.

Upon appeal, the decree in the proceeding by Clark was reversed, this court holding that the stockholders' liability by virtue of the statute was an asset of the bank, and as such collectable by the trustee. Clark v. Bank of Union, — W. Va. —, 78 S. E. 785.

But, before entry of the decree thus reversed, the circuit court heard both causes conjointly, referred them under the double caption to a master commissioner, who made three reports under the court's direction and pursuant to its several orders for this purpose, and sustained the motion of the Dunns to strike the pleas in abatement from the file. Though of this ruling upon the pleas complaint is now made, we do not deem it sufficiently prejudicial to warrant reversal. No one is thereby injured, except in respect of costs, the taxation of which is subject to adjustment under the court's direction at the close of the litigation. As heretofore observed, the Dunn suit was not instituted until after the circuit court had held, though erroneously, that Clark could not as trustee collect the liability imposed by statute. But, had the court held otherwise, as indeed it

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certificates which bore interest for six months longer.

On the other hand, the Ohio courts squarely hold that a stockholder who transfers his stock after a corporate debt has been created is not relieved from his statutory liability for such debt, by an agreement for an extension of time for its payment, although such agreement is made by the corporation and creditor after such transfer, and without the knowledge or consent of the transferrer. Boice v. Hodge, 51 Ohio St. 236, 46 Am. St. Rep. 569, 37 N. E. 265, followed in Hauenshild v. Standard Coffin Co. 10 Ohio S. & C. P. Dec. 536, 8 Ohio N. P. 124. There was a contrary declaration in Taylor v. West Liberty Wheel Co. 6 Ohio Dec. Reprint, 947, 9 Am. L. Rec. 28.

And it was held in an early New York case that if the defendant was a stockholder when the original debt was contracted, the fact that he was not a stockholder when a draft was drawn for the debt did not affect his liability, thus in effect holding that the draft did not merge the obligation I.R.A.1915B.

so as to relieve the stockholder from liability. Freeland v. McCullough, 1 Denio, 414, 43 Am. Dec. 685, involving liability under an act of incorporation making stockholders liable jointly and severally for corporate debts.

Attention is also directed to Hyatt v. Anderson, 25 Ky. L. Rep. 132, 74 S. W. 1094, rehearing denied in 25 Ky. L. Rep. 711, 76 S. W. 337, holding that rent accruing after the defendant transferred his stock, under a lease made by a corporation while the defendant was a stockholder, is a liability within the meaning of a statute making stockholders responsible for all contracts and liabilities of the corporation to the amount of their stock at par value in addition to the amount of such stock, and providing that no transfer of stock shall operate as a release of any such liability existing at the time of the transfer.

A somewhat similar question was involved in Griffin v. Long, 35 L.R.A.(N.S.) 855; see comment in the note to that case

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should have done, and consolidated the causes instead of hearing them as one, its action would not have been erroneous; for two causes between the same parties and involving the same subject-matter may properly proceed together to final determination as one suit. Mosby v. Withers, 80 Va. 82.

While it appears that plaintiffs are not jointly, but are separately, interested in the several items of indebtedness against the bank, they do have a sufficient interest in common to warrant the maintenance of this proceeding. Having such interest in the questions at issue and the relief sought, they did not improperly join as plaintiffs. To the extent of the individual indebtedness severally claimed, they had the right alone, or jointly with other creditors, to demand payment out of the assets, the collection and appropriation thereof to the liquidation of the insolvent bank's debts, as sought by the two causes so heard together. Pom. Eq. Jur. § 269; Bosher v. Richmond & H. Land Co. 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241.

The bill charges, and the report of the commissioner shows, that on March 4, 1902, H. B. Dunn loaned the Bank of Union $5,000, for which it then issued to him a certificate of deposit, which it renewed March 18, 1903, February 26, 1904, April 18, 1905, and April 18, 1906, and on each date, by indorsement thereon, canceled the old and issued a new certificate therefor, to which time it paid the interest then due thereon; that on April 15, 1903, he also loaned the bank an additional $2,000, for which it then issued to him a certificate, which in like manner it renewed April 15, 1905 and 1906; that on October 22, 1903, L. B. Dunn loaned the bank $3,660, for which it issued to him a certificate of deposit; but by payment on April 3, 1905, it reduced his loan to $2,000, for which it then issued a new certificate, and again renewed it October 19, 1905, and April 14, 1905. The loans thus made to each plaintiff remain wholly unpaid, except as heretofore noted, and to enforce payment thereof they instituted these proceedings.

The plaintiff H. B. Dunn unites as appellant, solely, as he says, because the court erred in decreeing against certain of the stockholders who, though parties defendant to both bills, were not served with process, and did not appear for any purpose in either cause, and demands the correction of the decree in this respect. Of course, to the extent it fixes liability and decrees against defendants not served and not appearing, the decree as to them is manifestly erroneous. Those who are thus prejudiced, so far as ascertained, are Isabelle C. Hereford, Willie Mae McDonald, Clara Buck, Allen Caperton, Francis G. Hereford, Katharine H. Stoddert, and Guy H. Bissett. They are, however, not complaining; and he cannot here complain, because through his efforts, and without previous protest on his part, the decree was thus procured.

The inquiries of first importance relate to two propositions advanced by appellants, as to both of which the circuit court held, as appears from its decree, adversely to appellants. To the reports of the commissioner exceptions were taken in so far as he found that the reissuance of the deposit certificates operated as a novation of plaintiffs' indebtedness, and that those liable therefor were the owners of shares of the bank's capital stock on the date of the last renewal certificates. These exceptions were overruled, and the report was confirmed. In both respects the decree is erroneous.

Except as noted, the loans remain unpaid. Liability therefor accrued when each plaintiff deposited his money with the bank, upon the understanding, if not upon an express agreement, that they were to be treated and deemed actual loans to the bank upon interest. The certificates originally issued therefor were mere evidences of indebtedness then contracted. In other words, the certificates were, in effect, the notes of the bank, payable to each plaintiff. Although renewed by the subsequent issuance of other certificates, as previously observed, the original liability was not extinguished and a new liability created, any more than a new note pays an antecedent debt, though reduced to judgment, unless the parties so intended or agreed, the burden of showing such intention and agreement resting always upon him who claims the benefit of the discharge. Where these conditions are left in a state of uncertainty or doubt, a renewal, in whatever form presented, is not a payment. Morriss v. Harvey, 75 Va. 726. Even a negotiable note, accompanied by a receipt in full, does not extinguish a judgment. Feamster v. Withrow, 12 W. Va. 611. See also Moore v. Johnson, 34 W. Va. 672, 12 S. E. 918; 3 Minor, Inst. pt. 1, p. 414. The rule generally prevailing, though not without exceptions, is that a new obligation given in lieu of a prior one does not alone authorize the presumption of payment. Sullivan v. Saunders, 66 W. Va. 350, 42 L.R.A.(N.S.) 1010, 66 S. E. 497, 19 Ann. Cas. 480; Bowman v. Miller, 25 Gratt. 331, 18 Am. Rep. 686; Coles v. Withers, 33 Gratt. 187; Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co. 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759; Fidelity Loan & T. Co. v. Engleby, 99 Va. 168, 37 S. E. 957; State Bank v. Domestic Sewing Mach. Co. 99 Va. 411, 86 Am. St. Rep. 891, 39 S. E.

141. See also Barnes v. Crockett, 111 Va. 240, 36 L.R.A.(N.S.) 464, 68 S. E. 983. The taking of a new simple contract obligation for a specialty debt does not extinguish the latter, nor suspend the right of action thereon. Dudley v. Barrett, 66 W. Va. 363, 66 S. E. 507.

Upon the second proposition, the argument presented, if followed, would lead to the exoneration of those who held stock in the bank at any time before the dates of the last renewal certificates of indebtedness, provided they had prior to that date transferred their shares. The appellees who would sustain this finding rely on § 77, chap. 54, Code 1913 (§ 3030), wherein it is provided that the transferee of stock in a banking company "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder" thereof. A cursory examination of the section cited forcefully suggests the soundness of the argument thus advanced. But when viewed in the light of § 78a III. of the same chapter, together with § 6, art. 11, of the Constitution, such contention is manifestly unsound.

Section 78a III. imparts express legislative force and vigor to the constitutional requirement, and provides, in the identical language of the latter, that the stockholders of every bank organized under the provisions of that chapter "shall be personally liable to the creditors thereof, over and above the amount of stock held by them respectively, to an amount equal to their respective shares so held, for all liabilities accruing while they are such stockholders." Both Constitution and statute impose a personal liability on stockholders for debts accruing while they are such shareholders in a banking corporation,—a liability thereby made personal; not as sureties but as principals, for double the amount of the shares so held by each of them at the date the liability accrues. Hobart v. Johnson (C. C.) 19 Blatchf. 359, 8 Fed. 493.

The liability of the bank to plaintiffs accrued the instant the loans were made. If not then, when did it accrue? To accrue, as defined by lexicographers, means to "come into existence;" "to become vested." The debts came into existence, and became vested as a corporate liability, when plaintiffs deposited their money with the bank and it was accepted by the bank as a loan by them for its benefit. Therefore, under the statute and Constitution, those who were then stockholders became personally liable for its repayment, to the extent prescribed by the Constitution and statute. To hold otherwise would render nugatory, would eviscerate, the plain mandatory provisions of both. While the authorities vary in their views upon the proper construction of similar provisions, the construction here proposed finds ample support in the following cases: Moss v. Oakley, 2 Hill, 265, 12 Mor. Min. Rep. 1; Judson v. Rossie Galena Co. 9 Paige, 598, 38 Am. Dec. 569; Harger v. McCullough, 2 Denio, 119; Tracy v. Yates, 18 Barb. 152; Phillips v. Therasson, 11 Hun, 141; Williams v. Hanna, 40 Ind. 535, 15 Mor. Min. Rep. 73; Chesley v. Pierce, 32 N. H. 388; Larrabee v. Baldwin, 35 Cal. 155; Norris v. Johnson, 34 Md. 485; Fleeson v. Savage Silver Min. Co. 3 Nev. 157, 8 Mor. Min. Rep. 153; Windham Provident Inst. for Sav. v. Sprague, 43 Vt. 502; Thebus v. Smiley, 110 Ill. 316. See note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 860, for the various holdings on this subject. Of the liability thus imposed on stockholders, Morawetz, in his work on Corporations (§ 879), says it is a liability for which they are bound as "for debts which they themselves owe in a corporate capacity," and not as mere sureties or guarantors.

But this construction does not impair the efficacy, nor is it in contravention, of the provisions of § 77. They are not necessarily inharmonious or inconsistent. Both may stand together. While § 78a III. imposes liability on a stockholder for a debt accruing while he remains the owner of bank stock, he exonerates himself, for subsequent debts accruing, by a transfer thereof. Such subsequent liability devolves upon the transferee, pursuant to § 77. By that section, the latter does not succeed to the profits theretofore paid as dividends on the stock out of the bank's earnings. If the transferee succeeds to past liabilities, why does he not succeed to the benefits previously accruing, paid to and enjoyed by the former owner? If the assignee of the shares succeeds to the liability of the assignor, why does he not also succeed to the former rights of the assignor? The section says he shall succeed to all the rights and liabilities of the prior holder, and yet no one would construe its language to mean that the benefit of the antecedent rights would pass to the transferee. The manifest purpose and intent of the legislative enactment, as expressed by this section, is, when properly analyzed in the light of § 78a III., that the transferee succeeds to the rights and liabilities which accrue by virtue of the shares subsequent to the change of ownership. As thus construed, the two sections are not inconsistent. This interpretation gives effect and validity to both, and enforces the mandatory constitutional provision under which they were enacted. That it may, under some circumstances and conditions, operate oppressively, does not afford

a sufficient reason for holding contrary to the manifest purpose and plain mandate of the sections cited. Hardships are unavoidable, whether assignor or assignee assumes the burdens imposed. The construction given prevents imposition by an assignor who transfers his stock in a banking corporation whose tendency towards insolvency he reasonably suspects, but of which he may not have any definite information, and thereby relieves himself from the liability imposed by statute for the protection of the creditor who deposits in or loans his money to the bank because of his confidence in the integrity and sound business judgment of its stockholders.

We therefore reverse the decree of August 4, 1911, and remand the cause for further proceedings therein, according to the principles herein announced and otherwise according to equity.

Petition for rehearing denied September 15, 1914.

IOWA SUPREME COURT.

J. J. SNOUFFER, Jr. et al., Appts.,
v.
CITY OF TIPTON et al.

(161 Iowa, 223, 142 N. W. 97.)

Injunction — temporary dissolution.

1. A temporary injunction, granted without notice, to prevent a city from interfering with the removal of a pavement by a contractor who has not been paid for his work, should be dissolved where the improvement has been a subject of contention before the courts for years, and the contractor has not established his right to remove it.

Judgement — res judicata — right to remove paving material.

2. A judgment denying the right of a contractor to recover for a street pavement is not conclusive against the right of the contractor to remove his material from the street.

Public improvement — right to remove material not paid for.

3. A contractor for a street pavement who has not been guilty of fraud or wilful wrong may, upon the refusal of the city to pay for the work because it does not comply with the contract, remove his material if he can do so without serious inconvenience or injury to the municipality or abutting property owners.

Limitation of action — removal of street pavement.

4. The statute of limitations does not run against the right of a street contractor to remove a pavement for which he has not been paid, while he is endeavoring to recover payment for his work.

Laches — removal of street pavement.

5. Street paving contractors cannot be charged with laches in failing to attempt to remove a pavement for which they have not been paid until the termination of litigation in which they are attempting to enforce payment for the work.

Injunction — against interference with removing pavement.

6. Injunction lies to prevent a municipal corporation from interfering with the removal of a pavement by a street contractor who has not been paid for his work because it did not comply with the contract.

(Weaver, Ch. J., dissents.)

(June 7, 1913.)

APPEAL by plaintiffs from a judgment of the District Court for Cedar County, dissolving an injunction restraining defendants from interfering in any way with plaintiffs in removing a pavement. Affirmed in part.

Statement by **Deemer**, J.:

Suit in equity, to enjoin the defendants,

Note. — Right of seller of property to municipal corporation under invalid contract to retake or remove the property upon refusal of payment.

It is pointed out in a note on this subject in 20 L.R.A.(N.S.) 110, to which this note is supplemental, that a municipality cannot acquire property under an invalid contract, and, on this ground, evade payment either of the contract price or the reasonable value of the property, and also retain the property; at least, where the contract is not wholly beyond the power of the corporation to make, or violative of public policy. If the contract is invalid merely because not entered into in accordance with statutory requirements, and the seller has acted in good faith in the matter, he will be allowed to recover the property. Whether he is entitled to recover the property when the contract is entirely beyond the power of the corporation to make, or is violative of public policy, is not entirely clear from the cases. No reason is perceived for making any distinction between a contract invalid merely because of some irregularity, and a contract void because beyond the power of the corporation to make, unless the subject-matter of the contract has been so appropriated that it could not be removed without causing injury to other property of the corporation. In such case the right to remove the property might be denied, but when the contract was irregular merely, compensation would be given.

The general doctrine of permitting the recovery by the seller of property received by a municipality under an invalid contract

the city of Tipton, the county of Cedar, and the officers of each, including the county attorney, city solicitor, the county sheriff, and certain private citizens, from prosecuting, either civilly or criminally, or from interfering in any way with plaintiff, its agents or employees, in removing a certain pavement and gutter and paving and guttering material, laid in the streets of the defendant city by the plaintiffs herein. A temporary writ of injunction issued as prayed, which, upon motion, was afterwards dissolved; and certain of the defendants filed demurrers to the original petition and an amendment thereto, and these demurrers were also sustained, and plaintiffs' petition was dismissed. Plaintiffs appeal.

Messrs. **Redmond & Stewart** and **R. R. Leach** for appellants.

Messrs. **C. O. Boling, J. C. France,** and **D. D. McGillivray,** for appellees:

There is no claim or showing in the pleadings that plaintiff would suffer irreparable injury by allowing the paving to remain intact pending the decision in the main case.

Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co. 76 Iowa, 702, 39 N. W. 691; Security Sav. Bank v. Carroll, 128 Iowa, 230, 103 N. W. 379; Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628; Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511.

The temporary injunction, if it had been permitted to stand, would have transferred the possession of the property from the city to the plaintiffs, without their right thereto, if any they had, having been determined, for which purpose an injunction will not issue.

1 High, Inj. 2d ed. § 355; Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 369, 12 Sup. Ct. Rep. 659; Hall v. Henninger, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6; Doige v. Bruce, 141 Iowa, 210, 119 N. W. 624; Currier v. Jones, 121 Iowa, 163, 96 N. W. 766; 22 Cyc. 817; Chicago G. W. R. Co. v. Iowa C. R. Co. 142 Iowa, 459, 119 N. W. 261; Minneapolis & St. L. R. Co. Chicago, M. & St. P. R. Co. 116 Iowa, 681, 88 N. W. 1082.

To have permitted the temporary injunction to stand, or to have refused to dissolve the same, would have been to grant to plaintiffs the only relief which they sought on a temporary injunction, and would have deprived the defendants of a hearing on the merits of the case, and would have inflicted upon defendants a great and irreparable injury.

Wingert v. Tipton, 134 Iowa, 97, 108 N. W. 1035.

Deemer, J., delivered the opinion of the court:

This seems to be the last case of a series which have come to this court, involving the construction of a curb and gutter and a certain pavement in the city of Tipton. The first of these cases involved the question as to whether or not the improvement was completed according to contract, and the right of the city to issue assessment certificates to the contractor on account thereof. This court held that the work had not been completed according to contract, and that abutting property should not be assessed with the cost thereof. See Wingert v. Tipton, 134 Iowa, 97, 108 N. W. 1035, 111 N. W. 432. It should be remarked parenthetically that plaintiff reported the work as completed some time in October of the year 1903. Failing to secure its assessment certificates, plaintiff brought a suit in which they sought to have a lien established against property abutting upon the streets which had been paved, to the amount of the value of such improvement, and in this they failed. See Snouffer v. Grove, 139

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is applied in SNOUFFER v. TIPTON to street paving, the payment of which was not enforceable because the pavement was not laid in accordance with the contract; and it is held that the contractor may remove such pavement if it can be done without injury to the street. In support of this holding the court refers with approval to the note in 20 L.R.A.(N.S.) 110.

And it has been held that while the sale of articles to a municipality under a contract reserving title in the seller is void, because creating an indebtedness beyond the power of the corporation to contract without the assent of the electorate, and that hence no recovery may be had on the contract, either of the consideration or the property, nevertheless, since the contract is invalid merely, as distinguished from illegal, the seller may recover the property, not under the contract, but according to the principle of primary justice. General L.R.A.1915B.

Electric Co. v. Ft. Deposit, 174 Ala. 179, 56 So. 802.

And the doctrine of that state is asserted in Mobile v. Mobile Electric Supply Co. 6 Ala. App. 131, 60 So. 426, to be that where a municipality receives property under an invalid contract which, however, is not illegal, the seller may have restitution of the property, or he may recover from the corporation on implied contract the reasonable value thereof.

It is within the power of the legislature to provide that where a contract by a municipality for a sewer is invalid, and hence the municipality is unable to pay for it, the title shall remain in the person building it. Jordan v. Logansport, 178 Ind. 629, 99 N. E. 1060, 1061.

For other remedies against municipality in case of an invalid contract, see note to Hagerman v. Hagerman, L.R.A.1915A, 904.

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Iowa, 466, 116 N. W. 1056. They then commenced an action on the *quantum meruit* against the city and others, and, as part of the relief prayed, asked that a lien be established against the improvement for the value thereof, and this action also failed. See Snouffer v. Tipton, 150 Iowa, 73, 129 N. W. 345, Ann. Cas. 1912D, 414. In each and all of these cases plaintiffs asserted that they had performed the work according to contract. In one of them, plaintiffs averred that they had offered to reconstruct the pavement to make it comply with the terms of the contract, but in that it was held that the offer came too late. The result has been that the plaintiffs have received nothing for the improvement constructed by them, and this improvement has remained in the city streets since it was originally constructed; neither the plaintiff nor the city doing anything toward remedying the defects which, this court held, existed therein.

The facts with reference to this prior litigation, the pleadings, decrees, and records of the testimony taken therein, as set out in the petition filed in this case, and, in addition thereto, plaintiff, among other things, alleged:

"Par. 6. That the contract by its terms provided that reconstruction of the work might take place at any time before it was paid for, and provided also that the defendant city might reconstruct and charge back the expense thereof to the plaintiff, and the city council itself, by resolution, after the commencement of said action, deferred further consideration of assessment and payment for said work by the adoption and approval of the following record: 'The matter of the assessment of paving under the Snouffer & Ford contract and the issuance of certificates against abutting property therefor was deferred pending the hearing and decision upon the injunction restraining the city council from assessing said paving or the issuing of certificates, issued in the case of Wingert v. Tipton, by district court of this county, until such time as said injunction is dissolved or finally heard, and then the matter of the assessment of said paving and issuing of certificates shall be taken up at the first regular meeting after the dissolution or disposition of said injunction or on a specially called meeting therefor.' That at the next regular meeting of the city council of the defendant city, held after the announcement of the opinion of the supreme court in the case of Wingert v. Tipton, held on October 1, 1906, and at the following regular meeting thereof in the same year, the plaintiff in this case offered both orally and in writing to reconstruct the pavement up to the strict requirements of the contract, but the city council ignored the offer and did nothing. This plaintiff, under the contract aforesaid, as according to its terms and under the construction thereof theretofore adopted by both this plaintiff and said city, could do nothing toward reconstruction of said pavement without inspection, supervision, direction, and co-operation of the defendant city and its officers. This offer to reconstruct was made after the filing of said opinion, but before any decree of injunction or other remedy had been rendered or entered in the supreme court in said cause, which decree was in fact entered on the 12th day of December, 1906.

"Par. 7. Thereafter, the plaintiff sought to recover on *quantum meruit* from some of the abutting property owners on said portions of Meridian and Fourth strrets, and also sought to recover so much as said pavement was worth from the city, but was defeated in both of said forms of action.

"Par. 8. Thereafter, the plaintiff caused to be served by the sheriff of Cedar county, Iowa, on each member of the city council of the defendant city of Tipton, and mayor thereof," a notice in writing to the effect that, in view of the failure of the city to accept and pay for the pavement, or to allow plaintiff to reconstruct or remedy the defects therein, it would, with as little disturbance to public travel and convenience as possible, and without disturbing the grade or the parking, proceed on the 8th day of May, 1911, to remove the pavement and curbing from the streets. It also averred that "at the first regular meeting of said council in May, 1911, it read the said notice to said council in session, by and through its attorney, R. R. Leech; and the plaintiff, prior to the service of said notice, orally notified the said mayor and said councilmen that it would take up and remove said pavement and curbing, and expeditiously, and not to interfere thereby with travel upon the streets, and would leave said streets upon which paving had been laid by it as aforesaid in as good or better condition than they were before. Snouffer & Ford began the work of putting down said pavement, and that all of the same could be done without material injury to said streets. That in truth and in fact said removal of said paving and curbing can be accomplished without material inconvenience to the use of said streets, and without material injury to the streets themselves, and the removal will leave said streets in substantially as good condition, or better, than they were before the pavement and curbing aforesaid was placed thereon.

"Par. 9. That pursuant to said notices, the plaintiff and its employees commenced

on the 8th day of May, 1911, to remove the said pavement and curbing, but the defendant city, acting through its officers and agents for and on behalf of said city, and some of the property owners, made defendants herein, who owned property abutting on said paved and curbed streets, arrested the men engaged in said removal for a violation of § 4703 of the Code of Iowa; and again, on or about May 23, 1911, when said work of removing was resumed, repeated said arrest, and again threaten to arrest the plaintiff or any of its employees who may attempt to or start upon said removal, and in this manner and ways the defendant city of Tipton and some of the other defendants, the plaintiff cannot specify them, through the officers and agents of said defendant city and the county of Cedar, refuse to permit the plaintiff to remove said paving and curbing as proposed, and have interfered with and threaten to interfere with and prevent said removal of said paving and curbing by the plaintiff and its employees.

"Par. 10. That the defendants and none of them have paid anything for said pavement and curbing. That said pavement and curbing is the property of plaintiff. That the defendants have failed and refused to accept said pavement and curbing as in compliance with the contract aforesaid, and have failed and refused to reconstruct the pavement and curbing to comply with the terms of said contract, and charge the expense thereof to the plaintiff, as said contract provides they might do; and on the proposal and offer of the plaintiff, as under the terms of said contract it might before final payment for said pavement and curbing, to reconstruct said pavement to the full requirements of said contract, and asking the supervision and approval of said reconstruction by the officers of said city, as plaintiff was bound to do, the defendant city and its officers refuse and neglect to do anything or to permit said reconstruction, and all defendants have failed and refused to pay anything for said pavement and curbing, and refuse to permit, and prevent the taking up and removal of the same, and it is their expressed purpose and intention so to do.

"Par. 11. The plaintiff has no plain, speedy, or adequate remedy at law, and will suffer irreparable injury if delayed in the taking up of said pavement and curbing, and will be harassed and annoyed by a multiplicity of suits, criminal and civil, without just or legal ground therefor."

In amendment to the petition plaintiff alleged:

"Par. 12. That the purpose of filing the information and prosecutions against the plaintiff and its employees, as alleged, was to prevent the removal of said paving and curbing by the plaintiff and its employees, and in an action in the Cedar county district court, styled E. Barr v. Brady Piatt, Sheriff, in which the said E. Barr, one of the employees of this plaintiff, had been arrested as alleged in the petition herein, was discharged on the hearing in habeas corpus from said arrest, and therein said prosecutions were held to be without merit, and by reference the judgment, finding, and decree of the court in said cause, filed in the Cedar county district court on or about June 3, 1911, is made a part of this amendment and petition without setting out the same in full herein." And, after pleading all the proceedings in the cases, to which we have referred, they further stated that ". . . by reason of said suits and the records therein, and other ways, the defendants had actual and constructive notice and knowledge of the fact that Snouffer & Ford had constructed said pavement and curbing, that it was unpaid for and unassessed, and that Snouffer & Ford were contending and seeking to recover compensation therefor, and that in that way and manner the said Snouffer & Ford claimed to own the pavement and curbing all since the time it was constructed by Snouffer & Ford to the present time. . . ."

The prayer was not only for an injunction, but also for general equitable relief.

As already indicated, a temporary writ of injunction was issued, which was dissolved upon motion, and some of the defendants demurred to the petition as amended, and the demurrers were sustained. The appeal challenges the correctness of the rulings on the motion to dissolve and also on the demurrer to the petition as amended.

I. We are well satisfied with the ruling on the motion to dissolve the temporary writ. It was granted without notice, and the effect thereof would have been to permit plaintiffs to proceed with the removal of the pavement and curbing without let or hindrance, before a hearing upon the merits of the controversy. By the time the case could reasonably have been brought on for hearing on the merits, the improvement would have been removed and it could not have been replaced; nor could the damages done by the removal thereof, in the event it were found the removal was wrongful, well have been measured by any known scale.

While courts have large powers in the matter of issuing writs and processes, they should exercise great care in granting temporary writs of injunction against the usual and ordinary processes of the law. Ordinarily these writs are to preserve the *status quo* or to save the plaintiff from

great injury which might arise before a trial upon the merits. There is no showing that plaintiff would suffer any damages by allowing the improvement to remain in the condition it was when the petition was filed, and, as a general rule, until it is found that one is entitled to the possession of property, the title to which is in dispute, a temporary writ which will transfer the possession from one to the other, or otherwise interfere with the *status quo*, will not be allowed. Hall v. Henninger, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6; Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co. 116 Iowa, 681, 88 N. W. 1082; Chicago G. W. R. Co. v. Iowa C. R. Co. 142 Iowa, 459, 119 N. W. 261; Wingert v. Tipton, 134 Iowa, 97, 108 N. W. 1035, 111 N. W. 432; Chamberlain v. Brown, 144 Iowa, 601, 123 N. W. 161.

Again, it is unusual for courts of equity to restrain either criminal or quasi criminal proceedings. Home Sav. & T. Co. v. Hicks, 116 Iowa, 114, 89 N. W. 103; Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511. Exceptions are made in cases where plaintiff's property would be placed in jeopardy, taken without due process of law, and perhaps in some others. Vide Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Joseph Schlitz Brewing Co. v. Superior, 117 Wis. 297, 93 N. W. 1120; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. But this case does not fall within any of these exceptions. The improvement has been a subject of contention for nearly ten years, and it has not yet been determined that plaintiffs are the owners of or are entitled to remove the same. In view of the facts appearing of record, the trial court was right in dissolving the temporary writ of injunction.

II. The demurrer to the petition as amended presents much broader and more doubtful propositions. It is the general equitable one, and the only means we have for determining the exact grounds thereof is to consult appellees' brief made for this appeal. The trial court filed no written opinion, but sustained the demurrers generally.

Among other things, defendants say that plaintiffs' right to the pavement and curbing has already been adjudicated against them in some of the cases to which we have referred. But this cannot be so, for in none of the prior cases was there an issue as to who owned the material; nor were any of the parties, unless it be these defendants, contending that the improvement, or the materials of which it was composed, belonged to the plaintiff. In all the prior actions, plaintiffs were seeking to recover either the contract price, or the market value of the improvement on the theory that it had been constructed for the defendants or some of them, under contract, or that it had been accepted and used by them or some of them, and that by reason of that fact they should pay either the contract price, or the market value thereof. They were also insisting that assessments against abutting property should have been made by the city authorities, as provided by statute, and that they had either complied with their contract, or, in one of the cases, that they were ready to do so. Each and all of the defendants interested in this controversy were insisting that they were not liable to pay for the improvement, and it is conceded that plaintiff has not been paid therefor. If defendants have any right thereto, it is not because of an adjudication giving them the title or because they have paid for the same, and there has been no finding in any of the prior cases as to where the title was or now is. So that there is no merit in the claim of former adjudication. Plaintiffs could not, in any of the prior cases brought by them, have injected a claim to ownership of and right to remove the property. Such an issue would not have been germane to the issues then tendered, and plaintiffs are not therefore concluded by reason of the rule that an adjudication settles not only the issues expressly made, but also all other issues necessarily involved, or which might have been introduced into the case. An examination of these prior cases and of the issues presented and determined is the only citation that seems to be needed in support of our conclusion here.

Appellees say, however, that this improvement, which was laid upon a public street, the fee title to which was in the city, was a permanent one, was intended to and did in fact become a part of the street, was so constructed as that it became a part of the realty and also an appurtenance to the abutting lots, and that for these reasons it cannot and should not be removed, even though the removal may be accomplished without injury either to the street or to the property owners. Both the city and the property owners have, at all times, refused to accept and pay for the improvement for the reason that it did not comply with the contract, and they have successfully contended that they cannot be held on *quantum meruit*.

The material going to make up the improvement belonged to plaintiffs, and they have not been paid therefor, so that, were they of the nature of personalty, they would ordinarily be removable. The close question here is whether or not, by reason of

the nature of the improvement, plaintiffs are without remedy; or, in other words, have no right to reclaim their property. Incident to that are some collateral questions, as laches, the statute of limitations, election of remedies, and plaintiffs' rights under the contract. Some of these matters will be discussed as we proceed.

As a general rule, one who furnishes goods or material to another, to be paid for when delivered and accepted by the vendee, may, in the event the vendee refuses to accept or pay for the goods, rescind the contract and recover back his goods; and this rule obtains even where the property is so annexed to land as to become a part thereof upon acceptance, provided the removal may be made without injury to the property to which it has been annexed. Harrison County Ct. v. Smith, 15 B. Mon. 155; Perry County v. Engle, 116 Ky. 594, 76 S. W. 382; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Wrought-Iron Bridge Co. v. Utica (C. C.) 17 Fed. 316; Lee v. Monroe County, 52 C. C. A. 376, 114 Fed. 744; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Fordsville v. Postel, 121 Ky. 67, 123 Am. St. Rep. 184, 88 S. W. 1065.

Appellee relies, however, upon the thought that, as this property became permanently attached to the real estate, it was, although not accepted by the city or by any of the property owners, what the law denominates a fixture, and that it cannot be removed by the plaintiff.

Some confusion has arisen over the meaning of this term "fixture." As a rule, the question only arises where the party making the annexation is claiming the right to remove property which he had annexed to a freehold against a stranger to the original contract. In other words, the doctrine of fixtures applies, as a rule, to chattels annexed to a freehold in actions between vendor and vendee of the real estate, landlord and tenant, mortgagor and mortgagee, the seller of the fixture and a purchaser, mortgagee, or creditor of the freeholder. As a rule, the owner of land and the seller of personal property may make any agreement they choose regarding personal property to be annexed or attached to the land. Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Taft v. Stetson, 117 Mass. 471; Melhop v. Meinhart, 70 Iowa, 685, 28 N. W. 545; Walton v. Wray, 54 Iowa, 531, 6 N. W. 742; Frey-Sheckler Co. v. Iowa Brick Co. 104 Iowa, 494, 73 N. W. 1051. A different question arises when rights of third parties intervene, and the subject of fixtures then becomes of great importance.

Neither the city of Tipton nor the abutting property owners ever accepted the pavement as being in compliance with the contract. On the contrary, they have, at all times, insisted that it was not constructed according to specifications, and they have persistently refused to pay. Of course, neither was obliged to reject the improvement or to offer to return the same. See Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co. 69 Wis. 454, 34 N. W. 509, and cases cited.

Nor could they be held liable on an implied contract or for *quantum meruit*, because of the use of the improvement. Snouffer v. Grove, 139 Iowa, 466, 116 N. W. 1056; Snouffer v. Tipton, 150 Iowa, 73, 129 N. W. 345, Ann. Cas. 1912D, 414.

And, following this rule to its logical conclusion, they could not be held liable for a conversion of the property in the event they sold their real estate without exempting the improvement from the covenants of warranty. Bowe v. Frink, 137 Iowa, 1, 114 N. Y. 543.

While it may be that trover or conversion will not lie for fixtures annexed or for a refusal to permit their removal (Guthrie v. Jones, 108 Mass. 191; Overton v. Williston, 31 Pa. 155; Russell v. Richards, 11 Me. 371, 26 Am. Dec. 532), yet it does not follow that the party making the improvement may not remove it, if he may do so without material damage to the street or to the property owner. These doctrines have been applied to improvements placed upon streets and highways and on city property. Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Bardwell v. Southern Engine & Boiler Works, 130 Ky. 222, 20 L.R.A.(N.S.) 110, 113 S. W. 97; Floyd County v. Owego Bridge Co. 143 Ky. 693, 137 S. W. 237.

In Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040, it is said: "The obligation to do justice rests upon all persons, natural and artificial; and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way." This language is quoted with approval in the Louisiana Case, 102 U. S. 294, 26 L. ed. 153.

In Chapman's Case, the Supreme Court of the United States, adopting the language of the California court, said: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons,

whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. Argenti v. San Francisco, 16 Cal. 282. The legal liability springs from the moral duty to make restitution."

In Floyd County v. Allen, 137 Ky. 575, 27 L.R.A.(N.S.) 1125, 126 S. W. 124, the court of appeals of Kentucky said: "It appears in this case, however, that appellee, when the fiscal court refused to allow his claim, proposed to take the material used by him in the construction of the bridge out of the road and apply it to his individual use, and the fiscal court refused him this privilege, and threatened to have him prosecuted if he did so. This was wrong. While appellee, under the statutes as construed, could not enforce his claim against the county, it had no right to refuse to pay him for it and hold the material furnished by appellee. He should have been permitted to remove the material if he could have done so without leaving the road in a worse condition than he found it when he undertook to repair it; and, as he was refused permission to take it, the county should pay him the reasonable market value of the material at the place it was situated at the time the fiscal court refused to allow him to take it, provided the material could have been removed and left the road in as good condition as when placed in the road. This equitable rule should be and is applied in all cases where a party in good faith, as appellee did in this case, furnish material and erected an improvement on the property of another without authority."

And in Floyd County v. Owego Bridge Co. the same court said: "But we are asked to say that equity demands that we should hold that the county, having received the benefit of appellee's work and acquired the bridges, should be required to pay for them. To apply such a rule would be to disregard entirely all the principles of law applicable to counties or municipal corporations. In every case, then, liability would be imposed upon the county, it matters not how it may have been created, for it could always be said that it received the benefit of the work or material furnished. The rule announced in Millikin v. Gillum, 135 Ky. 280, 122 S. W. 151, does not apply to this case. There the bridge was accepted by the county. Here the county refused to accept the bridge or in any way approve or ratify what the commissioners had done. The mere fact that the county accepted the deeds for all the rights of way and approaches did not constitute an acceptance of the bridges. However, there is a rule which is applicable to this case. As was said by the Supreme Court of the United States, in Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040, the obligation to do justice rests upon all persons, natural and artificial; and, if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. Under this rule, Floyd county will not be permitted to retain the bridges and not pay for them. Appellant having declined to pay for the bridges, appelle will be permitted to remove the bridges and all the material which it furnished in their construction. This is the only remedy the law affords appellee. Bardwell v. Southern Engine & Boiler Works, 130 Ky. 222, 20 L.R.A.(N.S.) 110, 113 S. W. 97; Floyd County v. Allen, 137 Ky. 575, 27 L.R.A. (N.S.) 1125, 136 S. W. 124."

Again, in Bardwell v. Southern Engine & Boiler Works, the same doctrine is announced. To this case, reported in 20 L.R.A.(N.S.), there is a valuable note referring to practically all the questions upon the subject: "In sustaining the right of a builder of a bridge, erected under an invalid contract with the commissioners of a county, to remove the same because of nonpayment of the purchase price, the court, in Lee v. Monroe County, 52 C. C. A. 376, 114 Fed. 744, said: 'While the law affords no remedy, equity, although it will not enforce the contract or create a contract between the parties on account of the acceptance and retention of the property, when the property is in existence, and in the hands of the defendant, will not allow it to retain that to which it has no title whatever, and prevent the owner from reclaiming it. The case presented by the bill shows no moral turpitude in the transaction, and, although the bridge company should have ascertained whether each step provided by the statutes had been properly taken, the law placed upon the defendant the duty of taking those steps. It was necessary for it to comply with every provision of the statutes in that behalf before entering into these contracts, and it represented to the bridge company that it had so complied, and thus misled the bridge company into entering into the agreement, the carrying out of which placed these bridges in the hands of the defendant. The complainant has no remedy at law, and to deny him equitable relief would be to enforce the contract on the part of the bridge company, and to allow the defendant to repudiate its part of the same contract, and thereby appropriate,

without compensation, property to which it had no legal or equitable right."

Indeed, there seems to be no departure from these cases in any of the decisions to which our attention has been called. The nearest approach to it is Bowe v. Frink, 137 Iowa, 1, 114 N. W. 543. But, as already noted, that was an action on *quantum meruit*, and also for conversion, based upon the fact that the defendant had converted a sidewalk, which he had refused to pay for, to his own use; his right to remove the walk was neither involved nor decided. Although language is used which tends to support appellees' claim that plaintiff herein had no right to remove the pavement, this language was used by way of argument, and is not binding as a precedent. But two conditions obtain on this right of removal, and the first is that it may be done without detriment to the property or only such detriment as will arise from the laying of a new pavement and gutter. The demurrer admits that the removal may be done without causing serious inconvenience or injury to any of the defendants, so that we need not, on this appeal, do more than accept the admission. Again, it must appear that plaintiffs were not guilty of fraud, and that failure to complete the contract was not due to any wilful wrong on their part.

True, it has been found and adjudicated that the plaintiff herein did not comply with the terms of its contract, and that the work was never accepted and approved by the city, and no assessments have ever been made on account thereof. But the record also shows that on the 1st day of October, 1906, six days after the decision of the original Wingert Case, plaintiffs served upon the city the following notice: "We, the undersigned, having finished, as we believe, the pavement under our contract with the city of Tipton, Iowa, for the construction of pavement on Fourth street from the east line of Cedar street to the east curb line of East street, on Meredian street from the north line of Fourth street to the south line of Fifth street, in your city aforesaid, do hereby respectfully ask your honorable body to order an assessment and issue certificates in payment for same to us, in city warrants as contract provides; and that same may be expeditiously done, we hereby notify you that we are ready and willing, and do hereby offer, to remedy any defects and reconstruct any portion of said pavement at our own expense, which your honorable body may point out or designate, and to complete all of said work up to the substantial requirement of our said contract. That the matters herein referred to may be speedily accomplished and performed, we request early action hereon, so that we may be advised and act accordingly."

The city did not respond to this notice by pointing out the defects complained of, and in one of the prior cases we held that this was not in time to justify a recovery against the city on the ground of *quantum meruit*, and, in the same case, it was held in effect that plaintiff was estopped from relying upon its offer of performance because of its attitude in former cases. We must, for the purposes of this case, treat the offer as bona fide, for the record would so indicate, and, while not sufficient to justify a recovery against the city because of failure to point out defects, it should be considered in this case as bearing upon the equities in plaintiff's favor. There never has been a finding that plaintiffs were lacking in good faith in making the offer to reconstruct, and, whilst they have been defeated in all their attempts to recover from the city or the property owners, we do not think that the question of fraud or good faith has ever been adjudicated in such a manner as to defeat the present action to establish title to the materials which went into the improvement, and to secure a decree authorizing their removal.

Defendants also rely upon laches and the statute of limitations. As the defendants have not, until recently, been claiming title to the property or disputing plaintiff's right to remove the property, and as it was not finally decided that plaintiff had no remedy against either the city or the property owners until January 13, 1911, we do not think the statute has run against them, or that they have been guilty of such laches as would prevent a recovery. After their first defeat, they offered to reconstruct the improvement, if the city would point out the defects; and, upon failure of the city to do so, they brought suit against the city to recover the contract price; and even before that, although after notice to the city that they would repair and reconstruct, they brought suit against the property owners; both actions on the theory that, as they had offered to do all within their power, they were entitled to some relief. In all these actions they were defeated, and, until thus defeated, they would doubtless have no right to claim the pavement as their own. In any event, they should not, in view of this record, be held guilty of such laches as defeats their action. Whether or not plaintiffs have been acting in good faith and were free from fraud and intentional wrong is a matter which cannot be determined upon this appeal, for the reason that the case was determined upon a demurrer, which admits all facts well pleaded.

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340, relied upon by appellees, is not in point, as an examination will show.

Some of the provisions of the contract between plaintiff and the city are relied upon by the respective parties. One of these provisions was as follows: "(13) If the contractor shall abandon his work under this contract, or if at any time the engineer shall be of the opinion and shall so certify to the committee that the work or any part thereof is unnecessarily delayed, or that the contractor is wilfully violating any of the conditions of the contract, or executing the same in bad faith, then at the option of the committee, the contract may be declared null and void, the security may be forfeited, and the materials delivered at and built into the work shall be the property of the city. The committee may then at its option proceed to complete the work, either by days' work or by contract, and any and all damages and increased costs of the work to the city will be deducted from the funds retained by the city, and from any sum realized from the value of the materials reverting to the city, and the city, through its committee, shall have the right to bring suit against the contractor or any of his sureties for any and all damages and increased costs."

Defendants claim something thereunder in the brief filed for them; but there is no showing that the city ever acted thereunder, or that the property has been forfeited to the municipality as therein provided.

Appellants rely, to some extent, upon these provisions: "(20) All materials furnished and work done will be inspected by the engineer, and if not in accordance with these specifications and the contract, they will be rejected (and shall be immediately removed), and other work done and materials furnished in accordance therewith. If the contractor refuses to remove the work and materials as above, when ordered, then the engineer shall have the right and authority to stop the contractor and his work at once and to supply men and materials to remove and correct the faulty work and materials at the cost and expense of the contractor; such expense to be deducted from any moneys then due, or to become due, to the contractor from the city. . . . The engineer shall have the right to reject at any time previous to the final settlement with the contractor, any work or materials which may be found to be faulty. Inspectors may be appointed by the committee, whose duty it shall be to point out to the contractor any neglect or disregard of these specifications, but the right of final acceptance or condemnation shall not be affected by such inspection. . . . A final estimate of all the work done and materials delivered according to the contract and these specifications will be made immediately after the engineer has satisfied himself by tests, examinations, or otherwise that the work has been and is finally and fully completed in perfect accordance with the contract and specifications, and the contractor will be paid as hereinafter provided."

These are relied upon as indicative of an intention of the parties that the improvement should not become the property of the city, or of the abutting property owners, until paid for, and that any of it found faulty was, by the express terms of the contract, to be removed by the contractor.

On the record before us, we are satisfied that the trial court correctly sustained the motion to dissolve the temporary writ of injunction, but that it was in error in sustaining the demurrer. The case will be remanded, with directions to overrule the demurrer and reinstate the case.

Affirmed in part, and reversed in part.

Weaver, Ch. J., dissents.

Petition for rehearing denied.

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IOWA SUPREME COURT.

O. WHEELER, Appt.,
v.
F. E. McSTAY et al.

(160 Iowa, 745, 141 N. W. 404.)

Contract — exchange of property — notice of abandonment — sufficiency of mailing.

The mailing of the notice within the thirty days is not sufficient, but it must be received by the other contracting party under a contract for exchange of property giving one party thirty days to examine the property of the other party, and providing that at the end of thirty days the contract "is to become binding upon said party unless he sooner notifies first party in writing of his intention to abandon" the same.

(Evans, J., dissents.)

(May 15, 1913.)

Note. — Mailing notice as satisfying requirement of notice by contract.

The present note is confined strictly to the question of substantive law whether the mere mailing of notice satisfies a contractual requirement of notice, in the absence of any provision in the contract or statute as to the manner of giving notice. The note is, therefore, not concerned with the question of evidence as to the presumption of the receipt of notice from the fact

APPEAL by plaintiff from a decree of the District Court for Black Hawk County dismissing the petition in an action to enforce performance of a contract for the conveyance of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Sager, Sweet, & Edwards**, for appellant:

The letter written by McStay to plaintiff was in effect and in fact a revocation of an offer previously made, and must have been actually communicated to him within the time specified in the contract. The mere posting of the letter within the time was not sufficient.

9 Cyc. 297; Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409; 7 Am. & Eng. Enc. Law, 136.

One of the express covenants in the contract was that "at the end of the thirty days" the said contract was to become binding upon defendant in case he failed to give the specified notice in writing before that time, and it is not in the province of the court (even in chancery) to change the contract of the parties; it must be as they made it.

Usher v. Livermore, 2 Iowa, 117.

The mere mailing of the letter on the 24th day of February, 1911,—if it was mailed on that day, which plaintiff denies,—was not notice to him, and the contract actually became binding on defendant F. E. McStay at midnight of the 24th of February, 1911.

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of mailing (on that question, see note to Feder Silberberg Co. v. McNeil, 49 L.R.A. (N.S.) 458). Nor is it concerned with cases that turn upon express provisions in the statute or contract in relation to the manner of giving notice.

So, cases where the requirement of the notice is by statute, and not by contract, are not within its scope.

And the question whether notice actually received through the mail is good notice is also without the scope of the note.

In general.

The courts are almost unaminous in holding that where a contract requires notice, but does not specify the manner in which the notice is to be given, mere mailing of the notice is not sufficient, unless it is received, in the absence of express provisions in the statute or contract to the contrary.

This rule is sustained not only by the cases cited in the present note, but also by numerous cases cited at page 256 of the note to Kavanaugh v. Security Trust & L. Ins. Co. 7 L.R.A.(N.S.) 253, on the question as to necessity that notice of maturity of premiums or assessments through the mail be received, although, as pointed out in that note, the rule in that class of cases is often defeated by express provisions in statute or contract on the subject.

In Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819, it was said: "If a contract requires a notice to be given for the purpose of creating a liability or imposing an obligation, personal notice should be given, unless the parties expressly stipulate that the notice shall be served in some other way, as by mailing it to a designated address. This, we think, is the correct rule, except in those cases where the party to be notified conceals himself or resorts to some trick or artifice to avoid the service of personal notice."

Where there is a provision in a certificate of life insurance requiring insured to pay assessments within thirty days of notice thereof, such notice cannot be considered as given by the mere mailing of notice, but

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insured is entitled to actual notice. Courtney v. United States Masonic Ben. Asso. — Iowa, —, 53 N. W. 238.

And where an insurance contract contains the stipulation that assessments shall be paid within a certain time after the notices of the same have been "issued," the mere mailing of such notices does not constitute notice to the policy holder. Puryear v. Farmers' Mut. Ins. Asso. 137 Ga. 579, 73 S. E. 851.

So, where the by-laws of an insurance company prescribe notice of assessments, without designating the method in which it must be made, it must be actual notice, and mere mailing of such notice to the address of the assured will not be sufficient. Supreme Council, A. L. H. v. Haas, 116 Ill. App. 587.

Thus, in People ex rel. McQuien v. Theatrical Mechanical Asso. 55 Hun, 608, 29 N. Y. S. R. 105, 8 N. Y. Supp. 675, where the by-laws of the insurer provided for notice of assessments before the dropping of members for nonpayment, and there was no proof that, before he had been dropped, insured had received the notice of assessment which had been mailed to him, he was ordered reinstated.

Other cases involving notice of premiums or assessments are cited in the note in 7 L.R.A.(N.S.) 256, already referred to.

In Farnum v. Phœnix Ins. Co. 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869, where a fire insurance policy contained a provision specifying that the policy might "be terminated at any time, at the option of the company, on giving notice to that effect," it is held that a cancelation upon notice sent by mail, and not received, is void.

A provision giving the insurance company the right to cancel the policy "by giving five days' notice" is not complied with by the mailing of a registered letter containing such notice; but actual notice must be given. Potomac Ins. Co. v. Atwood, 118 Ill. App. 349. And this is true although the failure of the insured to get his mail promptly is due to his failure to call for it.

ler, 151 Ill. 254, 37 N. E. 882; Cronin v. Supreme Council, R. L. 199 Ill. 228, 93 Am. St. Rep. 127, 65 N. E. 323; Ferrenbach v. Mutual Reserve Fund Life Asso. 59 C. C. A. 307, 121 Fed. 945; 5 Words & Phrases, 4843–4846; Hari v. Ohio Twp. 62 Kan. 315, 62 Pac. 1010, 9 Am. Neg. Rep. 32; Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; 9 Cyc. 295–297; 29 Cyc. 1119; Chase v. Surry, 88 Me. 468, 34 Atl. 270; Castner v. Farmers' Mut. F. Ins. Co. 50 Mich. 273, 15 N. W. 452.

The negotiations leading up to the execution of the contract and the execution of the same were done in person, and not by correspondence, and defendant F. E. McStay in attempting to notify the plaintiff by mail of his intention not to accept said contract thereby made the United States mail his agent to convey said notice of plaintiff.

Lucas v. Western U. Teleg. Co. 131 Iowa, 669, 6 L.R.A.(N.S.) 1016, 109 N. W. 191.

Messrs. **Reed & Tuthill**, for appellees:

Where a person makes an offer and requires or authorizes the offeree, either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated, and the contract is complete from the moment the letter is mailed or the telegram sent.

9 Cyc. 295; Ferrier v. Storer, 63 Iowa, 484, 50 Am. Rep. 752, 19 N. W. 288; Gipps Brewing Co. v. De France, 91 Iowa, 108, 28 L.R.A. 386, 51 Am. St. Rep. 329, 58 N. W.

So, where the insured received, but did not open, a registered letter containing notice of cancelation of his policy, which he believed to be an advertisement, he was held not to have received notice of such cancelation as prescribed in the policy as prerequisite to actual cancelation. Fritz v. Pennsylvania F. Ins. Co. 85 N. J. L. 171, 50 L.R.A.(N.S.) 35, 88 Atl. 1065.

It is held in Liverpool & L. & G. Ins. Co. v. Harding, 119 C. C. A. 611, 201 Fed. 515, however, that, under a clause in an insurance policy providing for cancelation on ten days' notice, "mailing the notice or a copy of it, and the return premium, in a letter postpaid and addressed to the insured at its postoffice, . . . are sufficient to effect the cancelation, where the insured is a foreign corporation, and all its officers are absent from the state in which its office, its principal place of business, and the property insured, are situated."

In Heusinkveld v. St. Paul F. & M. Ins. Co. 106 Iowa, 229, 76 N. W. 696, it is held that testimony of the agent of the insured that he mailed proof of loss in a stamped and addressed envelop to the insurance company shows a sufficient compliance with the requirement of the policy for notice of loss forthwith. This case seems to be based on the theory, however, that upon such evidence the letter must be presumed to have been received.

Time of mailing communication as time of notice.

Whether the time of notice dates from the time of the mailing of the communication depends, of course, on whether the mere act of mailing constitutes the giving of notice. Cases involving that point, therefore, depend upon the principles discussed under the preceding heading.

In Darlington v. Phœnix Mut. F. Ins. Co. 194 Pa. 650, 45 Atl. 482, where the insured property was injured by fire within ninety days after receipt of notice of assessment, but more than ninety days after the mailing of such notice, the policy was held not to be void under a provision in the policy to the effect that if assessments were not paid within ninety days after notice, the policy would become void.

In holding that the notice of an assessment due upon an insurance policy is notice from the date of receipt, and not from the date of mailing, the court in Protection L. Ins. Co. v. Palmer, 81 Ill. 88, says: "Nor does the mere fact that the written notice is placed in the mail prove that there was notice at the time it was so deposited. All know that, when the person to whom it is addressed resides and is at another place, perhaps hundreds of miles distant, he does not receive, nor can he receive, information of the contents of the notice, simply by its being placed in the postoffice. He is not there to see it, and if he were he could not possess himself of it to learn its contents. The postoffice is used as a convenient agency to carry the notice to the place of residence of the person to be notified. The placing of the notice in the postoffice is no more a service of the notice than placing it in the hands of a messenger to carry it to the person to be served. Had this notice been placed in the hands of such a messenger, we apprehend no one would contend that it would operate as a notice from the time it was placed in his hands, and the postal service was adopted in this case as the messenger, and with like effect as if the messenger had been an individual."

And in a similar case it is said: "Where the laws of the society require that assessments shall be paid within a certain number of days 'from the date of the notice' thereof, the date will be considered to mean the date it is delivered or received, and not the date written in the notice or the day it is mailed." Grand Lodge, I. O. M. A. v. Besterfield, 37 Ill. App. 522.

And in National Mut. Ben. Asso. v. Miller, 85 Ky. 88, 2 S. W. 900, it is said that, where payment of assessments must be made within thirty days of notice thereof, the thirty days begin to run from the time the notice would, in the regular course of the mail, be received, and not from the date of the mailing.

1087; Tuttle v. Iowa State Traveling Men's Asso. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131; Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 13 L. ed. 187; 1 Beach, Contr. 59; Ebersole, Enc. Iowa Law, § 415.

Weaver, Ch. J., delivered the opinion of the court:

The case made by the plaintiff is substantially as follows: Plaintiff being the owner of a quarter section of land in North Dakota and a house and lot in Waverly, Iowa, and the defendant F. E. McStay being the owner of certain other real estate in Waterloo, Iowa, said parties under date of January 25, 1911, at said city of Waterloo, entered into a written agreement for the exchange or mutual transfer of said properties on terms therein named, subject, however, to the following stipulations: "The party of the second part is to have thirty days from date in which to examine the properties described above as being owned by first party, and this contract is not to become binding upon said second party until the expiration of said thirty days unless such time is waived by said party. At the end of thirty days this contract is to become binding upon said party unless he sooner notifies first party, in writing, of his intention to abandon and cancel the same. In case this contract becomes binding upon both parties hereto in the manner above stated, then said parties are each to deliver to the other good and sufficient warranty deeds to their respective properties, and abstracts of title to the same showing clear and merchantable title thereto, except, of course, the mortgages above referred to, which are liens against the North Dakota property conveyed by first party and the Waterloo property conveyed by second party. Deeds and abstracts to be exchanged within a reasonable time after this contract becomes binding on both parties hereto." The making of the alleged agreement is conceded, but the defendant contends that, within the time stipulated, he notified the plaintiff, in writing, of his election to abandon the deal, and that no enforceable contract was ever completed between them. The defendant as a witness testifies that late in the evening of February 24, 1911, at Waterloo, Iowa, he wrote a letter to the plaintiff informing him of his intention to abandon the contract, which letter he addressed to plaintiff at Waverly, Iowa, the place of his residence, and, having duly sealed and stamped the same, deposited it in a street or hotel letter box provided for such purposes by the United States. The letter itself, being produced, appears to bear the date of February 24, 1911, but the postmark stamped thereon is dated February 25, 9 A. M., 1911, while the Waverly postmark shows its receipt at

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In Great Western Mut. Aid Asso. v. Colmar, 7 Colo. App. 275, 43 Pac. 159, it is said that where a mutual insurance policy contains a stipulation that it may be canceled if assessments are not paid "within forty days after receiving due notice," "the computation of time cannot be determined by the date upon the notice, nor from the date of mailing . . . , but must be computed from the date the insured received due notice." So much of this statement as falls within the scope of this note, however, is merely *obiter*.

For other cases involving time of notice of premiums or assessments, see the note to Kavanaugh v. Security Trust & L. Ins. Co. 7 L.R.A.(N.S.) 253, on the necessity that notice of maturity of premiums or assessments sent through the mail be received.

Under a clause in a fire insurance policy giving the insurance company the right of cancelation upon a certain number of days' notice, the time begins to run from the date of the receipt of the notice, and not from the date of mailing. Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321.

Thus, the cancelation of an insurance policy made five days after mailing of notice, but only one day after the receipt of such notice, is improper under a clause in the policy requiring five days' notice before cancelation. American F. Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373.

And a notice mailed on the 15th of the month and received on the 17th that an insurance policy will be canceled on the 20th is not sufficient under a clause in the policy requiring five days' notice before cancelation. German Union F. Ins. Co. v. Fred G. Clarke Co. 116 Md. 622, 39 L.R.A.(N.S.) 829, 82 Atl. 974, Ann. Cas. 1913D, 488.

In Skillings v. Royal Ins. Co. 6 Ont. L. Rep. 401, where insured property was injured by fire between the mailing of a notice of cancelation by the policyholder and the receipt of such notice by the company, it was held that, under the provision in the policy requiring the giving of written notice to effect cancelation, the policy was still in effect when the fire occurred.

Where proofs of loss are mailed on the 60th day after a fire, but not received by the insurance company until after 60 days have expired, such notice is not a compliance with a condition in the policy requiring insured to "render" such proofs within 60 days after loss. Peabody v. Satterlee, 166 N. Y. 174, 52 L.R.A. 956, 59 N. E. 818, reversing 36 App. Div. 426, 55 N. Y. Supp. 363; Huse & L. Ice & Transp. Co. v. Wielar, 86 N. Y. Supp. 24.

But it is held in Manufacturers' & M. Mut. Ins. Co. v. Zeitinger, 168 Ill. 286, 61 Am. St. Rep. 105, 48 N. E. 179, affirming 68 Ill. App. 268, that a clause in a fire insurance policy requiring that insured "within sixty days after the fire . . . shall

that office February 25, 11:30 A. M., 1911. It was actually received by the plaintiff about 3 o'clock P. M. of the 25th. Upon the facts thus briefly stated, the trial court found plaintiff not entitled to the relief asked.

The first and principal question presented by the record is whether the defendant signified his election to abandon the contract in such time and in such manner as to relieve himself from obligation to perform the same. It appears that, while the terms of the exchange were agreed upon and reduced to writing, the defendant was given thirty days in which to examine and satisfy himself as to the Dakota property, with the option on his part to withdraw from the transaction at any time within thirty days from the date of the writing. As expressed by the instrument itself, it was not to be become binding upon the defendant "until the expiration of said thirty days," unless such time was waived by him. It then provides that "at the end of thirty days this contract is to become binding upon said second party unless he sooner notifies the first party in writing of his intention to abandon and cancel the same."

It is the theory of the appellee, and such is said by counsel to have been the view of the trial court, that when properly construed the contract gives to the defendant the full period of thirty days to examine the property, and that a notice of his refusal to proceed farther, given with reasonable promptness after the expiration of that period, would be timely and relieve him from liability. To reach this conclusion, we must ignore the provision by which at the "end of thirty days" the contract was to become binding upon the defendant, "unless he sooner notified first party, in writing, of his intention to abandon the same." But counsel say the writing also provides that the defendant shall have thirty days from date in which to examine the property, and, as this privilege continues up to the last hour of the thirtieth day, it could not have been meant that he must exercise his option or election before that period expired. These provisions, it is argued, are so far repugnant or at least so obscure as to justify the construction by which notice within reasonable time after the expiration of the stated period may be held sufficient. We are disposed to the view, however, that this reading requires too great a strain upon the court's power of construction. The language of the writing is not at all obscure. It provides, in fairly clear terms, for a period of thirty days in which the bargain or agreement shall remain tentative only. Within that time defendant was at liberty to satisfy himself concerning the property he was to receive in the exchange, and, un-

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render a statement to the company," is sufficiently complied with if the statement is mailed to the company within that time. The court bases its decision upon the use of the word "render" in the clause requiring notice.

And in Badger v. Glen Falls Ins. Co. 49 Wis. 389, 5 N. W. 845, where a fire occurred at night and lasted until the next morning, in considering the question as to which day should be considered the date of the fire, and in computing the date upon which the proof of loss ought to have been furnished in accordance with a condition of the policy requiring insured to "render" such proof within thirty days after the loss, the court regards the date upon which the proof was mailed as the date upon which it was rendered to the company.

In Craig v. United States Health & Acci. Ins. Co. 80 S. C. 151, 18 L.R.A.(N.S.) 106, 128 Am. St. Rep. 877, 61 S. E. 423, 15 Ann. Cas. 216, it is held that notice of illness mailed by an insured person within ten days of the beginning of the illness is sufficient to satisfy the requirement of the policy that "written notice of any illness . . . must be given to the company at Saginaw, Michigan, within ten days from date of beginning of illness," regardless of the fact that such notice is not received until after the expiration of ten days after the beginning of the illness.

Where a prospective purchase of skins agrees to give notice within three days of a refusal to buy, notice mailed the third day, and not received by the owner of the skins until the fifth day, is not notice within three days. Field v. Mann, 42 Vt. 61.

And see the similar case of WHEELER v. McSTAY.

Where a person is entitled to notice under a contract of sale before delivering the wool sold, and there is no stipulation as to the method of notice, the date of receiving communication containing notice, and not the date of mailing such communication, will be considered the time of receipt of notice. Burhans v. Corey, 17 Mich. 282.

An acceptance mailed within sixty days after the making of a bid, but not received until after the expiration of sixty days, is not sufficient to make the bidder liable for failure to enter into a contract in fulfilment of such bid, where the bid contains stipulations that it will not be withdrawn for sixty days, and that ten days after notice the bidder will enter into contract. Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819.

And where the deed to a pew provides that it shall be void if assessments for repairs are not paid within six months after personal notice thereof, the six months' period runs from the date of receipt of such notices, and not from the date upon which they are mailed. Brattleboro East Soc. v. Reed, 42 Vt. 76.

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less he "sooner gave notice" of his withdrawal from the deal, the agreement was to become obligatory upon him "at the end of thirty days." In other words, to avoid the binding effect of the contract, he was required to reach his decision and to notify plaintiff thereof in writing, both before the expiration of thirty days. Notice given after that period had elapsed would be unavailing. Such also appears to have been the practical interpretation which defendant appears to have put upon his agreement. He says he had investigated the property and decided not to proceed with the exchange three days before the time expired, but, because of other business engagements, he neglected to give the notice until late in the evening of the last day, when he endeavored to do so in the manner indicated.

But one other debatable proposition remains. Assuming that defendant mailed his letter of withdrawal, as he says he did, by depositing it in a mail box at 10 o'clock in the evening of February 24, 1911, and that such letter reached the hand of plaintiff at Waverly on the afternoon of the following day, does this constitute a notice within the thirty day period? Excluding the day on which the writing bears date, the period of thirty days would expire with the close of February 24, 1911. To hold such notice sufficient it must be on the theory that the deposit of the letter in the mail box is the legal equivalent of placing it in the hands of the plaintiff. That a contract may result from an offer by mail or telegraph and an acceptance communicated by similar means, and that the contract obligation dates from the time of mailing or despatching the acceptance, is of course familiar doctrine. But where parties by agreement condition the acquirement or loss of contract rights upon the giving of a notice within the specified period, not prescribing the manner or means of the delivery thereof, we think there is no rule or precedent to the effect that the mailing of such notice operates as a delivery or service from the time of its deposit in the postoffice. For instance, if A lets his house to B under an agreement by which the latter is to vacate the premises upon a week's written notice from the former, no court would be disposed to hold, in the absence of an express or implied stipulation to that effect, that such notice, sent by mail, would be of any avail to terminate the tenancy until its actual receipt by the lessee.

The cases distinctly in point are not very numerous, but they are sufficient to show that the distinction between cases of this character and those where the question at issue is an acceptance of an offer of purchase or sale has received judicial recognition. See Burhans v. Corey, 17 Mich. 282, in which it is held that a person entitled to notice, where there is no stipulation or consent for its delivery by mail or other specially named means, is not bound by such notice until it is actually received. So also it has been held in Vermont that one who has undertaken to give notice within a specified number of days does not comply with his obligation by depositing notice in the postoffice at the close of the last day of the stipulated period, too late to be forwarded or delivered within the time named. Field v. Mann, 42 Vt. 68. This authority is quite in point upon the facts in the case at bar. A similar holding is to be found in Brattleboro East Soc. v. Reed, 42 Vt. 76. In Northwestern Traveling Men's Asso. v. Schauss, 148 Ill. 304, 35 N. E. 747, the court, speaking with reference to a contract requirement of notice, coupled with a provision that "notice sent to the last address given shall be considered legal notification," says: "As there is no provision in the Constitution to the effect that the service of notice shall date from the time of mailing, it can only date from the time of its actual receipt by the member to whom it is addressed, or at least until sufficient time has elapsed to enable it to reach him in due course of mail." Upon the same subject it is said by the Massachusetts court that "ordinarily when a demand must be made or notice given, merely posting the demand or notice in the mail would not be a communication to the person addressed, and would be ineffectual unless the same should be received." Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855. Any other rule would be unreasonable and productive of frequent unjust results. It follows that we must hold that there was a clear failure on the part of the defendant to give notice of his withdrawal from the contract within the time limited therefor, and that the contract became and is a binding and enforceable obligation.

For the reasons stated, the decree below must be reversed, and the cause remanded for the entry of a decree in accordance with the views here expressed.

Evans, J.:

I am unable to agree with the foregoing opinion. The contract gave defendant "thirty days" to satisfy himself as to the Dakota property. The effect of the majority opinion is to make the time for such purpose a little less than thirty days. The opinion rests its full weight upon the

word "sooner," and makes it of the very essence of the contract.

I think the interpretation of the contract adapted by the trial court is the more reasonable and natural one. The word "sooner" can be adopted thereto without excessive strain upon its meaning. If this be not so, then the contract is repugnant in its provisions at this point. Such repugnance is a sufficient reason why specific performance should be refused and the *status quo* be maintained. I would affirm.

Petition for rehearing denied.

IOWA SUPREME COURT.

DR. J. H. GUTHRIE, Appt.,
v.
JOHN McMURREN.

(— Iowa, —, 149 N. W. 71.)

Highway — title to materials placed in sidewalk.

A property owner who places a sidewalk in the street in front of his property, which is not accepted by the municipality because not on the established grade, does not lose title to the materials so as to justify their appropriation by one who has contracted with the municipality to replace the walk on the proper grade.

(October 21, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Jones County in defendant's favor in an action brought to recover the value of certain material used by plaintiff in the construction of a sidewalk in front of his property which was removed by the municipality because not on the established grade. Reversed.

Statement by **Gaynor, J.**:

This is an action to recover the value of certain material used by the plaintiff in constructing a sidewalk in front of his premises, which was ordered removed by the city council and a new walk placed in its stead. The material from the original walk having been removed, the party who constructed the new walk, under an agreement with the city that he might use such of the old material as he found suitable, not having found any of it suitable, appropriated the same to his own use by selling the same to the defendant, who had full knowledge of all the rights of the parties in the premises. Judgment for the defendant. Plaintiff appeals.

Mr. **John S. Welch**, for appellant:

The material in a street which constitutes a pavement, which is rejected by a city, may be removed by the party who constructed the pavement, if it can be done without injury to the street or the adjoining property.

Snouffer v. Tipton, — Iowa, —, ante,

Note. — Right of owner to material employed in an improvement made by him in the street which the municipality has refused to accept.

GUTHRIE v. McMURREN seems to be a case of first impression where a property owner has sought to recover the value of the materials used in a street improvement which he himself has constructed, when it has been appropriated upon repavement.

Two cases have been included as bearing in a measure upon the question under annotation.

Thus, in Hedge v. Des Moines, 141 Iowa, 4, 119 N. W. 276, it was held that the value of material in an old pavement the cost of which had been assessed against the property holders could not be set off against a special assessment for a new pavement even though the contention of plaintiffs be accepted, that they became the owners of such material when it ceased to be a part of the pavement, the basis of the decision being that a special assessment is a tax, and not liable to counterclaim or set-off.

As to the validity of the claim of ownership, the court refused to express an opinion, it being unnecessary to a decision of the case, but stated that if the plaintiffs were owners of such material, and these were wrongfully taken and converted by any person, they had their cause of action against such person, whether it be the city or an individual. This *dictum*, it will be seen, while not authority, accords with the decision in GUTHRIE v. McMURREN.

And that, upon repavement of the street, an abutting property holder could not compel the city to return to him the value of cobblestones taken from the street, was the decision in Schmitt v. New Orleans, 48 La. Ann. 1440, 21 So. 24, the court stating that when they were placed in the street at the cost of the property holders it was a contribution to the public, and they became the property of the city for the use of the public. It was said further that it would be impractical for the city to dispose of the stones and to return to each property holder his proportion of the value; that the benefit of the value had been received in the contract for repavement, as the stones were to be reduced in size and used in the new pavement.

As to right of abutting owner to prevent construction of sidewalks in front of his property, see note to Hitchcock v. Zink, 13 L.R.A.(N.S.) 1110.

As to right of municipality to prohibit construction of sidewalk by abutting owner in front of his property, see note to Georgetown v. Hambrick, 13 L.R.A.(N.S.) 1113.

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173, 142 N. W. 98; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040.

In employing the power of taxation as to street or sidewalk improvements, the power must be exercised strictly in accordance with the statute.

Coggeshall v. Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; Bucroft v. Council Bluffs, 63 Iowa, 646, 19 N. W. 807.

The purchase of property with notice of the rights of another thereto, and an appropriation thereof, is a conversion.

Allison v. King, 25 Iowa, 56.

Mr. **R. M. Corbit**, for appellee:

Before a party can waive the tort and sue in assumpsit for the conversion of personal property, the tort feasor must have converted the property into money, or the relations existing between the parties must have had its inception in contract.

Grinnell v. Anderson, 122 Mich. 533, 81 N. W. 329; Berkshire Glass Co. v. Wolcott, 2 Allen, 227, 79 Am. Dec. 781; Weiler v. Kershner, 109 Pa. 219; Johnston v. Salisbury, 61 Ill. 316; Tucker v. Jewett, 32 Conn. 563; Emerson v. McNamara, 41 Me. 565; Robertson v. Dunn, 87 N. C. 191; Cushman v. Jewell, 7 Hun, 525; Winchell v. Noyes, 23 Vt. 303; Chamblee v. McKenzie, 31 Ark. 155; Knapp v. Hobbs, 50 N. H. 476; Daniel v. Daniel, 9 B. Mon. 195; Barlow v. Stalworth, 27 Ga. 517; Smith v. Jernigan, 83 Ala. 256, 3 So. 515.

Where a party has property in his possession rightfully, there can be no wrongful conversion until after a demand and refusal.

Beaver v. Swecker, 138 Iowa, 721, 116 N. W. 704.

If the plaintiff has suffered no loss, he can recover no damages. Plaintiff received all the benefit of the value of the old blocks, and therefore was not damaged. By refusing to build the walk himself, he forfeited his right to claim any damage.

3 Sutherland, Damages, § 1127.

A party cannot affirm a contract and retain benefits, and yet maintain an action for damages.

Schmoltz v. Schmoltz, 116 Mich. 692, 75 N. W. 135; Curtis v. Ward, 20 Conn. 204; Bates v. Courtwright, 36 Ill. 518.

One who has received the full benefit of a contract cannot deny its validity or the authority to make it.

Hall Mfg. Co. v. American R. Supply Co. 48 Mich. 331, 12 N. W. 205.

Gaynor, J., delivered the opinion of the court:

In July or August, 1910, the plaintiff built a cement sidewalk on two sides of his property. The walk was constructed of cement and sand blocks 4 feet square. This walk was built by the plaintiff on his own motion. After the walk was built, and about the 3d day of August, the city council of Wyoming, Iowa, passed an ordinance requiring a walk to be laid at the place where plaintiff had previously laid his walk and at a different grade from that on which plaintiff had built. Before, however, attempting the construction of the new walk, the plaintiff was notified to take up and change the walk as laid down by him. This he failed to do. Afterwards the town entered into a contract with one Grindrod to put in the new walk, and in this contract with Grindrod it was provided that the material and blocks, heretofore used by the plaintiff in the construction of the walk, should be taken up, and, so far as suitable, used in the building of the new walk. Grindrod undertook the building of this new walk, and in doing so removed all the blocks placed in the walk previously built by the plaintiff, and found none of them suitable to be relaid. After the blocks were removed they were piled up along the street, and were left there for some time, and while the new walk was being put in. Thereafter Grindrod, assuming to be the owner of these blocks, sold them to defendant, and this action is brought to recover the value of the blocks so claimed to have been converted.

The only provision in the contract under which Grinrod claimed the right to the blocks is the provision to the effect that the old blocks might be used, so far as suitable, in the construction of the new sidewalk. He claims that his bid was made with reference to the use of these old blocks, and he assumes that, because he did not use them, he became entitled to them, and, upon that assumption, sold them to the defendant. It appears that defendant was then a member of the city council, and had full understanding of the facts herein related. It also appears that the plaintiff notified Grindrod not to dispose of the blocks, and also notified McMurren that he claimed to be the owner of the blocks, and that he should not remove them. Upon these facts the cause was tried to a jury. At the conclusion of all the testimony, the court instructed the jury to return a verdict for the defendant.

It appears that the sidewalk, laid by the plaintiff, was not at grade, and for that reason was rejected by the town, and its removal ordered. It appears that the plaintiff failed to remove it; that thereupon the defendant employed one Grindrod to remove it, and the blocks were accordingly removed, the sidewalk reduced to grade, and a new

walk built, in accordance with the ordinance of the town, at the place where the old walk was laid. The question is, Did the town become the owner of these blocks immediately upon their being placed by the plaintiff in the position on the street to be used as a public sidewalk? In answering this question it must be borne in mind that these blocks were the property of the plaintiff at the time he laid them upon the street for use by the general public; that he placed them there in good faith, but not on the grade fixed by the ordinance of the town; that, immediately upon the town's discovering the walk in its then position, it repudiated the act of the plaintiff in placing these blocks there, and ordered him to remove them. If he had removed them in obedience to the order of the city, is there any question that the blocks would remain his property? The city, acting for the public, had refused to accept the walk, and had repudiated his right to build the walk as then built and maintained by him. The city paid nothing for the walk, contributed nothing to the building of the walk, assumed no jurisdiction over the walk, repudiated it, and ordered it removed at once. They were unquestionably, then, the property of the plaintiff, and continued to be the property of the plaintiff, and no contract or agreement between the city and Grindrod could affect that ownership. Nor did the city attempt to convey to Grindrod any property in these blocks. Grindrod was employed to lay a new walk, permission given only to use such of the old blocks as he deemed suitable in building the new walk. This gave him no right, under any construction of the agreement, to appropriate the blocks to his individual use. It gave him no property in the blocks, and he conveyed none to the defendant. Defendant had full knowledge of all the rights of the parties in this walk at the time he made his purchase.

It is unquestionably the law that one who places even a fixture on the property of another, under mistake as to his right to do so, where he acts in good faith, may, upon discovering his mistake, reclaim his property where it can be done without injury to the property of the other. See Snouffer v. Tipton, — Iowa, —, ante, 173, 142 N. W. 97, and cases therein cited.

We think the court erred in directing a verdict for the defendant, and the case is therefore reversed.

Ladd, Ch. J., and **Deemer** and **Withrow**, JJ., concur.

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MISSISSIPPI SUPREME COURT.

STATE OF MISSISSIPPI, Appt.,
v.
E. O. POWE.

(— Miss. —, 66 So. 207.)

Kidnapping — by father — liability.

A father is not guilty of kidnapping his child by enticing it from the custody of its mother, to which it had been committed under agreement between the parties as part consideration for the dismissal of a divorce proceeding.

(October 12, 1914.)

APPEAL by the State from a judgment of the Circuit Court for Wayne County sustaining a demurrer to an indictment charging defendant with kidnapping his child. Affirmed.

The facts are stated in the opinion.

Mr. **Luther K. Saul**, for the State:

The fact that a marriage separation contract contains a provision for the care and custody of the children begotten as the fruits of the marriage does not make it contrary to public policy and void, but, to the contrary, it is legal and binding.

Luttmer v. Luttmer, 143 Ky. 844, 137 S. W. 777; State ex rel. Giroux v. Giroux, 19 Mont. 149, 47 Pac. 798.

One can be convicted for the abduction of his own child if he has parted with the legal right to its custody.

Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515; State v. Angel, 42 Kan. 216, 21 Pac. 1075; Biggs v. State, 13 Wyo. 94, 77 Pac. 901.

Where it is charged that the child was taken from its father or mother, it is not necessary to aver that they had the legal charge of its person, for the reason that when such relationship is stated, the law attaches the right of custody.

1 Standard Enc. Proc. pp. 81, 82, Ex parte Estrado, 88 Cal. 316, 26 Pac. 209.

Note. — Taking of child by or at instance of one parent from custody of the other parent as kidnapping.

The early cases upon the question here involved are considered in the note to State v. Brendenberg, 32 L.R.A.(N.S.) 845.

As to civil action for abduction of child, see note to Howell v. Howell, 45 L.R.A. (N.S.) 867.

It has been held in a subsequent case that a statute providing that "kidnapping is the forcible abduction, stealing away, or secreting of a man, woman, or child," and containing nothing from which it might be inferred that a parent who has lost the custody of his child by a formal court decree should be exempt from its provisions, applies to a father who has lost the custody

Mr. **Frank Johnston**, Assistant Attorney General, also for the State.

Reed, J., delivered the opinion of the court:

E. O. Powe was charged with kidnapping his child, a girl four years old. It is alleged in the indictment that he led, took, carried, and enticed away the child from her mother, who was then legally entitled to her custody and possession. Omitting the formal parts, the indictment reads:

"That E. O. Powe, on the 12th day of December, A. D. 1911, in the county aforesaid, did enter into a certain contract with one Sudie W. Powe, who was then and there his wife, whereby, for and in consideration of the dismissal by the said Sudie W. Powe of a certain suit in the chancery court of Wayne county, Mississippi, wherein the said Sudie W. Powe was complainant and the said E. O. Powe was defendant, which was then and there pending, and in which the said Sudie W. Powe was seeking the recovery of alimony and support against her said husband, the said E. O. Powe, and also the recovery of and a decree giving her the care and custody of the two children of her and the said E. O. Powe, to wit, Wilda, aged four years, and Mildred, two years of age, he, the said E. O. Powe, did covenant and agree to convey to the said Sudie W. Powe certain lands in full discharge of all claims for support as prayed for by her, and did agree that the said Sudie W. Powe should have full and complete control, custody, and possession of the two said children. The said Sudie W. Powe did then and there dismiss her said suit as she agreed, and did have the custody and possession of the two said children until the 27th day of April, 1912. And the jury aforesaid, upon their oath aforesaid, do further present that on the 27th day of April, 1912, having surrendered all right to the custody and possession of the said children aforesaid, did unlawfully and feloniously lead, take, carry away, and entice away, wilfully and maliciously, the said child Wilda, under fourteen years of age, to wit, of the age of four years, with the unlawful, wilful, malicious, and felonious intent then and there to detain and conceal said child from its said mother, to wit, Sudie W. Powe, who was then and there legally entitled to the custody and possession of the said child, Wilda, as aforesaid, contrary to § 1079 of the Code of Mississippi, 1906."

A demurrer to this indictment was sustained. Several grounds were assigned in the demurrer; but it is only necessary for

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of his child by a decree awarding the custody to the mother, and which merely gave the father permission to visit the child and take it to places within a limited distance; and that therefore where the father falsely pretended to act under the decree, and obtained possession of the child, and immediately left the state with it, he was guilty of kidnapping. Lee v. People, 53 Colo. 507, 127 Pac. 1023. The court said: "We find no case, under a statute like ours, holding that the parenthood of a defendant is a defense, for such wrongful taking, where a decree of court has withdrawn from such parent his natural and legal right to the custody of the child. It is for the protection of children, and for the benefit of society, that courts take jurisdiction of the status of parent and child, and when that jurisdiction attaches and a valid and binding decree has been entered, which devests either parent of the custody and gives it to the other, then such child is as fully protected from being stolen and carried away by the parent, thus devested of its custody, as if done by any other person. The necessity for a statute of this sort, applicable to just such cases as the one before us, is clearly apparent. But for it, or a similar one, there would be no adequate protection for a parent who had been awarded exclusive custody of a child, against its unlawful seizure and removal to another state by the one ousted of its custody and control. It is idle to say that resort should be had to proceedings in contempt. Where, as in this case, the offender has fled the state with the child, it is impossible to reach him except by criminal process. Contempt proceedings would be utterly futile."

A decree of an Indiana court granting a divorce and awarding custody of a child to its mother was held valid and effective in Rex v. Hamilton, 22 Ont. L. Rep. 484, 20 Ann. Cas. 868, there being no fraud or collusion shown, although the cause upon which it was founded would not have justified a divorce in an English court, and the father was accordingly held liable under § 316 of the Criminal Code for unlawfully taking and enticing away the child with intent to deprive the mother of its possession.

But neither a father nor his assistant is guilty of kidnapping where they obtain peaceable possession of the former's child from its mother, who has begun divorce proceedings against the father but has procured no order affecting the custody of the child, although they obtained possession by falsely representing that the assistant was an officer having an order of court for the delivery of the child to him; since under such circumstances the father was equally entitled to the custody of the child, and committed no crime in taking peaceable possession of it, and his assistant was merely aiding him in doing a lawful act in a lawful way. State v. Dewey, 155 Iowa, 469, 40 L.R.A.(N.S.) 478, 136 N. W. 533.

J. T. W.

us in this opinion to notice the ground that the indictment charges no offense under the law. It will be seen that the custody of the child was given to the mother through an agreement between the parents. There was no award of the custody by decree of court.

The question for decision here is whether the father can be held criminally liable on the charge of kidnapping his own child, where its custody was in the mother solely by virtue of an agreement with the father. It was decided in the case of State v. Farrar, 41 N. H. 53, that a father could be held on the charge of kidnapping his own child where he took it from the lawful custody of its mother; but in that case the custody of the child was assigned to the mother by decree of court, and it was said that the father, by force of the decree, had lost his right over the child. In the case of Re Peck, 66 Kan. 693, 72 Pac. 265, it was held that both parents were guilty of kidnapping their children, where they were taken from their grandmother, to whom their custody had been awarded by the court in a habeas corpus proceeding. The grandmother was held the person having lawful charge of the children, even against the parents.

In both of the cases above referred to the children were in the custody of persons by decree of court. We find no decision in this state dealing with the question presented in those cases, and we have been unable to find any case reported from any court discussing the precise question now before us. In a habeas corpus proceeding to determine the question as to the custody of the children between the parents, undoubtedly the agreement set forth in the indictment would be given its due weight, and might be considered by the court as sufficient to justify the award of custody in accordance with its terms. Such proceeding would be a civil controversy between the contending parents. We are now dealing with the criminal liability of the father for kidnapping his child. Facts may be deemed sufficient to support a finding in a civil suit for the custody of a child, and yet be wholly insufficient to warrant the conviction of a father on the criminal charge of kidnapping.

This is a prosecution by the state for a violation of a statute. The duty to support and care for his child is imposed upon the father by law. He is answerable to the state for the abandonment and failure to support his child. He cannot, by agreement with the mother of the child, relieve himself of his responsibility to the state in the performance of his duty. While this responsibility continues, certainly there goes along with it some right over the child. It should not be said that, by reason of the agreement in this case, there has been such complete annulment and dissolution of the sacred relation of parent and child as to render the father guilty of kidnapping when he takes into possession his own child. The welfare and integrity of family organization, of which the father should be the head, forbids such holding. We must also bear in mind, while considering this question, that agreements for separation between married couples are not looked upon with favor.

Admitting that we will in this state follow the decisions of the courts of New Hampshire and Kansas herein referred to, surely we cannot give the same force to the agreement between the parents as to a solemn decree of a court of competent jurisdiction taking the custody of the child from one parent and awarding it to another. Under the facts stated in the indictment, appellee should not be held for the crime of kidnapping. The demurrer was properly sustained.

Affirmed.

MISSOURI SUPREME COURT.
(In Banc.)

E. B. HELLER et al., Doing Business as Goodwill Clothing Company, Appts.,
v.
JOHN LUTZ, Doing Business as John Lutz & Company, Respt.

(254 Mo. 704, 164 S. W. 123.)

Assignment — wages — prohibition — constitutionality.

No constitutional right of liberty or property is infringed by a statute forbidding the assignment of wages to be earned.

(December 24, 1913.)

APPEAL by plaintiffs from a judgment of the Circuit Court of the City of St. Louis in defendant's favor in a suit to recover wages due by defendant to Patrick Hannigan and assigned by him to plaintiffs in payment of a debt. Affirmed.

The facts are stated in the opinion.

Messrs. **Collins, Barker, & Britton** and **William F. Fahey**, for appellants:

The right to assign wages, earned and unearned out of existing employment, is a right and privilege inherent to citizenship.

Note. — For constitutionality of statutes restricting the right to assign salary or wages, see notes to Massie v. Cessna, 28 L.R.A.(N.S.) 1108, and Mutual Loan Co. v. Martell, 43 L.R.A.(N.S.) 746.

Such right is a property right within the constitutional meaning of that term.

Citizens' Loan Asso. v. Boston & M. R. Co. 196 Mass. 528, 14 L.R.A.(N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Massie v. Cessna, 239 Ill. 352, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152; Rodijkeit v. Andrews, 5 L.R.A.(N.S.) 564, note; Bell v. Mulholland, 90 Mo. App. 612; State v. Julow, 129 Mo. 173, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119.

The action in question is invalid, being in violation of the 14th Amendment of the Constitution of the United States and § 30 of article 2 of the Constitution of Missouri (Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; State v. Fire Creek Coal & Coke Co 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Cooley, Const. Lim. 6th ed. 430–434); and in violation of § 4 of article 2 of the Constitution of Missouri. (State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Cooley, Const. Lim. 6th ed. 430–434; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Massie v. Cessna, 239 Ill. 352, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152).

The right to contract by assignment with reference to the gains of one's own industry may be regulated or restricted under the police power, but such right cannot, in its entirety, be taken from the citizen under the guise of the police power.

State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 Ann. Cas. 119; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A. (N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507; State v. Missouri P. R. Co. 242 Mo. 356, 147 S. W. 118.

Mr. **Carl Otto** also for appellants.

Mr. **George Eigel**, for respondent:

The act in question is valid, and not in violation of the 14th Amendment of the Constitution of the United States and § 30 of article 2 of the Constitution of Missouri.

International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521; Chicago & E. R. Co. v. Ebersole, — Ind. —, 87 N. E. 1090; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; Knoxville Iron Co. v. Harbison, 183 U. S. 14, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265.

Neither is it in violation of § 4 of article 2 of the Constitution of Missouri.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521; Chicago & E. R. Co. v. Ebersole, — Ind. —, 87 N. E. 1090; Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; Knoxville Iron Co. v. Harbison, 183 U. S. 14, 46 L. ed. 56, 22 Sup. Ct. Rep. 1; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Shaffer v. Union Min. Co. 55 Md. 74, 15 Mor. Min. Rep. 59.

Walker, J., delivered the opinion of the court:

Appellants and respondent are separately engaged in the mercantile business in the city of St. Louis, under the firm name set forth in the title. On the 16th day of August, 1911, one Patrick Hannigan was in the employ of the respondent. Prior thereto he became indebted to appellants, and, to secure the payment of such indebtedness on the date above mentioned, gave appellants an assignment of all money or wages due or to become due to him from respondent within a period of six months from the date of the execution of said assignment. No money or wages were due to him from respondent at said date. Appellants, upon the execution of said assignment, notified respondent of same, who five days thereafter returned the notice, stating, in effect, in his reply that he would ignore same as in violation of the statute prohibiting the assignment of unearned wages, and that he theretofore had paid Hannigan the wages due him. No further communication was had between the appellants and respondent in regard to this matter. On the 23d day of September, 1911, appellants brought suit against respondent to recover the amount of Hannigan's debt to them. The case was

tried upon an agreed statement of facts, the material portions of which we have set forth above. The trial court rendered judgment for the defendant. Plaintiffs filed a motion for a new trial, in which, among other averments purely formal, they allege that "the court erred in finding, as a matter of law, that the act of the general assembly of Missouri 1911 (Laws 1911, p. 143), relating to contracts and promises, and providing that all assignments of wages, salaries, and earnings not earned at the time the assignment is made, shall be null and void, is not in violation of the 14th Amendment of the Constitution of the United States, and invalid because thereof. The court erred in finding, as a matter of law, that said act is not in violation of § 4 of article 2 of the Constitution of Missouri, and is not invalid for that reason. The court erred in finding, as a matter of law, that said act is not in violation of § 30 of article 2 of the Constitution of Missouri, and is not invalid for that reason. The court erred in finding, as a matter of law, that said act is not in violation of § 28, art. 4, of the Constitution of Missouri, and is not invalid for that reason." Upon the overruling of this motion, an appeal was applied for and granted to this court.

Omitting the address and signature, the notice given by the appellants to respondent is as follows: "You are hereby notified that Patrick Hannigan did sell and assign, transfer, and set over to the undersigned, all money and wages due or to become due from you to the said Patrick Hannigan in accordance with the terms of a certain written, printed instrument, which will be shown you on application. There is now due us from the said Patrick Hannigan the sum of twenty-two dollars and fifty cents ($22.50). You will therefore either pay all of the said wages to the undersigned, or retain out of any money or funds now due, or to become due, from you to the said Patrick Hannigan, sufficient of said money or funds, to satisfy the amount to be paid under the terms of said written, printed instrument, and you will pay such over to the undersigned. St. Louis, Mo., August 16, 1911.

The statute is in the following language: "All assignments of wages, salaries, or earnings must be in writing, with the correct date of the assignment and the amount assigned and the name or names of the party or parties owing the wages, salaries, and earnings so assigned; and all assignments of wages, salaries, and earnings, not earned at the time the assignment is made, shall be null and void." Approved April 7, 1911, Laws 1911, p. 143.

I. Notice of assignment. We question the sufficiency of the notice of the assignment. The statute is mandatory in its terms, and its express purpose is to limit the right of creditors and the power of debtors in the assignment of wages, salaries, and earnings. The notice, therefore, should have been drawn in strict conformity with the statute, in that it should have stated the date of the assignment and have set forth its purport. This is true regardless of the validity of the latter part of the statute of which appellants complain, and which is not involved in the question of notice. The appellants were seeking to bind respondent for the debt of another. Their notice should have informed him of all the facts necessary to have enabled him to determine the extent to which he was sought to be bound, instead of referring him to a "certain written, printed instrument," which appellants with ironic generosity proposed would be "shown him on application."

II. Is the assignment a property right? The construction of the statute, in its relation to the constitutional provisions which it is claimed to violate, will suffice, under appellants' contention, to dispose of this case; but we are inclined to doubt the correctness of the conclusion reached in cases wherein it is held that such assignments are valid as constituting property rights. This we regard as a fallacy. It may be admitted that the term "property" includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible. 32 Cyc. p. 648, and cases. That no corporeal, tangible, or visible property right exists in cases involving the assignment of unearned wages, is beyond question. These classes, therefore, may be dismissed from the discussion, leaving for our consideration their antithesis, *viz.*, incorporeal, intangible, and invisible rights, to determine whether the term "property rights" may, with propriety, be employed as a basis for the right to assign unearned wages. An incorporeal property right is one issuing out of a thing corporate, real or personal, or concerning, or annexed to, or exercisable within, the same. 2 Bl. Com. 20; 32 Cyc. 659; Whitlock v. Greacen, 48 N. J. Eq. 359, 360, 21 Atl. 944.

The enumeration of these classes of rights, recognized by the ancient English law, is not applicable here on account of the nonexistence in this country of several of same. We still have, however, annuities (3 Kent, Com. 460), rights of common (Smith v. Floyd, 18 Barb. 522, 527; Western University v. Robinson, 12 Serg. & R. 29, 32; 8 Cyc. 346), easements (Mackey v. Harmon, 34 Minn. 168, 172, 24 N. W. 702;

McMillian v. Lauer [Sup.] 24 N. Y. Supp. 951, 953; Clawson v. Wallace, 16 Utah, 300, 307, 52 Pac. 9), franchises of corporations (Gibbs v. Drew, 16 Fla. 147, 149, 26 Am. Rep. 700; 19 Cyc. 1451), rents (Brown v. Brown, 33 N. J. Eq. 650, 659; Van Wicklen v. Paulson, 14 Barb. 654, 655; 3 Kent Com. 460), and patent rights (Com. v. Petty, 96 Ky. 452, 29 L.R.A. 786, 29 S. W. 291).

Illustrations of intangible or invisible rights in property are to be found in copyrights, trade marks or names, good will, the right to the publication of news, market reports, and the products of one's brain independent of copyright. National Teleg. News Co. v. Western U. Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Simmons Hardware Co. v. Waibel, 1 S. D. 488, 11 L.R.A. 267, 36 Am. St. Rep. 755, 47 N. W. 814; De Lauder v. Baltimore County, 94 Md. 1, 6, 50 Atl. 427. These, after all, are but incorporeal rights of property, and could well be classed as such. There may be, and there doubtless, are others, because the ever-expanding horizon of human effort, mental and physical, is continually creating new relations out of which, from necessity, arise new rights. Analysis will disclose that all of these possess the essential characteristics of rights incorporeal, in that they issue out of something corporate, either real or personal, and are inheritable, and are not tangible or visible. 2 Bl. Com. 20; Cyclopedic L. Dict.; Walker v. Daly, 80 Wis. 222, 227, 49 N. W. 812; Slingerland v. International Contracting Co. 43 App. Div. 215, 230, 60 N. Y. Supp. 12, affirmed in 169 N. Y. 60, 56 L.R.A. 494, 61 N. E. 995. An examination of the alleged right to assign unearned wages should, if it be a property right, disclose similar essentials to those found in the other unquestioned rights of this character, to entitle it to a like classification. That it is intangible and invisible will be admitted, but it issues out of nothing corporate, it is not inheritable, and it may be extinguished at the will of the assignor or his employer, and the creditor or assignee is without power to prevent same, and has no right of redress. To illustrate: The right being based upon nothing but the unsubstantial promise of the assignor, because the wages purporting to have been assigned have not even been conceived, much less quickened, in the womb of the future, the assignor determines, upon making the assignment, to quit the service, or the employer terminates same, and the creditor, having obtained nothing by the assignment, losses nothing by its extinguishment, except an airy possibility of the payment of his debt from this source. From which it follows that, if this right ex-

ists, it constitutes a marked exception to the maxim that there is no right without a remedy. The right at best is but an expectancy, and, as we will later show, will not, in the absence of contract, sustain an action at law even if the right to assign be conceded.

We have not been unmindful of the rulings of the courts in cases of the type of Citizens' Loan Asso. v. Boston & M. R. Co. 196 Mass. 528, 14 L.R.A.(N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 Ann. Cas. 365, in which the implication is evident that an assignment of future earnings was held to be a property right, but in which it is expressly stated that the transaction was based upon an existing contract of service; or of Massie v. Cessna, 239 Ill. 352, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152, which held a statute in derogation of the right to assign future earnings unconstitutional, such statute being wholly unlike the one in question here, and the opinion assuming that the assignment created a property right, which we deny; or of Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395, which held an act unconstitutional which prohibited a certain specified class of corporations from keeping truck stores; or of Rodijkeit v. Andrews, 74 Ohio St. 104, 5 L.R.A.(N.S.) 564, 77 N. E. 747, 6 Ann. Cas. 761, which was a ruling in regard to an assignment under a contract of existing employment. These cases are not in our opinion, sufficiently parallel, in their facts or the statutes construed, to render them persuasive precedents in the case under consideration.

III. Does assignment create a chose in action? If it is not a property right, it has, in our opinion, no such actual or potential existence as will suffice to entitle it to be classed as a chose in action; but admitting, as is held in Close v. Independent Gravel Co. 156 Mo. App. loc. cit. 416, 138 S. W. 81, and cases cited, that it may be so classified, is it, in the instant case, a present right or interest, or one to take effect in the future? To render it a present interest, sufficient to sustain an action at law, such as is brought in the case at bar, it must, among other things, be based upon a contract of employment between the assignor and the employer at the time of the assignment. One cannot assign wages when there is no contract of service. Bell v. Mulholland, 90 Mo. App. 612; Jones v. Richardson, 10 Met. 481; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357; Eagan v. Luby, 133 Mass. 543. No evidence of such a contract appears in the agreed statement of facts, the only reference thereto being that the assignor "was employed by defendant at the time of the assignment."

A present employment will not justify the presumption that it is of any definite duration, or that there is a contract in regard to same. The services, for aught disclosed in the evidence, may have been at will, from day to day, or for a longer definite period; but courts cannot predicate their conclusions upon conjectures to establish agreements upon which to base rights of action. There are cases holding that no definite period of employment need be shown to sustain the validity of an assignment of future wages, but the better reasoned authorities are to the contrary.

Regardless, therefore, of whether the statute in derogation of the right to assign unearned wages is valid, an action at law is not authorized in the present case under the rule announced in some cases that an assignment creates a chose in action, for the reasons stated.

As to whether a suit in equity would lie against respondent, as was held in Bell v. Mulholland, 90 Mo. App. 612, Hax v. Acme Cement Plaster Co. 82 Mo. App. 447, and Price v. Morning Star Min. Co. 83 Mo. App. 470, if the statute is invalid, is not pertinent under the facts in this case.

IV. Constitutionality of statute. The part of the statute contended by the appellants to be invalid is as follows: "All assignments of wages, salaries, and earnings not earned at the time the assignment is made, shall be null and void." The presumptions are always in favor of the constitutionality of a statute; and it will not be declared invalid unless its contravention of the Constitution is so manifest as to leave no room for reasonable doubt.

As the forms of industrial activity increase, the relations of those engaged therein, towards each other, undergo changes which necessitate regulatory legislation, not only for the welfare of those immediately interested, but for the general public. Such legislation is authorized under that continually expanding power recognized as an incident of sovereignty, called the police power. In the absence of this power of the state, as Woodson, J., has aptly said in State ex rel. Hadley v. Standard Oil Co. 218 Mo. 1, 379, 116 S. W. 902, 1019, a "citizen would have the absolute authority to contact and the power to hold property as he might deem proper; but under that power the state may enact valid laws requiring each citizen to so conduct himself and so use his property as not to unnecessarily injure others."

The exercise of the police power, as evidenced by various phases of legislation affecting individual liberty or personal rights, has met with judicial approval in many cases; the rule to be deduced therefrom being that in civilized society there is no such thing as an unrestrained power on the part of the individual to contract; this right being subject to wise and beneficial police regulations, and, when an act which may prove detrimental to the public welfare is prohibited by a general statute, it will be upheld unless it is clearly in violation of some provisions of the organic law. Grimes v. Eddy, 126 Mo. 186, 26 L.R.A. 638, 47 Am. St. Rep. 653, 28 S. W. 756; State ex rel. Crow v. Firemen's Fund Ins. Co. 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595; Karnes v. American F. Ins. Co. 144 Mo. 413, 46 S. W. 166; Morrison v. Morey, 146 Mo. 543, 48 S. W. 629. And in State v. Davis, 194 Mo. 500, 4 L.R.A.(N.S.) 1023, 92 S. W. 488, 5 Ann. Cas. 1000, it is held that "the state," in the exercise of its police power, "has a right to determine upon what conditions and under what circumstances its citizens should be entitled to pursue any vocation."

Instances of the exercise of this power held not to be in violation of the Constitution are found in the following statutes: Requiring all corporations to pay wages of their employees semimonthly (Laws 1911, p. 150; State v. Missouri P. R. Co. 242 Mo. 339, 147 S. W. 118); abolishing the fellow-servant rule as applying to mining corporations (Whittaker Rev. Stat. 1909, §§ 5440–5444; Hawkins v. Smith, 242 Mo. 688, 147 S. W. 1042); declaring invalid contracts made by employees with corporations limiting the liability of the latter in the event of injury to the employee (§ 5437, Rev. Stat. 1909; Shohoney v. Quincy, O. & K. C. R. Co. 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143); creating a lien in favor of subcontractors and others, notwithstanding prior payment of the full contract price by the owner of the property to the principal contractor, and further providing that such liens are not limited to the amount agreed to be paid to the owner by his contractors (§§ 8212, 8233, Rev. Stat. 1909; Henry & C. Co. v. Evans, 97 Mo. 47, 3 L.R.A. 332, 10 S. W. 868).

These statutes illustrate the extent to which the police power has been invoked here; and, while we have confined our illustrations to this jurisdiction, the statutes of other states will disclose the exercise of a like, if not in some instances a greater, latitude in the enactment of laws on kindred subjects which have met with judicial approval. The statute in the instant case does not attempt to regulate labor or to interfere with contracts in regard to any present, tangible property right or interest, but does provide that those who labor shall not assign their future earnings, which are not property rights, have no potential

existence, and may be brought into being, or the possibility of their creation prevented, by the whim or caprice of the workman. The statute's denial, therefore, of the right of the workman to assign or transfer this illusory and unsubstantial nothing, is the basis of the appellants' complaint that liberty and property and the gains of industry are, by this enactment, taken without due process of law.

This contention so seriously made must, of course, be treated with that conventional gravity befitting judicial utterances. Seriously considered, therefore, resort must be had to fancy, rather than fact or reason, to determine in what manner individual liberty is limited, or the right to contract impaired, by the statute in question. We may be answered that there are precedents to sustain the contention; to which we reply that "judgment should be according to the law, and not according to the precedents;" and if we may be permitted to paraphrase a couplet of the Proverbial Philosopher: "To follow precedents and wink is easier far than 'tis to think." We may be precluded from inquiring into the motives of the legislature to determine the validity of the statute but this does not deter us from discussing its purpose as disclosed by its subject and terms.

Labor and its sequence, wages, is the life of the workman, and upon the workman must that intangible thing called the "state" rely for its existence and perpetuity. That the providence of the workman is one of the prime factors in promoting the perpetuity of the state there can be no question. A statute, therefore, which tends to increase this providence, is nothing more than one in the interest of the public welfare, and is therefore not an improper exercise of the police power. This is a truth so evident that it needs no precedent to prop it up. If one is required, it is to be found in the case of International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 L.R.A. 599, 98 Am. St. Rep. 334, 65 N. E. 521, construing a statute passed by the legislature of Indiana much more comprehensive than the one at bar, in which it was held that a statute prohibiting the assignment of future wages by employees was not void as an unreasonable restraint upon the liberty of the citizen, or as depriving him of his property without due process of law. An excerpt from a portion of the reasons adduced in support of the validity of this statute is pertinent in this connection. Among other things, the court said: "A large proportion of the persons affected by these statutes of labor are dependent upon their daily or weekly wages for the maintenance of themselves and their families. De-

lay of payment or loss of wages results in deprivation of the necessaries of life, suffering, inability to meet just obligations to others, and, in many cases, may make the wage earner a charge upon the public. The situation of these persons renders them peculiarly liable to imposition and injustice at the hands of employers, unscrupulous tradesmen, and others who are willing to take advantage of their condition. Where future wages may be assigned, the temptation to anticipate their payment, and to sacrifice them for an inadequate consideration, is often very great. Such assignments would, in many cases, leave the laborer or wage earner without present or future means of support. By removing the strongest incentive to faithful service,—the expectation of pecuniary reward in the near future,—their effect would be alike injurious to the laborer and his employer." The International Case has been cited ith approval in Chicago & E. R. Co. v. Ebersole, — Ind. —, 87 N. E. 1090.

In the discussion of the purpose and effect of a statute to determine its constitutionality, the concrete facts in the case at issue are immaterial. Appellants probably did not overreach the assignor; this is not the question, but does the statute, without interfering with fundamental rights, tend to prevent such an evil? Like that of Indiana, the statute bears the stamp of beneficence upon its face. It restrains no right as to anything in possession, and it impairs no contract as to anything *in esse* but it does protect, and that effectually, the unfortunate and improvident from the unscrupulous and overreaching. It is a fact too well known to render reference thereto unauthorized that, in our centers of population and trade, wage earners, *i. e.*, those who are paid by the day or the week or the month, constitute the only class which borrows money and pledges its future earnings in payment of same. It is equally well known that the "money shark," not too harshly named, who lets money to the hard pressed on short time, at long interest, is the usual, if not the only, lender. The purpose of the statute therefore, and it is evident from its terms, is to protect the first from the exactions of the last.

In view of these facts, even if it be conceded that an assignment of unearned wages is a property right, to our mind a palpable absurdity, or that it is a chose in action, although it has no potential existence, the validity of the statute should be upheld on the ground that its enactment is a wholesome exercise of the police power.

V. Title. The title of the statute is not subject to substantial objection. The principal subject of legislation is "the as-

signment of wages," and as a corollary thereto the regulation of same. The title is sufficiently comprehensive of the statute, and the latter is so brief, consisting of but one section, and also so definite in its terms, that no one can be misled by the title, which, conforming to a ruling of this court, is a clear and unmistakable guide-board indicating the general contents of the bill. St. Louis v. Weitzel, 130 Mo. loc. cit. 616, 31 S. W. 1045.

From all of the foregoing, we are of the opinion that the judgment of the trial court should be affirmed, and it is so ordered.

Brown and **Faris**, JJ., concur. **Lamm**, Ch. J., and **Graves**, J., concur in result. **Woodson** and **Bond**, JJ., concur in paragraph IV. and the result.

Petition for rehearing denied February 10, 1914.

NEVADA SUPREME COURT.

STATE OF NEVADA EX REL. ARTIE B. RIGGLE
v.
GEORGE BRODIGAN, Secretary of State.

(— Nev. —, 143 Pac. 238.)

Election — fee for filing nomination — validity.

No constitutional right of a candidate for a salaried state office is infringed by the exaction of a fee of $100 for the filing of his nomination so that his name will appear on the official ballot.

(Norcross, J., dissents.)

(September 29, 1914.)

APPLICATION by relator for a writ of mandamus to compel respondent to file a verified nomination paper of relator as a candidate for the office of Secretary of State. Writ denied.

The facts are stated in the opinion.

Messrs. A. Grant Miller and **James M. Frame** for relator.

Mr. **George B. Thatcher**, Attorney General, for respondent.

Talbot, Ch. J., delivered the opinion of the court:

The relator applies to this court for a writ of mandate to compel the respondent, the secretary of state, to file a verified nomination paper of relator as a candidate for the office of secretary of state. Respondent refused to file this paper, because the relator declined and failed to pay the fee of $100 provided by the statute as a condition for such filing. Stats. 1913, p. 514. It is shown, and not denied, that the relator is a citizen of the United States and a fully qualified elector of the state of Nevada, and that he possesses all the constitutional qualifications for the office for which he seeks the Socialist party nomination. He alleges that he is working for wages, and has not the sum of $100 with which to pay the filing fee, and that he

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Note. — Validity of fee exacted for filing nominations.

While there is a difference of opinion among the authorities as to the validity of fees exacted for the filing of nomination papers, the decision in STATE EX REL. RIGGLE v. BRODIGAN seems to be sustained by the weight of authority.

Thus, in Riter v. Douglass, 32 Nev. 400, 109 Pac. 444, cited in the opinion in STATE EX REL. RIGGLE v. BRODIGAN, and upholding the constitutionality of the Nevada direct primary law of 1909, the court said: "The further contention is made by counsel for appellant that 'the law is void, in that it requires the payment of certain fees as a condition precedent to becoming a candidate.' There is no merit in this contention, in view of the fact that the fee exacted is not an unreasonable one, and within the discretion of the legislature to impose upon candidates who may desire to avail themselves of the benefit of the act. The right of the legislature to exact a reasonable fee from candidates for office has been sustained in practically every state where a primary law exists, upon the same principle that fees in actions at law and proceedings in courts and for the filing and recording of documents are sustained. These cases maintain the right of the legislature to exact fees, upon the theory that those who seek the benefit of a particular proceeding provided by law should be compelled to reimburse the state for at least a portion of the expense which the state incurs in maintaining the means whereby they accomplish their desires."

And it has been held that a provision in a primary election law for the payment of certain fees by candidates on filing their nomination papers and affidavits of candidacy, which fees range from $10 to $50, depending upon the office sought, is not in conflict with a constitutional provision that no property qualification shall ever be required of any person to vote or hold office, but is a reasonable means adopted by the legislature, under constitutional authority "to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election," to regulate primary elections. Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181.

In this case, it was not claimed that the fees were unreasonable, but the right to ex-

has no means or resources that would enable him to raise the amount required.

On behalf of the relator it is contended that the provision of the primary election law imposing a filing fee is unconstitutional, because it adds a money qualification as a condition precedent to becoming a candidate for public office; that the legislature was without power to impose more than a nominal filing fee; and that, even if the legislature had power to impose more than a nominal fee, the one prescribed is so unreasonable as to render the provision imposing it void.

In the courts which have considered this question two different views have been held. A part of these courts have taken the view that the legislature is without power to impose a fee for filing nomination papers greater than may be a reasonable fee for the service of the officer filing the petition. State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174; Ballinger v. McLaughlin, 22 S. D. 206, 116 N. W. 70; Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562. Cases holding that more than a nominal fee may be required are Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181; State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728; State ex rel. Thompson v. Scott, 99 Minn. 145, 108 N. W. 828; Kenneweg v. Allegany County, 102 Md. 119, 62 Atl. 249.

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act them at all was questioned; and the court said: "The exaction of a fee tends to prevent an indiscriminate scramble for office. Where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of anyone, regardless of whether or not he is a desirable candidate, it is but a reasonable means adopted by the legislature to regulate primary elections for the selection of candidates for public office. And the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as to the payment of a fee, but [it] is a reasonable regulation prescribed by the legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office, and whose candidacy calls for the payment of the fee required by the act, will be at no difficulty to pay the required amount." Ibid.

So, it has been held that a statute requiring any eligible person desiring to have his name placed upon the primary election ballot to file his affidavit of candidacy for nomination, and if the office be one for which pecuniary compensation is provided, to pay thereupon the sum of $20 if the affidavit is filed with the secretary of state (as where the candidate is to be voted for in more than one county), or $10 if the affidavit is filed with the county auditor (as where the candidate is to be voted for in a single county),—is not unconstitutional upon the ground that it violates either the constitutional provision with reference to the equality and uniformity of taxation, or that against the requirement of a property qualification for any office of public trust; but it is a reasonable regulation, and not an unwarranted interference with the rights of voters, and is not objectionable on the ground that the filing fee bears no relation to the emoluments of the office, the cost of filing, or the cost or expense of the election. State ex rel. Thompson v. Scott, 99 Minn. 145, 108 N. W. 828.

In this case, the court distinguished the cases of State ex rel. Adair v. Drexel and People ex rel. Breckon v. Election Comrs. infra, on the ground that the statutes there involved exacted much larger fees and might well have been held arbitrary and unreasonable. The court said: "What is a reasonable restriction upon the right to stand for office is a matter of opinion. . . . Where shall the line be drawn, and who is to determine it? Fifty cents, one dollar, or two dollars would not go far to cut down the list of applicants. The amount should be fixed at a point which would not impose a hardship upon any person for whom there may be any considerable desire to vote at a nominating election, and yet enough to prevent a wholesale filing of petitions for nomination by anyone, regardless of whether or not they are desirable candidates. . . . When all these considerations are taken into account, we are of the opinion that the sum of $10 is not so large but that any person who may be called upon to stand as a candidate for public office can obtain the amount without hardship." State ex rel. Thompson v. Scott, supra.

And in Kenneweg v. Allegany County, 102 Md. 119, 62 Atl. 249, upholding the constitutionality of a primary election law, one section of which provided "that each person who desires to become a candidate for nomination shall pay to the chairman of the committee of the party to which he belongs a certain fee, the amount of which is regulated for the different offices by the section in question; which fees are to be used exclusively as a fund to defray the expenses of announcing candidates, printing ballots, furnishing blanks, and other necessary expenses for holding and conducting the primary election, and for paying such expenses of the return judges as may be determined by the convention of return judges,"—the court said: "Primary contests necessarily require the expenditure of money for the purposes just indicated; and the money must be procured from some source. The requirement that the individ-

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courts which have sustained legislative acts requiring more than nominal fees from candidates for nomination for public office. In Riter v. Douglass, 32 Nev. 437, 109 Pac. 444, we held that the statute of 1909 requiring the payment of a fee of $50 by a candidate for the party nomination for a state office, and the obtaining and filing by him of a petition signed by a percentage of the voters, was not unreasonable. There was complaint and difficulty regarding the obtaining of these petitions by candidates, and after the rendition of that decision the legislature changed the law to provide for a fee of $100, and omitted the requirement for the petition. If the trouble and expense of obtaining a petition signed by 3 per cent of the voters of the state be considered an exaction of as much or more from the candidate as the payment of $50, which was added to the original $50 fee in lieu of the petition signed by a percentage of the voters, there is no good reason why the $100 fee may not be required, if the decision in the Riter-Douglass Case was correct.

Under the original primary law as sustained by that decision, each signer of a nomination paper was required to verify the same before some officer authorized to administer oaths, or before a special verification deputy, and the regular fees for notaries public for these verifications by 3 per cent of the voters of some of the political parties would exceed the $50 added to the fee by the law under the amendment

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nals who, through the primaries, seek to secure nomination, shall pay the expenses which the governing body of their party are compelled to incur for their benefit and in their behalf, is neither unreasonable nor unjust, and most certainly is not the superaddition of a property qualification for holding the offices to which they aspire."

In State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728, where the relator assailed the constitutionality of the Washington primary election law on the ground, among others, that it violated a constitutional provision that "no bill shall embrace more than one subject, and that shall be expressed in its title," the court said: "The provisions most especially dwelt upon as being outside of the title are . . . § 5, providing for the payment of fees by candidates for Congressional office. . . . But we think even these sections fairly germane to the title. . . . The provision in relation to fees is within the scope of the act. The right to exact a reasonable fee for the privilege of running for office may be sustained on the principle that fees in actions and proceedings in courts and for filing and recording papers are sustained; namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentalities necessary to carry into effect the particular proceeding. In other words, the state but asks the candidates for office under a particular law to reimburse it for a part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do."

And in State ex rel. Boomer v. Nichols, 50 Wash. 529, 97 Pac. 733, a fee of $60 required of a nominee for the office of governor for filing his certificate of nomination in order that his name might be certified for printing upon the official ballot—the amount of which fee was based on a per centum of the salary of the office for which he was a candidate, which was $6,000 per annum—was held not to be invalid as an unreasonable exaction because thus based on a per centum of the salary of the office sought, instead of being a fixed fee for all candidates alike.

On the other hand, it has been held that a statutory provision exacting of candidates for nomination for office, upon their filing their petitions, as provided by the primary election law, certain fees, to entitle them to have their names printed on one of the ballots to be used at the primary election,—the amount of such fees being, with certain few exceptions, fixed at 2 per cent of the annual salary of the office sought, and going into the general fund of the county,—is beyond the power of the legislature, which cannot require the payment of any fee, except such as may be a reasonable fee for services in filing the petition, as a condition to having the name of a candidate printed on the official primary election ballot; and is unconstitutional and void as imposing a qualification of voters and candidates not included in the constitutional requirements, and being an arbitrary, unwarranted, unreasonable, and unnecessary regulation of elections, without any tendency to prevent fraud or to promote good order therein. Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071.

And a statute (§ 10 of the South Dakota primary election law of 1907) requiring the payment of certain fees for filing nominating petitions, the amount thereof being either $15, $10, $5, or $1, depending upon the office for which nomination is sought, which fees bear no relation to the services performed by the officer who receives the petitions, but are paid over to the county treasurer for the general fund, and are not calculated to prevent fraud, or to protect the rights of honest electors or candidates, —has been held to be unconstitutional and void as attempting to impose, in effect, an arbitrary tax upon the privilege of being a candidate for office, which, especially in a state where the voters are limited to the choice of candidates whose names are lawfully printed upon official ballots, is an invasion of the constitutional rights of qualified persons to become candidates, and

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as it now stands. Consequently the former decision of this court sustained the act of the legislature under which, if as much was paid for these verifications as the statutory notarial fees therefor, the nomination of a candidate of the larger political parties, with the former $50 filing fee, would have amounted to more than the $100 now exacted, besides the trouble of obtaining the petition, which is no longer required.

The cases in other states in which the question has been determined are about equally divided, and should this court reverse its unanimous decision in the Riter-Douglass Case, holding such a law to be constitutional? After we have said that the requirement of such fee, petitions, and signatures was not unreasonable or unconstitutional, and the legislature amended the law so as to require an additional $50 to be paid in the fee, but relieved the candidate from the necessity of obtaining the petition, signatures, and verifications, it appears that the decision in the Riter-Douglass Case fully justified the legislature in amending the law, and that for this court to now hold that the law as amended is unconstitutional would be equivalent to leading the legislature into amending the law, and then determining that such law is unconstitutional.

The decisions are numerous holding that all acts of the legislature are presumed to be valid until it is clearly shown that they are unconstitutional. If the exaction of a fee of $50, as previously held by this court, did not render the law invalid, we are unable to see how the requirement of $50 additional fee would make the law unconstitutional. If personally we believe that the fee of $50 was high enough, and that at the most it should not exceed $100, we do not wish to set aside the judgment of the two houses of the legislature and the governor in passing and approving the law fixing the fee at $100 and eliminating

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of qualified electors to support the candidates of their choice. Ballinger v. McLaughlin, 22 S. D. 206, 116 N. W. 70.

And in Morrow v. Wipf, 22 S. D. 146, 115 N. W. 1121, an application for a writ of mandamus commanding the defendant, as secretary of state, to receive and file the certificate of nomination of certain candidates of the Prohibition party for state offices, etc., in accordance with the provisions of the Revised Political Code, in which case the defendant contended that the said law under which the proceedings of the Prohibition party were taken and the nominations made had been superseded by the primary election law of 1907, and the plaintiff contended that the former law was still in force, because the latter law was unconstitutional and of no force or effect, and did not abrogate the former law,—the court, in considering generally the constitutionality of the primary election law, said (among other things): "As there is no difference in principle between §§ 8 and 10, so far as they relate to the collection of fees for filing nominating petitions, both must fall,"—citing Ballinger v. McLaughlin, supra.

So, it has been held that a provision contained in a primary election law, that those who become candidates for nomination for office at the primaries therein provided for must pay, for filing their nomination papers, fees to be "computed at 1 per cent of the emoluments authorized by law for the office to which such candidate aspires, during the term for which he would serve, if elected," is beyond the power of the legislature, and is unconstitutional and void as an unwarranted hindrance and impediment to the exercise of the elective franchise, in that it most seriously interferes with the right of the electorate to choose freely from among those eligible to office whomsoever they may desire. State ex rel. L.R A.1915B.

Adair v. Drexel, 74 Neb. 776, 105 N. W. 174. The court said: "It is to be observed that the amount thus required to be paid before one can have his name submitted to the voters at such primary is fixed arbitrarily, and wholly regardless of the value of the services performed in filing the nomination papers. A person aspiring to be nominated for clerk of the district court would be required to pay, perhaps, $200; a candidate for the nomination of county clerk, probably $40; other candidates for county offices different sums, ranging between the two extremes. Is it competent for the legislature to impose burdens of this character on those desiring to become candidates for public offices the nominations for which come within the provisions of the primary law? Can a test of ability to pay fees of the magnitude mentioned be made as to one's right to be voted for at a primary election? It is, at first glance, apparent that these enormous fees prevent many from becoming candidates for party recognition, who otherwise would be willing to yield to a public demand that they become candidates for nomination for a public office. It is said the fees required to be paid in the manner stated are for the purpose of defraying the expenses of the primary. It is not so stated in the act. It is expressly provided the expenses of the primary are to be paid out of the public treasury. It is not, therefore, required of us to pass upon the question of the power of the legislature to require those submitting their names to be voted for at a primary to pay the expenses thereof. It appears from the act itself that there is no relation between the charges made for filing nomination papers, as therein provided, and the expenses incident to a primary election, nor to the value of the services rendered in filing such papers. The charges are arbitrary and unreasonable. They make the pecuniary abil-

the requirement for the petition and verifications, and thereby, in effect, reverse the principle sustained by our decision in the Riter-Douglass Case, and order the respondent to file a nomination paper without the payment of any fee.

Although a candidate for a state office may be without funds with which to pay a fee of $100, or $10, or even a nominal fee, in view of the importance of state offices and the proper qualifications for filling them, and the liberal salaries paid, which are usually from a few to several thousands of dollars a year, we do not think that, under the conditions now and heretofore prevailing, a fee of $100 can be considered so unreasonable or arbitrary as to make the law invalid or as imposed for purposes other than regulation. Political conventions have sometimes exacted as large a fee from a candidate seeking a nomination before the convention, and some of the political parties have made it a rule in this state for more than a generation to levy assessments on candidates many times in excess of the fee exacted by the statute.

The supreme court of California sustained the requirement for the payment of a fee of $50, and the supreme court of Washington for a fee equivalent to 1 per cent of one year's salary, on which basis a filing fee for some offices in this state would amount to $60 or $70. The fee should not be so high as to prevent any elector from running for office who is competent and worthy, and who has a fair chance of being elected, or for whom any considerable proportion of the voters might desire to cast their ballots. Certainly a fee of $100 is fully as much as should be required from a candidate for any office; but in view of the opinion in the Riter-Douglass Case, which gave no intimation to the legislature that a fee of more than $50, in addition to the petition, might not be required, and of the decisions of other

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ity of a person to pay the same a test as to his qualification to become a candidate for a party nomination. The law is as objectionable as if the test were based on a property qualification, or the amount the elector had contributed to the public revenues. The primary election contemplated in the act may not, in and of itself, be an election within the meaning of the constitutional provisions which guarantee that 'all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.' . . . It is, however, a means to an end. It is a part of the election machinery by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances are interposed, would be a hollow mockery. The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise."

And provisions of a primary election law which require the payment, by persons desiring to become candidates for certain offices, of certain filing fees, upon their filing petitions of legal voters as therein provided for,—the amount of which fees is from $25 to $100, depending upon the office sought,—have been held to be illegal and void as an unwarranted hindrance and impediment to the rights of the candidates and voters alike. People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562. The court said: "These payments bear no relation to the services rendered in filing the papers or the expenses of the election. They are purely arbitrary

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exactions of money, to be paid into the public treasuries as a monetary consideration for being permitted to be a candidate. The payments are not intended as compensation for services rendered in filing the papers, but the provisions make the ability and inclination of a person to pay money a test of his qualification and of the right of the voters to choose him for public office. Every eligible person has a right to be a candidate for a public office without being subject to arbitrary or unreasonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve."

In Ledgerwood v. Pitts, 122 Tenn. 570, 125 S. W. 1036, it was held that a provision in the Tennessee primary election law of 1909 that the expenses of holding the primary might be assessed against the candidates in fair proportion, and payment of the assessment might be declared a condition of becoming the party nominee, with the further provision that assessments against a candidate should not exceed certain stated sums, varying in amount from $10 to $500 for the different offices,—was unconstitutional for the reason that it made an arbitrary, capricious, oppressive, and unreasonable classification of candidates in providing that persons who were able to pay the prescribed fees might enter the primary, while other men who were equally capable and worthy were excluded because of their pecuniary inability to pay the prescribed fee.

Generally, as to the constitutionality of primary election laws, see notes to People ex rel. Phillips v. Strassheim, 22 L.R.A. (N.S.) 1136, and State ex rel. Miller v. Flaherty, 41 L.R.A.(N.S.) 132.

As to primary elections as elections, within a Constitution or statute relating to elections generally, see note to Line v. Waite, 18 L.R.A.(N.S.) 412. A. C. W.

courts which have held that more than a nominal fee may be required, and considering the amount usually paid by candidates for campaign expenses and as party assessments in this state, and the liberal salaries paid to public officers, we are not prepared to say that the $100 designated in the statute is so excessive that it may not be collected. To hold otherwise might allow candidates for state offices to file their own nomination papers, and have others file in their interest, without paying any fee.

It is within the province of the legislature to consider whether, if only a nominal fee were required, the ballot might, in certain instances, be encumbered by the names of many candidates without chance of election, who, without expectation that they would be elected, might, in the interest of another candidate, run in certain localities where the opposing candidate is popular, for the purpose of dividing his vote; and to exact a reasonable fee for the purpose of preventing, at least in some degree, such a result. The statute does not require any fee to be paid by a candidate for regent of the State University, an important office which carries no salary.

Under our former decision the people's representatives in the lawmaking body assembled have the right to make any reasonable regulations regarding elections and to fix any fee which is not unreasonable. It necessarily follows that they have considerable discretion, and the court should not be overstrict in order to set aside the statute which they have deliberately enacted. It may happen that a worthy candidate for an important state office does not possess $100, or any considerable part of that amount, but it may be assumed that if there is much demand that he run for office his friends or the people desiring that he become a candidate will arrange for the payment of the fee. In State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728, the "right to exact a reasonable fee for the privilege of running for office" was sustained, and the statute which exacted 1 per cent of the salary was upheld. The court said: "The state but asks the candidates for office under a particular law to reimburse it for a part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do."

The candidates concerned in this case are seeking to appear as party candidates on the ticket for the general election. As the Constitution does not state that any rights are guaranteed to any political party, it may be questioned whether the legislature may not entirely prohibit candidates for office from appearing under any party designation on the ticket at the general election, the same as is required in some states for candidates for judicial offices, and consequently exact fees so large as to be partly or wholly prohibitive. If it be conceded that the courts should be kept out of politics, and candidates for judicial positions not allowed under party designations, may not the state, acting through its legislature, prohibit any candidate from running as a Democrat, Republican, Progressive, or Socialist, or under any party designation, even if it be granted that any citizen has the constitutional right to run for any office as an independent or simply as a candidate without the payment of any fee? In what way can it be said that the Constitution requires the legislature to enact laws in the interest of any party, or to allow any elector to run for public office under any party designation?

The application for the writ is denied.

McCarran, J., concurring:

I concur in the opinion written by Chief Justice Talbot. The fee required by the act of 1913 is imposed by way of regulation, and not as an additional qualification. Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181. Under the former law unanimously sustained by this court in the case of Riter v. Douglass, supra, a fee of $50 was required, and, in addition, a petition signed by 3 per cent of the voters of the state. These conditions were undoubtedly imposed by way of regulation and in order to prevent promiscuous filing of nomination papers. The legislature having before it the experience of its members, as well as the experience of state and county officials elected under the former law, unquestionably yielded to a popular demand for a change in the regulations, and with that in view the subsequent act was passed, which act did away with the requirement of petitions signed by any percentage of the voters, and in place of such petition a filing fee of $100 was imposed. By this act the legislature did away with the burdensome expense imposed on candidates in circulating petitions, as well as the annoyance attendant thereon.

The legislature is the lawmaking body. It speaks for the policy of the people of the state, and its functions should not be assumed by the courts. That branch of the government having as its office the making of the law must be accredited with having a conception of what is reasonable and what is an unreasonable regulation, and, unless unreasonableness is apparent and manifest, the court should not discredit its judgment or assume its functions, nor should it set itself up as being possessed of more immaculate judgment as to the

reasonableness or unreasonableness of the regulation than the people whose representatives create legislative acts.

Norcross, J., dissenting:

I am unable to concur in the views expressed by my learned associates for the following reasons: The relator has the constitutional qualifications for the office for which he seeks a party nomination; the majority of the courts that have considered the question hold that the legislature is without power to impose upon candidates for a party primary nomination more than a nominal filing fee covering the expense of the services of the filing officer; those courts which hold that more than a nominal fee may be imposed, as a matter of regulation, limit such fee to a reasonable one, such as is not so large as to impose a hardship upon any person for whom there may be any considerable desire to vote at a nominating election, and yet enough to prevent a wholesale filing of petitions by persons regardless of whether or not they are desirable candidates; that a filing fee as high as $100 has never by any court been sustained as reasonable, but, upon the contrary, a fee in so large an amount has been both expressly and impliedly held to be unreasonable; that the change made by the statute of 1913, imposing the same fee for filing independent petitions as for filing primary nomination papers, and forbidding the use in such petitions of the name of a prior existing party, cuts off the right which formerly existed to so secure a place upon the ballot with the use of a party designation, thus limiting the right to the use of a party designation in any form to nominations obtained through primary elections; that to so cut off the right to obtain a place upon the official ballot with the use of a party designation by petition of electors renders any fee imposed for filing primary nomination papers subject to a more rigid test as to reasonableness than might otherwise be the case.

In Riter v. Douglass, 32 Nev. 400, 109 Pac. 444, we sustained the view that the legislature could impose a reasonable filing fee for primary nomination papers. The question presented in that case was not as to whether the fee of $50, imposed by the statute of 1909, was reasonable or unreasonable, but as to the power of the legislature to impose any fee at all. The same situation was presented in the California and Washington cases, cited in support of the rule that the legislature could impose reasonable filing fees in excess of a mere nominal fee.

The question of the reasonableness of a filing fee was directly presented in the case of State ex rel. Thompson v. Scott, 99 Minn. 145, 108 N. W. 828, which may be regarded as the leading case supporting the rule that a reasonable fee may be imposed. This was a proceeding in mandamus to compel the filing, without payment of the fee prescribed therefor, of relator's affidavit of candidacy for nomination as a member of the Prohibition party for the legislature. The Minnesota statute prescribed a filing fee of $20 in the case of state candidates and $10 in other cases. The court, among other things, said: "The amount should be fixed at a point which would not impose a hardship upon any person for whom there may be any considerable desire to vote at a nominating election, and yet enough to prevent a wholesale filing of petitions, for nominations by anyone, regardless of whether or not they are desirable candidates. . . . When all these considerations are taken into account, we are of the opinion that the sum of $10 is not so large, but that any person who may be called upon to stand as a candidate for public office can obtain the amount without hardship. . . . The law very wisely assumes that any candidate who is proper material to stand as such before the people for any public office requiring a fee of $10 or $20 will find no difficulty in raising the amount."

Referring to the provisions of the Illinois and Nebraska statutes, held to be unconstitutional in the cases of People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562, and in State ex rel. Adair v. Drexel, 74 Neb. 776, 105 N. W. 174, the Minnesota court further said: "We need not deny that both acts were arbitrary and unreasonable in the exaction of fees."

The highest fee prescribed under the Illinois statute was $100, the same as is involved here. The statute was assailed as unconstitutional by representatives of the Socialist party. The Illinois court, in the Election Commissioners' Case, supra, said: "These payments bear no relation to the services rendered in filing the papers, or the expenses of the election. They are purely arbitrary exactions of money, to be paid into the public treasuries as a monetary consideration for being permitted to be a candidate. The payments are not intended as compensation for services rendered in filing the papers, but the provisions make the ability and inclination of a person to pay money a test of his qualification and of the right of the voters to choose him for public office. Every eligible person has a right to be a candidate for a public office without being subject to arbitrary or unrea-

sonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve."

The North Dakota court, in Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071, in holding void a statute imposing a fee of 2 per cent of the annual salary of the office for which primary nomination was sought, said: "If the fee as fixed is to stand, the practical working of the law is to discourage and possibly eliminate all party effort, except on the part of the majority party."

In Ballinger v. McLaughlin, 22 S. D. 206, 116 N. W. 70, the South Dakota court, considering a similar question, said: "If, in connection with the filing of the nominating petitions, the legislature has power to impose, as a condition precedent, the payment of any sum in excess of a uniform nominal filing fee, it is difficult to understand how the courts could formulate a rule of general application by which they shall be guided in determining when the required amount is excessive and when it is not."

Considering a statute imposing a fee of 1 per cent of the emoluments of the office, the Nebraska court, in State ex rel. Adair v. Drexel, supra, said: "Can a test of ability to pay fees of the magnitude mentioned be made as to one's right to be voted for at a primary election? It is, at first glance, apparent that these enormous fees prevent many from becoming candidates for party recognition who otherwise would be willing to yield to a public demand that they become candidates for nomination for a public office. . . . The charges are arbitrary and unreasonable. They make the pecuniary ability of a person to pay the same a test as to his qualification to become a candidate for a party nomination. . . . The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen."

See also Ledgerwood v. Pitts, 122 Tenn. 570, 125 S. W. 1036.

In Riter v. Douglass, supra, this court held that, under the primary election law of 1909: "If candidates or political parties do not wish to avail themselves of the privilege accorded them of securing their nominations as now provided by the primary law, or by reason of not being able to qualify with the legislative requirements imposed, they still have the constitutional privilege of running independently."

It is now provided by § 3 of chapter 5 of the Acts of 1913 that candidates seeking a place on the general election ballot by petition of electors cannot use the name of a "political party existing at the last preceding general election," and § 7 of the same chapter imposes the same fees as for a primary nomination. In these two respects a radical change was made from the prior existing law.

Even if it were conceded to be manifest that the legislature has no power to impose such fees on candidates by petition of electors, nevertheless relator is now debarred from using his party designation as he formerly could by having his name appear upon the official ballot as "Electors Socialist," "Independent Socialist," or some similar designation. It thus appears that relator cannot have his name upon either ballot with the use of his party designation except by the payment of the fee prescribed for filing his primary nomination paper.

The courts which have adopted the rule that a reasonable fee, in excess of a mere nominal fee covering the expense of the mere filing of papers, shall be charged, have, necessarily, imposed upon themselves the burden, of doubtful propriety, of supervising the discretion of the legislature. When the courts hold that the legislature has power to impose a reasonable fee, they necessarily say that the legislature may not impose an unreasonable or capricious fee. Suppose, for example, the legislature should impose a fee of $500 or $1,000 for filing a nomination paper. A court would have no difficulty in declaring such fees so exorbitant as virtually to deprive the great body of electors of becoming aspirants for public office. The difficulty in enforcing the rule of reasonable fees is in drawing the line between what is reasonable and what is unreasonable. The right of an elector to become a candidate for public office being guaranteed by the Constitution, such right cannot be destroyed under guise of regulation. Government cannot exist without officeholders who voluntarily seek public office; hence the public at large is more interested than is the individual in requiring that unreasonable conditions be not imposed on citizens who may become candidates.

From the admitted facts in this case a number of electors who are desirous of becoming candidates for party nomination for several state offices may not become such party candidates if such a fee may lawfully be exacted, and in the case of the relator it is an admitted fact that he cannot pay the required filing fee because of pecuniary inability to do so. It is asserted by counsel for petitioner, and not controverted, that these several candidates have been, by some form of referendum, already approved as the desired candidates of a political party which in the last election, we judicially know, polled more than 15

per cent of the entire vote of the state, and that, if their nomination papers cannot be filed, such party will be without candidates for such offices. A fee that is so large as to tend to prevent minority parties from having representation upon the official ballot can scarcely be said to be reasonable. Constitutions are largely designed to protect the individual or the minority against the unlawful encroachments of majorities. Minority parties have rights and play a part in the scheme of government scarcely less important than that of majority parties. Parties are the practical means through which the great body of electors express their voice in the policies that should control in the matter of government, and the means by which existing policies may be changed when a majority of electors so decree. The majority party of to-day may be the minority party of to-morrow, and *vice versa*. This is illustrated in our own state when, in the election of 1892, the two present leading parties in the state cast a combined vote only about equal to the vote of relator's party in the last election. It is no answer to say that the Constitution itself does not recognize party organizations. Electors have the constitutional right to organize into political parties, and the legislature has recognized the fact of parties by providing a method by which party electors may be nominated for public office. It is a "condition, and not a theory," that the great majority of electors seek public office through party nominations. Unreasonable conditions cannot be sanctioned in the matter of an elector exercising his constitutional right to seek public office as the representative of a political party. A fee of $100 is a considerable burden upon the ordinary citizen. It is equal to the amount of ordinary taxes for state and county purposes on a property value of $3,000 or $4,000. It is, in effect, a heavy tax upon the individual willing to serve the state in public office.

Conceding that in the Riter Case we held that a $50 fee was reasonable, it does not follow that when the legislature doubled the amount of that fee it did not exceed the bounds of reasonableness, especially so when it deprived an elector of the right, by petition of electors, of securing a place on the official ballot with the use of a prior existing party designation in any form. The decision in the Riter Case should not, in my judgment, be considered conclusive of any of the questions involved in this case, even though we conclude to adhere to the rule that reasonable filing fees, as a matter of regulation, may be imposed. It was unnecessary to consider the question at all in that case, and it was not given that careful consideration, either by court or counsel, that would have been given had the question been essential to a determination of the main question involved. This is shown by the fact that a number of the existing cases bearing on the question were not cited to the court. The contention made on behalf of the respondent in the Riter Case that the courts which had considered the question had very generally sustained provisions of statutes imposing fees in excess of a nominal amount, as a matter of regulation, was erroneously accepted. The fact is that at the time the Riter Case was decided the supreme courts of Illinois, Nebraska, Tennessee, North Dakota, and South Dakota, a majority of the courts that had considered the question, had held directly to the contrary.

As said by the South Dakota court, in Ballinger v. McLaughlin, 22 S. D. 206, 116 N. W. 70: "It is difficult to understand how the courts could formulate a rule of general application by which they shall be guided in determining when the required amount is excessive and when it is not."

In Socialist Party v. Uhl, 155 Cal. 776, 103 Pac. 181, the California court said: "The exaction of a fee tends to prevent an indiscriminate scramble for office, where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of anyone, regardless of whether or not he is a desirable candidate."

If it be a proper rule to apply that the fee may be fixed at such an amount as, while not imposing a "hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent a wholesale filing of petitions," then the fee of $100 may, I think, be said to be unreasonable, as shown by past experience. The fee of $50 prescribed by the statute of 1909 appears to have been large enough to have prevented a "wholesale filing of petitions" for the primary election of 1910. If a $50 fee was sufficient to accomplish this result, what justification can be found for doubling the amount of the fee? It is said that the statute of 1909, also, required, in addition to the fee, a petition of 3 per cent of the party vote; that this entailed an additional expense and effort, which, when removed, justified the increase of the amount of the filing fee. I cannot agree with this view. It may readily be conceded that many candidates might prefer to pay the additional fee rather than to bother with securing a petition, and it may be true that some candidates would spend more to secure a peti-

tion, in some cases much larger than the law required, than the increase in the fee amounted to; nevertheless it is not true that the securing of a petition necessarily involved more than a nominal expense.

The constitutional right of a qualified elector to become a candidate for public office is scarcely less important than his right to vote at an election. This court has repeatedly held that the legislature is without power to infringe the constitutional right of an elector to vote. Davies v. McKeeby, 5 Nev. 369; State ex rel. Whitney v. Findlay, 20 Nev. 198, 19 Am. St. Rep. 346, 19 Pac. 241; State ex rel. Boyle v. State Examiners, 21 Nev. 67, 9 L.R.A. 385, 24 Pac. 614.

The writ should issue as prayed for.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PHILIP I. MARVEL, Appt.,
v.
WILLIAM E. JONAH, Respt.

(— N. J. —, 90 Atl. 1004.)

Covenant — against engaging in business — enforcement.

That the practice of a physician who takes another into partnership under an agreement that if the contract is terminated because of the latter's violation of it, he will refrain for three years from practising his profession in the municipality where the firm is located, is so large that he cannot cope with it alone, and that the enforcement of the restrictive covenant will interfere with the other partner's means of livelihood, will not prevent the granting of an injunction against violation of it.

(Garrison, Bergen, and White, JJ., dissent.)

(June 17, 1914.)

APPEAL by complainant from a decree of the Court of Chancery denying the enforcement of restrictive covenants in a partnership agreement. Reversed.

The facts are stated in the opinion.

Messrs. **Bourgeois & Coulomb**, for appellant:

Upon a dissolution restraint goes by the terms of the agreement.

Huffman v. Hummer, 18 N. J. Eq. 83, 2 Mor. Min. Rep. 242; Cranwell v. Clinton Realty Co. 67 N. J. Eq. 540, 58 Atl. 1030; Trusdell v. Jones, 23 N. J. Eq. 121; Sire v. Wightman, 25 N. J. Eq. 102; Industrial Land Development Co. v. Post, 55 N. J. Eq. 559, 37 Atl. 892; Van Dyke v. Van Dyke, 31 N. J. Eq. 176.

The contract is not in restraint of trade.

Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Richardson v. Peacock, 26 N. J. Eq. 40; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; Gilman v. Dwight, 13 Gray, 356, 74 Am. Dec. 634; Whittaker v. Howe, 3 Beav. 383; Davis v. Mason, 5 T. R. 118, 2 Revised Rep. 562; Mitchel v. Reynolds, 1 P. Wms.

Note. — Remedy by injunction to restrain the violation of an agreement not to practise medicine or surgery within a certain territory.

Scope.

Contracts by physicians or surgeons not to engage in the practice of their profession within a restricted area involve questions as to their validity as affected by the reasonableness of the restriction, and also questions as to the remedy for the violation thereof, the question being as to whether or not the remedy is restricted to an action at law for damages, or whether equitable aid may also be invoked to enjoin the breach, thereby in effect specifically enforcing the contract.

The question as to the validity of such agreements as affected by their territorial scope is considered in a note in 24 L.R.A. (N.S.) 913, and, as specifically applied to physicians and surgeons, at page 927; the validity of agreements restricting the practice of a profession after the expiration of the term of service of the promisor is considered in a note in 26 L.R.A.(N.S.) 961. The present note is limited to the question of remedy by injunction to enjoin the breach of such an agreement by a physician or surgeon.

General rule.

Contracts by physicians or surgeons where made in connection with the sale of their practice, or with a contract for employment or a partnership agreement, not to engage in the practice of their profession after such sale or the termination of the employment or partnership relation, in the place where such practice has been carried on, are usually held to be valid, and the injured party under ordinary circumstances is held entitled to invoke the aid of equity to enjoin a breach of the covenant. Equitable aid is given on the ground that for the breach of such a covenant there is no adequate remedy at law, since the breach is a continuing one, and damages commensurate to the injury are not usually recoverable.

—McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806, enjoining the breach by a physician of his agreement not to compete with the promisee in the practice of medicine, where made in connection

181; Timmerman v. Dever, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230; Linn v. Sigsbee, 67 Ill. 75; Butler v. Burleson, 16 Vt. 176; French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; Kimberley v. Jennings, 6 Sims. 340, 5 L. J. Ch. N. S. 115; Supplee v. Cohen, 80 N. J. Eq. 83, 83 Atl. 373; Doherty v. Allman, L. R. 3 App. Cas. 709, 39 L. T. N. S. 129, 26 Week. Rep. 513; Osborne v. Bradley [1903] 2 Ch. 446, 89 L. T. N. S. 11, 73 L. J. Ch. N. S. 49; Kemp v. Sober, 1 Sim. N. S. 517, 20 L. J. Ch. N. S. 602, 15 Jur. 458; Manners v. Johnson, L. R. 1 Ch. Div. 673, 45 L. J. Ch. N. S. 404, 24 Week. Rep. 481; Western U. Teleg. Co. v. Rogers, 42 N. J. Eq. 311, 11 Atl. 13; American Ice Co. v. Lynch, 74 N. J. Eq. 298, 70 Atl. 138; Artistic Porcelain Co. v. Boch, 76 N. J. Eq. 533, 74 Atl. 680; Christian Feigenspan v. Nizolek, 71 N. J. Eq. 382, 65 Atl. 703.

Messrs. **Allan B. Endicott and Robert H. McCarter**, for respondent:

There should be no injunction.

Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; Keeler v. Taylor, 53 Pa. 467, 91 Am. Dec. 221; Harkinson's Appeal, 78 Pa. 196, 21 Am. Rep. 9; Rakestraw v. Lanier, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735; Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37; Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287; Nordenfeldt v. Maxim-Nordenfeldt Guns & Ammunition Co. [1894] A. C. 535, 63 L. J. Ch. N. S. 908, 11 Reports, 1, 71 L. T. N. S. 489, 6 Eng.

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with the sale of the practice and good will of the promisor;

—Webster v. Williams, 62 Ark. 101, 34 S. W. 537, enjoining the breach of an agreement by a physician not to practise his profession in a certain city and vicinity, where made in connection with the sale of his practice at such place;

—Freudenthal v. Espey, 45 Colo. 488, 26 L.R.A.(N.S.) 961, 102 Pac. 280, enjoining the breach of an agreement by a physician not to practise his profession in a certain place for three years, in consideration of his employment by the promisee;

—Styles v. Lyon, 87 Conn. 28, 86 Atl. 564, enjoining the breach of an agreement by a physician not to engage in the practice of his profession in a certain city upon the termination of his employment as an assistant to a physician practising in said city;

—Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781, restraining the breach by a physician of his agreement not to practise his profession at a certain place or within 8 miles thereof, while the promisee was engaged in the practice of medicine at such place, where made in connection with a sale by him of his practice at this place;

—Beatty v. Coble, 142 Ind. 329, 41 N. E. 590, enjoining a physician from violating his agreement to retire from the practice of medicine at a certain place, where made as part consideration for the purchase of his property;

—Cole v. Edwards, 93 Iowa, 477, 61 N. W. 940, enjoining the breach of an agreement by a physician made in connection with the sale by him of his practice at a certain place, not to re-engage in the practice of his profession at such place;

— Mills v. Cleveland, 87 Kan. 549, 125 Pac. 58, enjoining the breach by a physician of his agreement not to practise proctology at any time within the United States.

—Brown v. Benzinger, 118 Md. 29, 84 Atl. 79, Ann. Cas. 1914B, 582, enjoining a surgeon chiropodist from re-engaging in the practice of chiropody within the limits of her former practice, where she had sold her business, furniture, etc., and the good will of the business for an amount showing that L.R.A.1915B.

the good will formed a large portion of the consideration. This relief was given, although there was no express agreement not to re-engage in the practice of this profession at such place;

—Dwight v. Hamilton, 113 Mass. 175, enjoining the breach of an implied agreement not to engage in the practice of medicine within a certain territory, implied from the sale by a physician of his practice and good will in such territory;

—Timmerman v. Dever, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230, restraining a physician from breaching his agreement not to practise medicine for five years in a certain city and vicinity, where made in connection with the sale by him of his practice at such place;

—Doty v. Martin, 32 Mich. 462, enjoining the breach of an oral agreement made in connection with the sale by a physician of his property and practice at a certain place, not to engage in the practice of his profession at that place or vicinity;

—Glover v. Shirley, 169 Mo. App. 637, 155 S. W. 878, restraining the breach of an agreement contained in a contract for the formation of a partnership to practise medicine, not to continue in the practice of medicine in the place where the partnership were to practise, or within 10 miles thereof, for ten years after the dissolution of the partnership;

—Gordon v. Mansfield, 84 Mo. App. 367, restraining the breach of an agreement not to practise medicine in a certain town and county, where made in connection with the sale by a physician of his property and practice in such place;

—MARVEL v. JONAH, restraining breach of a covenant by a physician not to continue the practice of medicine in a certain city for three years after the termination of his partnership, formed for the practice of medicine in that city, where made in connection with the contract for the forming of such partnership. (Compare with Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37, denying a preliminary injunction to restrain the breach of an agreement by a physician not to engage in the practice of

Rul. Cas. 413, 4 Harvard L. Rev. 128; Hitchcock v. Coker, 6 Ad. & El. 438; Spelling, Inj. § 489; Thayer v. Younge, 86 Ind. 259; Kimberley v. Jennings, 6 Sim. 340, 5 L. J. Ch. N. S. 115.

Gummere, Ch. J., delivered the opinion of the court:

The complainant and defendant are practising their profession in the city of Atlantic City, together with one Dr. Durand, as partners. The bill filed by the complainant prays an accounting from the defendant, the dissolution of the partnership relationship between them because of continued violations by the defendant of certain provisions contained in the partnership agreement, and the enforcement against the defendant of a restrictive covenant contained in that agreement, by the terms of which the defendant bound himself, in case the partnership was terminated because of violations of the contract by him, to refrain from practising his profession in Atlantic City for a period of three years next thereafter. The learned vice chancellor before whom the case was heard in the court below held that the complainant was entitled to an accounting, and to have the partnership dissolved because of breaches of the partnership agreement by the defendant, but refused to enforce against the latter the restrictive covenant, because he considered that to do so "would be unjust and unnecessarily oppressive." From so much of the decree as refuses an injunction

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medicine or surgery at any time thereafter, on the ground that the validity of the contract was not clear, since the restriction imposed was unlimited and hence unreasonable as to time, it being said that the complainant is not entitled to a preliminary injunction when the right on which he founds his claim, as a matter of law, is unsettled);

—Holbrook v. Waters, 9 How. Pr. 335, overruling a demurrer to a complaint for an injunction to restrain a physician from breaching his agreement not to engage in the practice of medicine in a certain county, where made in connection with the sale of the promisor's medical practice in that county, which agreement, while restricted as to area, was unlimited as to time;

—Hauser v. Harding, 126 N. C. 295, 35 S. E. 586, restraining the breach of an agreement by a physician never again to engage in the practice of his profession in the territory surrounding a certain incorporated town, to the extent of the limits of the town, where made in connection with the sale by him of his property and practice at this place;

—Threlkeld v. Steward, 24 Okla. 403, 138 Am. St. Rep. 888, 103 Pac. 630, enjoining the breach by a physician of an agreement for two years not to engage in the practice of medicine at a certain place or within a radius of 10 miles thereof, where made in connection with the sale of his practice and property at such place;

—Wilkinson v. Colley, 164 Pa. 35, 26 L.R.A. 114, 30 Atl. 286, enjoining the breach by a physician of his agreement based upon a valuable consideration, not to practise his profession within 8 miles of a certain place for a period of ten years;

—McClurg's Appeal, 58 Pa. 51, enjoining the breach by a physician of an agreement never thereafter to establish himself as a physician within 12 miles of a certain place, where made in connection with the sale of his property and practice at such place;

—Betts's Appeal, 10 W. N. C. 431, restraining the violation of an agreement by a physician not to practise his profession within 5 miles of a certain place, where made in connection with the sale of his property and practice at such place;

—French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870, restraining the breach of an agreement by a physician not to engage in the practice of his profession at a certain place or within 5 miles thereof, where made in connection with the sale by him of his property and practice at such place;

—Wolff v. Hirschfeld, 23 Tex. Civ. App. 670, 57 S. W. 572, restraining the violation of an agreement by a physician not to practise his profession at a certain place or within 10 miles thereof, for a period of ten years, where made in connection with the sale of his property and practice at such place;

—Butler v. Burleson, 16 Vt. 176, enjoining the breach of a contract by a physician not to settle himself in the practice of medicine at the place where he was to engage in practice in partnership with the promisee, or within 10 miles thereof;

—Palmer v. Mallet, L. R. 36 Ch. Div. 411, 57 L. J. Ch. N. S. 226, 58 L. T. N. S. 64, 36 Week. Rep. 460, restraining the breach of an agreement evidenced by a bond, the consideration of which was the employment of the obligor, at any time not to set up or carry on the business of surgeon at a certain place, or within 10 miles thereof, being the place where the employer's business or profession was being carried on;

—Everton v. Longmore, 15 Times L. R. 356, restraining the breach of an agreement not to practise his profession as a medical man in a certain place or within 5 miles thereof, the consideration of which was the appointment of the promisor as the medical officer of the promisee, an association formed for the purpose of supplying medical attendance to members of societies affiliated with it;

—Gravely v. Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. N. S. 659, 30 L. T. N. S. 863, 22 Week. Rep. 891, restraining the breach of an agreement in a bond not to set up or practise the profession of surgeon, apothecary, or midwife in a certain place

against the defendant restraining him from practising in Atlantic City during the stipulated period, the complainant appeals.

Dr. Marvel began the practice of medicine in Atlantic City about 1884. His practice gradually grew to such an extent that in 1905 it became necessary for him to employ an assistant. Dr. Jonah, who had graduated from a medical college five years before that time, was selected by him for that position. In 1906 Dr. Marvel found it desirable to employ a second assistant, and took in Dr. Durand. In 1908 the complainant and defendant entered into a parol partnership agreement which, in 1910, was superseded by that which is involved in the present controversy. It is apparent from the proofs that the present development and value of the practice of the firm is, in large measure, due to the efforts and reputation of Dr. Marvel; and that his purpose in having the restrictive covenant put in the partnership agreement was to prevent the younger members of the firm, after having been brought into association with his patients as his representatives, from setting up an independent practice in Atlantic City, and taking with them such patients or any of them.

The conclusion of the learned vice chancellor that it would be unjust and unnecessarily oppressive to enforce the restrictive covenant against Dr. Jonah seems to be based upon the idea that, although the independent practice of his profession in Atlantic City by Dr. Jonah will result in the

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or within 10 miles thereof, the consideration for which was the continued employment of the obligor as an assistant by the obligee. And see Ballachulish Slate Quarries Co. v. Grant (1904) 5 F. 1105, cited in 3 Butterworths' Dig. 836;

—Snider v. McKelvey, 27 Ont. App. Rep. 339, restraining the breach by a physician to pay a certain sum of money if he reengages in the practice of his profession at a certain place or within 5 miles thereof within five years, where made in connection with the sale of his practice at that place.

As affected by statute.

Hulen v. Earel, 13 Okla. 246, 73 Pac. 927, holds to be well taken a demurrer to a petition for an injunction to restrain a physician from practising his profession in violation of his agreement not to practise the same in the vicinity of a certain place, made in connection with the sale by him of his interest in a copartnership engaged in such practice at that place. This decision is based upon a statute which invalidates such agreement unless limited to the time the promisee or any person deriving title to his good will shall continue in that business at that place. It is, however, said that if the agreement was valid, a resort to equity for an injunction was the proper remedy.

Reason for rule.

As a ground for granting injunctive relief in such cases, it has been reasoned that the mischief arising from the breach of such an agreement cannot be repaired, nor can it well be estimated. Hence, a suit at law would afford no adequate remedy and the damages would be accruing from day to day. Another ground for injunctive relief is that the object of the contract can be obtained only by the parties conforming expressly and exactly to its terms. McClurg's Appeal, 58 Pa. 51.

To the same effect on this point is Butler v. Burleson, 16 Vt. 176, wherein it is said that for the violation of an agreement of this character, a suit at law will afford no adequate remedy, for the damages will be continuing and accruing from day to day; and furthermore the object can be obtained only by the parties conforming expressly and exactly to its terms.

An action at law is an inadequate remedy for the persistent violation of an agreement of this character for a long period of time, since there is an utter uncertainty in any calculation of damages for the breach of the covenant, and the measure of damages is largely conjectural. Wilkinson v. Colley, 164 Pa. 35, 26 L.R.A. 114, 30 Atl. 286.

Effect of agreement for stipulated damages for breach.

For a general discussion of the right to an injunction to restrain the breach of a contract not to engage in a business or profession, as affected by a stipulation for liquidated damages, see note in 10 L.R.A. (N.S.) 204.

The rule has been asserted in cases of this character where the agreement not to resume practice was in the form of a bond in a certain sum to be paid the obligee if the obligor resumed practice in a designated place, that the stipulated sum was liquidated damages, but that nevertheless the obligee, in event of the breach of the agreement not to practise at the place mentioned, implied from the form of the bond, may elect to recover at law the amount stipulated, or he may proceed in equity to restrain the breach, and it is said that these remedies are optional, but that both cannot be resorted to. Snider v. McKelvey, supra.

In Fox v. Scard, 33 Beav. 327, in sustaining this doctrine and applying it to a contract by a physician, the court said the obligee has the right to say, "I will not have money or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond."

And see Mills v. Cleveland, 87 Kan. 549, 125 Pac. 58, holding that the right to an injunction to restrain a breach of an agreement of this character is not affected by the

loss of patients by Dr. Marvel, yet, even after such loss, the latter's practice will still be so large as to be beyond his ability to cope with it without the assistance of others, and, consequently, that the restraint sought by him against Dr. Jonah would be of little value to him if granted. The premises do not justify such a conclusion. If Dr. Marvel has built up a practice so large that he is unable to take care of it without the aid of qualified assistants, he is entitled to the emoluments thereof, and to be protected against the loss of those emoluments through illegal competition. It will hardly do to say that a man who has built up a business so extensive that he cannot handle it without the aid of a staff of assistants suffers no loss or injury by its diminution in volume to such an extent that he no longer needs assistance to carry it on, provided that what remains of it is sufficient to fully occupy his own time. Common experience is to the contrary.

But the right of Dr. Marvel to the aid of a court of equity to restrain Dr. Jonah from violating his covenant to refrain from practising his profession in Atlantic City for three years after the termination of their partnership agreement does not depend upon the extent of the injury to his business

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provision in a contract relating to the amount of damages recoverable for its breach.

And also McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806, enjoining the breach of a covenant by a physician not to practise medicine in a certain place, although the contract contained an agreement by the promisor to pay a certain sum of money as a forfeiture for a breach of the agreement. And see cases supra, under "General rule."

It has been held that where the parties to a contract for the sale of a medical practice stipulated as to the damages recoverable for the breach of the agreement by the seller not to re-engage in the practice of his profession at that place, the remedy is by action to recover such damages, and not by injunction to restrain the breach of the agreement. Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118.

And it has been asserted that where a contract of this character contains a stipulation for liquidated damages for its breach, the promisee is not entitled to enjoin its violation, for he has an adequate remedy at law to recover such damages. But that is not the case where the sum stipulated for is a penalty. Wilkinson v. Colley, supra.

A provision that, for the true performance of his covenants, the obligor binds himself in the penal sum of $4,000 does not constitute an agreement to pay liquidated damages where there are different covenants, and it is clear from the contract not to re-engage in the practice of medicine in a certain place for a designated period of time, that it was not intended that the obligor should have the privilege of resuming practice by paying the amount designated in the agreement as a penalty for a violation of any of the covenants therein contained. [illegible]

Election.

Where a promisee in an agreement [illegible] from the agreement and recover judgment for the amount stipulated as liquidated damages, after the agreement has been [illegible] the promisor, the former cannot then have recourse to equity [illegible]

the agreement. Sainter v. Ferguson, 1 Macn. & G. 286, 1 Hall & Tw. 333, 19 L. J. Ch. N. S. 170, 14 Jur. 255.

As affected by the adequacy of the consideration.

A court of equity, as a condition to issuing injunctive relief in cases of this character, will not inquire into the sufficiency of the consideration for the agreement. Freudenthal v. Espey, 45 Colo. 488, 26 L.R.A.(N.S.) 961, 102 Pac. 280.

Injunctive relief in cases of this character will not be conditioned upon the adequacy of the consideration for the agreement, if there is a sufficient consideration. McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

If there is a legal consideration to support a contract by a physician not to engage in the practice of his profession at a certain place or within 8 miles thereof, the adequacy of the consideration is not for the determination of the court, where no fraud is alleged; and this question does not affect relief to the promisee by restraining the breach of the agreement. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781.

The purchase by one physician of the property and practice of another furnishes a sufficient consideration for an agreement by the seller, in enhancement of the value of the good will of his practice, not to compete in the practice of his profession, and the suggestion that, while valid in a court of law, such an agreement will not be specifically enforced in equity, is not tenable. McCurry v. Gibson, supra.

But it has been held that the agreement of a physician not to engage in the practice of his profession in a certain city, when made in connection with the sale of his office furniture and good will, will not be enforced by injunction, where the amount paid was grossly disproportionate when taken in connection with the value of the property sold by the seller. [illegible] were a part [illegible] The effect of this decision as authority in this court is weakened by the fact that the result was also [illegible] the amount [illegible]

which would result from such violation. It is sufficient that such injury be material. Where there is an express covenant, and an uncontroverted injury arising from the breach of it, equity will grant an injunction to restrain such breach, where the injury arising therefrom cannot be repaired, nor estimated in dollars and cents. The damages arising from the breach of a covenant such as that now under consideration would be continuing, accruing from day to day, and it would be impossible to ascertain the money loss sustained by Dr. Marvel therefrom with anything approaching accuracy. A suit at law, therefore, would afford no adequate remedy; and when this is the case a court of chancery should enforce the covenant by granting an injunction to prevent the breach of it. Butler v. Burleson, 16 Vt. 176; Timmerman v. Dever, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230; Wilkinson v. Colley, 164 Pa. 35, 26 L.R.A. 114, 30 Atl. 286; Gravely v. Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. N. S. 659, 30 L. T. N. S. 863, 22 Week. Rep. 891. In each of the cited cases the complainant, a physician, appealed to a court of equity to restrain a fellow practitioner from violating a covenant very similar in its legal aspects to that which Dr. Marvel claims the benefit

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tiff or the defendant, or that the buisness of the former was less remunerative on account of the breach, or that the breach had caused or was likely to cause any damage to the plaintiff. Thayer v. Younge, 86 Ind. 259. Compare with Beatty v. Coble, 142 Ind. 329, 41 N. E. 590, holding that upon application for an injunction to restrain the breach of an agreement of this character, the adequacy of the consideration will not be inquired into, if some legal consideration appears.

And in this jurisdiction a breach of an agreement of this character will be enjoined where the consideration is not shown to be inadequate, and it is shown that the violation of the agreement has caused, and will continue to cause, damage to the promisee. Pickett v. Green, 120 Ind. 584, 22 N. E. 737.

When the consideration is disporportionate to the injury resulting to the promisor or to the benefit accruing to the promisee, its inadequacy may be so great as to lead a court of equity to refuse to enforce the contract, since equity will not enforce a contract that is hard and oppressive. Styles v. Lyon, 87 Conn. 28, 86 Atl. 564.

Where contract is unlimited as to time.

In so far as concerns the enforcement of agreements by physicians not to engage in practice within a restricted territory, it has been held that there is no distinction between such an agreement and a similar agreement relating to a business, and it is said that a profession partakes on its financial side of a commercial business, and its good will is often a valuable asset, and while similar covenants ancillary to contracts of employment may invoke a somewhat broader application of a public policy rule, in the construction of each class of contracts, and in the application of the test of reasonableness, there is no substantial difference, and authorities upon restricted covenants in partial restraint of trade are applicable alike to contracts of sale and of employment. Styles v. Lyon, supra, citing note in 24 L.R.A.(N.S.) 927.

According to the general rule referred to, and also the weight of authority as applied to contracts by physicians and surgeons, L.R.A.1915B.

the right to an injunction to restrain the breach of an agreement of this character by a physician or surgeon will not be denied merely because the agreement is unlimited as to time, where as to area the restraint is limited and reasonable. For, generally, where the restraint is unlimited as to time, the contract is not thereby rendered unconscionable or oppressive, for equity will refuse to enforce it if the breach does not result in material injury to the promisee. Hence, such agreements may be said to extend only for such period of time as is necessary to protect the promisee from material injury.

On this point, in Gordon v. Mansfield, 84 Mo. App. 367, the court says that such a covenant is not invalid because no time is therein specified during which the promisor is not to re-engage in the practice of his profession within the designated territory, for the law may interpolate therein a reasonable time for such performance. What would be a reasonable time would probably be held to be the time the plaintiff should be engaged in practice within the designated territory.

In French v. Parker, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870, a leading case on the subject, in holding that a contract of this character by a physician, if otherwise valid, will not be held invalid simply because it is not limited as to time, it is said that a professional practice would sell for more with a restraining contract unlimited in duration, than it would if it expired on the death or removal of the promisee, and it would be more valuable to the latter as an asset.

And in Beatty v. Coble, 142 Ind. 329, 41 N. E. 590, in construing an agreement by a physician to retire from practice at a certain place, as an agreement not to engage in the practice of his profession at that place, without limit as to time, the court said that want of a definite limit as to time was no objection to the contract or to its enforcement by injunction. And see cases supra, under "General rule."

In Rakestraw v. Lanier, 104 Ga. 188, 69 Am. St. Rep. 154, 30 S. E. 735, the court refused to enforce a contract by one physician not to engage in practice in a certain town or within a radius of 15 miles from

of. In each of them the restraint prayed for was decreed, and this was done without any consideration of the extent of the injury which the plaintiff would suffer from a violation of the covenant.

The conclusion of the learned vice chancellor that the granting of the restraint asked for by Dr. Marvel would be unjust to the defendant seems to be based upon the idea that the latter would thereby be deprived of the privilege of pursuing his practice in the only field of his acquaintance. But this idea is not justified by the proofs in the case, for from them it appears that the practice of the firm is not confined solely to the city of Atlantic City, but embraces Ventnor, Margate, and Longport, boroughs which are adjacent thereto. But even if the deprivation should be as complete as the learned vice chancellor seems to think it would, we see no injustice in compelling Dr. Jonah to live up to the

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a certain drug store in that town, the consideration of which was the taking of the promisor into partnership by the promisee in the practice of medicine. The enforcement of the agreement was denied on the ground that it was void because unlimited as to time, and that hence the restriction imposed was of greater extent than necessary for the full protection of the promisee, since it might still be enforced although the promisee was dead or had retired from practice in that locality.

And in Mandeville v. Harman, 42 N. J. Eq. 185, 7 Atl. 37, denying a preliminary injunction to restrain the breach of an agreement by a physician not to engage in the practice of medicine in a certain city, on the ground that its validity was not clear because unlimited as to time, it is said that "professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die within him. There can be no doubt, I think, that if the complainant was the most distinguished physician, . . . and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his good will or practice as a thing of property, distinct from the office which he had occupied prior to his death, for any price, and I think it is equally obvious that if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value. And if the complainant should make sale of his practice in his lifetime, it is manifest all the purchaser could possibly get would be immunity from competition with him, and perhaps his implied approval that the purchaser was fit to be his successor, but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had." But see on this point MARVEL v. JONAH.

L.R.A.1915B.

Enjoining breach of implied agreement.

It has been held that a physician or surgeon may be enjoined from practising his profession at a certain place although he has not expressly covenanted not to do so; that it is sufficient in this regard if he has sold his practice and good will.

Thus, Dwight v. Hamilton, 113 Mass. 175, holds that the sale of the practice and good will of a physician is a legitimate subject of contract, and carries with it the implied covenant, as in every sale, that the seller will not himself do anything to disturb or injure the buyer in the enjoyment of that which he has purchased, and this implied covenant will be enforced in equity by enjoining its breach by the seller reengaging in the practice of his profession in the territory included in the practice he sold.

And such an agreement will be implied from a bond by which the obligor agrees to pay to the obligee a certain sum of money in the event that he resumes practice of his profession at a certain place. Snider v. McKelvey, 27 Ont. App. Rep. 339, or from the sale of a business and its good will. Brown v. Benzinger, supra.

Right to injunction as affected by extent of injury.

The right to invoke equitable aid to enjoin a breach of a contract of this character does not depend upon the extent of complainant's injuries from the breach. It is sufficient in this regard if the injury was material. In such case where there is an express covenant and an uncontroverted injury from the breach of it, equity will grant an injunction to restrain the breach. MARVEL v. JONAH.

The fact that the promisee has so large a practice as to be unable to take care of it without the aid of assistance presents no ground for refusing equitable aid by way of injunction, for he is entitled to all the emoluments of his practice, and to be protected therein against loss through illegal competition. Ibid.

Where the contract sought to be enforced by injunction is an agreement not to engage in the practice of medicine in a certain neighborhood, to be entitled to injunctive relief the promisee must show the extent of the practice in order to establish the territory in which the injunction shall operate. McNutt v. McEwen, 10 Phila. 112.

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covenant solemnly entered into by him, and which was one of the causes inducing Dr. Marvel to admit him into partnership, and to a share in the benefits of the practice which he had built up. The fact that the performance of such a promise involves personal hardship or pecuniary loss to the promisor affords no justification for nonperformance. If the law recognized such an excuse for the breach of a contract of this kind, very few cases would be found in the books where the performance of such negative covenants had been compelled by injunction; for, speaking generally, it is only where the performance of the covenant is disadvantageous to the covenantor that he refuses to perform it, and renders it necessary for the party for whose benefit it is made to apply to the courts for relief.

The above views lead to a reversal of so much of the present decree as is brought before us by this appeal. The record will be remitted to the Court of Chancery with a direction that an injunction issue against Dr. Jonah restraining him from the practice of his profession in the city of Atlantic City for a period of three years from and after the making of the decree in that court. The complainant below is entitled to costs.

Garrison, J., dissenting:

I agree that Dr. Marvel was entitled to the measure of protection stated in the majority opinion, *viz.*, that Dr. Jonah, after having been brought into association with Dr. Marvel's patients, should not set up an independent practice in Atlantic City and take with him such patients or any of them. I very fully agree that a covenant to this effect would be one that a court of conscience ought to enforce. The present covenant, however, goes away beyond such protection and penalizes Dr. Jonah by prohibiting him from practising not only among such patients of Dr. Marvel, but also among the hundreds of thousands of persons who annually visit Atlantic City without ever having heard of Dr. Marvel.

Such a covenant, while good in law, is, owing to its highly penal character, one to the enforcement of which equity refuses to lend its aid, leaving the parties to the courts of law where the complainant can obtain redress that is exactly proportioned to the injury he has suffered.

This was the view of Vice Chancellor Leaming, in whose conclusions I concur, and vote to affirm the decree advised by him. I am requested by Mr. Justice Bergen and by Judge White to say that they concur in the foregoing views.

L.R.A.1915B.

NEW MEXICO SUPREME COURT.

STATE OF NEW MEXICO, Appt.,
v.
CLARENCE BROOKEN.

(— N. M. —, 143 Pac. 479.)

Indictment — insufficiency of allegation.

1. An indictment, charging a violation of § 1, chap. 23, S. L. 1901, which, after alleging that defendant held under herd, in a certain pasture, calves unaccompanied by their mothers, proceeds, "The said calves being then and there under the age of seven months," is not subject to attack on the ground that the calves are not directly and positively alleged to be under seven months of age.

Constitutional law — statute invalid in part.

2. A part of a law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other, without impairing the force and effect of the section which remains, and where the legislative purpose as expressed in such section can be accomplished and given effect, independently of the void section, and when the entire act is taken into consideration it cannot be said that the legislature would not have passed the section retained, had it been known that the void section must fail. Held, that § 1 of chapter 23, S. L. 1901, is valid and enforceable, even though § 5 of the same act is unconstitutional, under the above rule.

Headnotes by ROBERTS, Ch. J.

Note. — Constitutional law: statutes infringing freedom to deal with one's property, enacted in order to prevent larceny.

Generally speaking, statutes or ordinances to prevent larceny, other than those for the punishment of the criminal, may curtail the rights of innocent persons (1) as interfering with their rights of purchase and receipt of property, or (2) as limiting and regulating their powers of enjoyment and disposal of their own property. Regulations of the business of pawnbrokers, junk dealers, etc., belong in general to the first class, although such regulations indirectly curtail the salability, etc., of property in the hands of the owner.

In STATE v. BROOKEN, the statute sustained is of the second class, and the owner of property is forbidden to keep it in other than a certain manner, and, if he disobeys, is guilty of a crime; the purpose of the statute, as declared by the court, being to make larceny difficult.

If the statute had simply entailed on the owner a loss of the property if stolen, it might not seem so severe. Thus, it might not be inconceivable that the state should

Animals — separation of calves from mothers — prohibition.

3. The legislature, under the police power, may provide reasonable regulations for the use and enjoyment of property, where the same are necessary for the common good and the protection of others. Held, that a statute which prevents the holding under herd, or in any inclosure, unaccompanied by their mothers, of any calves of neat cattle under seven months of age, is not violative of any constitutional provision, and is sustainable under the police power, where such regulation appears reasonably necessary to prevent the larceny of young animals.

(September 18, 1914.)

APPEAL by the State from a judgment of the District Court for Eddy County, sustaining a motion to quash an indictment charging defendant with unlawfully holding under herd calves of neat cattle. Reversed.

The facts are stated in the opinion.

Mr. **Ira L. Grimshaw**, Assistant Attorney General, for the State:

Section 1 of chapter 23 of the Laws of 1901 is not in conflict with any provision of the Constitution.

8 Cyc. 864; Bishop, Statutory Crimes, § 1103; St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791.

Messrs. **Armstrong & Botts**, for appellee:

The indictment is void in that it states no offense known to or denounced by the laws of New Mexico.

22 Cyc. 293; People v. Dunlap, 113 Cal. 72, 45 Pac. 183; People v. Jones, 123 Cal. 299, 55 Pac. 992; State v. Howard, 66 Minn. 309, 34 L.R.A. 178, 61 Am. St. Rep. 403, 68 N. W. 1096; State v. Bradford, 78 Minn. 387, 47 L.R.A. 144, 81 N. W. 202; Johns v. State (Haughn v. State) 159 Ind. 413, 59 L.R.A. 789, 65 N. E. 287; Fletcher v. State, 2 Okla. Crim. Rep. 300, 23 L.R.A. (N.S.) 581, 101 Pac. 599.

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take the attitude that recovery of stolen property lost by certain kinds of carelessness would devolve an undue expense and trouble upon the state; but it would be going far to assert that its courts could not be burdened with actions for the recovery of property stolen from an owner whose lack of care made the theft an easy matter and difficult of detection. But by the statute sustained in STATE v. BROOKEN the failure to keep young calves in a certain manner is made a positive crime, and the court puts the purpose of the statute squarely on the ground of preventing larceny of calves in general, and not on the ground of the prevention of cruelty to them, or on the ground of the confusion that might arise between innocent cattle owners as to the ownership of young calves on the open range.

The reader will see that the scope of this note excludes cases regulating pawnbrokers and junk dealers, and that it also excludes statutes requiring, for instance, the purchaser of an animal to take a written conveyance, or making his failure to take a written conveyance where the animal has recently been stolen prima facie evidence of "illegal possession." Statutes requiring the owner to brand cattle which are at large are not included, as such statutes may well be supported as a proper regulation of the business in order to prevent confusion as to the ownership of cattle between innocent claimants.

For police power as exercised by municipalities over business of pawnbrokers and junk dealers, see the note to Grand Rapids v. Braudy, 32 L.R.A. 116; and also as to traffic in junk, the note to Com. v. Malatsky, 24 L.R.A. (N.S.) 1168.

In Davis v. State, 68 Ala. 58, 44 Am. Rep. 128, while it was not necessary to the decision, the court sustained the constitutionality of the statute providing "that it shall not be lawful for any person to transport or move, after sunset and before sunrise of the succeeding day," in certain counties in the state, "any cotton in the seed," the statute containing a proviso permitting the owner or producer of the cotton to remove it from the field where it is grown to the gin-house or other place of storage of such owner or producer. The court said: "It does not inhibit all transportation, but seeks only to regulate and control it, in one particular condition of a commodity. We regard this as a mere police regulation, the alleged impolicy or injustice of which is beyond the legitimate scope of judicial criticism. The primary object of this law is not to interfere with the right of property or its vendible character. Its object is to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the lawmaking power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits, to the public detriment; at least, within the specified territory. This the legislature had the power to do." It is suggested that the person accused of transporting and removing was perhaps the owner of the cotton, but the case is not very clear in this respect.

A later case under another section of the same statute should be read in this connection, although the charge was against a buyer of cotton. In Mangan v. State, 76 Ala. 60, the defendant was indicted for buying seed cotton under another section of the same statute, which provided that it shall not be lawful for any person to sell or offer for sale, barter, exchange, or buy in certain counties, etc., any cotton in the seed, or buy any cotton in the seed which is produced in those counties, etc. (the section not to apply to any sale of cotton made under any legal process or under

The indictment is void because the act upon which it is based attempts to authorize an officer to search premises and seize property without a search warrant.

35 Cyc. 1265; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; McClurg v. Brenton, 123 Iowa, 368, 65 L.R.A. 519, 101 Am. St. Rep. 323, 98 N. W. 881.

Because it attempts to declare a forfeiture of liberty and property without due process of law.

Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 725, 21 Pac. 994; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 268, 7 Am. St. Rep. 684, 18 N. E. 692; 8 Cyc. 1095 et seq.; State v. Robbins, 124 Ind. 308, 8 L.R.A. 438, 24 N. E. 978; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Fisher v. McGirr, 1 Gray, 1, 6 Am. Dec. 381; Rost v. New Orleans, 15 La. 129, 35 Am. Dec. 186; Lanfear v. New Orleans, 4 La. 97, 23 Am. Dec. 477; People v. O'Brien, 2 L.R.A. 258, note; Kuntz v. Sumption, 2 L.R.A. 655, note; Ulman v. Baltimore, 11 L.R.A. 224, note; Gilman v. Tucker, 13 L. R. A. 305, note.

It attempts to delegate judicial power to executive and administrative officers.

8 Cyc. 858; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381; Jones, Ev. §§ 123–129.

The statute is not a valid exercise of police power.

State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Tiedeman, Pol. Powers, § 85; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Eden v. People, 161 Ill. 296, 32 L.R.A. 663, 52 Am. St. Rep. 365, 43 N. E. 1108; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 184, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Chenoweth v. State Medical Examiners, — Colo. —, 51 L.R.A.(N.S.) 958, 141 Pac. 132; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A. (N.S.) 1123, 144 N. W. 795.

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any court order, nor any sale at public auction under any mortgage or deed of trust, nor to the delivery or surrender of cotton by any tenant to his landlord in payment of his rent or advances, nor to cotton delivered by one tenant in common or joint tenant to another on division of the crop). The court sustained the constitutionality of the statute, quoting in part the quotation given above from Davis v. State.

In Jenkins v. State, 119 Ga. 430, 46 S. E. 629, it was held (the syllabus only being reported), that "it was within the province of the general assembly of this state, in the exercise of its police powers, 'to make it unlawful to transport seed cotton in or from the county of Harris, or from one place to another in said county, between the hours of sunset and sunrise, except when carried from the field where picked to the place of storage on the premises of the owner, and to prescribe a penalty for the violation' of the act," the court not stating what the purpose of the act was.

In this connection, although the charge was against the receiver, reference may be made to State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143, where the court sustained the constitutionality of the statute making it unlawful in certain counties for any person to sell, deliver, or receive for a price, etc., any cotton in the seed where the quantity is less than that usually baled, without having the sale in writing, signed and witnessed and delivered to the nearest justice of the peace, whose duty it should be to docket the same on his civil docket for the inspection of all persons, the indictment in the case being for receiving cotton in an amount less than that usually baled without having any written contract or record of the same. The court said: "We must presume that the provision of the Code referred to was, in the opinion of the general assembly, insufficient to afford adequate protection to the producers of this great staple in those counties mentioned in the law under which the bill of indictment was drawn, and therefore persons who disposed of small quantities of loose cotton, even in daylight, were required to execute a receipt that might prove valuable in tracing the movements of a thief. We can see how the law might have been enacted with a view to afford necessary protection to property, and when it proposes upon its face to mete out the same punishment for violation of its provisions to the seller and buyer, we cannot go behind the manifest meaning of the act, according to all legal rules of construction, and hunt for a hidden intent, under the guise of regulating trade, to restrict the rights of any class of persons to enjoy the fruits of their own labor."

In Senterfit v. State, 41 Tex. 186, an indictment was dismissed which charged the owner of cattle with driving them out of the county without having a certified copy of the marks and brands, or without having the same properly recorded, but the constitutionality of a statute of this character was not passed on.

In Beyman v. Black, 47 Tex. 558, the court sustained the constitutionality of a statute providing for the inspection of cattle about to be driven, or after they had been driven, from a county, with the intention of being slaughtered or sold, with power of seizure, and making it a misdemeanor to sell uninspected hides, or to drive out of the county cattle, etc., uninspected, or to purchase animals or hides without obtaining a bill of sale from the owner, but the point of the case was that it did not appear that the statute prevented a purchaser, even although he had disobeyed the statute, from establishing his right to the property seized or slaughtered, if he really was the owner.

B. B. B.

Roberts, Ch. J., delivered the opinion of the court:

On the 5th day of September, 1913, the grand jury of Eddy county returned an indictment against Clarence Brooken, the appellee, charging him with having unlawfully held under herd 12 calves of neat cattle of the value of $10 each, then and thereby interfering with the freedom of said calves; said calves being then and there under the age of seven months, and not being young animals accompanied by their mothers, nor calves of milch cows actually used to furnish milk for household purposes or for carrying on a dairy. The indictment was predicated upon § 1, chap. 23, S. L. 1901, which reads as follows: "That hereafter it shall be unlawful for any person, firm or corporation to hold under herd, confine in any pasture, building, corral or other inclosure, or to picket out, hobble, tie together or in any manner interfere with the freedom of calves of neat cattle or colts of horses, asses and burros which are less than seven months old except such young animals be accompanied by their mothers. This provision shall not apply to the calves of milch cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation separating calves from their mothers for either of these purposes shall, upon the demand of any cattle owner, sheriff, inspector or any other officer, produce, in a reasonable time, the mother of each one of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf."

Appellee filed a motion to quash the indictment, upon the following grounds:

"(1) The indictment is void in that it states no offense known to or denounced by the laws of New Mexico.

"(2) The indictment is void in that the act upon which it is based attempts to authorize an officer to search premises and seize property without a search warrant describing the place to be searched and the person or thing to be seized, upon a written showing of probable cause supported by oath or affirmation.

"(3) The indictment is void in that the statute upon which it is based attempts to declare a forfeiture of liberty and property without due process of law.

"(4) The indictment is void in that the statute upon which it is based attempts to delegate judicial powers to executive and administrative officers.

"(5) The indictment is void in that the statute upon which it is based violated the right to acquiring, possessing, and protecting property, and violates the constitutional prohibition against class legislation.

"(6) The statute upon which the indictment is based is not a valid exercise of police power."

The motion to quash was sustained generally, and the state has appealed. We are therefore required to notice each ground of the motion to quash, for, if any one be well taken, the action of the trial court must be sustained.

The first ground is based upon the manner in which the age of the calves is alleged. The statute only applies to the herding of calves under the age of seven months; hence it is necessary to allege in the indictment that the calves were under that age. The allegations of the indictment, in so far as pertinent, are:

"That Clarence Brooken . . . 12 calves of neat cattle . . . did unlawfully hold under herd in a certain pasture; . . . the said calves being then and there under the age of seven months. . . . "

It is appellee's contention that the age of the calves is not directly and positively alleged; that the mere recital that "the said calves being then and there under the age of seven months" is not an allegation that the said calves were then and there under the age of seven months, and without such allegation the indictment charged no offense known to or denounced by the laws of the state. There is no merit in this ground of the motion, as the age was directly and positively averred. In Bishop's New Criminal Procedure, vol. 2, § 557, the author says: "Under 4 & 5 Phil. & M. chap. 8, which made it punishable for one 'above the age of fourteen' to steal an heiress, the age, which was one of the two pillars of the offense, was held to be sufficiently set out by charging that the defendant, 'being above the age of fourteen years,' did the act."

The second ground of the motion is predicated upon § 5 of the act, which authorizes any inspector, appointed by the cattle sanitary board of New Mexico, who shall receive notice of the violation of the law, to seize such live stock and sell the same, if ownership be not proven within ten days, and this he is authorized to do without obtaining a search warrant, regardless of the fact that, in order to make such seizure, it may be necessary for him to enter upon a citizen's premises and break into buildings and inclosures. This section of the act may be clearly unconstitutional, yet if it be a distinct section or provision, which can be literally and physically separated from § 1 of the act, without impairing the force and effect of the 1st section, and if the legislative purpose, as expressed in said § 1, can be accomplished or given effect, independently of § 5, and, when the entire act is taken into consideration, it cannot be

said that the legislature would not have passed § 1, had it been known that § 5 must fail, the 1st section must be upheld. Lewis's Sutherland, Stat. Constr. 2d ed. § 297. The 1st section of the act denounced as a crime the holding under herd or confining in any pasture, building, corral, or other inclosure, or picketing out, tying together, or in any manner interfering with the freedom of calves of neat cattle, colts of horses, asses, and burros less than seven months of age, except such young animals be accompanied by their mothers. The purposes of the act, when we consider the conditions existing in this state, are apparent. Here we have the open range, where countless herds of cattle, horses, and other animals graze, unattended by keepers, and wander over a vast expanse of country, rear their young, which are gathered in at "round-ups" at the approximate age of seven months and branded by the owners. The only way by which the owner is able to prove his property is by the brand upon the animal. Prior to the enactment of this law cattle thieves would gather up large numbers of calves and colts, inclose them in corrals, or hold them under herd until they were weaned from their mothers and brand them with their brand. There was no way by which such crimes could be detected and the culprits brought to justice, as the owner was unable to prove ownership of the calves, separated from their mothers bearing the brand of the owner. To remedy this evil, and to protect this class of property, the act was passed. Section 5, it will be noted, does not affect in any manner the offense denounced by § 1 of the act, under which this indictment was framed. It simply provides for the seizure, and under certain conditions the sale, of young animals held under herd, etc., in violation of § 1, so that, if such section should be held unconstitutional and eliminated from the act, it would not affect any other section of the act, but would simply preclude the inspector from entering upon premises and seizing such animals.

"A statute may be unconstitutional in part, without invalidating the remainder, or the unconstitutional part may be so material as to render the whole act void." State v. Newton, 59 Ind. 173.

"Now nothing is better settled than that a part of a law may be declared constitutionally invalid, and yet another portion properly separable therefrom, and therefore unexceptionable in every particular. This may be so, even though the sound and unsound are in one section together. This is always the rule, unless the parts sound and unsound are so mutually related, so blended together, as to constitute an entirety, making it evident that, unless the act be carried into effect as a whole, it could not have received the legislative sanction. Bishop, Statutory Crimes, § 34, and cases cited." State v. Bockstruck, 136 Mo. 335, 38 S. W. 317.

It must be apparent that the portion of the act under consideration, upon which this indictment is bottomed, would have been enacted by the legislature, even though it could not constitutionally have declared that such animals, so held in violation of § 1, should "be considered as estray;" and the inspector could not take such animals into his possession and hold them for proof of ownership, or sell them and apply the proceeds, as directed. For the reasons stated, this ground of the motion was not well taken.

The third ground was also based upon the claimed unconstitutionality of § 5, because such section attempts to declare a forfeiture of liberty and property without due process of law. What we have said above disposes of this contention. The same is also true as to the fourth ground of the motion.

The fifth point made by appellee is upon the theory that the indictment is void because the statute upon which it is based violates the constitutional right of acquiring, possessing, and protecting property, and that the statute is in conflict with the prohibition contained in the Constitution against class legislation.

Appellee's counsel, in their argument, assume that the Constitution gives unqualified right to a person to acquire, possess, protect, and use his property as he chooses. They fail to recognize the right in the legislature, under the police power, to provide reasonable regulations for the use and enjoyment of property, where the same are necessary for the common good and the protection of others. Rights of property, like all other social and conventional rights, are subject to regulations under this power, and such reasonable limitations may be imposed upon their enjoyment as may be necessary to prevent injury to others.

In Com. v. Alger, 7 Cush. 53, Chief Justice Shaw said: "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it . . . shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is . . . held subject to those general regulations which are necessary to the common good

and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property . . . whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power—the power vested in the legislature by the Constitution—to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise."

Because the economic conditions of a country, due to the rapid stride toward a more complete and perfect civilization, are constantly changing, it would seem that it has been and is impossible to define "police power" in so many words.

In 8 Cyc. 863, it is stated: "Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise, whenever public policy in a broad sense, demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure, in any respect, such economic conditions as an advancing civilization of a highly complex character requires."

This power is to be exercised by the legislature, and under it it may enact all needful laws for the benefit of society at large, within constitutional limitations. Section 4, art. 2, of the state Constitution, provides that "all persons are born equally free, and have certain natural inherent and inalienable rights, among which are the rights of . . . acquiring, possessing and protecting property. . . ."

Appellee claims that the act under consideration violates this section of the Constitution in that it denies to him the right of protecting his property, because it precludes him from holding calves under herd, or in an inclosure, and feeding and caring for them. The section of the act in question, however, in this case, does not contravene this constitutional provision. While it is true the legislature cannot deny the right to acquire, possess, and protect property, it may provide such reasonable regulations for the exercise of such rights as the public welfare requires, so that others may not be injured. The act neither denies the right to acquire, possess, nor protect property. It simply provides regulations which, under the peculiar conditions prevailing in this state, must be held reasonable for the exercise and enjoyment of the constitutional guaranties in this regard.

Under this head, appellee advances the argument that § 4 of the act provides that any person violating the provisions thereof, "either as principal or when acting for, or as manager of the business of any firm or corporation, etc.," shall be punished, etc., and therefore it would not be a violation of the act for one to interfere with the freedom of young animals, unless one were acting for himself or as agent for a firm or corporation, and, this leaving one class of citizens without its operation, it violates § 24, art. 4, of the Constitution. But no one is excluded from the operation of the statute. If A holds under herd calves of neat cattle, pursuant to orders of B, and individual, both A and B would be principals, as the offense is only a misdemeanor. It is evident that the legislature inserted the clause "either as principal or when acting for, or as manager of the business of any firm or corporation," as a matter of precaution, to preclude one acting as manager for a firm or corporation from escaping liability under the act. These words were entirely unnecessary, and do not extend in any manner the liability of the individual. Without such words the manager of a corporation, if he had participated in the violation of the statute, would have been guilty.

The sixth ground of the motion was that "the statute upon which the indictment is based is not a valid exercise of police power." What we have already said has disposed of this contention. As stated, the object of the statute was to prevent the larceny of unbranded young animals, a manifest evil, and is clearly within the police power.

For the reasons stated, we hold that § 1 of the act in question, upon which the indictment was predicated, is constitutional, and the indictment charged a violation thereof by appellee.

The trial court erred, therefore, in sustaining the motion to quash, and its judgment is reversed, and the cause remanded, with instructions to overrule the motion to quash; and it is so ordered.

Hanna and **Parker, JJ.**, concur.

NORTH CAROLINA SUPREME COURT.

MARY THOMAS et al., Appts.,
v.
ROSA THOMAS.

(166 N. C. 627, 82 S. E. 1032.)

Waste — removing timber — repairs — justification.

A tenant for life cannot avoid liability for selling timber from the property merely by showing that he made repairs equal in value to that of the timber removed.

(October 7, 1914.)

APPEAL by plaintiffs from a judgment of the Superior Court for Lee County in defendant's favor in an action to recover damages for waste. New trial ordered.

Statement by **Hoke**, J.:

Civil action to recover damages for waste, tried before his Honor Peebles, judge, and a jury, at March term, 1914, of the superior court of Lee county. Plaintiffs, children of John P. Thomas, deceased, by a former wife, and owners of a vested estate in remainder under their father's will, sued the defendant, the widow of said Thomas, who occupies and possesses the land as life tenant under said will, claiming that the life tenant has committed waste upon the land.

The evidence on part of plaintiffs tended to show that, since defendant had entered on the property as life tenant under the will, she had sold a lot of timber for crossties, receiving pay therefor, also some cord wood and saw stocks,—this last to a small amount, and which had been paid for by labor done on the estate by the purchaser. Some of the witnesses testified that the permanent damage done to the property by the sale and removal of this timber would amount to $75 or $100, but the evidence did not show that defendant had realized more than $40 or $50 from said sale. On examination in chief and cross-examination of plaintiffs' witnesses, it appeared that defendant, while in possession of her present estate, had made some repairs on the property, had reconstructed a cotton house worth from $12 to $25, the estimates of the witnesses varying as to its value; that, at another time, she had rebuilt an old tobacco barn which had fallen, using as part the old timbers, and had also built and repaired some fencing on the property, the value of these improvements being under $50. The court, among other things, charged the jury: "You will consider the evidence you have here from the witness stand, and say whether or not the plaintiffs have satisfied you by the greater weight of the evidence; and that does not mean the greater number of witnesses, but that carries to your hearts and minds the greater amount of conviction. If in that way the plaintiffs have satisfied you that she sold more wood and timber off that land than she applied to repairing and keeping up the farm and buildings, then you should answer the first issue, 'Yes,' otherwise answer it, 'No.'"

Plaintiffs excepted. There was verdict for defendant on the issue as to commission of waste. Judgment, and plaintiff excepted and appealed.

Messrs. **Hoyle & Hoyle**, for appellants:

A tenant for life has the right to use wood and timber in kind for repairs, but does not have the right to cut and sell timber ties and wood to create a fund out of which repairs may be made, or to reimburse herself for repairs already made.

Ward v. Sheppard, 3 N. C. (2 Hayw.) 283, 2 Am. Dec. 625; Parkins v. Coxe, 3 N. C. (2 Hayw.) 339; Davis v. Gilliam, 40 N. C. (5 Ired. Eq.) 308; Dozier v. Gregory, 46 N. C. (1 Jones, L.) 101; Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Jones v. Britton, 102 N. C. 166, 4 L.R.A. 178, 9 S. E. 554; 40 Cyc. 512, note 89; Rutherford v. Wilson, 95 Ark. 246, 37 L.R.A. (N.S.) 763, 129 S. W. 534; Abel v. Wuesten, 141 Ky. 766, 133 S. W. 774, 143 Ky. 513, 136 S. W. 867, Ann. Cas. 1912C, 389.

It was waste for the defendant to allow buildings on the estate, and necessary to its proper use, to rot and fall down.

Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

A life tenant is required to preserve the life estate as near as may be in the same condition as received.

Ibid.

Mr. **R. H. Hayes**, for appellee:

A life tenant may cut sufficient wood for firewood, fences, repairs of buildings, and the erection of such as are reasonably needed on the lands or plantations, and may use the property for the necessary purposes of

Note. — The subject of timber rights of life tenant is discussed in the note to Rutherford v. Wilson, 37 L.R.A.(N.S.) 763, and the allied questions as to the right of a life tenant as to minerals, in the note to Deffenbaugh v. Hess, 36 L.R.A.(N.S.) 1099, and as to oil and gas, in the note to Ohio Oil Co. v. Daughetee, 36 L.R.A.(N.S.) 1108. Any supplementary notes hereafter made on these questions will be cited under the title "Life Tenant," in the Index to L.R.A. Notes. Various other questions in relation to the respective rights of life tenant and remainderman may be found by consulting that title.

cultivation, if it should become necessary for her to cultivate the land in order to get a reasonable support from it.

Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588; King v. Miller, 99 N. C. 583, 6 S. E. 660.

Hoke, J., delivered the opinion of the court:

In Norris v. Laws, 150 N. C. 604, 64 S. E. 501, the definition of waste as recognized at common law is given as follows: "A spoil or destruction, done or permitted with respect to lands, houses, gardens, trees or other corporeal hereditaments, by the tenant thereof, to the prejudice of him in reversion or remainder, or, in other words, to the lasting injury of the inheritance."

Definitions substantially similar are approved in Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588, and King v. Miller, 99 N. C. 584, 6 S. E. 660, where waste is said to be a "spoiling or destroying of the estate, with respect to bulidings, wood, or soil, to the lasting injury of the inheritance."

While these definitions are still regarded as sufficiently descriptive, as shown in the decisions referred to and others of like kind here and elsewhere, in adapting the general principle to conditions existent in this country, the acts which constitute waste have been variously modified, until it has come to be established that a tenant, as a general rule, may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition, and which do not cause a substantial injury to the inheritance. Norris v. Laws, Sherrill v. Connor, King v. Miller, — supra: Lambeth v. Warner, 55 N. C. (2 Jones, Eq.) 165; Shine v. Wilcox, 21 N. C. (1 Dev. & B. Eq.) 631; Ballentine v. Poyner, 3 N. C. (2 Hayw.) 110; Sheppard v. Sheppard, 3 N. C. (2 Hayw.) 382; Rutherford v. Wilson, 95 Ark. 246, 37 L.R.A.(N.S.) 763, 129 S. W. 534; Anderson v. Cowan, 125 Iowa, 259, 68 L.R.A. 641, 106 Am. St. Rep. 303, 101 N. W. 92.

In King v. Miller, the position is stated as follows: "While, in its essential elements, waste is the same in this country and in England, being a spoil or destruction of houses, trees, etc., to the permanent injury of the inheritance, yet, in respect to acts which constitute waste, the rules are not the same. Here an act is not waste in law which is not waste in fact. The real and important inquiry, in such cases, is: Has the land been abused, during the life tenant's occupancy, by a spoliation unwarranted by the usage of prudent husbandmen in respect to their own property, to the impairment of it, as a whole, in value?"

In Sherrill's Case, Avery, Judge, delivering the opinion, said: "While the courts of this country have generally adhered to the old definition of waste that we have already given, they have as uniformly maintained that what is permanent injury to the inheritance must, of necessity, depend often upon the circumstances attending a particular case, and that rules laid down in England, for determining what acts constituted waste there, were not always applicable in a new country, where the same acts might prove beneficial, instead of detrimental, to the inheritance. Gaston, Judge, in Shine v. Wilcox, 21 N. C. (1 Dev. & B. Eq.) 631, says: 'While our ancestors brought over to this country the principles of the common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste. . . . We also hold that the turning out of exhausted land is not waste.' The court, in that case, reached the conclusion that it was for the jury to determine whether, in clearing additional land or turning out that which had been exhausted, the tenant for life acted as a prudent owner in fee would have done, had he been cultivating the land for a support or for profit. Substantially the same reasoning is adopted in other cases decided before and since that opinion was delivered, here and in other states."

And in Norris v. Laws, Associate Justice Walker thus succinctly states the principle: "We have held that what is a peranent injury to the inheritance must often depend upon the facts and circumstances of the particular case under consideration, and the jury must determine, under proper instructions from the court, whether the tenant for life, in what he has done or omitted to do, has acted with the same care as a prudent owner of the fee would have exercised if he had been in possession, cultivating or using the land for a support or for profit."

In the practical application of the doctrine, as it now prevails, and under the restrictions and limitations as indicated, a tenant has been allowed to clear land required for the proper enjoyment of his estate, and, where he may clear, it seems that he may sell the timber for his own benefit. Under his right of common of estovers, to wit, housebote, plowbote, and haybote, he may cut sufficient timber to repair the necessary buildings already on the premises and for fuel: (2) for making and repairing implements of husbandry; and

(3) for repairing fences and hedges. Parkins v. Coxe, 3 N. C. (2 Hayw.) 339; Anderson v. Cowan, 125 Iowa, 259, 68 L.R.A. 641, 106 Am. St. Rep. 303, 101 N. W. 92. But the general rule is that the standing timber growing on land is considered a part of inheritance, and a tenant is never allowed to cut and sell timber therefrom merely for his own profit (Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362), and, in case he has done this in violation of the rights of the remainderman or reversioner, he may not recoup or set off against such a demand the costs or profits from repairs or improvements made by him at another time. Morehouse v. Cotheal, 22 N. J. L. 521. It may be that the cutting and selling of timber by a tenant for the present purpose of making necessary repairs on buildings already on the premises can, at times, be sustained. Such a course seems to have been approved in a few cases, as in Loomis v. Wilbur, 5 Mason, 13, Fed. Cas. No. 8,498, where Justice Story states the proposition as follows: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and, if so, it would not be purged or its character changed, by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were bona fide applied for that purpose, in pursuance of the original intention, it does not appear to me to be possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense, that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate."

Notwithstanding the closing sentences of the learned judge, or rather in correct interpretation of entire excerpt, if such a privilege can be upheld at all, it is only in very exceptional instances, and it must be made to appear that the cutting and sale was with a present view of making needed repairs; that the proceeds have been honestly expended for such purpose; and that no substantial injury to the inheritance has been caused, or, as said in the statement, "that it is most for the benefit of all concerned." Pursuant to these authorities, we must hold that there was error in the directions given the jury, on the present trial. There was no evidence offered that the cutting and sale of this timber, on the part of the widow, was with the purpose of making needed repairs, or that the proceeds were expended for any such purpose. On the contrary, the defendant has been allowed to justify for an act that ordinarily constitutes waste by showing in a general and indefinite way that, during her tenancy, she has expended for repairs an amount fully equal to the value of the timber sold. On the record as it now appears, the defendant, in selling the timber for cross-ties, etc., has prima facie committed an act of waste, and, before she can be excused, it is incumbent upon her to show, as heretofore intimated, that the cutting and sale of the timber was with the present view of making necessary repairs on the property; that the proceeds were honestly expended for the purpose; and that such a course was in accordance with good husbandry and caused no substantial damage to the inheritance.

There is error entitling plaintiffs to a new trial of the cause; and it is so ordered.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

C. N. RUTHERFORD, Plff. in Err.,
v.
A. B. HOLBERT.

(— Okla. —, 142 Pac. 1099.)

Appeal — absence of brief — effect.

1. Where plaintiff in error has, in compli-

Headnotes by THACKER, C.

Note. — Fixing the extent of liability of the several obligors to an agreement as making it joint, joint and several, or several.

I. Introductory, 221.
II. General rules of construction, 222.
III. Application to specific contracts.
  a. In general, 222.
  b. Limitation of contracts otherwise joint, 228.
IV. *Pro rata*, etc., limitations.
  a. In general, 229.
  b. Doctrine that such limitations affect only obligors, 231.

I. Introductory.

The present note excludes subscription agreements and other agreements in which there is no obligee. Subscriptions to corporate stock have likewise been excluded, as they constitute a somewhat distinctive class. See note to Gibbons v. Bente, 22 L.R.A. 80, as to this class of agreements.

Even though there is a limitation of the liability of the several obligors to the amounts set opposite their names, this may not affect the entire contract so as to render it several.

Thus, in Buster v. Fletcher, 22 Idaho, 172,

ance with the rules of the court, served and filed his brief, but the defendant in error has neither filed nor offered excuse for failure to file brief, the court is not required to search the record to find a theory upon which the judgment may be sustained, and may reverse the case in accordance with the prayer of the plaintiff in error if the brief filed appears to reasonably sustain such action.

Joint debtors — separate suit.

2. Where a joint obligation of several obligors to pay plaintiff a specified sum of money also shows that as between such obligors each is a principal debtor for a specified portion of the whole sum and is surety as to all the remaining portion thereof, each such obligor may be separately sued for such portion as he owes as such principal debtor.

Same — benefit from consideration.

3. Under § 877, Stat. 1890 (§ 969, Rev. Laws 1910), "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

Evidence — subscription — conditions.

4. Where a written obligation to pay a specified sum of money recites that same is null and void if full amount is not "subscribed," and after defendant, who is the second subscriber, has signed and set opposite his name thereto the amount of his subscription, eight other persons sign same and each sets opposite his name the amount of his subscription, so that the ten several sums subscribed amount to said specified sum, such expression in writing of such condition precedent to the finality of the

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125 Pac. 226, an agreement between a number of persons and a contractor, by the terms of which the contractor agreed to build and construct a butter factory and feed mill for a stated sum, and the subscribers, who signed the contract, promised and agreed to pay him the sum of $100 each upon the completion of the factory according to the terms of the contract, was treated as a joint obligation on the part of all the signers so far as the construction of the building was concerned, and therefore upon the failure of the contractor to complete it within the time agreed upon no less than all the subscribers could rescind the contract.

The contract in this case, after reciting the desire of the subscribers for a factory, continued that the subscribers entered into the agreement with the contractor for the construction and equipment of the factory. In the following paragraph it was stated that the contract was not to be binding unless the full amount was subscribed, and it is "understood and agreed that no subscriber is to be liable for a greater interest in said factory when the same is completed than is represented by the amount of his or her individual subscription." It was stated that this made the obligation of the signers a joint contract in the employment of the contractor and a several contract with reference to the payment to be made by each signer.

A contract similar to that set out under III. a, Creamery, etc., construction contracts infra, except that there was no limitation of liability of the stockholders, was construed in Gibbons v. Bente, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, as being joint, so that no less than all the subscribers could rescind or repudiate it, although it may have been several as to the liability of the respective subscribers.

II. General rules of construction.

The thing to be determined in the construction of contracts is the intent of parties, and if when read as a whole with reference to the subject-matter and the occupations of the parties, it is reasonably clear that only a limited or several obligation was intended to be assumed by each individual obligor, the courts will recognize and give force and effect to such intention. McArthur v. Board, 119 Iowa, 562, 93 N. W. 580.

It is stated in Davis v. Hendrix, 59 Mo. App. 444, that in construing contracts isolated phrases or sentences should not be allowed to govern or subvert the evident intention of the parties as shown by the contract as a whole; that if the whole contract discloses that as to any part of it there is imposed upon the obligors the taking of several duties, words of joint obligation, such as, "we bind ourselves," will not make the contract joint.

The construction of a contract is nothing more than a gathering of the intentions of the parties to it, from the words they have used. In the ascertainment of the thought or purpose so expressed, regard must be had to the whole instrument as applied to the facts and circumstances to which it relates, and when the agreement so considered reveals some obvious absurdity or some repugnance or inconsistency with such manifest intention, then to avoid such consequences, but no further, the meaning of the particular words employed may be modified, extended, or abridged. Gibbons v. Grinsel, 79 Wis. 365, 48 N. W. 255.

It is stated in Davis & R. Bldg. & Mfg. Co. v. Barber, 51 Fed. 148, that a contract must be considered as a whole in arriving at the intention of the parties, and if upon such consideration the intention of the parties becomes apparent it must prevail over the literal interpretation of the particular words, phrases, and clauses.

III. Application to specific contracts.

a. In general.

In accordance with the rules stated in the preceding section, the court in the following cases, for a survey of the contract as a whole, determined the character of the liability as to its being joint or several.

execution and delivery of such writing does not exclude oral proof of other conditions precedent, not wholly repugnant thereto, upon which defendant signed and delivered such writing.

Same — condition of contract.

5. A written contract does not come into existence as such until its utterance is final and complete; and parol evidence to establish or refute such utterance, as by showing it was delivered upon a condition precedent, is admissible.

Trial — taking issue from jury.

6. Where the pleadings and the evidence present an issue of fact in respect to whether a writing was delivered upon a condition precedent to its effectiveness, it is error for the court to so instruct the jury as to take such issue from them.

Same — instructions — effect.

7. Instructions to the jury, to the effect that their verdict should be for the plaintiff, unless defendant was induced by fraud or trickery to sign the writing sued on, or unless he signed the same thinking he was signing a blank paper, and when he could not, by reasonable diligence, have ascertained that he was signing more, take from the jury their right to determine, under the issues in the present case, whether such writing was completely executed and finally delivered.

(August 25, 1914.)

ERROR to the County Court for Johnston County to review a judgment in plaintiff's favor in an action on a subscrip-

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Thus an agreement by the patrons of a private school to pay the teacher certain named rates of tuition, signed by the patrons with the number of scholars entered by each, was held to create a several liability of the subscribers, and therefore one may be sued alone. Beck v. Pounds, 20 Ga. 36.

An agreement of property owners to pay contractors a stated sum "per front foot for paving each side of street in front of our property," signed by the property owners, who add to their signature the number of feet by them respectively owned, is a several contract, since it is apparent that the intention of the parties was each owner would be liable only for the amount of improvement in front of his property. Combs v. Steele, 80 Ill. 101.

In Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888, where a subscription contract for the building of a church was signed by a number of subscribers, who set opposite their names certain amounts, it was held that the contract was several, although it did not state in the body that the promise was to pay "the subscription set opposite our names;" the court stating that "the paper and the manner of the subscription as clearly indicated the intention by all the parties that each subscriber should be liable and only liable for the amount by him subscribed, as if the words, "opposite each of our names," had been used. As stated above, subscription contracts such as was involved in this case have in general been excluded.

An agreement reciting in its introduction the employment of a purchasing agent by a corporation, and the agreement by the directors of the company to become individually responsible in a stated sum each for goods purchased by the agent, and containing in the body of the contract an agreement as follows: "We bind ourselves and each of us . . . in the sum of $2,500 each, making in all the sum of $30,000 . . . and we and each of us agrees and promise that we will pay such hope and malt bills in total not exceeding the sum of $30,000 or $2,500 each," creates a several, L.R.A.1915B.

not a joint, liability on the part of the directors. Boyd v. Kienzle, 46 Md. 294.

An official bond for a stated penalty in which the sureties bind themselves "severally for the sum and the sum alone set respectively opposite their names," signed by sureties, with certain amounts set opposite their names aggregating the penalty of the bond, is the several obligation of the sureties, and not the joint obligation, each surety being bound severally for the sum set opposite his name. State v. Powers, 52 Miss. 198.

An official bond in which the sureties acknowledged themselves "jointly and severally bound" in certain specified sums, which followed the names of the respective sureties, was treated in People v. Breyfogle, 17 Cal. 504, as rendering the sureties severally liable for the amounts set opposite their names. The words, "jointly and severally," not apply to the sureties *inter sese*, but to the respective sureties in connection with the principal in the bond.

But in People v. Love, 25 Cal. 521, a bond containing a specification of the several amounts for which each surety bound himself, followed by a statement, "for which sums respectively . . . in the manner and in the proportion hereinbefore set forth, we bind ourselves, our and each of our heirs, executors, and administrators jointly and severally, firmly by these presents," was held to be a joint and several obligation upon which a suit might be brought against a part of the sureties by virtue of a statute providing that persons severally liable upon the same obligation or incident may all, or any of them, be included in the same action at the option of the plaintiff.

An indemnity bond reciting that the principal and sureties are held and firmly bound to the employer of the principal in the sum of $10,000, "that is to say, the said [principal] in the whole of said sum, above named, and the said [sureties] each as surety respectively in the sum of $3,333 33-100, . . . for which payment well and truly to be made we do hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents," is a several obligation

tion contract for the purchase price of a stallion. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Stephen C. Treadwell for plaintiff in error.

Messrs. W. F. Bowman and Newman & Lawrence for defendant in error.

Thacker, C., filed the following opinion:

Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 15, 1911, plaintiff obtained a verdict and judgment against the defendant for $300, with interest thereon at 6 per cent per annum from May 17, 1910, in an action upon an instrument in writing, which reads as follows:

Tishomingo, Okla. May 17, 1910.

Seeing it necessary to improve the breed of our horses, we, the undersigned subscribers, hereby purchase and agree to pay the sum of $3,000 to A. B. Holbert for the English Hackney Stallion Ryedale Evolution. Payments to be made to A. B. Holbert by cash or joint note, drawing 8 per cent interest from date, payable as follows: $1,000 one year, $1,000 two years, $1,000 three years.

If full amount is not subscribed, this is null and void.

A. B. Holbert

M. J. Jester	$ 300 00
C. N. Rutherford	300 00
Z. T. Burton	300 00
H. E. Fagan	450 00
J. A. Ray, Sr.	450 00
O. J. Davis	300 00
J. H. Duncan	450 00
R. C. Johnson	300 00
C. D. Bynum	150 00
	$3,000 00

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of the sureties, and not the joint obligation of each surety and the principal. Commercial Nat. Bank v. Gorham, 11 R. I. 162.

But in People v. Hartley, 21 Cal. 585, 82 Am. Dec. 758, an official bond reciting that "we . . . as sureties are held and firmly bound . . . in the several sums as hereinafter specified and affixed to our names," signed by the sureties with certain specified sums attached to their signatures, is stated by the court to bind the principal and each of the sureties in the certain sum designated, not jointly and severally, but only jointly. The term "severally" as used in the instrument is stated to apply only to the different sums which the parties respectively specify as the limit of the liabilities they assume.

An official bond reciting that the principal and the sureties "are held and firmly bound . . . in the sum of $1,000 each" is not a joint, but a several, bond of the parties. Middletown v. M'Cormick, 3 N. J. L. 500.

An official bond for a stated sum in which the plaintiff is bound for a stated sum and the sureties are bound in certain other stated sums aggregating the amount of the bond is a several obligation of the sureties. Collins v. Prosser, 1 Barn. & C. 682. The clause binding the sureties who were sued in this case read: "And we [the sureties] are also held and firmly bound in £1,000 each for which we bind ourselves and each of us for himself for the whole and entire sum of £1,000 each."

An agreement by the renter of tolls and his sureties, reciting that they "do hereby severally promise, undertake, and agree to and with the said trustees that "the renter of the tolls should pay the rent at the appointed times, and perform and keep the above-mentioned petition, creates a several obligation of the parties. Lee v. Nixon, 1 Ad. & El. 201, 3 Nev. & M. 441, 3 L. J. K. B. N. S. 160.

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In Parrish v. State, 14 Md. 238, a recognizance in which the accused acknowledged himself indebted unto the state in a certain sum, and his bail also acknowledged himself indebted to the state in the same sum, "which they and each of them acknowledge themselves and each of them severally to owe and stand justly indebted to the state of Maryland in [the stated sum] which . . . they and each of them acknowledged shall be made and levied of their respective bodies, goods and chattels, lands and tenements," is held to be a several, and not a joint, recognizance.

A contract of guarantors to guarantee a debt in the proportion of "£200 (one half the whole debt) each" renders them severally liable. Fell v. Goslin, 7 Exch. 185, 21 L. J. Exch. N. S. 145.

See Williamson v. Chiles, 27 N. C. (5 Ired. L.) 244, infra.

Contracts relating to the purchase of horses.

An agreement between the owner of a stallion and a number of persons interested in the purchase of such a horse, whereby the owner agrees to sell "for $3,000 to the undersigned subscribers, who, wishing to improve their stock, agree to pay $100 for each share in said stallion, capital stock $3,000 number of shares thirty," is a contract in which the several subscribers are severally liable, and not jointly. McArthur v. Board, 119 Iowa, 562, 93 N. W. 580. It was further provided in the contract in this case that the payments were to be made in cash, or one third in one year, one third in two years, and one third in three years, secured by joint and several notes, with interest.

In an action on a note which had been executed in pursuance to such contract, the court in City Deposit Bank Co. v. Green, — Iowa, —, 103 N. W. 96, followed this case, refusing to make a distinction between

The petition alleged compliance with the foregoing on the part of plaintiff, and that defendant "without any cause refused to execute a joint note, and refused to pay the same." The overruling of defendant's demurrer to the petition is assigned as error; and this presents the question as to whether said instrument is a joint obligation requiring that the action must be brought against all the living joint obligors within the jurisdiction of the court. As between plaintiff and the purchasers of the stallion the instrument appears to be a joint obligation so as to bind all the obligors for said $3,000. All the obligors join in a promise to pay him the whole amount to be paid. Davis v. Shafer (C. C.) 50 Fed. 764; Davis & R. Bldg. & Mfg. Co. v. Knoke, 55 Minn. 368, 57 N. W. 62; Field v. Runk, 22 N. J. L. 525.

However, the last sentence of the instrument, and the figures set opposite the names of the obligors, characterize the instrument as a species of subscription contract, when completely executed and delivered, in which, as between the obligors, each should pay the amount set opposite his name as the amount of his individual subscription, so that as between them each is a principal debtor for such amount and a mere surety for his co-obligors in respect to the other portion of the joint indebtedness. It thus appears that while the obligation to plaintiff is a joint one, the instrument discloses a somewhat qualifying state of facts and a special and equitable reason for permitting plaintiff, at his election, to treat it as several as against each obligor to the extent of his individual subscription, that is, it shows that he is a principal debtor as between the joint obligors, and that his co-obligors are his sureties to that extent, and this action deprives him of no right, and the plaintiff only demands of him an amount he is ultimately and in all events bound to pay.

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an action on the contract and an action on the note, and held that the two instruments were executed as a part of the same transaction and may be taken together in determining the intent of the parties. It was accordingly held that the note was a several note, binding the subscribers for the amount subscribed for by them respectively. But in a subsequent report 130 Iowa, 384, 106 N. W. 942, the contract was held inadmissible to vary the note. The notes apparently contained no limitation of the signers' liability, hence are not within the scope of the present discussion.

But in Rumsey v. Fox, 158 Mich. 248, 122 N. W. 526, a joint and several note given in payment of a stallion by the purchasers thereof in pursuance of a contract reciting that "we, the undersigned, . . . do hereby agree to take the amount of stock set opposite our respective names for the purpose of purchasing the . . . stallion . . . for the sum of $2,600 in shares of $200 each, and agree to give our joint notes in payment for the said stallion," was held to be unambiguous, and not to be explainable by parol evidence showing that the parties construed the contract as the several contract of the various subscribers.

Creamery, etc., construction contracts.

This question arises frequently in agreements for the construction of creamery, butter, and cheese factories, and factories of similar kind. The most common form of these contracts consist of:

1st. An agreement between the builders and subscribers that the builders erect the factory.

2d. A stipulation of the amount of contract price.

3d. An agreement by the subscribers to pay the amount of the contract price.

4th. A stipulation for the organization of a corporation to conduct the business, fixing the amount of capital stock at not less than the amount subscribed.

5th. A provision for the issuance to the subscriber of shares in proportion to their paid-up interests.

6th. A limitation of liability of each stockholder to the amount subscribed by him.

Such contracts have been held to impose a several, not a joint, liability upon the obligor to the builder. Davis & R. Bldg. & Mfg. Co. v. Hillsboro Creamery Co. 10 Ind. App. 42, 37 N. E. 549; Davis & R. Bldg. & Mfg. Co. v. Booth, 10 Ind. App. 364, 37 N. E. 818; Davis & R. Bldg. & Mfg. Co. v. McKinney, 11 Ind. App. 696, 38 N. E. 1093; Waddy Bluegrass Creamery Co. v. Davis-Rankin Bldg. & Mfg. Co. 103 Ky. 579, 45 S. W. 895; Davis & R. Bldg. & Mfg. Co. v. Murray, 102 Mich. 217, 60 N. W. 437; Davis & R. Bldg. & Mfg. Co. v. Cupp, 89 Wis. 673, 62 N. W. 520; Davis & R. Bldg. & Mfg. Co. v. Barber, 51 Fed. 148; Davis & R. Bldg. & Mfg. Co. v. Jones, 14 C. C. A. 30, 32 U. S. App. 32, 66 Fed. 124.

See Gibbons v. Bente, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, supra, I.

The only clause in this contract expressly limiting the obligors' liability is that each stockholder shall be liable only for the amount subscribed by him, following the provisions relating to the organization of the corporation. Notwithstanding the position of this cause, it has been held that it evidently relates to the liability on the contract, and not to liability on account of the stock subscription. Davis & R. Bldg. & Mfg. Co. v. Hillsboro Creamery Co. supra. It is stated in Waddy Bluegrass Creamery Co. v. Davis-Rankin Bldg. & Mfg. Co. supra, that to make the contract joint would render nugatory this clause. This stipulation is stated in Davis & R. Bldg. & Mfg. Co. v. Barber, supra, to clearly manifest the

A joint contract will be treated in equity as joint and several where there is a special and equitable reason for so treating it (9 Cyc. 654, and cases cited in notes); and, where a joint contract shows upon its face that as between the obligors one is ultimately bound as principal for a specified amount and ought to contribute that amount as his share of the indebtedness, he cannot be heard to complain if he is sued alone for only that amount. (Id. and, among the others, Pickersgill v. Lahens, 15 Wall. 140, 21 L. ed. 119.)

The conclusion we have reached as to the several liability of each of the subscribers seems also to be in accord with and required by § 877, Stat. 1890 (§ 969, Rev. Laws 1910), which reads as follows: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

See Schowalter v. Beard, 10 Okla. 454, 63 Pac. 687.

It thus appears that there was no error in overruling the demurrer to the petition.

The defendant answered by general denial and further by alleging in effect: (1) That plaintiff did not deliver the stallion; (2) that, although defendant may have written his name where it appears on said instrument, he did not sign said instrument, nor any contract, but wrote his name upon what plaintiff represented and what appeared to him to be a blank sheet of paper, on a tablet, presented to him by plaintiff (while

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purpose to make the obligors liable only for the amounts set opposite their respective names. This clause was well calculated to confirm the impression that each obligor should be liable only for the amount set opposite his name, according to the court in Davis & R. Bldg. & Mfg. Co. v. Jones, supra.

In Chicago Bldg. & Mfg. Co. v. Graham, 23 C. C. A. 657, 41 U. S. App. 680, 78 Fed. 83, the limitation of liability was that "each stockholder shall be liable to the corporation only for the amount subscribed by him, and no more." It also contained the clause, "for the full performance of our respective parts of the above contracts, we bind ourselves," etc., as was contained in Gibbons v. Grinsel, infra. The contract also contained an agreement that "there shall be no waiver of original and joint liability until the contract price is fully paid." It was nevertheless held to be the several obligation of the subscribers.

The fact that the signatures were under a heading providing places for the "name of subscribers," "number of shares," and "amount of stock after incorporation," was held to be some indication that the liability was to be several, in Chicago Bldg. & Mfg. Co. v. Graham, supra. See bearing given this fact in Davis v. Shafer, infra.

In the contract involved in Davis v. Ravenna Creamery Co. 48 Neb. 471, 67 N. W. 436, the limitation of the liability of the subscribers appeared immediately after the agreement of the contractor to erect the factory for the stipulated amount, and in these words, "And it is hereby understood that subscribers are liable only for amount and number of shares signed by them, shares to be for $150 each." This contract was signed by the subscribers and followed by the numbers of shares each subscriber took. It was held to impose a several liability upon the subscribers, and not a joint liability. The limitation of liability of the subscribers in this case was written into the printed contract, and reference is made to the rule of construction that a written stipulation will prevail over a plaintiff's provision; but the court construed the contract as a whole, and comes to the conclusion that it imposes a several liability, as above stated.

The contract involved in Davis v. Belford, 70 Mich. 120, 37 N. W. 919, varied from the foregoing in that, after providing for the organization of the corporation, it was provided that stock be issued to the subscribers "to the amount of their subscription hereunto annexed," but there was no limitation of the liability of the stockholders to the amount subscribed. The only liability in fact contained in the contract appears after the provision for the organization of the corporation. Here it is provided that no assessment shall be made on the stockholders of the company for its indebtedness, nor "shall the private property of said stockholders be liable for such indebtedness (except that which is hereby created and to be paid to the parties of the first part)."

Parol evidence was introduced of the circumstances under which the signatures to the contract were obtained, certain letters bearing upon the obtaining of the signatures to the contract were also introduced, and the entire contract, being considered in the light of such evidence, was held to be a several contract, and not a joint one. The amounts of the subscriptions of the respective subscribers followed their names upon the contract.

The contract involved in Gibbons v. Grinsel, 79 Wis. 365, 48 N. W. 255, did not contain a limitation of liability as was contained in the usual form of contract set forth above. The language here was, "We, the subscribers hereto, parties of the second part, agree to pay the above amount," and "for a faithful and full performance of our respective parts of the above contract we bind ourselves," etc. This was followed by the name of each subscriber with the amount of his particular subscription, and the contract was held a several obligation of the respective subscribers.

There was no limitation of the liability in the contract involved in Davis v. Hendrix, 59 Mo. App. 444, except that resulting from the addition of the amount of the subscription after the names of the subscribers, but

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the words of said instrument, if then upon the same, were unknown to him, and were by trick and fraud in some way concealed from his view) for the sole purpose of furnishing plaintiff a memorandum of his name and the amount he was willing to subscribe in the event plaintiff should procure other satisfactory and additional subscribers to join him in the purchase of said stallion, and so that the plaintiff might be aided by his name in procuring such additional subscribers; and (3) that if defendant signed said instrument, he did not deliver it, except upon the condition precedent that the plaintiff should procure in all ten financially responsible and otherwise, to him and each to all the others, satisfactory subscribers, who would keep the stallion at Tishomingo; but that the plaintiff failed to procure the requisite satisfactory additional subscribers, and the contract was never consummated, nor any writing thereof unconditionally delivered. Although the answer is somewhat vague and uncertain in this respect, we think it appears therefrom that it is intended to allege a conditional, if any, delivery in substance and effect as stated.

The answer does not deny that the requisite number of subscribers were secured and the requisite amount subscribed (although evidence was introduced for the purpose of doing this and an instruction was requested and refused embodying a question in this regard); and the only particular in which the subscribers who were pro-

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the contract was held several; the court being of the opinion that there could be no object in the subscribers specifying the amount opposite each of their names if it were not that the amount of liability was limited by the amount so specified, that if the amount was not so limited, and was not so intended and understood, it would have been much more direct and simple to have merely subscribed to the contract without more. The court said: "When the subscribers set opposite their names the amount of their subscription, it has effectually limited the liability of each as if such amounts had been, in words, limited in the body of the contract."

In Frost v. Williams, 2 S. D. 457, 50 N. W. 964, an agreement by a builder to construct a cheese factory for $300, containing a guaranty by a number of farmers in the following language: "We, the undersigned farmers of McCook county, Dakota, guarantee the said A. W. Frost the above-named sum of money, and to furnish the milk from the number of cows set opposite our names," and signed by the farmers, who followed their signatures by a stated number of dollars, is held to create a several obligation on the part of the farmers signing the contract.

A contract similar in many respects to that discussed in Davis v. Belford, 70 Mich. 120, 37 N. W. 919, and Gibbons v. Grinsel, supra, was involved in Davis v. Shafer, 50 Fed. 764. There was this difference, however, that the contract in the Davis v. Shafer Case did not contain the language relied upon by the courts as a limitation in the two other cases. The contract in the Shafer Case was held to be the joint contract of the subscribers. A state statute is referred to, but not set out, it being stated that by the express provision of this statute the contract is joint and several. It is pointed out by the court that the subsequent provision of the contract respecting the organization of the corporation in no wise affected the liability of the subscribers under the previous part of the contract; that this was a matter between themselves as to how their interests in and to the joint property thus acquired should be secured. The heading to the subscription list, *viz.*, "amount of stock after incorporation," is referred to and stated to show that the subscriber did not become such stockholder until after incorporation, and that this act depended upon himself and was beyond the control of the contractors.

In Davis & R. Bldg. & Mfg. Co. v. Barber, 51 Fed. 148, the court criticizes the decision in Davis v. Shafer. The contract however, in the Barber Case contains the provision that "it is herein agreed that each stockholder shall be liable only for the amount subscribed by him," a clause which is absent from the contract in the Shafer Case; the court in the Barber Case stated the fact that each subscriber had written after his name the amount subscribed by him was cogent evidence that he meant to become liable for no more, and this of course is directly contrary to the holding in the Shafer Case, for the amount was there written after the name the same as in the Barber Case; but in the Barber Case there was an additional clause limiting the liability not contained in the Shafer Case; and thus an indication, not present in the Shafer Case, or an intention of the parties to limit the liability to a several liability, and not a joint one.

Davis v. Shafer has been critized in other decisions as well. The decision in that case is based upon the written contract that was before the court for construction, and upon this basis the decision is unassailable. The decisions contrary to it take into consideration the circumstances under which the contract was given, and interpret the written contract in the light of these circumstances. They do not confine themselves strictly to the contract as contained in the writing. The latter method of interpreting contracts has come to be that commonly accepted by the courts, at least when applied to contracts such as are covered in the present note.

A contract for the erection of a creamery in which the subscribers agree to pay the sums severally set opposite their names, and which contains the further provision that

cured after defendant signed were unsatisfactory is indicated in the foregoing statement in respect to the contents of the answer. The answer, unaided by the petition, would not show when defendant signed said instrument in relation to his cosubscribers; but it may be inferred from the copy of said instrument attached to the petition that he was the second of said obligors to sign the same, so that the eight whose names and subscribed amounts follow his were not parties to the instrument at the time he signed same.

The instrument sued on imports that there was a delivery of the stallion, so that the burden was upon defendant to show that there was no delivery, and the evidence indisputably shows delivery, so that this was not an issue for the jury; but there was evidence adduced by defendant tending to support each of the other propositions asserted in the answer, and the defendant was entitled to have the jury determine the issues thus presented by both the pleadings and the evidence.

The court in effect instructed the jury: (1) That if they found that defendant was induced by fraud or trickery to sign the contract, if they found that he did sign it, their verdict should be for him, otherwise it should be for the plaintiff; (2) . . . (3) that if defendant signed the contract "he is bound by it, and he cannot escape liability, although he did not read it, and although he thought he was signing a blank paper, if it appears that by the use of rea-

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25 per cent of the contract price is to be paid in cash, 40 per cent to be settled by a good approved joint note payable in three months, and 35 per cent to be settled by good approved joint notes payable in six months, creates a joint obligation upon subscribers. Davis & R. Bldg. & Mfg. Co. v. Knoke, 55 Minn. 368, 57 N. W. 62.

An agreement of contractors to erect a creamery for $5,000, followed by the agreement of the subscribers as follows: "We, the subscribers hereto, parties of the second part, agree to pay the above amount for said creamery when completed," was treated as the joint agreement of the subscribers, in Davis v. Bronson, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836.

The limitation of liability by placing the amount of the subscription opposite certain names on such a contract may have the effect of rendering severally liable other persons whose signatures are not followed by the amount of their subscriptions.

Thus an agreement for the construction of a creamery which provided that the contract price was to be payable in cash or by joint negotiable note or notes and which is signed by a number of subscribers, who limit their liability by stating the amount of their subscriptions after their names, and by others who do not state the amount of their subscriptions, was held to create a several liability on the part of those not stating the amount of their subscription in Cornish v. West, 82 Minn. 107, 52 L.R.A. 355, 84 N. W. 750.

b. Limitation of contracts otherwise joint.

In the above cases, the courts arrived at the judgment after considering the contract as a whole without particular reference to the clause limiting liability, except as otherwise noted.

In some cases it is assumed that but for the fixing the extent of liability of the several subscribers, the contract would be joint, the words of limitation being regarded as sufficiently indicative of the intention to make the contract a several one.

The addition of the words, "and will pay the sum annexed to their names for the purposes aforesaid," in an agreement by a large number of settlers to pay a stated sum for the services of an attorney in having a certain claim rejected, limits the liability of the parties signing the acceptance to the sums respectively set down by them. Moss v. Wilson, 40 Cal. 159. After referring to the fact that the signers of the agreement were settlers upon the land, the court continued: "They had no joint interest in the subject of the controversy; . . . there was no relation between them that would make it probable that they would be willing to undertake for each other, but the contrary . . . they certainly had, so far as appears, no joint estate or claim, and were not engaged in a joint enterprise or undertaking."

An agreement by the purchasers of a printing press and printing material, to pay the vender the purchase price "in manner hereinafter specified," payment to be made in instalments, and "each of the said first parties to be held personally responsible for one fourth of the said $1,500," creates a several liability on the part of purchasers, and is not a joint obligation. Larkin v. Butterfield, 29 Mich. 254.

The agreement of a number of grain growers with one who undertook to secure a reduction of freight rates for shipping grain, to pay to such person one half the reduction secured upon grain grown for sale by the growers, but containing a provision that the growers shall not be deemed sureties, one for the other, upon the contract, creates a several liability rendering the signers liable only for the amount computed on the respective crops of each. Gaines v. Vandecar, 59 Or. 187, 115 Pac. 721, 1122.

The court in Davis v. Ravenna Creamery Co. 48 Neb. 471, 67 N. W. 436, supra, mentions certain clauses in the contract, and states that if these clauses were construed by themselves the undertaking of the subscribers would be a joint one, but in view of the stipulation limiting the liability as

sonable diligence he could have ascertained what the contract was that he was signing, as the law requires every man who can read and write, and is in possession of his faculties, to use ordinary and accessible means of informing himself of the contents of any instrument that he signs." These instructions eliminate from the issues triable to the jury the question as to whether the contract was completely executed and unconditionally delivered, and are erroneous at least in this respect.

The last sentence of the contract ("if full amount is not subscribed this is null and void") stated a condition precedent (and not a condition subsequent) to the complete execution and final delivery of the instrument sued on as the contract of the parties thereto, and we have thought it a serious question if such an expression in the writing itself does not exclude all other conditions precedent to its finality; but, although we deem it unnecessary to determine whether this expressed condition precedent would exclude others wholly repugnant thereto, we think it does not exclude the condition that the plaintiff should procure financially responsible and otherwise satisfactory subscribers who would keep the stallion at Tishomingo, nor any other condition precedent not wholly repugnant to that expressed in the writing. Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; Golden v. Meier, 129 Wis. 14, 116 Am. St. Rep. 935, 107 N. W. 27; Elastic Tip Co. v. Graham, 174 Mass. 507, 55

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stated above and construing the entire contract together, the limitation is several.

In the following cases the words of limitation used were held not sufficiently indicative of an intention that the contract should be the several one of the obligors, and therefore it remained joint.

Thus, an agreement for the building of a ship in which the contractor agreed to build a ship of certain dimensions, and a number of other persons "agreed to pay" according to certain terms signed by the parties with the words, "three eighths," "one eighth," and "one sixteenth," respectively, opposite the names of the parties other than the contractor, was held the joint contract of parties for whom the ship was being built. The proportional part of the ship which each defendant was to take, and which was indicated by the words set opposite his name, was not regarded as sufficient to show an intention to limit the liability of each defendant to his proportion of the ship, and therefore they could not control the general language used in the contract. It is stated that these words may serve to show the relation subsisting between the parties of the second part of the contract, but they cannot be permitted to subvert or even modify the unambiguous terms as made by the parties themselves. Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491.

An agreement between three persons and a committee, for the purchase of a wharf and boat, that if the cost thereof exceed the amount which the committee is authorized to spend, the three persons "will bear and pay . . . one half the amount of their said contracts," creates a joint liability on the part of the three persons, although it is followed by the provision that "it is the mutual agreement of the parties hereunto that the above contemplated advances shall be paid equally by the subscribing persons, and that all profits and losses arising from such advances shall be divided or borne equally by the subscribers hereto;" the court being of the opinion that this latter clause does not annul or control the plain and direct stipulation by which the three persons stipulated in a certain event to pay a sum of money to the committee. Bartlett v. Robbins, 5 Met. 184.

An agreement to indemnify one for becoming bail for a prisoner, which recites that "we, the subscribers, hereby agree to indemnify . . . for all damages and costs that may accrue . . . by reason of said M having become bail for T," signed by the parties, who follow their signatures by the respective amount of their subscriptions, is joint obligation of the subscribers. McCullis v. Thurston, 27 Vt. 596. It is stated by the court that the sums may have been affixed to the respective names of the subscribers to regulate the principles or rate of contribution among themselves upon giving the plaintiff his full indemnity.

See Wood v. Farmer, 200 Mass. 209, 86 N. E. 297, infra.

IV. Pro rata, etc., limitations.

a. In general.

Contracts are frequently made in which the several parties assume a *pro rata* or proportional share of the entire amount called for by the contract. This is sometimes the case in agreements of abutting property owners for street improvements.

In Combs v. Steele, 80 Ill. 101, it is stated by the court that contracts will be construed to be joint or several, as the case may be, where the intent of the respective parties appears on the face of such obligation, and that that construction will be adopted which is most consistent with the words employed to express the undertaking of the several parties. It was accordingly held in this case where property owners had contracted with a contractor for the improvement of a street in front of their property at so much per front foot, and had signed the contract, following their signatures by the number of feet owned by them, that it was apparent that the intention of the parties was to bind themselves severally for the number of feet in front of their respective properties.

In O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939, three owners of land abutting on

N. E. 315; Boston Woven Hose & Rubber Co. v. Graham, 185 Mass. 597, 71 N. E. 117; Wilson v. Powers, 131 Mass. 539; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127.

In 4 Wigmore on Evidence, §§ 2408–2410, and 3 Jones's Commentaries on Evidence, § 471, will be found a thorough elucidation of the principle upon which parol evidence is admitted to show that a written instrument was never executed and delivered in a way to bind the parties by its terms.

In 4 Wigmore, § 2408, supra, it is said: "A legal act does not come into existence as such until its utterance is final and complete. All transactions require an appreciable lapse of time for their fulfilment; most important transactions in writing are consummated only after successive inchoate acts of preparation, drafting, and revision. Moreover, the written terms may be prepared with a precision which leaves nothing to alter (as it turns out), and still may be for a while retained for reflection or submitted for suggestion, without as yet any final adoption. Until some finality of utterance takes place, there is no legal act. Whenever, therefore, certain conduct or writing is put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act."

The plaintiff in error, in compliance with the rules of the court, served and filed his brief, but the defendant in error has neither filed nor offered excuse for failure to file brief; and in such case the court is not required to search the record to find a theory upon which the judgment may be sustained, but may reverse the case in accordance with the prayer of the plaintiff in error if the brief filed appears reasonably to sustain such action.

For the reasons stated, this case should be reversed and remanded for another trial.

Per Curiam:
Adopted in whole.

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a street contracted with a contractor in regard to paving the street, "each contracting severally," and "each for himself, and not for the others," agreed to pay according to the ratio that their respective frontage bore to the whole frontage represented. In an action against one of the owners thus contracting, the introduction of the contract in question was objected to on the ground that the contract was signed by the contractor as an entire contract, whereas the owners severally limited the obligation of each to pay for only a specified part of the grading. In passing upon this objection the court states that the instrument as written "is of the nature of a subscription contract whereby the obligation of each subscriber is limited and several, and not joint."

So an agreement by the stockholders in a corporation in regard to money borrowed by the corporation, that if it cannot repay such loans out of its assets the stockholders will pay such amounts "provided the aggregate asked from each of us does not exceed 5 per cent of the par value of our respective holdings of stock," was held to impose a several liability upon the stockholders to pay the proportionate share thereof merely, and not to impose a joint liability to pay for such borrowed money. Dornan v. Swift, 1 Penn. (Del.) 457, 41 Atl. 1105.

An agreement between the various banks of the city to contribute for any one of their number, not able to pay or secure a balance found due on settlement, in the ratio which the circulation of the respective bank bore to the circulation of all the banks, was held to create a several, and not a joint, obligation, under a statutory provision that a joint obligation is one in which several persons join in the same contract to do the same thing, and that a several obligation is one in which one of the obligors promises something not promised by the other, but each one promises separately for himself to do a distinct act. New Orleans Improv. & Bkg. Co. v. Citizens' Bank, 10 Rob. (La.) 14.

An agreement by the stockholders of a corporation in process of dissolution to pay the outstanding debts of the company in proportion to the amount of stock held by each is not a joint, but a several, contract of the various stockholders. Green v. Relf, 14 La. Ann. 841. The statutory provision involved in this case was the same as that mentioned in New Orleans Improv. & Bkg. Co. v. Citizens' Bank, supra.

An indemnity agreement between the stockholders of a corporation in which it is agreed between such stockholders "each with all the others, and each with such stockholders as shall now be liable upon the company's paper or shall hereafter become so by indorsement or otherwise . . . that each of the said parties will so indemnify, protect, and save harmless the said stockholders now upon the company's paper or such as shall hereafter assume the liability of indorsers of said company's paper, in proportion of each of said stockholders' ownership of said stock, and to that end will, upon the demand of any one or more of said stockholders, . . . contribute toward the payment thereof such sum as such party ought to contribute in proportion to the stock held by him," further limiting the amount of liability to a stated sum, is the several contract of the various subscribers. Taylor v. Coon, 79 Wis. 76, 48 N. W. 123.

A note given by the residents of certain districts upon the purchase of a scraper, reading, "We, residents of districts . . . promise to pay to the order of Western Wheel Scraper Company, $47 . . . first payment for one Western Reversible Road

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Grader to be paid by us in proportion to road tax in above-mentioned districts on lands and property which we now own and occupy in said districts on which we now pay road tax," creates a several liability of the signers, and not a joint liability. Western Wheel Scraper Co. v. Locklin, 100 Mich. 339, 58 N. W. 1117. It was urged by council for the payee that it was unreasonable and incredible that a business corporation should assume the determination of the amount due from each maker, and contemplate the bringing of twenty suits to collect the amount. In answer to this it is stated that "if this be true, it would be equally unreasonable and incredible that each maker contemplated his individual liability for the entire amount and the bringing of nineteen other suits to enforce contribution." The action in this case was apparently against all the signers of the note, on the theory of a joint contract.

An agreement of the owners of land situate in a certain patent, employing attorneys to prosecute certain actions in regard thereto, which recites that "we, the subscribers, hereby mutually bind ourselves to each other jointly and severally, our respective heirs, executors, and administrators, to pay each according to his relative respective interest and proportion in the said lands," creates a several, and not a joint, liability. Ludlow v. McCrea, 1 Wend. 228.

An agreement among several insurance companies to unite in resisting a claim upon certain policies, and to contribute to and pay the costs, fees, and expenses of suits and legal proceedings instituted for that purpose, *pro rata*, "that is to say, . . . such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured upon said property by all the companies subscribing this agreement," creates a several, not a joint, obligation on the part of the several insurance companies. Adriatic F. Ins. Co. v. Treadwell, 108 U. S. 361, 27 L. ed. 754, 2 Sup. Ct. Rep. 772. Compare with Security Ins. Co. v. St. Paul F. & M. Ins. Co. infra.

An agreement by three persons interested in a banking corporation to carry a stated number of shares of stock for another, the stock to be carried by the parties named *pro rata* according to the amount of their respective interest in the banking corporation, creates a several obligation upon each of the parties, and of the person for whom they are carried to each of the parties, so that one of the parties may sue the person for default. Villard v. Moyer, 123 App. Div. 629, 107 N. Y. Supp. 1054.

An indemnity agreement reading, "We bind ourselves . . . to bear each of us, in equal proportions, with the said [persons indemnified] any loss which they may thus sustain, provided nevertheless, and it is hereby expressly understood and agreed by and between all parties concerned in this agreement, that we, the undersigned, are not to be held responsible to an amount exceeding $500 each," creates a several liability upon the part of the indemnitors, and not a joint nor joint and several. Williamson v. Chiles, 27 N. C. (5 Ired. L.) 244.

An agreement among persons about to purchase property that the property shall be taken in the name of one of them, but that each should have and hold one undivided seventh thereof, "and pay each his or her portion of the price," was held a several agreement in Fuselier v. Lacour, 3 La. Ann. 162.

An agreement by two persons for whom a boat was being built, to pay the builder the contract price "each his one half," is the several contract of the two persons. Costigan v. Lunt, 104 Mass. 217.

An agreement between one who is constructing a building for a corporation and two of the stockholders of such corporation that if the contractor would take a certain amount of the stock in part payment of his contract and hold the same for two years, the stockholders "said Stanley and Hills agree to *pro rata* the loss or gain in the value of said stock at the expiration of two years," is the joint contract of the two stockholders as one party, and the contractor as the other, and upon a loss the two stockholders are jointly liable for the one half thereof. Penniman v. Stanley, 122 Mass. 310.

See Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491; Bartlett v. Robbins, 5 Met. 184; Larkin v. Butterfield, 29 Mich. 254, supra, III. b.

b. Doctrine that such limitations affect only obligors.

In the contracts in which the several obligors assume a *pro rata* or proportional share of the entire amount called for are some in which the limitation to a *pro rata* share has been held to affect only the obligors themselves, and not the contractor.

The agreement of the guarantors of a contract to "jointly guarantee the payment of said $25,000 or any part thereof *pro rata*" creates a joint liability of the guarantors. The words *pro rata* not being sufficient to change the meaning and legal effect of the previous part of the contract, it is stated by the court that "as here used they [the words *pro rata*] are not proper to characterize several action as distinguished from joint action; they more naturally refer to the proportion of the whole amount that the guarantors are to pay jointly, if payment of only a part should be required under the guaranty." Wood v. Farmer, 200 Mass. 209, 86 N. E. 297.

In Moreing v. Weber, 3 Cal. App. 14, 84 Pac. 220, the contract between the owners of the abutting property and the contractor recited the offer of the contractor, and continued, "We, the undersigned property owners, agree one with the other . . . that we will forthwith have said Fremont street . . . graded to the official grade . . . and will pay therefor on completion and acceptance of the work . . . the total sum of $1,154 *pro rata* as the frontage of our real property bears to the whole work,

and we jointly and severally contract and agree with . . . as contractor that he shall with all convenient despatch . . . grade to the official city grade . . . for the sum of $1,154." It is here held that this clause of the contract as to prorating was not with the contractor, but between the property owners, that as among themselves they would prorate and with which the contractor had nothing to do. It was accordingly held that the contract was joint and several, and by virtue of the California statute providing that persons severally liable upon the same obligation may all or any of them be included in the same action at the option of the plaintiff, the contractor might recover of certain of the property owners without joining all.

In Security Ins. Co. v. St. Paul F. & M. Ins. Co. 50 Conn. 233, a number of insurance companies having insurance upon a building which had been destroyed by fire united to resist a claim for the insurance on the ground of fraud, and agreed to contribute to and pay the costs, fees, and expenses of suits and proceedings "*pro rata*, that is to say, each company shall pay such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement." The action in question was one by one of the parties to such agreement which had been compelled to pay a judgment against it for attorney fees rendered in resisting the insurance claim against another of the parties to such agreement for contribution. It is stated by the court that by the terms of the agreement the signers jointly subjected themselves to liability to all persons rendering service at the request of the committee which had been appointed to manage the matter; that the provision in the contract as to payment *pro rata* applied only to the obligors between themselves. Compare with Adriatic F. Ins. Co. v. Treadwell, 108 U. S. 361, 27 L. ed. 754, 2 Sup. Ct. Rep. 772.

In Knowlton v. Parsons, 198 Mass. 439, 84 N. E. 798, where there was an oral contract for the services of a stenographer by several litigants, it is held that an agreement among the litigants as to the division of the amount of the stenographer's fees would not render the contract several if the stenographer herself was ignorant of the arrangement.

See Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491, supra, III. b. W. A. E.

OKLAHOMA SUPREME COURT.

R. N. DUNHAM, City Clerk of the City of Guthrie, Plff. in Err.,
v.
H. F. ARDERY.

(— Okla. —, 143 Pac. 331.)

Officer — removal — constitutionality.

1. Section 1 of article 8 of the charter of the city of Guthrie is not in conflict with §§ 1, 2, and 6 of art. 8 of the Constitution, nor with § 2, (schedule) of the Constitution.

Same — removal — discretion of clerk.

2. Section 1 of article 8 of the charter of the city of Guthrie provides in part as follows: "The holder of any elective office may be removed at any time by the electors qualified to vote for a successor to such incumbent. . . . The procedure to effect the removal shall be by petition, signed by electors entitled to vote for a successor to the incumbent. The signatures to the petition need not be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. . . . Within ten days from the date of filing such petition, the city clerk shall examine, and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified voters, . . . and he shall attach to said petition his certificate, showing the result of such examination. If, by the clerk's certificate, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make a like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect." Held, that the duties required to be performed by the clerk are quasi judicial and vest in him the exercise of discretion and judgment.

Mandamus — official discretion — review.

3. Where the duties devolving upon a ministerial officer require the exercise of discretion and judgment, and such officer has acted, although erroneously, a writ of mandamus may not lawfully issue to review, reverse, or correct the erroneous decision of such officer, nor to control his decision, even though there may be no other method of review or correction provided by law.

Same — arbitrary action.

4. Where an inferior officer, is vested with the exercise of discretion or judgment in the discharge of his duties, but in any case where his duties are clear, and there are not sufficient controverted facts to call for the exercise of discretion and judgment, or where such officer acts arbitrarily or fraudulently, a writ of mandamus may be issued to require the performance of his duty. Held, in this case, there being no

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Note. — The "Recall" is the subject of a note to State ex rel. Topping v. Houston, 50 L.R.A.(N.S.) 227.

The character and extent of relief by mandamus against an officer vested with discretion who has rendered a decision upon a ground not within his discretion is treated in a note to French v. Jones, 7 L.R.A. (N.S.) 525.

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allegation or facts showing that the defendant acted arbitrarily or fraudulently, it was error to issue the writ of mandamus and to make same permanent.

Elections — registry — definition.

5. The term "voters' register" as used in article 8, § 1, of the charter of the city of Guthrie, has reference to and includes precinct books provided by § 3172, Rev. Laws 1910, to be furnished by the state election board to the county election board, wherein the inspectors of elections are required to transcribe the names of all electors registered in the precincts, to be arranged in alphabetical order, and the blanks, to be filled to conform to the age, the street number, the postoffice address, the politics, and the color of each elector, as stated in his registration certificate.

(September 15, 1914.)

ERROR to the District Court for Logan County to review a judgment in plaintiff's favor in a proceeding for a writ of mandamus to compel defendant to certify as sufficient a recall petition previously rejected by him as insufficient. Reversed.

The facts are stated in the opinion.

Messrs. Burford & Burford and D. M. Tibbetts, for plaintiff in error:

Defendant having performed his duty, found the facts as required of him by the charter, and executed his certificate, his judgment cannot be reviewed or controlled by mandamus, and the court has no power to substitute its judgment for his.

People ex rel. Skelton v. Los Angeles, 133 Cal. 338, 65 Pac. 749; Monroe v. Beebe, 10 Okla. 581, 64 Pac. 10; Seminole County v. State, 31 Okla. 196, 120 Pac. 913; Norris v. Cross, 25 Okla. 287, 105 Pac. 1000; Kimberlin v. Commission, 44 C. C. A. 109, 104 Fed. 653; Decatur v. Paulding, 14 Pet. 497, 10 L. ed. 559.

The duty imposed upon the clerk to examine the registration lists and determine the sufficiency of recall petitions requires the exercise of both judgment and discretion.

State ex rel. Montgomery v. State Election Board, 29 Okla. 31, 116 Pac. 168; McKee v. Adair County Election Board, 36 Okla. 258, 128 Pac. 294; Roberts v. Marshall, 33 Okla. 716, 127 Pac. 703; Seminole County v. State, 31 Okla. 196, 120 Pac. 913; Molacek v. White, 31 Okla. 693, 122 Pac. 523; Good v. San Diego, 5 Cal. App. 265, 90 Pac. 44; Chesney v. Jones, 31 Okla. 363, 126 Pac. 715.

If the finding of defendant is conclusive when he certifies the sufficiency of the petition, it must of necessity follow that his action is conclusive when he, in exercising the same functions, determines the insufficiency of the petition.

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State ex rel. Heller v. Thornhill, 174 Mo. App. 469, 160 S. W. 558; Good v. San Diego, 5 Cal. App. 265, 90 Pac. 44; Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719.

The so-called recall petition does not contain sufficient grounds or charges to authorize defendant to act upon it, and he cannot be compelled by mandamus to do an act which he may lawfully refuse to do.

State ex rel. Topping v. Houston, 94 Neb. 445, 50 L.R.A.(N.S.) 227, 143 N. W. 796; 20 Cyc. 1368; Cudihee v. Phelps, 76 Wash. 314, 136 Pac. 367; Tangeman v. Denver, 51 Colo. 208, 117 Pac. 145; Good v. San Diego, 5 Cal. App. 265, 90 Pac. 44.

The only persons who are qualified to vote in a city election in a city of the first class are electors whose names are upon the registration books of the precinct in which they reside, and are entitled to vote.

Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684; Chesney v. Jones, 31 Okla. 363, 126 Pac. 715.

Messrs. Devereux & Hildreth, for defendant in error:

Defendant is purely a ministerial officer in counting the names of qualified voters upon the recall petitions.

Stearns v. State, 23 Okla. 462, 100 Pac. 909; People ex rel. Blodgett v. Coeymans, 19 N. Y. Supp. 206; United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; Lower v. United States, 91 U. S. 536, 23 L. ed. 420; Stearns v. State, 23 Okla. 462, 100 Pac. 909; Monroe v. Beebe, 10 Okla. 581, 64 Pac. 10; Seminole County v. State, 31 Okla. 196, 120 Pac. 913; Norris v. Cross, 25 Okla. 287, 105 Pac. 1000; State ex rel. Montgomery v. State Election Board, 29 Okla. 31, 116 Pac. 168; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623.

The fact that a mayor of a city is incompetent to discharge his duties is both a ground for removal and is a charge sufficient to sustain his removal.

Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719; State ex rel. Topping v. Houston, 94 Neb. 445, 50 L.R.A.(N.S.) 227, 143 N. W. 796; Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154.

The fact that a signer of a removal petition signs from a different precinct from that in which he is registered, does not render him ineligible to sign the recall petition.

Rampendahl v. Crump, 24 Okla. 873, 105 Pac. 201; Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684; Chesney v. Jones, 31 Okla. 363, 126 Pac. 715; Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719.

Riddle, J., delivered the opinion of the court:

The city of Guthrie adopted a charter and is operating under a charter form of government. One J. E. Niesley was elected mayor of said city, and the plaintiff in error, R. N. Dunham, is the duly appointed and acting clerk. In October, 1913, defendant in error, H. F. Ardery, and other citizens, residents of the city of Guthrie, filed their petition with the plaintiff in error, seeking to recall said J. E. Niesley, mayor. Upon the filing of said petition, plaintiff in error, as city clerk examined the same and compared it with the voters,' register of said city, and gave it such other consideration as he deemed proper and lawful; and on the 30th day of October, 1913, said clerk certified in writing that he had carefully examined the petition and compared the names thereon with the voters' register to ascertain who would be entitled to vote at the election demanded by said parties for a successor to said J. E. Niesley; and as a result of said examination, he found that the same was insufficient, in that it failed to contain the names of the number of legal voters required by the city charter. He also found that said petition on its face was insufficient. Said petition was amended and an additional certificate made by said clerk, in substance as hereinbefore stated. Thereupon defendant in error filed his petition in the district court of Logan county, praying for a writ of mandamus. In substance, the petition alleges that in 1911 J. E. Niesley was duly elected mayor of the city of Guthrie; that defendant, R. N. Dunham, was duly appointed city clerk of said city; that plaintiff, with other qualified electors of the city, prepared and circulated a certain petition for the recall of said Niesley as mayor, which said petitions were signed by more than 800 qualified electors of the city of Guthrie, being more than 35 per cent of the entire vote cast at the preceding election for all candidates for the office of mayor; that all the signers of said petitions were qualified electors, entitled to vote for a successor to the present incumbent; that each of the petitions sets out the place of residence by street number of every signer; that the incumbent is incompetent to discharge the duties of said office; that he is not in harmony with the public welfare and the best interests of the city of Guthrie; and that he is narrow in his views, and administers said office in a partisan manner, and not for the interests of the taxpayers of said city; that each of said petitions so filed with the clerk was properly and duly verified in the manner provided by the city charter; that said petitions for the recall of said mayor were filed with the city clerk on the 20th day of October, 1913, and within ten days thereafter the city clerk made in part the following certificate: "The number of names appearing upon said petitions aggregate 805. Of said names, the number not appearing on the voters' register is 239; number of names withdrawn, 15; number of names as to which no street number is designated, 16; number of names as to which city of residence is not given, 3; number appearing in duplicate, 1; number not legible, 13; total, 287; total number of legal voters remaining, 518. The number of signatures required to authorize the submission of said petition to a vote is 573; by reason, whereof, said petition contains less than the required number of duly qualified electors. I further certify that it has been reported to me that in some cases signatures were procured to said petition by misrepresentation of facts. I further certify that by reason of other defects and irregularities, apparent upon the face of the papers, said petition is insufficient, both in form and substance. I therefore certify and declare that said petition is not signed by the requisite number of qualified electors, and is insufficient to authorize the calling of an election as demanded."

Plaintiff alleges that afterwards, within ten days from the date of said certificate to the original petitions filed with the clerk, as heretofore alleged, he caused said petitions to be amended by filing additional petitions containing the signatures of qualified electors who had not signed said petition, and by making an additional showing to the clerk that certain names stricken from the original petitions were duly qualified voters and should have been counted. It is alleged that it is the duty of the said R. N. Dunham, city clerk, to make a certificate to the effect that he had examined and compared the petitions with the voters' register, and that the petitions were signed by the requisite number of qualified electors, and that said petitions were regular in all respects; but plaintiff alleges that said defendant has wrongfully refused to so certify to the sufficiency of said petitions and to submit the same to the board of commissioners without delay, in order that they may call an election as provided for by said charter, and that he is without a remedy in the premises, except by writ of mandamus, and prays the court that he be awarded the writ, ordering said defendant to certify to the board of commissioners of the city of Guthrie that said petitions are sufficient.

Upon this petition an alternative writ of mandamus was issued by the district

court. Thereafter the defendant filed his response to the alternative writ, which is, in substance, as follows: That said writ of mandamus does not state facts sufficient to entitle plaintiff to the relief prayed for, or to any relief, or to authorize a writ of mandamus to issue; (2) that plaintiff has no legal capacity to prosecute or maintain said proceeding; (3) the alternative writ does not state facts sufficient to constitute a cause of action; (4) there is a defect of parties plaintiff, as appears from the averments of said writ. He also denied each and every material averment contained therein. He affirmatively avers that under the general law and the provisions of the charter of the city of Guthrie, he, as clerk of said city, was vested with a discretionary power, and that he was required to exercise his judgment in the determination of the question as to whether or not said petition was sufficient and had been signed by the required number of legal voters; that he had made such examination in good faith in his official capacity as city clerk, and certified to his findings in said matter; that upon a careful inquiry and examination of the proof, he came to the conclusion and rendered his judgment to the effect that said petition was insufficient, and he cannot be required to violate his oath and conscience by executing a certificate contrary to his findings and judgment, and he prays judgment that he be discharged without costs. Several other matters are set up in his answer, but all involve practically the same matter as contained in his certificate, denying the sufficiency of the petition filed.

Upon a hearing before the district court, where testimony was introduced, pro and con, the court found that the plaintiff in error had committed many errors in his finding and the certificate made as a result thereof, and issued an order directing the city clerk to recount and add the names which were stricken from said recall petition to the original number, and that he certify the sufficiency of said recall petition to the commissioners forthwith. Other names which the clerk found were not legal voters were ordered to be added to the petition. Motion for new trial was filed and overruled, and plaintiff in error prosecutes his appeal to this court by filing petition in error, with original case-made attached.

Plaintiff in error sets out twelve different assignments, which he presents to this court, insisting that the judgment of the trial court should be reversed. From the view we take of this case, it will be necessary to consider only the following assignments of error:

"(4) The court erred in rendering judgment against the said R. N. Dunham for costs. (5) The court erred in ordering the peremptory writ of mandamus to issue, as provided in said judgment. (11) The court erred in overruling defendant's motion for a new trial."

If the cause had been before the district court on appeal from the decision made by the city clerk, it would then require consideration of other assignments of error, which might result in the affirmance of the judgment of the trial court. The only questions which we deem necessary to be considered are: 1st. Is the provision of the charter involved here in conflict with any provision of the Constitution? 2d. Will a writ of mandamus be issued to compel plaintiff in error to do and perform those things required of him by the trial court in the judgment rendered?

The first question which naturally presents itself for our consideration is: Is the provision of the charter involved here in conflict with the provisions of the Constitution? The provisions of the Constitution applicable, are as follows: "Any city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, . . . and if a majority of such qualified electors voting thereon shall ratify the same, it shall thereafter be submitted to the governor for his approval, and the governor shall approve the same if it shall not be in conflict with the Constitution and laws of this state. Upon such approval it shall become the organic law of such city, and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it." Const. § 3, art. 18.

It is contended that the charter is in conflict with §§ 1, 2, and 6, art. 8, of the Constitution, which provides:

"Section 1. The governor and other elective state officers, including the justices of the Supreme Court, shall be liable and subject to impeachment for wilful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude committed while in office.

"Sec. 2. All elective officers, not liable to impeachment, shall be subject to removal from office in such manner and for such causes as may be provided by law."

"Sec. 6. The legislature shall pass such laws as are necessary for carrying into effect the provisions of this article."

It is contended, inasmuch as the officer sought to be removed was elected for a certain term, that he can only be removed in the manner provided for in the provisions

of the Constitution quoted above. To so hold would be equivalent to holding that our Constitution was diametrically opposed to the charter form of government and the principle known as the recall. If it were not intended under the Constitution to give cities adopting the charter form of government, the power and right to put in practice the power to recall their officers, then there would have been some express inhibition; and in the absence of such, we are not warranted in holding that such power is by implication inhibited. If the municipalities operating under the charter form of government could only remove an official when guilty of an offense or some act which would warrant his impeachment or removal in the manner provided for in §§ 533 and 540 of Revised Laws 1910, it would not have been necessary for the people to have incorporated in their charter any provision providing for the recall or removal of such officers, inasmuch as they could resort to the courts and remove any officer for such conduct as is covered by the sections referred to, supra, without any special provision in the charter. We understand that the principle underlying the recall of public officers means that the people may have an effective and speedy remedy to remove an official who is not giving satisfaction,—one who they do not want to continue in office, regardless of whether or not he is discharging his full duty to the best of his ability and as his conscience dictates. If the policies pursued do not meet the approval of a majority of the people, it is the underlying principle of the recall doctrine to permit them to expeditiously recall the official, without form or ceremony, except as provided for in the charter.

In Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154, the supreme court of Texas stated: "It is contended that the recall provision of the charter seeks to substitute within the municipality a socialistic and communistic system of government in lieu of a republican form of government, and that it operates to impair the obligation of contract. We do not concur in this contention. The charter does not impair the obligation of contract. The appellant held his office by election, and not by contract. It is neither socialistic, communistic, nor obnoxious to a republican form of government to require an elective officer of a municipal government to submit to the voters of the city the issue for their determination whether he shall longer continue in office (citing Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; Re Pfahler, 150 Cal. 71, 11 L.R.A.(N.S.) 1092, L.R.A.1915B. 88 Pac. 270, 11 Ann. Cas. 911; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177).

In the case of Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719, the supreme court says: "Manifestly the tenure of office and the method of removing an elected city official are purely municipal affairs, which in no sense conflict with the constitutional provisions relating to the tenure of office or the removal by impeachment of state officers. Similar recall provisions as applied to administrative officers have been upheld and declared not to be in conflict with either state or Federal Constitution in other jurisdictions, where the points of attack were identical with the arguments advanced here" (citing Graham v. Roberts, 200 Mass. 152, 85 N. E. 1009; Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305; Bonner v. Belsterling, supra).

It is further contended that said charter is in conflict with § 2, of the schedule to the Constitution, which provides: "All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

A proper and reasonable construction of this provision is that such local laws not of a general nature as apply to municipal corporations locally were intended to be and were superseded by the charter adopted, if in conflict therewith. We hold that the provision of the charter under consideration is not in conflict with any of the provisions of the Constitution, as contended.

The next question left for our determination is: Do the duties to be performed by the plaintiff in error, as clerk of the city of Guthrie, require the exercise of discretion and judgment? Are they in their nature quasi judicial? If the duties required of plaintiff in error are merely ministerial, not requiring the exercise of judgment or discretion, then a writ of mandamus is the proper remedy; and in this event, if it further appears that the court has committed no prejudicial error in the trial of said issue, the judgment should be affirmed. Norris v. Cross, 25 Okla. 287, 105 Pac. 1000. On the other hand, if the duties to be performed by plaintiff in error as city clerk, although he be a ministerial officer, require the exercise of discretion and judgment, the action of the trial court rendering the judgment complained of would be erroneous and should be reversed. Monroe v. Beebe, 10 Okla. 581, 64 Pac. 10; Molacek

v. White, 31 Okla. 693, 122 Pac. 523. In the consideration of this question, we are not unmindful of the importance of a correct determination, not only as affects the parties of record and the people of the city of Guthrie in general, but it is likewise important as it may affect and have bearing upon the rights of the people to local self-government, when not inconsistent with the Constitution and general laws, unrestrained and without an unreasonable interference on the part of the court or the other co-ordinate branches of the government. Besides the importance from the viewpoint suggested above, it is imperative that a proper, just, and sound conclusion be reached, lest we may overturn well-established principles and rules of procedure which have been tried and found necessary for the proper and orderly conduct in transacting the business of the courts, and likewise impair established rules based upon reason and justice, placing limitations upon the power of the courts from an unreasonable interference with other co-ordinate departments of government and their various inferior officers in performing discretionary duties in accordance to their conscience and in obedience to their oaths of office.

From the oral argument and the extensive and able briefs filed by counsel, we are impressed with the fact that there is but little difference of opinion as to the law of this case, but a wide difference as to its application to the facts involved. It will be necessary to analyze certain portions of § 1 of art. 8 of the charter, in order to ascertain the character of duties to be performed by the city clerk. This section is the one under which the petitioners are seeking to remove the mayor in the manner set out in the statement of facts. In so far as necessary here, this section provides:

"The holder of any elective office may be removed at any time by the electors qualified to vote for a successor to such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least thirty-five (35) per centum of the entire vote for all candidates for the office of mayor at the last preceding general municipal election, demanding an election of a successor to the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds and charges for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. . . . Within ten days from the date of filing such petition, the city clerk shall examine, and from the voters' register, ascertain, whether or not said petition is signed by the requisite number of qualified electors; and if necessary, the board of commissioners may allow him extra help for that purpose; and he shall attach to said petition his certificates, showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the board of commissioners without delay."

In ascertaining the intent of the people in framing and adopting the charter under consideration, all provisions and each word and sentence of said section should be given effect. It will first be noted that an elective officer can only be removed by the "electors" qualified to vote for his successor. (2) Before a vote can be taken, a petition must be signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to 35 per centum of the entire vote cast for mayor at the preceding election. The framers of the charter and the people in their wisdom in adopting the same designated the city clerk as the official to determine the question as to when a petition filed is sufficient, and contains the requisite number of qualified electors. There was vested in him a quasi judicial power. It is the contention of the defendant in error, however, that the only duty the clerk is required to perform is simply to compare the petition with the voters' register, and if names equal to 35 per cent of the total vote appended to the petition appear to be on the voters' register, his duties thereby cease, except to certify said fact to the board of commissioners; that it becomes the plain duty of the clerk, under the law, to so certify, and that he has no authority and is not required to ascertain from the face of the petitions and the voters' register whether or not such persons are legal voters, as defined by law. We are unable to agree with counsel in this contention. It was the intention of the framers of the charter and the people in adopting same to make the voters' register the basis for the determination of the sufficiency of the petitions, yet it is our opinion, that it was

not intended that the examination of the voters' register should be the only means by which he should determine whether or not the requisite number of legal voters had signed the petition. It was, no doubt, intended that the names signed to the petition should not be considered, unless they should be upon the voters' register; but from the other language in this section, when the clerk finds a name signed to the petition and finds the same name upon the voters' register, if it should appear from the face of the petition and the voters' register that such party was not a legal voter under the law, he is not compelled to consider and count him as such. If the contention of defendants in error be sound, and the provision of the charter be given the construction contended for, then if the names signed to the petitions for removal are equal to 35 per cent of the total number of votes cast for mayor at the preceding election, and if all of said names are found upon the voters' register, notwithstanding a large per cent of the persons who signed the petitions and whose names appear upon the voters' register have become ineligible to vote since registering, by reason of removal from the city or the precinct in which they registered, or for other reasons, and which fact could be ascertained from the face of the petitions and the voters' register, thereby reducing the names of the legal voters below 35 per cent, yet the requirements of the charter in this regard would be fulfilled, and the clerk could exercise no discretion; it being his legal duty to certify said petitions to be sufficient. If this is a proper and reasonable construction to be placed upon the provision of the charter, then the following provision is surplusage and has no place, to wit: "Electors entitled to vote for a successor to the incumbent sought to be removed." It was only necessary to have provided that if the clerk, upon examination, found that the names signed to the petitions equaled in number to at least 35 per cent of the total vote cast for mayor at the preceding election to be upon the voters' register, he should certify said petition as meeting all the requirements. In other words, upon examination by the clerk, if the persons whose names are signed to the petition for removal are found to equal in number 35 per cent of the vote cast for mayor at the preceding election, and by comparison are found upon the voters' register, then it becomes his duty to make the certificate required, notwithstanding he may ascertain from the statement of the voters on the petition and the voters' register that among the names offered are those who are not legal voters for a successor to the incumbent, sufficient to reduce the number below 35 per cent. The clerk is not required to count names affixed to the petition, if he finds from an examination of the voters' register and the petition that such party is not a legal voter, entitled to vote for a successor to the incumbent. The charter further provides that "he [the clerk] shall attach to said petition his certificate, showing the result of said examination," not showing that the names attached to the petition are found upon the voters' register; that they are equal in number to 35 per cent of the total vote cast for mayor, but that said certificate shall show the "result" of said examination. Again, said section provides: "If by the clerk's certificate, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate."

This language clearly indicates that the clerk is vested with a discretionary and a quasi judicial power to determine whether the petition is sufficient. If the form of the petitions is proper, and if there were nothing lacking, other than sufficient names, the petition itself would not need amending, but permission should be given for leave to withdraw the same for the purpose of having other legal voters sign. "After the amended petition is presented to the clerk, he shall, within ten days thereafter, make a like examination of the amended petition, and if his certificate shows the same to be insufficient, it shall be returned to the person filing the same, without prejudice, however, to the filing of a new petition to the same effect."

The law as expressed by this court—the law based upon reason and justice—the law as expressed by every court, will not permit the use of the writ of mandamus to control an inferior officer in the performance of duties requiring the exercise of judgment or discretion, unless it appears that no facts are presented, calling for the exercise of judgment, except when it is alleged and shown that such officer acts arbitrarily or fraudulently; in such case the writ may issue. People ex rel. Skelton v. Los Angeles, 133 Cal. 338, 65 Pac. 749; Seminole County v. State, 31 Okla. 196, 120 Pac. 913; Norris v. Cross, 25 Okla. 287, 105 Pac. 1000; Montgomery v. State Election Board, 27 Okla. 324, 111 Pac. 447; McKee v. Adair County Election Board, 36 Okla. 258, 128 Pac. 294; Roberts v. Marshall, 33 Okla. 716, 127 Pac. 703.

In the case of Chesney v. Jones, 31 Okla. 363, 126 Pac. 715, wherein a provision of a city charter was involved similar to the provision here, this court, speaking of the duty of the city clerk, said: "Under paragraph B of § 10, he is required to determine

whether the requisite number of qualified electors have signed the petition by certain specific means, to wit, by examining the petition, the registration books, and election returns. His jurisdiction and authority is special and limited, and herein is clearly, definitely fixed just the measure of his duty. The sufficiency of the petition filed with him shall be determined, first, by an examination of the petition, to determine necessarily whether it is in due form, apparently valid or forged, and to determine whether the requirements in reference to affidavits, etc., have been complied with. Next, the registration books will disclose to him whether the names appearing upon the petition are qualified electors as shown thereby. His rule for determining the qualifications of the electors to sign the petition is limited by the act to the names appearing upon the registration books. The election returns disclose to him the number of electors participating in the last preceding vote cast for the candidates, and enable him to ascertain whether the number signing the petition was equal in amount to 25 per cent thereof. It is also to be noted that it is also provided that if the clerk's certificate shows the petition to be insufficient, the petitions may be amended, and that the determination of the sufficiency of the amendment is then made by the clerk under a like examination, which refers to the examination required to be made of the sufficiency of the petition in the first instance."

The case quoted from was a suit for a writ of mandamus to compel the clerk to certify the petition to be sufficient. He had made a certificate, showing the petition to be insufficient for want of the required names of qualified electors. The trial court awarded the writ. This court reversed the trial court and ordered the petition dismissed. The decision of this court was, no doubt, on the ground that the provision of the charter vested a quasi judicial power in the city clerk. So we hold the same rule applies here. The duties of the clerk in the instant case are clearly quasi judicial. The clerk is vested with power, in the first instance, to decide whether the petition in form is sufficient, and whether the grounds alleged come within the charter. (2) He must ascertain the total number of votes cast for mayor at the last preceding election. (3) From an examination of the petition, together with the voters' register, he must ascertain whether at least 35 per centum of the entire vote for all candidates for the office of mayor at the last preceding general election have signed the petition. (4) He must pass on the question whether the signatures are bona fide or forgeries. The signers are required to give their street and number; the purpose of which is that the clerk may ascertain whether, by comparison with the voters' register, they are legally qualified electors. The facts having been ascertained, he is to determine whether or not the signers, or a sufficient number of them, are legal electors at the time. This legal question must be determined by looking to the law prescribing the qualifications of a voter. Thus, it will be seen, a purely legal question is presented, and under the charter the clerk is authorized to decide it. A similar question to the one here under consideration was before the supreme court of Iowa, in the case of Bennett v. Hetherington, 41 Iowa, 142, wherein it was said: "The question next arising, upon the concession that the notice was insufficient, is what effect would such insufficiency have upon the order for the election made by the board. The action of the board of supervisors in determining whether the petition was 'signed by at least one half of all the legal voters in the county,' and also whether 'the notice hereinbefore prescribed has been given,' was necessarily judicial. For such, and many other purposes, the board of supervisors constitute a judicial tribunal having limited jurisdiction. The statute, in express language, gives to the board jurisdiction to determine those questions. Having jurisdiction to determine them, their decision is as conclusive as that of any other judicial tribunal, until it is reversed or set aside in some manner provided by statute. The board decided that the requisite number of voters had signed the petition, that the notice itself was sufficient, and that it had been given or published in the manner and length of time prescribed by the statute. As we have seen, the board of supervisors had jurisdiction, by express statute, to determine these questions, and if they did not decide them correctly, it was an error or irregularity only, which might have been corrected either by appeal, writ of error, or certiorari, whichever the statute may authorize, but which could not render their decision void. Their decision is binding and conclusive upon any other tribunal, when assailed collaterally, until it is reversed or set aside. If the notice was not given the number of days required by law, their decision was erroneous simply, and must be corrected as other errors are corrected (citing authorities)."

In the case of Norris v. Cross, 25 Okla. 287, 105 Pac. 1000, it is said: "It is not within the scope of a mandamus proceeding to coerce an executive officer in the discharge of a duty involving the exercise of judgment or discretion, or the exercise

of judicial or quasi judicial power, further than to direct him to act. The court cannot supplant him in the determination of questions of fact or of law required by the statute to be determined by him, nor direct in whose favor his decision shall be."

The authorities are so uniform upon this proposition that it has now become elementary. The provision of the charter in question conferred the authority and jurisdiction upon the city clerk to pass upon these questions. He may commit error, but his decision is not void, and not subject to be overthrown or disregarded in this proceeding. In the absence of fraud or an arbitrary action, his decision is conclusive on the courts. It is contended, however, since there was no provision for review, that a proceeding for writ of mandamus is the only remedy left to the complainants. As we have seen, this procedure cannot be substituted for an appeal, and can be resorted to only when a case is presented which comes within the exception. The petition in this case does not bring the case within the exception, it does not allege that the clerk acted fraudulently, nor that his decision was made arbitrarily, and the fact that no provision is made for a review on appeal does not authorize the court to give relief by mandamus.

Again referring to the case of Norris v. Cross, supra, this court, in referring to the purpose of the writ of mandamus, said: "It may not lawfully issue to review, reverse, or correct the erroneous decisions of an executive officer in such cases, even though there may be no other method of review or correction provided by law. Decatur v. Paulding, 14 Pet. 497, 599, 10 L. ed. 559, 609; United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; United States ex rel. Goodrich v. Guthrie, 17 How. 284, 15 L. ed. 102; Commissioner of Patents v. Whiteley (Holloway v. Whiteley) 4 Wall. 522, 18 L. ed. 335; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; United States ex rel. Boynton v. Blaine, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97."

The next question presented is as to what constitutes the "voters' register," within the meaning of the provision of the charter. We fail to find this term mentioned in the statute relative to elections or registration. It was said by this court in the case of Chesney v. Jones, 31 Okla. 363, 126 Pac. 715: "The ordinance under which the clerk is required to act was drawn with the purpose in view of making his duties as simple as they could be made. The evidence given by the registration books established a certain and ready foundation as a basis, and was doubtless deemed to be the best and the simplest which could be secured."

Keeping this rule in mind, what did the framers of the charter mean by the term "voters' register?" Section 3172, Rev. Laws 1910, provides: "The state election board shall provide for each precinct books of sufficient size and properly ruled to indicate, in addition to the name of the registered voter, with the number of the registration certificate, his age, his street number, his postoffice address, his politics, and his color. And it shall be the duty of the county board to deliver to the inspector of elections one of such books at the time the registration certificates are delivered, when the registration is completed, and it shall be the duty of the inspector of elections to transcribe into the said book, or cause to be transcribed into the same, the names of all electors registered in his precinct, and the same shall be arranged in alphabetical order, and the blanks after such names shall be filled by said inspector, to conform to the age, the street number, the postoffice address, the politics, and the color as stated in the duplicate certificate of registration. Such list of voters shall, in addition to said duplicate certificates, be delivered at the opening of the election into the hands of the precinct election board, and unless some member of the precinct election board requires an inspection of the carbon duplicate of the certificate of a voter, the fact that his name is recorded upon such book in its alphabetical order, and that it conforms to the original certificate presented by the elector, shall be considered sufficient evidence of such elector's right to vote."

The legislature had in mind, in incorporating this provision into the election laws, of keeping a more permanent record of the registration of voters than would have been by keeping the carbon copies of the certificates referred to in this section. The same facts contained in the carbon copies of the certificates were required to be transcribed and kept in these books. They were more substantial, and would not be so easily lost or misplaced as the duplicates of the certificates; besides, the names were required to be kept in alphabetical order; that they would be more convenient. The blanks in these books were required to be filled out from the certificates by the sworn election officials, and they were to be used by the officials in conducting the election, for all

purposes, save and except when one of the members of the board should call for the carbon certificate. The use of the duplicate certificate in this instance was, no doubt, for the purpose of making comparison, when a mistake is charged. In our opinion, the permanent books required to be filled out and kept by the election officials by this section of the statute were what the framers of this provision of the charter had in mind when they used the term "voters' register." We can see no good reason why all the papers, books, and certificates and duplicates should have been included in this term, when so to do would be to make the duty of the clerk more complicated, the result uncertain, and without any apparent benefit to be derived therefrom. Thus we hold the term "voters' register," as used in the charter, refers to and meant the precinct books required to be kept by § 3172, Rev. Laws 1910, supra.

From the foregoing views, the judgment of the trial court is reversed, with direction to dismiss plaintiff's petition.

All the Justices concur.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.
(Department No. 2.)

SPERRY & HUTCHINSON COMPANY, Appt.,
v.
CITY OF TACOMA et al., Respts.

(68 Wash. 254, 122 Pac. 1060.)

License — of use of trading stamps — constitutionality.

An ordinance imposing a license tax upon the use in a business of trading stamps purchased from another is not unconstitutional as to the latter, on the ground that it deprives him of his property without due process of law, impairs the obligation of his contracts, or operates in restraint of trade.

(April 15, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in defendants' favor in an action to enjoin them from enforcing an ordinance imposing a license tax on the use of trading stamps, which was alleged to be unconstitutional and void. Affirmed.

The facts are stated in the opinion.

Messrs. **D. J. Lyons** and **John Hall Jones**, with **Tucker & Hyland**, for appellant:

The trading stamp business is legitimate, and it cannot be directly prohibited under the police power, or indirectly prohibited under the guise of regulation or taxation.

Humes v. Little Rock, 138 Fed. 929; Sperry & H. Co. v. Black (1909; C. C. N. E. D. S. D. Ga.); Territory v. M. A. Gunst & Co. 18 Haw. 196; Sperry & H. Co. v. Louis Weber & Co. 161 Fed. 219; Sperry & H. Co. v. Fisher (1905; Md. Balto. Daily Rec.); Sperry & H. Co. v. Temple, 137 Fed. 992; Ex parte Hutchinson, 137 Fed. 950; Sperry & H. Co. v. Brady, 134 Fed. 691; Sperry & H. Co. v. Mechanics' Clothing Co. 135 Fed. 833; Ex parte Hutchinson, 137 Fed. 949; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Ex parte McKenna, 126 Cal. 429, 58 Pac. 716; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327.

Prohibition of the trading stamp business is in violation of the 14th Amendment of the United States Constitution.

Montgomery v. Kelly, 142 Ala. 552, 70

Note. — The prohibition or regulation of the use of trading stamps is considered in the notes to Ex parte Drexel, 2 L.R.A.(N.S.) 588; Denver v. Frueauff, 7 L.R.A.(N.S.) 1131; District of Columbia v. Kraft, 30 L.R.A.(N.S.) 957, and State ex rel. Hartigan v. Sperry & H. Co. 49 L.R.A.(N.S.) 1123.

L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; People v. Mich. Trad. Stamp Co. (1904; Mich.); Flaherty v. Lincoln (1903; Neb.); State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Territory v. M. A. Gunst & Co. 18 Haw. 196.

The trading stamp business is not a "gift enterprise," as there is no element of chance.

State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Humes v. Little Rock, 138 Fed. 929; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; Territory v. M. A. Gunst & Co. 18 Haw. 196; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Moorhead, 7 Pa. Co. Ct. 513; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Young v. Com. 101 Va. 853, 45 S. E. 327.

Statutes or ordinances imposing a license fee or tax on merchants for using trading stamps in their business are unconstitutional.

Ex parte McKenna, 126 Cal. 429, 58 Pac. 716; People v. Ross (1902; Cal. Sup. Ct. Sacramento Co.); State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; People v. Ross (Cal. Justice's Ct. Sacramento Co.); Fleming & Bowles v. Augusta (1901; Ga. Sup. Ct.); Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Schoch v. St. Paul (1904; Dist. Ct. Minn.); Columbia v. Lusk (1909; S. C. Com. Pleas, Richland Co.); Young v. Com. 101 Va. 853, 45 S. E. 327; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136; Barker v. Alexandria (1905; Va. Corp. Ct.); Ex parte Hutchinson, 137 Fed. 949.

Messrs. **F. R. Baker, F. M. Carnahan,** and **T. L. Stiles,** for respondents:

The ordinance is valid.

L.R.A.1915B.

Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Stull v. De Mattos, 23 Wash. 77, 51 L.R.A. 892, 62 Pac. 451; State v. Clark, 30 Wash. 446, 71 Pac. 20; State v. Ide, 35 Wash. 582, 67 L.R.A. 280, 102 Am. St. Rep. 914, 77 Pac. 961, 1 Ann. Cas. 634; Re Garfinkle, 37 Wash. 653, 80 Pac. 188; Oliure Mfg. Co. v. Pidduck-Ross Co. 38 Wash. 141, 80 Pac. 276; Thurston County v. Tenino Stone Quarries, 44 Wash. 351, 9 L.R.A.(N.S.) 306, 87 Pac. 634, 12 Ann. Cas. 314; Humes v. Ft. Smith, 93 Fed. 857.

The trading stamp scheme is a "gift enterprise" within the meaning of the law.

Lansburgh v. District of Columbia, 11 App. D. C. 512; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957; District of Columbia v. Gregory, 35 App. D. C. 271.

Fullerton, J., delivered the opinion of the court:

On July 13, 1904, the city of Tacoma enacted the following ordinance:

"Be it ordained by the city of Tacoma:

"Section 1. Every firm, person, or corporation within the city of Tacoma, who shall use any stamps, coupons, tickets, cards, or other similar devices for the sale of goods, wares, and merchandise, which said stamp, coupon, tickets, or other similar devices, shall entitle the purchaser receiving the same to procure from any other person, firm, or corporation any goods, wares, or merchandise free of charge, upon production of any number of said stamps, tickets, coupons, cards, or other similar devices, shall, before using the same, obtain a license therefor from the city clerk.

"Sec. 2. Before obtaining such license, the person applying therefor shall pay to the city treasurer the sum of one hundred dollars ($100), and upon such payment being made, and filing a receipt therefor with the city clerk, the city clerk shall issue to the person, firm, or corporation making such payment a license to use, for one year, the stamps, coupons, tickets, cards, or other similar devices mentioned in § 1 of this ordinance.

"Sec. 3. That any person violating the provisions of this ordinance shall be punished by a fine of not less than fifty ($50) dollars, and not exceeding one hundred ($100) dollars, or by imprisonment not exceeding thirty (30) days, or by both such fine and imprisonment.

"Sec. 4. That ordinance No. 1298 and ordinance No. 2092, and all and other ordinances of the city of Tacoma, in conflict herewith, be and same are hereby repealed." Ordinance No. 2,133.

On July 7, 1911, the appellant, as plain-

tiff, began the present action to enjoin the city and its officers from enforcing or attempting to enforce the ordinance, on the ground that the same was unconstitutional and void. Facts were set forth in the complaint tending to show that the appellant was engaged in a business which would be injuriously affected by the enforcement of the ordinance, and facts tending to show otherwise its right to assert its invalidity. To the complaint a general demurrer was interposed, which the court sustained. The appellant elected to stand upon its complaint, whereupon the court entered judgment of dismissal, with costs. This appeal followed.

In this court the only question suggested is the validity of the ordinance. The appellant has filed an exhaustive brief, in which it contends that the law is void because prohibitive of the appellant's business, because it deprives the appellant of its property without due process of law, because it impairs the obligation of contracts, because it is *ultra vires*, and because it operates in restraint of competition and in restraint of trade, and is thus void as against public policy. We have not, however, found it necessary to follow the plaintiff in its discussion of the several contentions suggested, as we think they have all been foreclosed by the prior decisions of this court. In Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665, an ordinance of the city of Tacoma, the exact counterpart of the one now in question, was upheld by us against an attack based on the ground that it was void because of the matters charged against the present ordinance, and in numerous cases decided both before and since that time we have upheld similar ordinances against similar attacks. Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. De Mattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; Seattle v. Barto, 31 Wash. 141, 71 Pac. 735; Re Garfinkle, 37 Wash. 650, 80 Pac. 188; Oilure Mfg. Co. v. Pidduck-Ross Co. 38 Wash. 137, 80 Pac. 276; McKnight v. Hodge, 55 Wash. 289, 40 L.R.A.(N.S.) 1207, 104 Pac. 504; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599.

The case of Fleetwood v. Read, supra, is cited in all of the foregoing cases, with two exceptions, and is in each instance mentioned with approval. It is also cited with approval in the cases of State v. Clark, 30 Wash. 439, 71 Pac. 20; State v. Ide, 35 Wash. 576, 67 L.R.A. 280, 102 Am. St. Rep. 914, 77 Pac. 961, 1 Ann. Cas. 634, and Thurston County v. Tenino Stone Quarries, 44 Wash. 351, 9 L.R.A.(N.S.) 306, 87 Pac. 634, 12 Ann. Cas. 314, although the point at issue in these cases was not the validity of a license ordinance. These cases are conclusive of the questions at bar, if they are allowed to control, as to hold with the appellant is to deny their authority. We believe they were rightly decided, and decline to overrule them. It is thought the appellant's contention is sustained by the case of Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879, which holds unconstitutional the act of the legislature forbidding the use by merchants of trading stamps. But a business may be subject to license for the purposes of regulation and revenue which cannot be absolutely prohibited. There is not therefore any conflict between that case and the cases above cited.

The judgment appealed from is affirmed.

Dunbar, Ch. J., and **Mount, Morris, and Ellis, JJ.**, concur.

MAINE SUPREME JUDICIAL COURT.

THEODORE R. SOUTHARD
v.
BANGOR & AROOSTOOK RAILROAD COMPANY.

(— Me. —, 91 Atl. 948.)

New trial — acts after trial showing testimony to be untrue.

A new trial of an action to recover damages for personal injuries in which the damages were assessed on testimony to the effect that plaintiff was physically wrecked and able to do but little, if any, manual labor, may be granted for newly discovered evidence that soon after the trial he went on a hunting trip, engaged in heavy work, and danced.

(October 8, 1914.)

Note. — New trial: physical condition of plaintiff, after verdict in an action for personal injuries, tending to show falsity of testimony as to extent or character of his injury, as ground for new trial.

The reader will distinguish the subject of this note from the subject of the note to Anshutz v. Louisville R. Co. 45 L.R.A. (N.S.) 87, "Subsequent events disproving character or extent of bodily injury for which recovery was had, as ground for new trial," as that note excluded cases where the subsequent events were in the nature of evidence of fraud, perjury, or malingering on the part of the plaintiff.

For the general subject of perjury as ground for new trial, see the note to State v. Mounkes, 51 L.R.A.(N.S.) 286.

MOTION by defendant for new trial of an action brought before the Supreme Judicial Court for Aroostook County to recover damages for personal injuries, which resulted in a verdict for plaintiff. Granted on question of damages only.

The facts are stated in the opinion.

Messrs. **Stearns & Stearns, Powers & Guild,** and **Joseph F. Gould** for defendant.

Mr. **F. W. Halliday** for plaintiff.

Savage, Ch. J., delivered the opinion of the court:

The plaintiff recovered a verdict of $8,500 against the defendant for personal injuries. The only question submitted to the jury was that of damages, for the defendant admitted liability. The defendant filed a general motion for a new trial, also a motion based on newly discovered evidence.

As to the general motion, we think it only necessary to say that the verdict seems excessive. But we will not undertake now to discuss the question, for we think the motion based on newly discovered evidence should be sustained.

At the trial the vital question was: What was then the plaintiff's physical condition, so far as it had been affected by the acts for which the defendant was responsible? Knowing this, the jury could determine past damages and draw reasonable inferences as to future damages. The claim of the plaintiff, which his testimony tended to support, was that, as a result of his injuries, he was suffering from an incurable disease, that he was physically wrecked, and able to do but little, if any, manual labor.

The newly discovered evidence comes from several witnesses and relates to the acts and doings of the plaintiff after the trial, but nearly related to the time of the trial, of such a character that, if this

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There are a number of personal-injury actions where a new trial has been granted on evidence showing a condition of the injured person after the trial inconsistent with the showing of his condition made on the trial. Wells, F. & Co. v. Gunn; Colorado Springs & Interurban R. Co. v. Fogelsong; Sullivan v. Chicago, R. I. & P. R. Co; Cole v. Fall Brook Coal Co. 40 N. Y. S. R. 834, 16 N. Y. Supp. 789, infra; Jensen v. Hamburg-American Packet Co. and Thornton v. Rhode Island Suburban R. Co., infra; SOUTHARD v. BANGOR & A. R. Co.

In Wells, F. & Co. v. Gunn, 33 Colo. 217, 79 Pac. 1029, it was held that it was an abuse of discretion to deny a motion for a new trial on newly discovered evidence, where the plaintiff's physician testified at the trial to the effect that she was practically entirely paralyzed, and that she might recover her speech, but he thought she would never be able to walk, and the day before the trial two of the defendant's physicians examined the plaintiff and found a similar state of affairs, but after the case had been submitted to the jury and on the same day the plaintiff was found to be almost normal. The court said: "While it is true that the physicians made an examination of the plaintiff before the trial, and while it may also be true that it was their belief that plaintiff was in a measure feigning or shamming, still the newly discovered evidence of which defendant seeks to avail itself, in the very nature of things, did not exist, and could not have been discovered or produced, until after the trial was over; for that evidence relates to things which transpired after the verdict was returned. Without intimating our own opinion as to whether or not plaintiff was shamming, it is sufficient to say that this newly discovered evidence is material and important on that issue, and the defendant is entitled to produce it before a jury."

In Colorado Springs & Interurban R. Co. v. Fogelsong, 42 Colo. 341, 94 Pac. 356, it was held to be error to refuse a new trial on the ground of newly discovered evidence where it was testified at the trial that the plaintiff was unable to get around except with the aid of crutches or cane, his witnesses stating that the disability would continue indefinitely, while those for the defendants stated that, in their judgment, he would fully recover, but it was shown by the moving affidavits on the part of the defendant that since the verdict for the plaintiff was rendered, persons residing next door observed him operating a washing machine, working in his garden without crutches or other support, and also walking considerable distances without the aid of crutches or cane, apparently being able to walk the same as any other person and performing other work, and that the plaintiff coming into the shop of the affiant with his crutches, on being asked why he did not throw away his crutches and to go to work hauling coal again, replied: "I could do it all right, but it would not look very well for me to do it while my case is still in court." The court said: "The proposed testimony of affiants goes to the very vitals of the case, so far as the extent of plaintiff's injuries is involved. Whether what they say they will testify to is true or untrue can only be satisfactorily determined after they have been examined and cross-examined as witnesses. It relates to matters which the defendant could not possibly have had the benefit of at the trial, and the credibility of affiants, and the weight to be attached to their statements in the circumstances of this case,

testimony is true, the plaintiff at that time could not have been suffering as he claimed, and could not have been in the physical condition he said he was. Since the evidence must be submitted to a jury, we do not analyze it, but it tends to show that in the very next month after the trial he went into the woods on a hunting trip; that within three or four months after the trial he engaged in heavy work, went to dances, and danced, and did other things indicating that his physical condition was good, and it is strongly contradictory of what the plaintiff claimed at the trial.

That evidence of things happening after the trial may be regarded in some cases as newly discovered is settled in Mitchell v. Emmons, 104 Me. 76, 71 Atl. 321. We think the evidence in this case should be regarded as newly discovered. Though it is evidence of acts which did not occur until after the trial, it is evidence of a condition which existed at the trial, and throws newly discovered light on that condition.

We think that justice requires that the defendant should have an opportunity to submit this evidence to a jury, to be considered by them, together with any evidence the plaintiff may have to rebut it, and with such other relevant evidence as may be offered by either party on the question of damages. The evidence brings the case within the condition applicable to the granting of new trials on the ground of newly discovered evidence, namely, that it seems "probable to the court that the verdict will be different when the case is submitted anew with the additional evidence." Parsons v. Lewiston, B. & B. Street R. Co. 96 Me. 503, 52 Atl. 1006, 12 Am. Neg. Rep. 38.

Motions sustained.

New trial granted on the question of damages only.

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should be determined by a jury." (The report of the case omits the statement of how soon after the verdict the matters aforesaid were observed.)

In Sullivan v. Chicago, R. I. & P. R. Co. 119 Iowa, 464, 93 N. W. 367 (reversing the decision below), a new trial was granted on the ground of newly discovered evidence where the court said that much of the so-called newly discovered evidence was merely cumulative, and as such would be no sufficient reason for a new trial, but that much of it appeared to have a direct bearing upon the vital question as to the nature and character and extent of the disability of which the plaintiff complained. It was made to appear that a physician who attended the plaintiff professionally prior to the trial, and was one of his principal expert medical witnesses, made an examination of him with the aid of electricity just at the close of the trial, and discovered conditions leading to conclusions largely if not entirely at variance with those testified to by him while a witness on the stand, and evidence was also offered as to statements and admissions made by the plaintiff subsequent to the trial, wholly inconsistent with his testimony while on the witness stand.

In Jensen v. Hamburg-American Packet Co. 23 App. Div. 163, 48 N. Y. Supp. 630, a new trial was granted in a case where the plaintiff had recovered a verdict on account of injuries to his leg and impairment of his hearing and memory, where the defendant, being suspicious that the plaintiff had magnified his injuries by his evidence, caused observation to be taken of the actions and conduct of the plaintiff, also of his ability to attend to his business and the condition of his memory and hearing capacity, and these observations and investigations resulted in affidavits relating to the plaintiff's ability for physical activity and service, and relating to his hearing and memory, quite inconsistent with the situation in those respects as represented by the evidence on the part of the plaintiff at the trial. It was held that the newly discovered evidence was not cumulative in such sense as to prejudice the application for a new trial, as the nature and extent of the affliction to which the plaintiff's evidence tended to prove he was subjected were such that the defendant could not well be supposed to have been able to make them the subject of inquiry by independent affirmative evidence at the trial.

In the briefly reported case of Thornton v. Rhode Island Suburban R. Co. — R. I. —, 67 Atl. 451, a new trial was granted partly because there appeared upon the trial of another action to which the plaintiff was not a party, facts with regard to the plaintiff's physical condition since the accident which were not disclosed at the trial of the case, tending to show that she was not in such a desperate physical condition as she claimed as the result of the accident.

The rule of the foregoing cases was supported where a new trial was denied on the ground that the trial evidence was not in the record, in Indianapolis v. Pansel, 157 Ind. 463, 62 N. E. 35, where it was shown by affidavits that the plaintiff was brought in and out of the courtroom in an invalid's chair, and that as soon as the trial was ended he was able to walk without support. The court declined to accede to the plaintiff's claim that his admission by act or word after the trial could not be used to support a charge of misconduct, but refused to grant a new trial, stating that the evidence given at the trial was not in the record, that the trial court, however,

heard the evidence and overruled the motion for a new trial, and that they were bound to presume in favor of the ruling that the plaintiff had testified on the trial that he could walk without support, and that he had explained his use of an invalid's chair so that the trial court, in refusing to grant a new trial, was satisfied that in fact no fraud had been practised.

In Cole v. Fall Brook Coal Co. 32 N. Y. S. R. 762, 10 N. Y. Supp. 417, where the plaintiff's evidence on the trial tended to show that his injuries were of a permanent and incurable nature, and that his future life would be one of suffering and comparative uselessness, and some of the evidence offered as a reason for a new trial was to the effect that, after the trial, the plaintiff developed into an able-bodied man, performing vigorous and continued labor in various directions, the court, in denying a new trial, stated that the evidence was simply cumulative. But, upon a further application in 40 N. Y. S. R. 834, 16 N. Y. Supp. 789, it was held that the court properly ordered a new trial when it was shown that, subsequent to the trial, the plaintiff performed feats of physical strength with other circumstances showing that he possessed great agility and strength, and he admitted that he had exaggerated and overstated his condition upon the trial of the case, as this class of evidence "was not cumulative; no evidence of that character was given upon the trial. It did not then exist."

But a new trial has been refused on the ground that the newly offered evidence of fraud was not strong enough.

In Brooks v. Rochester R. Co. 10 Misc. 88, 31 N. Y. Supp. 179, where a new trial was asked for on the ground that the plaintiff's condition had improved so rapidly after the trial as to suggest that she was somewhat of a malingerer, the court, while not disposed to limit the rule of Cole v. Fall Brook Coal Co. supra, denied the motion on the ground that in such cases a new trial could properly be granted only where the evidence of fraud practised on the court was exceedingly strong. (This case is of peculiar interest from the fact that before the accident, the plaintiff had suffered an earlier injury at the hands of the defendant, for which she had brought an earlier action, and, as the court points out in 156 N. Y. 244, 50 N. E. 945, 4 Am. Neg. Rep. 426, her interest on the trial of the second action was to belittle the injuries suffered in the first accident.)

So, a new trial was denied in Seaboard Air Line R. Co. v. Reid, 6 Ga. App. 18, 63 S. E. 1130, where the plaintiff recovered for the loss of both legs, he having testified that he would never be able, on account of the nature of his injuries, to wear cork or artificial legs, pointing out the reasons therefor, and it was held to be no cause for a new trial that he was, at the time of the application, wearing cork legs, as his testimony was merely the giving of an opinion. L.R.A.1915B.

and the question, having been once finally settled, must remain settled.

And in National Concrete Constr. Co. v. Duvall, 153 Ky. 394, 155 S. W. 757, the court refused a new trial where the newly discovered evidence was that the wife of the plaintiff had become pregnant or was discovered to be pregnant some seventeen months after the trial at which the plaintiff had testified that he had lost his manhood, but he did not say that it was permanent, nor did his physicians so state, and the plaintiff had been injured in other respects.

It may be noted that in St. Louis Southwestern R. Co. v. Smith, 38 Tex. Civ. App. 507, 86 S. W. 943, while the offer of new evidence was not effective, as not sworn to, the plaintiff had testified on the trial that he could not see with his right eye, and the court considered that the discovery by a physician on an examination after the trial, that the plaintiff's right eye was healthy, and that he could see to read with it, was not cumulative evidence, but very material. (It would seem from the case that the expert testimony at the trial was to the effect that the sight of the eye was not impaired. No question of fraud is directly discussed, and the case was remanded on other grounds.)

Where the newly discovered evidence as to the improved condition of the plaintiff subsequent to the trial would not probably influence or reduce the verdict, a new trial will not be granted. Thus, in Whipple v. New York, N. H. & H. R. Co. 19 R. I. 587, 61 Am. St. Rep. 796, 35 Atl. 305, the court, in denying a motion for a new trial, said: "The newly discovered evidence is all directed to the question of the extent of the plaintiff's injuries. As the verdict was only for $1,500, and it is not denied that the plaintiff was confined to his bed for five or six weeks, during which time he suffered much pain, we do not think that the newly discovered testimony, which goes merely to his improved condition subsequently to that period, is of such importance that it would be likely to lessen the verdict if a new trial were granted."

For a case where a new trial was granted on account of a false effect produced upon the jury as to the condition of the plaintiff at the time of the trial, where the evidence seems to have been confined to his condition before and at the trial, see Corley v. New York & H. R. Co. 12 App. Div. 409, 42 N. Y. Supp. 941. Such seems also to have been the situation in a case where there was a refusal of a new trial on the ground of newly discovered evidence which tended to prove that the plaintiff, after her alleged injury, used her arm in a manner inconsistent with her claim of injury, the court stating that other evidence to the same effect was introduced on the trial, and a new trial would not be granted on account of newly discovered evidence which was cumulative. Linton v. Smith, 31 Ind. App. 546, 68 N. E. 617. B. B. B.

ILLINOIS SUPREME COURT.

WILLIAM J. SCOWN, Appt.,
v.
ANTHONY CZARNECKI et al.

(264 Ill. 305, 106 N. E. 276.)

Statutes — amendments — extending privilege of suffrage.

1. A statute extending to women the privilege of suffrage is not an amendment of the existing election law, which conferred the privilege upon men only, so as to come within the operation of a constitutional provision requiring the statute amended to be inserted in the amending one.

Same — constitutional qualification of voters — right of legislature to extend.

2. Constitutional provisions defining the qualification of voters apply to persons voting for candidates for office created by the Constitution alone, and do not prevent the legislature from extending to women the privilege of suffrage for other offices.

Same — questions submitted to voters — statutory construction.

3. A statute attempting to confer upon women the privilege of voting upon all questions or propositions submitted to a vote of the electors of "such municipalities or other political divisions of the state" includes all questions or propositions submitted to the electors of a county.

Same — vote upon referendum.

4. The legislature cannot confer upon women the privilege of voting upon propositions which the Constitution requires to be submitted to the voters, where they are not qualified voters under the Constitution.

Statutes — partial unconstitutionality — separation.

5. That, in conferring the privilege of suffrage upon women, the legislature exceeded its constitutional power in some particulars, does not destroy the act *in toto*, but such matters may be segregated, and the statute upheld so far as it applies to offices, the privilege of voting for which might legally be conferred upon women.

Judgment — interference with established rules.

6. The courts will not overturn a deliberate decision upon the constitutional power of the legislature under which the highest political rights have been held and exercised without question for many years, regardless of the opinions of the judges upon the bench as to the correctness of the decision.

(Farmer, Cooke, and Craig, JJ., dissent.)

(June 16, 1914.)

Note. — Right of women to vote.

The early cases passing upon this question are presented in the notes in 21 L.R.A. 662, and 27 L.R.A.(N.S.) 522, and the present note is supplementary thereto.

It is competent for the legislature to confer the right of suffrage upon women in elections at district road meetings, notwithstanding art. 2, § 2, of the state Constitution, which prescribes the qualifications of electors "in all elections not otherwise provided for by this Constitution," and limits the right to vote to male citizens, as the word "election" as used in the Constitution refers only to election of public officers. Oregon-Wisconsin Timber Holding Co. v. Coos County, — Or. —, 142 Pac. 575; Beirl v. Columbia County, — Or. —, 144 Pac. 457. Generally, as to applicability of constitutional or statutory provisions relating to general elections, to elections other than for the selection of officers, see note to State ex rel. Birchmore v. State Canvassers, 14 L.R.A.(N.S.) 850.

The legislature has power to confer the right of suffrage upon women in the election of county superintendent of schools, under the constitutional provision that the section prescribing the qualifications of voters "shall not apply to the election of school trustees and other common school district elections," as the words, "other common school district elections," refer to all elections that have to do with matters relating exclusively to the management and conduct of the affairs of the common schools of the state, except the office of superintendent of public instruction, which is a constitutional office. Crook v. Bartlett, 155 Ky. 305, 159 S. W. 828.

Under such constitutional provision it is competent for the legislature to extend the right of suffrage to women "upon all school measures or questions submitted to a vote of the people." Stuessy v. Louisville, 156 Ky. 523, 161 S. W. 564.

An election to pass upon the question of issuing bonds for the improvement of the public schools is an election upon a "school measure or question," within the contemplation of the statute providing that women shall have the right to vote. Ibid.

Women possessing the necessary qualifications are entitled to vote upon the proposition to issue municipal bonds, by virtue of a statute (New York general village law, § 41, chap. 64, Consol. Laws) which authorizes resident women who were assessed on the last assessment roll to vote on the proposition whether money shall be raised by the village by tax or assessment. Ward v. Kropf, 120 N. Y. Supp. 476, affirmed without opinion in 143 App. Div. 919, 127 N. Y. Supp. 1148.

Under such a statute women have the right to vote upon the proposition to expend a certain sum in the purchase of an existing water supply system, as it necessarily contemplates and implies that money shall be raised by tax for the purpose of paying the same and the interest accruing thereon. Waverly v. Waverly Waterworks Co. 69 Misc. 373, 125 N. Y. Supp. 339.

Women are entitled to vote for school officers without registering as electors, or

APPEAL by complainant from a decree of the Superior Court for Cook County dismissing a bill filed to restrain defendants from expending money for providing separate ballots and ballot boxes for women and for other purposes in accordance with the provisions of the woman's suffrage act. Affirmed.

The facts are stated in the opinion.

Messrs. **Mayer, Meyer, Austrian, & Platt**, for appellant:

The woman's suffrage act violates § 13 of article 4 of the Constitution of Illinois, in that in its passage the legislature amended the general election laws of the state, and more particularly § 65 thereof, without inserting said § 65 at length in the new act.

People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; Badenoch v. Chicago, 222 Ill. 71, 78 N. E. 31; O'Connell v. McClenathan, 248 Ill. 350, 94 N. E. 21; People ex rel. Cant v. Crossley, 261 Ill. 78, 103 N. E. 537; Brooks v. Hatch, 261 Ill. 179, 103 N. E. 745.

The legislature cannot constitutionally give to women the right to vote "upon all questions or propositions submitted to a vote of the electors of cities, villages, and towns, or other political divisions of this state," and the words "all questions or propositions" contained in the woman's suffrage act cannot be separated by the courts.

People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678; Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Baldwin v. Franks, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; United States v. Ju Toy, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 409, 50 L. ed. 246, 249, 26 Sup. Ct. Rep. 66; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 528, 51 L. ed. 298, 304, 27 Sup. Ct. Rep. 153; Employers Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct. Rep. 964; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Duggan v. Peoria, D. & E. R. Co. 42 Ill. App. 536; Bernier v. Russell, 89 Ill. 60; Re Gage, 141 N. Y. 112, 25 L.R.A. 781, 35 N. E. 1094; Coffin v. Election Comrs. 97 Mich. 188, 21 L.R.A. 662, 56 N. W. 567; State ex rel. Mills v. Board of Elections, 6 Ohio C. D. 36, affirmed in 54 Ohio St. 631, 47 N. E. 1114; Harris v. Burr, 32 Or. 348, 39 L.R.A. 768, 52 Pac. 17; Livesley v. Litchfield, 47 Or. 248, 114 Am. St. Rep. 920, 83 Pac. 142; Setterlun v. Keene, 48 Or. 520, 87 Pac. 763.

Messrs. **John J. Herrick, Charles S. Cutting, Isaiah T. Greenacre**, and **Joel F. Longenecker**, with Mr. **Charles H. Mitchell**, for appellees:

The woman's suffrage act does not violate § 13 of article 4 of the Constitution of Illinois.

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furnishing an affidavit as required by electors who are not registered, where qualified electors, as defined by the North Dakota Constitution, § 121, are male persons only, possessing the other qualifications therein enumerated; § 128, North Dakota Constitution, providing that "any woman having qualifications enumerated in § 121 of this article as to age, residence, and citizenship, and including those now qualified by the laws of the territory, may vote for all school officers, and upon all questions pertaining solely to school matters, and be eligible to any school office," does not make women electors within the terms of § 121 of the Constitution, but vests them with a limited elective franchise. Wagar v. Prindeville, 21 N. D. 245, 130 N. W. 224.

Women are not entitled to vote at an election upon the question of the issuance of bonds for school purposes, under a statute which limits the right to vote thereon to qualified electors, which are defined by the state Constitution to embrace male citizens only. Shelton v. School Bd. Dist. — Okla. —, 142 Pac. 1034. It appeared from the report of the above case that the Oklahoma Constitution, § 3, art. 3, provided L.R.A.1915B.

that "until otherwise provided by law, all female citizens of this state possessing like qualifications of male electors, shall be qualified to vote at school district elections or meetings," and the court pointed out that the intent of the legislature to deprive female citizens of the privilege of participating in elections of the kind in question was further manifested by the language used in another section of the statute, wherein it is specifically provided that all persons, male and female, possessing the other qualifications provided in the Constitution and laws of the state, may vote for elective school officers only.

The Constitution of the United States does not confer the right of suffrage upon women to vote for members of Congress, nor preclude the several states from changing the qualifications of electors as they existed at the time of its adoption. Carpenter v. Cornish, 83 N. J. L. 696, 85 Atl. 241.

In Carpenter v. Cornish, 83 N. J. L. 254, 83 Atl. 31, affirmed in 83 N. J. L. 696, 85 Atl. 240, it was contended that women had the right to vote by virtue of the former state Constitution of 1776, which declared that "all inhabitants of this colony of full

People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678; Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Dorsey v. Brigham, 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Collier v. Anlicker, 189 Ill. 34, 59 N. E. 615; People ex rel. Cant v. Crossley, 261 Ill. 78, 103 N. E. 537; Timm v. Harrison, 109 Ill. 593; Erford v. Peoria, 229 Ill. 546, 82 N. E. 374; Hollingsworth v. Chicago & C. Coal Co. 243 Ill. 98, 90 N. E. 276; People ex rel. Lynch v. La Salle County, 100 Ill. 495; Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237; Cook County v. Healy, 222 Ill. 310, 78 N. E. 623; Hill v. Tohill, 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423; People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157.

The contention that § 1 of article 7 of the Constitution, as to the qualifications of voters, applies not only to officers provided for in the Constitution, but also to officers created by the legislature, and that therefore the provisions of the woman's suffrage act, which give women the right to vote for the officers named,—all of whom are officers created by the legislature,—are void, is contrary to many express decisions of this court.

Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Wilson v. Sanitary Dist. 133 Ill. 443, 27 N. E. 203; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Dorsey v. Brigham, 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Collier v. Anlicker, 189 Ill. 34, 59 N. E. 615; People ex rel. Wies v. Bowman, 247 Ill. 276, 93 N. E. 244; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785; People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157; State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674; State ex rel. Gibson v. Monahan, 72 Kan. 492, 115 Am. St. Rep. 224, 84 Pac. 130, 7 Ann. Cas. 661; State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294, 117 N. W. 412.

Even if it is assumed that the provision of the act giving women the right to vote on the propositions and questions referred to is void, the further provisions which give women the right to vote for the officers named in the act (§§ 1 and 2) are valid.

Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Chicago v. Wolf, 221 Ill. 130, 77 N. E. 414; People ex rel. Honore v. Olsen, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23; Fletcher v. Tuttle, 151 Ill. 41, 25 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683; Dickey v. Reed, 78 Ill. 261; People ex rel. Malley v. Barrett, 203 Ill. 99, 96 Am. St. Rep. 296, 67 N. E. 742; People v. Huff, 249 Ill. 164, 94 N. E. 61; Weber v. Timlin, 37 Minn. 274, 34 N. W. 29.

The act is not void, either in whole or in part, because of the provision which gives women the right to vote on questions and propositions.

The court may reject so much of a section or clause of a statute as is unconstitution-

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age, . . . and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote," and that the limitation contained in the subsequent Constitution of 1844, granting the right to vote to male citizens, must be disregarded, because it was improperly adopted for the reason that only male citizens were allowed to vote thereon. The supreme court denied that women had a right to vote by virtue of the Constitution of 1776, upon the ground that prior to its adoption women had no legal right to vote, and that the term "all inhabitants" is limited to those legally entitled to vote before the adoption of the Constitution, and that the words "claim a vote" must be understood to mean a lawful claim to vote prior to the adoption of the Constitution. The court of errors and appeal held that it would not undertake to decide the question upon the ground that it was a political question; that courts will not undertake to decide the question as to the existence of the government under which it exercises jurisdiction.

In Ward v. Kropf, 120 N. Y. Supp. 476, affirmed without opinion in 143 App. Div. 919, 127 N. Y. Supp. 1148, it was held in a taxpayers action to restrain the issuance of village bonds for the construction of a public improvement, that an election for the reincorporation of the village would not be declared invalid because women were not permitted to vote upon the question, where, under the village law, resident women taxpayers are allowed to vote on three propositions, (1) whether town territory shall be incorporated as a village; (2) whether money shall be raised by the village by tax or assessment, and (3) whether the village shall be dissolved. It was said: "But the statute does not seem to have expressly conferred the right upon women to vote on the question of reincorporation, and it would seem to be consistent with the trend of decisions to hold that women had no right to vote upon that question. But if they had the right to vote on the question, there were not enough of them in the entire village to overcome the majority which was cast in favor of the proposition to reincorporate; and, were that not so, it is doubtful if the objection could be raised in this action."

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al, and give full force to the constitutional remainder.

Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Dorsey v. Brigham, 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Palmer v. Mead, 7 Conn. 149.

A legislative act may be divided into constitutional and unconstitutional parts, according to the separability of the subject-matter, without regard to whether words or sentences may or may not be divided.

Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; People ex rel. Smith v. Rodenberg, 254 Ill. 386, 98 N. E. 764; People v. Booth Fisheries Co. 253 Ill. 423, 97 N. E. 837; State ex rel. Dawson v. Martin, 87 Kan. 817, 126 Pac. 1080; People ex rel. Atty. Gen. v. Detroit, 29 Mich. 108; Com. v. Gagne, 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449; Com. v. Kimball, 24 Pick. 359, 35 Am. Dec. 326; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 117 S. W. 238; State v. Amery, 12 R. I. 64, 4 Am. Crim. Rep. 112; Murphy v. Wheatley, 100 Md. 358, 59 Atl. 704; Pleasants v. Rohrer, 17 Wis. 578; Brady v. Mattern, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358; Dunn v. Great Falls, 13 Mont. 58, 31 Pac. 1017; People v. O'Neil, 109 N. Y. 251, 16 N. E. 68; Ex parte Byles, 93 Ark. 612, 37 L.R.A.(N.S.) 774, 126 S. W. 94; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; Elwell v. Adder Mach. Co. 136 Wis. 82, 116 N. W. 882; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888; Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Allen v. Texas & P. R. Co. 100 Tex. 525, 101 S. W. 792; Cooley's Const. Lim. 215, 216; Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A. (N.S.) 1015, 100 S. W. 705; Sinking Fund Comrs. v. George, 104 Ky. 260, 84 Am. St. Rep. 454, 47 S. W. 779.

The right of women to vote on questions or propositions has been sustained on the ground that the determination of such questions is not the holding of an election.

Seaman v. Baughman, 82 Iowa, 216, 11 L.R.A. 354, 47 N. W. 1091; State v. Hirsch, 125 Ind. 207, 9 L.R.A. 170, 24 N. E. 1062; State ex rel. Sneed v. Bullock, 80 N. C. 132; Coggeshall v. Des Moines, 138 Iowa, 730, 128 Am. St. Rep. 221, 117 N. W. 309; Callam v. Saginaw, 50 Mich. 7, 14 N. W. 677; Valverde v. Shattuck, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947; Thornton v. Territory, 3 Wash. Terr. 482, 17 Pac. 896; Woodley v. Clio, 44 S. C. 374, 22 S. E. 410; Menton v. Cook, 147 Mich. 540, 111 N. W. 94; Belles v. Burr, 76 Mich. 1, 43 N. W. 24; L.R.A.1915B. Hall v. Madison, 128 Wis. 132, 107 N. W. 31.

Messrs. McEwen, Weissenbach, Shrimski, & Meloan, also for appellees:

An act which is complete within itself, and does not purport, either in its title or in the body thereof, to amend or revive any other act, is valid, even though it may by implication modify or repeal prior existing statutes.

People ex rel. Cant v. Crossley, 261 Ill. 98, 103 N. E. 537; People ex rel. Klokke v. Wright, 70 Ill. 388; Timm v. Harrison, 109 Ill. 593; Union School Dist. v. New Union School Dist. 135 Ill. 464, 28 N. E. 49; People ex rel. Stuckart v. Knopf, 183 Ill. 410, 56 N. E. 155; Hollingsworth v. Chicago & C. Coal Co. 243 Ill. 98, 90 N. E. 276; People v. Van Bever, 248 Ill. 136, 93 N. E. 725; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785; People v. Jones, 242 Ill. 145, 89 N. E. 711; Erford v. Peoria, 229 Ill. 552, 82 N. E. 374.

The legislature may create offices other than those mentioned in the Constitution, and provide the manner of filling them and the qualifications of those who shall make the selection.

People ex rel. Wies v. Bowman, 247 Ill. 284, 93 N. E. 244; People ex rel. Longenecker v. Nelson, 133 Ill. 565, 27 N. E. 217; Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157; People ex rel. Grinnell v. Hoffman, 116 Ill. 587, 56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788; People ex rel. South Park v. Williams, 51 Ill. 63; People ex rel. Dunham v. Morgan, 90 Ill. 558; Moore v. People, 106 Ill. 376; Blake v. People, 109 Ill. 504; Kilgour v. Drainage Comrs. 111 Ill. 342; Huston v. Clark, 112 Ill. 344; Owners of Lands v. People, 113 Ill. 296; Mt. Vernon v. Evens & H. Fire Brick Co. 204 Ill. 32, 68 N. E. 208; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; Knopf v. People, 185 Ill. 20, 57 N. E. 22; People ex rel. Bruce v. Dunne, 258 Ill. 455, 45 L.R.A. (N.S.) 500, 101 N. E. 560.

The right to vote on all questions means all questions which women may lawfully vote upon.

People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678; Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191; Lower Salt Fork Drainage Dist. v. Smith, 257 Ill. 55, 100 N. E. 179; Given v. Simpson, 5 Me. 303; Jackson v. Reeves, 53 Ind. 231; State ex rel. Murphy v. Rising, 10 Nev. 97; Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; Flake v. Van Wagenen, 54 N. Y. 25; Blevings v. People, 2 Ill. 172; United States v. Herron, 20 Wall. 251, 22 L. ed. 275; Austin v. Ber-

lin, 13 Colo. 198, 22 Pac. 433; Josselyn v. Stone, 28 Miss. 753; Holden v. O'Brien, 86 Minn. 297, 90 N. W. 531; Gilham v. Wells, 64 Ga. 192; Griffith v. Manning, 67 Kan. 559, 73 Pac. 75; Hare v. McIntire, 82 Me. 240, 8 L.R.A. 450, 17 Am. St. Rep. 476, 19 Atl. 453; State v. Ward, 9 N. C. (2 Hawks) 443; Ex parte Voll, 41 Cal. 29; Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32; Milo v. Kilmarnock, 11 Me. 455; Hallowell v. Gardiner, 1 Me. 93; Mortenson v. Nelson, 248 Ill. 520, 94 N. E. 120, 21 Ann. Cas. 251; Hartranft v. Meyer, 135 U. S. 237, 34 L. ed. 110, 10 Sup. Ct. Rep. 751; Territory ex rel. Albuquerque v. Pinney, 15 N. M. 625, 114 Pac. 367.

Dunn, J., delivered the opinion of the court:

William J. Scown filed a bill in the superior court of Cook county in behalf of all other taxpayers as well as himself, to restrain the election commissioners of the city of Chicago and the town of Cicero from expending money for providing separate ballots and ballot boxes for women, and for other purposes, in accordance with the provisions of the act of the legislature of June 26, 1913, known as the woman's suffrage act (Laws of 1913, p. 333), and the act of June 30, 1913 (Laws 1913, p. 310), amending the primary election laws. A demurrer was sustained to the bill, which was dismissed for want of equity, and the complainant appealed.

The ground on which the injunction was asked was that the expenditures complained of were not authorized by law, because the woman's suffrage act is unconstitutional; and that is the only question to be considered. The act provides as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly: That all women, citizens of the United States, above the age of twenty-one years, having resided in the state one year, in the county ninety days, and in the election district thirty days, next preceding any election therein, shall be allowed to vote at such election for presidential electors, member of the state board of equalization, clerk of the appellate court, county collector, county surveyor, members of board of assessors, members of board of review, sanitary district trustees, and for all officers of cities, villages, and towns (except police magistrates), and upon all questions or propositions submitted to a vote of the electors of such municipalities or other political divisions of the state.

"Sec. 2. All such women may also vote for the following township officers: Supervisor, town clerk, assessor, collector, and highway commissioner, and may also participate and vote in all annual and special town meetings in the township in which such election district shall be.

"Sec. 3. Separate ballot boxes and ballots shall be provided for women, which ballots shall contain the names of the candidates for such offices which are to be voted for and the special questions submitted as aforesaid; and the ballots cast by women shall be canvassed with the other ballots cast for such officers and on such questions. At any such election where registration is required, women shall register in the same manner as male voters."

It is first contended that this act is in violation of § 13 of art. 4 of the Constitution, because it amends the general election laws, but does not insert in the new act the section amended; reference being made particularly to § 65 of chapter 46 of the Revised Statutes, which is in the identical language of § 1 of art. 7 of the Constitution, as follows:

"Sec. 1. Every person having resided in this state one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this state on the 1st day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this state prior to the 1st day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election."

It cannot be denied that the act in question changes the qualifications prescribed by said § 65 for voters for the offices mentioned in the act, and, if it is to be regarded only as an amendment of that section, the constitutional requirement has not been complied with, and the act is void. Not every enactment, however, which enlarges, restricts, or modifies previous statutes is subject to the constitutional objection made here.

"Any new provision of law may in some sense be said to amend and change the prior system of laws, and whenever there is an irreconcilable conflict between two acts the later one must prevail. To the extent of the conflict the later act amends the earlier one by implication, and if the later act is not amendatory in form and perfect in itself it is not within the prohibition of the Constitution. It is not necessary, when a new act is passed, that all prior acts modified by it by implication shall be reenacted and published at length." Hollingsworth v. Chicago & C. Coal Co. 243 Ill. 98, 90 N. E. 276.

The requirement of the Constitution was intended to enable the meaning of enact-

ments directly amending prior statutes to be ascertained by an examination of the enactments themselves, without the necessity of examining all prior statutes on the subject to ascertain the effect of the amendment. The purpose of this provision and its meaning have been announced in numerous cases, and in People ex rel. Cant v. Crossley, 261 Ill. 78, 103 N. E. 537, the whole question was again considered with reference to these cases, and the rule was reiterated that "an act which is complete within itself and does not purport, either in its title or in the body thereof, to amend or revive any other act, is valid, even though it may by implication modify or repeal prior existing statutes."

This act does not purport to amend or revive any other act, and it is complete in itself. Its only object is to extend to women the right of suffrage so far as the offices and subjects mentioned in it are concerned. The intention of the legislature can be ascertained without reference to any prior act. The act is entirely intelligible; its meaning appears clearly on its face; no further legislation is necessary; no machinery other than is provided is required to put it in operation and make it effective; nothing remains to be done other than for the women to vote. The act does not violate § 13 of article 4 of the Constitution.

It is argued that by § 1 of article 7 of the Constitution, which has already been set out, the power of extending the right of suffrage to women has been denied to the legislature. This question is one of constitutional construction, purely. We cannot give expression to our own views as to the justice, the wisdom, or the public policy of extending the right of suffrage to women, or permit those views to affect the decision of this case. The right to determine who may vote rests with the legislature and not the courts, and the courts have no authority to interfere with the act of the legislature unless such act has been clearly prohibited by some provision of the Constitution. It is elementary that the right of suffrage is not a natural right, but exists only by positive law; that the Constitution is not a grant of authority so far as the legislature is concerned, but is a limitation of legislative power, and that the legislative power of the general assembly is unlimited except by such restrictions as the Constitution has imposed in express terms or by necessary implication. It is also true that where the Constitution has prescribed the qualifications of the electors, they cannot be changed by the legislature. The question presented therefore is whether the qualifications of electors prescribed by § 1 of article 7 of the Constitution apply to elections for the officers named in the act under consideration, and this question has been heretofore answered, practically and in principle, by the decisions of this court, in the negative. None of the offices named in the act in question are mentioned in the Constitution, but all have been created by statutory enactments. From the time of the organization of the territory of the United States northwest of the Ohio river under the ordinance of 1787, the right of suffrage under the various acts of Congress, Constitutions, and statutes from time to time in force in the territory now constituting the state of Illinois was confined to male inhabitants or male citizens, and no woman was permitted or authorized to cast a vote for any office or upon any question until 1891. The general assembly in that year enacted a law "to entitle women to vote at any election held for the purpose of choosing any officer under the general or special school laws of this state." Immediately the power of the legislature to extend to women the limited right of suffrage conferred by this act was questioned, the objection to the existence of such power being based upon the section of the Constitution involved in the present case (§ 1 of article 7). The question was presented to this court in a petition for mandamus against the board of election commissioners of Cook county. People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678. The precise question in that case was the right of a woman to vote at an election for county superintendent of schools. It was held that the legislature had no power to grant her such right, upon the ground that the county superintendent of schools was an officer provided for by the Constitution, and that no person not possessing the qualifications prescribed in § 1 of article 7 could have the right to vote for a constitutional officer. The court expressly reserved the question whether it was competent for the legislature to provide that women might vote at an election of school officers not mentioned in the Constitution, but the inference to be drawn from the opinion was that it was competent.

A year later this precise question was presented to the court in the case of Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191, in which case two men contested the election of two women as members of the board of education of a school district. The election turned upon the votes of women cast and counted for the women candidates, who would otherwise have been defeated. It was held that as to the two school officers mentioned in the Constitution,—the state superintendent of public instruction and the county superintendent of public instruc-

tion,—the qualifications of electors must be those prescribed in § 1 of article 7 of the Constitution, but that the general assembly had complete control as to what other school offices should be created, and the manner in which the incumbents of those offices should be designated, and, if it provided for the choice of such officers by popular vote, it was not necessary that the voters should have the same qualifications as those of electors as defined by the Constitution.

These two cases have established this construction of the Constitution, and they have been followed without question for many years. Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381; Dorsey v. Brigham, 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Collier v. Anlicker, 189 Ill. 34, 59 N. E. 615; Bloome v. Hograeff, 193 Ill. 195, 61 N. E. 1071. The distinction which they indicate between offices of constitutional origin and those created by statutes, as to their control by the legislature, has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the legislature. If an office is not of constitutional origin, it is competent for the legislature to declare the manner of filling it, how, when, and by whom the incumbent shall be elected or appointed, and to change, from time to time, the mode of election or appointment. People ex rel. Dunham v. Morgan, 90 Ill. 558; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785; People ex rel. Sadler v. Olson, 245 Ill. 288, 92 N. E. 157; People ex rel. Wies v. Bowman, 247 Ill. 276, 93 N. E. 244.

By these decisions the rule is settled that § 1 of article 7 of the Constitution refers only to elections provided for by that instrument. The qualifications of voters at such elections are fixed by the Constitution, and the legislature cannot change them. Other elections, however, provided for only by statute, and not by the Constitution, are wholly within the control of the legislature. Against this statement of the law it is contended by counsel for the appellant, in the language of their brief: "That the words 'any election,' in § 1, refer to and embrace every election at which any political office is to be filled, whether the political office is created by the Constitution itself, or by any law passed by the legislature under the powers conferred upon it by that Constitution."

They then proceed to argue that the case of Plummer v. Yost, supra, and the cases which followed it, are not inconsistent with their argument, because those cases involved only "district school elections, *i. e.*, non-political elections," and they lay down the postulate that "school districts, boards of education, and similar instrumentalities for the control of the education of the people of the state, are of a philanthropic and non-political character. They exercise no functions of a political or governmental nature."

This proposition is essential to their argument, for if school directors and members of boards of education hold political offices, then it has been the uniform holding of this court for more than twenty years, that the words "any election," in § 1 of article 7 of the Constitution, do not embrace every election at which any political office is to be filled, and that the legislature may confer on women the right to vote for political offices.

Counsel give no definition of "political," and we know of no division of the agencies of government into those which are political and those which are philanthropic. The terms have no relation to each other, and the division is no more logical than would be a division of articles into those which are red and those which are round. "Political" is thus defined by Webster: "Of or pertaining to polity or politics, or the conduct of government, referring in the widest application to the judicial, executive, and legislative branches; of or pertaining to or incidental to the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of state."

Politics is: "The science and art of government; the science dealing with the organization, regulation, and administration of a state in both its internal and external affairs."

The public school system of the state was not established, and has not been maintained, as a charity or from philanthropic motives. The first legislative expression in regard to schools in Illinois was in the ordinance of 1787, which declares that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

This declaration grew, not out of philanthropic motives, but out of a consideration of the essentials of good government. The conduct and maintenance of schools by school directors, school trustees, and boards of education is no less an "exercise of the functions vested in those charged with the conduct of government," is no less a part of "the science and art of government," and deals no less with "the organization, regulation, and administration of a state" in its internal affairs, than the construction and maintenance of roads by the commissioners of highway; the conduct and

maintenance of the charitable institutions of the state by the board of administration; the inspection of factories, and the enforcement of the laws for the protection of workmen and in regard to the employment of women and children, by the factory inspectors; the performance by the industrial board of the duties imposed upon it by law, and the performance of many other duties by public officials which, however beneficial to individuals, are not undertaken from philanthropic or charitable motives, but for the protection, safety, and welfare of the citizens of the state in the interest of good government. School districts are involuntary political divisions of the state, each embracing a certain territory and all the inhabitants thereof, organized for the public advantage, and not in the interest of individuals, having for their purpose the exercise within their territory, by their inhabitants and for their benefit, of that part of the governmental function committed to them. There is no higher exercise of the sovereign power than the exaction from the citizen of a part of his property as taxes, in payment of his proportionate share of the expenses of government. When school directors levy taxes, they exercise political power of the highest quality. When they purchase school sites, build and equip schoolhouses, employ teachers, and disburse, in their discretion, public funds for these purposes, their action is political; it pertains to the conduct of government. It differs in no respect, so far as this quality is concerned, from the acts of highway commissioners with reference to their duties in connection with roads. Neither school directors nor highway commissioners have legislative or judicial powers, but both are administrative officers, engaged in administering that portion of the government of the state committed to them by law. Neither of them exercises any function which is not of a political and governmental character.

This same argument was advanced in the case of People ex rel. Ahrens v. English, 139 Ill. 630, 15 L.R.A. 131, 29 N. E. 680, in which counsel for the petitioner made the claim that the constitutional clause that voters shall be males does not refer to school elections, but only to political offices; that school districts are quasi corporations of a charitable nature and exert no functions of government; that the Constitution refers only to political offices; and that the article on education (article 8) should be construed by itself. The court did not take this view of the matter, but said (p. 630): "It is suggested that article 8 of the Constitution, entitled 'Education,' makes it the duty of the general assembly to provide 'a system of free schools,' and that therefore the various sections in said article 8 should be construed by themselves and without reference to other provisions contained in the Constitution. The conclusion reached does not seem to follow from the premises stated. The general assembly, in accordance with the mandate of the Constitution, passed an act in 1872, 'to establish and maintain a system of free schools.' Rev. Stat. 1874, p. 947, chap. 122. The state superintendent of public instruction and the county superintendents of schools were made component and important parts of the system established by the act, and their duties were therein defined, and provisions therein made for their election. But notwithstanding this, the requirements of §§ 3 and 20 of article 5 of the Constitution, in regard to the election of a state superintendent of public instruction, still remained in full force, as also did the provision of the Constitution which fixed the qualifications of those who could vote at an election for such state superintendent, or for any other officer provided for in the Constitution."

In distinguishing the case of Belles v. Burr, 76 Mich. 1, 43 N. W. 24 (which counsel for the appellant rely upon here), and the cases of Wheeler v. Brady, 15 Kan. 26, and State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N. W. 682, in which the right of women to vote for district school officers had been sustained, it was further said in the English Case, 139 Ill. 631, 15 L.R.A. 131, 29 N. E. 680: "We do not consider said cases as here in point, or that the decisions which were rendered in them are in conflict with the conclusion which we have reached in the present controversy. In the Michigan case the question at issue was in regard to the right of the plaintiff, a woman, to vote, under a statute of that state, at an election for school trustees of a school district, and the court, speaking of the Constitution of the state, said: 'But no officer of the school district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the legislature, and it cannot be said that the officers of school districts, chosen pursuant to the system adopted by the legislature, are constitutional officers. . . . While it must be conceded that no person can vote for the election of any officer mentioned in the Constitution unless he possesses the qualifications of an elector prescribed by that instrument, it does not follow that none but such electors can vote for officers which the legislature has the right to provide for, to carry out the educational purpose declared in that instrument.' This is a plain intimation that, if the Constitution of Michigan had provided for or men-

tioned school trustees of school districts, then the decision in that case would have been otherwise."

This plainly indicates that the decision of the court was based upon the ground that the county superintendent of schools is a constitutional officer, and further indicates the view of the court that the decisions cited were based upon the power of the legislature to provide for the election of officers not mentioned in the Constitution by persons having different qualifications from those prescribed by the Constitution, and that the right of women to vote for school directors and other school officers not mentioned in the Constitution could be sustained only by virtue of such power, and not by a construction of article 8 of the Constitution, independently of the other provisions of that instrument. Whether such right could be sustained at all was not then decided; but in Plummer v. Yost, supra, the right was sustained, the court citing the case of Belles v. Burr, supra, and again quoting the last sentence of the quotation from the opinion in that case given in People ex rel. Ahrens v. English, supra. This court said (144 Ill. 73): "Section 1 of article 8 of the Constitution makes it the duty of the general assembly to 'provide for a thorough and efficient system of free schools, where all the children of this state may receive a good common school education.' The mode in which the required 'system of free schools' should be organized, and the officers by whom it should be controlled and directed and its affairs administered, is left to the legislative discretion of the general assembly. The only school officers expressly provided for by the Constitution are a county superintendent of schools in each county and a state superintendent of public instruction. . . . At the election of these two officers, as we held in the case above cited, the qualifications of the electors must be those prescribed in § 1 of article 7 of the Constitution. But the Constitution contains no direction as to what other school offices shall be created or as to the mode in which the incumbents of those offices shall be designated and chosen. Those matters are left wholly to the discretion of the general assembly."

Counsel for the appellant, in referring to this case, say that it is only upon the theory that school trustees and members of the board of education are not political officers, and that they do not exercise political functions, and that the school system is governed by a separate and independent article of the Constitution, that the doctrine of Plummer v. Yost can be upheld. On the contrary, all that was said in that case is just as applicable to the offices of highway commissioners, or to any other township or municipal offices, or to any other offices which the general assembly has the authority to create, as to school offices. The theory that an educational article in the Constitution imposing upon the legislature the duty of establishing a school system authorized the legislature, in selecting officers for the system it might establish, to disregard the constitutional provisions in regard to the qualification of electors, had its origin in the Michigan case. Belles v. Burr, supra. Reference was made in that case to the fact that, for fifty years before the question arose there, the qualifications of voters at school district meetings, as fixed by statute, had been different from those prescribed by the Constitution for electors entitled to vote under that instrument. The first Constitution of the state of Michigan provided that the legislature should establish a school system, and under this Constitution, from the beginning, the legislature in fact fixed the qualifications of voters at school district meetings without regard to the qualifications prescribed by the Constitution for electors at other elections. School districts had preceded the Constitution and were recognized by it, but no officer of the school district was recognized or mentioned in the Constitution. It was held that the whole primary school system was committed to the legislature, and the court used the language that "the authority granted by the Constitution to the legislature, to establish a common or primary school system, carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, their term of office, and how and by whom they should be chosen."

Counsel do not claim, and probably no one will assert, that the Constitution granted to the legislature authority to establish a school system. Constitutions may limit the power of the legislature, but they are not the source of legislative power. In fact, the supreme court of Michigan took into consideration the contemporaneous construction of the Constitution by the legislature as exemplified by its acts, and because of such contemporaneous construction held that the legislature should be regarded as having the power, which it had always exercised, to prescribe by whom officers to conduct the affairs of school districts should be chosen, without regard to the requirements of the Constitution as to the qualifications of electors. In New York, where the Constitution prescribed the qualifications of voters "for all offices that now are or hereafter may be elective by the people," and limited the franchise to "male citizens," a

woman claimed the right to vote for school commissioner, contending that this office was taken out of the constitutional provision by the long and invariable interpretation placed upon it. The court held that this was the only possible answer to the claim that she was disqualified under the Constitution, but that such interpretation had been applied only to the officers of the school district, and that she was not qualified to vote for school commissioner, whose duties extended to superintendence over many districts. In Harris v. Burr, 32 Or. 348, 39 L.R.A. 768, 52 Pac. 17, the court relied upon a contemporaneous and uniform legislative interpretation of the Constitution, similar to that in Michigan, as authorizing the legislature, in establishing a system of common schools, to determine what officers should administer its affairs, who and what manner of persons should be eligible to office, and how and by whom they should be chosen. In New Jersey the constitutional provision in regard to suffrage was: "Every male citizen of the United States . . . shall be entitled to vote for all officers that now are, or hereafter may be, elective by the people."

In State ex rel. Kimball v. Hendee, 57 N. J. L. 307, 30 Atl. 894, it is said: "In State, Elkin, Prosecutor, v. Deshler, 25 N. J. L. 177, it was adjudged that trustees of school districts were officers within this constitutional provision. But it is said this adjudication has ceased to be authoritative, because since it was rendered an amendment of the Constitution has imposed on the legislature the express duty of providing for the maintenance and support of a thorough and efficient system of free public schools. I am quite unable to see how the imposition of this duty affects the question whether school trustees are officers, or whether, if they are made elective by the people, any other than constitutional voters may vote for them. This duty of the legislature must be performed in accordance with all other constitutional provisions."

Under the doctrine of contemporaneous, long-continued, and uniform legislative construction, the supreme courts of New York, Michigan, and Oregon have recognized the right of the legislature to fix different qualification for voters for district school officers from those prescribed by the Constitution for electors in other cases. That doctrine has no application in Illinois. Before the Constitution of 1870 there was no constitutional provision in regard to schools. No express duty and no limitation were imposed upon the legislature in that regard. In 1825 an act was passed providing for the establishment of free schools. Such officers as the legislature saw fit to provide for the conduct of the schools it required to be elected by the legal voters. From time to time the law was amended. The secretary of state was made state superintendent of public instruction. Afterward a state superintendent of public instruction was elected. A commissioner was elected in each county, who had supervision of the schools in his county, and later a county superintendent of public instruction was elected. All of this legislation occurred many years before 1870, and when the Constitution of 1870 was adopted, the system of free schools throughout the state was already established and had been in operation for years, and the mandate of that instrument to the general assembly to provide a thorough and efficient system of free schools merely imposed upon that body the duty to continue the work it had already begun, and to carry it to a higher degree of efficiency. The Constitution adopted the state superintendent of public instruction and the county superintendent of public instruction, imposed some limitations not relating to the question in hand, and left the general assembly with the same free hand which it had always used. For twenty years longer there were no great changes in the school law, and then the legislature decided that women should have the right to vote for school officers, and passed the law of 1891. Until that time the law provided that only legal voters should vote for school officers. The system of free schools had been established by the general assembly. The Constitution had granted the legislature no power, and the legislature had assumed none, as to which any question had been or could be raised, until the enactment of that law. When the question came before the court reference was made to the educational article of the Constitution,—not as relieving the legislature from any of the limitations imposed by any other of the provisions of that instrument, but as showing that no restrictions were imposed upon the legislature as to the designation of officers under that article, except the state superintendent of public instruction and the county superintendent of public instruction. There was no question of contemporaneous construction to help the court or to confuse the question, and no question of any grant of power by the legislature. No such question was mentioned or considered, but the two cases were decided on the broad ground that the legislature has the power to prescribe qualifications for voters where the officers to be elected are not provided for in the Constitution. That principle is decisive of the question now under consideration.

Since our own decisions in numerous cases during many years have established the

principle involved under our Constitution, it will be neither necessary nor profitable to investigate the decisions of other states under their Constitutions. While there may be some conflict in such decisions, their weight is not contrary to the long-established doctrine of this court, and if it were otherwise we would not, out of deference to such decisions, change the construction which we have placed upon a provision of the Constitution of the state. The case of Plummer v. Yost has been cited in other jurisdictions as sustaining the proposition of the cases of Belles v. Burr, 76 Mich. 1, 43 N. W. 24, and Harris v. Burr, supra, that the constitutional injunction upon the legislature to establish a system of free schools is to be construed independently of the rest of the Constitution, and of itself confers upon the legislature power to adopt such system and provide for the election of such officers as it chooses, unrestrained by all other provisions of the Constitution. We have seen that that was not the view adopted, and that in the case of People ex rel. Ahrens v. English, it was expressly repudiated. In State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383, in Buckner v. Gordon, 81 Ky. 665, and in Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 396, 35 Atl. 674, it was held that constitutional provisions prescribing the qualifications of electors do not apply to any election for municipal offices not provided for by the Constitution, but created by legislative enactment. This is the doctrine announced in the case of Plummer v. Yost, and the case was cited in support of the doctrine in State ex rel. Lamar v. Dillon, supra.

The act in question provides that women may vote not only for the officers named, but also "upon all questions or propositions submitted to a vote of the electors of such municipalities or other political divisions of this state." The Constitution provides, in different sections, for a referendum upon various questions and propositions to be determined by the people, the voters, or the legal voters of the state, the county, or of the city of Chicago. It is contended by the appellant that only electors possessing the qualifications prescribed in the Constitution can participate in such a referendum; that the legislature has not the power to give to women the right to do so; that therefore the attempt to give them the right to vote upon all questions or propositions submitted to a vote of the electors is unconstitutional; and that the words of the act are not separable, so that it can be sustained to the extent that it was authorized by the Constitution. The appellees insist that the section does not attempt to confer the right of suffrage upon women in the matter of all questions or propositions submitted to the electors of a county, but we do not agree with this contention. The words "such municipalities" refer to those named, and the words "other political divisions of this state" include counties. It must be conceded that no new bonded indebtedness other than for refunding purposes can be incurred by the city of Chicago without the consent of the majority of the legal voters in the city, and that no county can be divided or have any of its territory taken from it except by a vote of a majority of the legal voters of the county. There are other cases mentioned in the Constitution where the consent of a majority of voters is required, and in attempting to give to women the right to vote upon all questions or propositions submitted to the vote of electors in the municipalities or political subdivisions of the state, the legislature exceeded its powers. There are many questions and propositions, however, not mentioned in the Constitution, which may be submitted by the legislature to a referendum at which women may be authorized to vote. Does the fact that the legislature has acted in excess of its power in some particulars, and enacted a law which cannot have effect in some cases, render the whole act void and invalidate the grant of the right of suffrage even in those cases where the legislature has the undoubted power to grant it? It is a well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that in such cases the constitutional part of the act will be given effect, and the unconstitutional part disregarded, unless the unconstitutional part is of such a character that it may be inferred that without it the legislature would not have passed the act. The most usual form in which the question is presented is where the constitutional and unconstitutional parts of the enactment are contained in separate sections, as in People ex rel. Honore v. Olsen, 222 Ill. 117, 113 Am. St. Rep. 371, 78 N. E. 23, 29. In that case the opinion, after quoting at length from Cooley on Constitutional Limitations, states (p. 134) that "in the language of the rule laid down by Judge Cooley, supra, the fact that one part of a statute is unconstitutional 'does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.'"

The constitutional and unconstitutional provisions are sometimes contained in the same section, as in Chicago v. Wolf, 221 Ill.

130, 141, 77 N. E. 414, 417, where it was claimed that the act was void as to the state treasurer and county treasurer for constitutional reasons, and was therefore void as to the other officers mentioned in the act. After again quoting from Cooley, the court said (p. 141): "When we attempt to apply this rule to the statute now before us, it becomes evident that the provisions, so far as they affect the state treasurer and county treasurers, are in nowise connected with or dependent upon the other provisions, so far as those other provisions affect other custodians of public funds; that is, it is not apparent that the legislature would not have passed this act with reference to all custodians of public funds other than the state treasurer and the county treasurers, had it appeared to that body that for constitutional reasons such an act could not be made effective as to the last-named officers."

In these two cases the language was severable. In the first the unconstitutional section, and in the second the names of the officers as to whom the act was unconstitutional, could be stricken from the act and a valid constitutional act remain, and it is to such cases only, as the appellant insists, that the rule in regard to the separableness of constitutional from unconstitutional provisions in an enactment applies. There are many cases which hold that where a statute accomplishing all its results by the same general words in a single section has covered subjects as to which the legislature could, and subjects as to which it could not, constitutionally enact laws, it cannot be restricted lawfully, by construction, to the constitutional class, because the part applicable to that class is not separable from the part applicable to the unconstitutional class, so that each may be read and may stand by itself. Thus, the constitutionality of the act is made to depend upon the form of the enactment. For instance, in Chicago v. Wolf, supra, the act referred to "the state treasurer, and every county, city, township, school, and park treasurer, and every other custodian of public funds," and because the words "the state treasurer and" and "county" could be stricken out of the act, the remainder could be held constitutional; but if the act had referred only to "every custodian of public funds," nothing could have been stricken out; the constitutional part of the act could not have been given effect, and not being wholly valid, it would have been altogether void.

There are other cases, however, which hold that a law will not be held void because the legislature has attempted more than it had the constitutional power to make effectual, and that courts, treating the question as one of legislative power, and not of verbal form, will separate statutes valid in part and in part void because in excess of the legislative power, and will disregard the excessive exercise of power, and preserve so much as is within the legislative power. In Com. v. Gagne, 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449, it is said: "Where a statute is in some aspects or in relation to some subjects unconstitutional, but in other aspects is not, the whole statute is not to be declared void, unless the parts are so connected and so interdependent that they cannot be separated, or those which are unconstitutional are of such a character that it must be inferred that but for them and their assumed validity the legislation would not have been had. . . . A law which is unconstitutional within certain limitations, if in terms it exceeds or fails to notice those limitations, may yet be entirely operative within its legitimate sphere, and properly held to have the application which thus confines it."

In this case the court held that a statute which prohibited the sale of intoxicating liquors except as authorized by the act was not rendered unconstitutional by a failure to exempt from its operation liquors imported and sold in original packages.

In Com. v. Kimball, 24 Pick. 359, 35 Am. Dec. 326, a statute prohibiting the sale of intoxicating liquor without a license made no exception in favor of imported liquor. Chief Justice Shaw, in delivering the opinion, said: "But it is argued for the defendant that the prohibition to sell is general, and makes no distinction between the cases of a sale by the importer of imported spirits in the original packages, supposing them under 28 gallons, and the sale of spirits not imported, or not by the importer, or not in the original packages. Be it so; what is the consequence? Supposing the law could be construed to be repugnant to the Constitution of the United States in so far as it prohibited the sale of imported spirits by the importer in the original package, it would be void thus far and no farther, and, in all other respects conforming to the acknowledged power of the state government, it would be in full force. Whether legal enactments, some of which it is competent for the legislature to make, and others not, are contained in the same or in different sections of a statute, can make no difference. It is not the defect of form, but of power, that invalidates any of them. It is therefore the subject-matter, and not the arrangement of the language in which it is embodied, that is to be regarded in deciding whether any provision is constitutional or not."

In State v. Amery, 12 R. I. 64, 4 Am. Crim. Rep. 112, a similar statute prohibit-

ing the sale of intoxicating liquors contained no exception of those imported and sold in original packages. It was said: "It is perfectly well settled that a statute which is unconstitutional or void in part may still be valid as to the residue, unless the parts are so intimately connected that it cannot be supposed that one part was intended to be enforced independently of the other."

After the citation of some cases it is said: "These cases are not distinguishable in point of principle from the case at bar. The doctrine of them is that if a law which is constitutional under certain limitations exceeds those limitations, it may still be operative within its legitimate sphere, and void only for the excess."

In State, Chamberlain, Prosecutor, v. Board of Education, 57 N. J. L. 605, 31 Atl. 1033, and Landis v. Ashworth, 57 N. J. L. 509, 31 Atl. 1017, the statute gave women the right to vote at any school meeting, and it was held unconstitutional as to voting for officers, but constitutional and enforceable as to voting for all other purposes at school meetings. In Hagerstown v. Dechert, 32 Md. 369, the legislature enacted that the mayor should have all the jurisdiction and powers of a justice of the peace. It was held that the legislature had no power to appoint a justice of the peace or vest judicial power in the mayor, and to that extent the act was unconstitutional and inoperative, but that it was constitutional and valid to the extent that it conferred upon the mayor the police powers, as a conservator of the peace, of a justice of the peace. In Sinking Fund Comrs. v. George, 104 Ky. 260, 84 Am. St. Rep. 454, 47 S. W. 779, the legislature was not authorized, under the Constitution, to fix the terms of officers exceeding four years, but it passed an act fixing a term of six years for certain commissioners, and it was held void for a six-year term, but good for four. So also there are similar decisions in Murphy v. Wheatley, 100 Md. 358, 59 Atl. 704; Elwell v. Adder Mach. Co. 136 Wis. 82, 116 N. W. 882; Income Tax Cases, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Allen v. Texas & P. R. Co. 100 Tex. 525, 101 S. W. 792; Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705; Oliver v. Chicago, R. I. & P. R. Co. 89 Ark. 466, 117 S. W. 238; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 152 Ind. 1, 69 L.R.A. 875, 71 Am. St. Rep. 301, 49 N. E. 582; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; and Atty. Gen. ex rel. Commissioner of Corporations v. Electric Storage Battery Co. 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631.

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This question, as well as all other questions now raised in opposition to the decree of the court below, was involved in the two cases of People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678, and Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191, and the decisions rendered in those cases that the act then under consideration was unconstitutional as to the state and county superintendents, but constitutional as to the school officers not mentioned in the Constitution, are inconsistent with all of the appellant's contentions. The act of 1891 amended § 65 of chapter 46 of the Revised Statutes in the same manner as the act now under consideration. It extended the right to vote for public officers to women, as does the act now under consideration, though not to the same extent, and it attempted more than the legislature had the constitutional power to make effectual, by including in the same general words, in a single section, subjects as to which the legislature could, and subjects as to which it could not, constitutionally enact laws, as does the act now under consideration. The same objections existed against that act as are urged against this, and the court sustained it as a constitutional exercise of the legislative power. We cannot sustain the objections urged against the present act without expressly overruling those decisions, as well as the numerous cases which have since followed them. Those decisions established the construction of the fundamental law of the state many years ago, and the stability of this fundamental law requires that, when the meaning of a constitutional provision has been considered by the court and declared by its decisions, that meaning cannot be afterward considered open to question or further argument.

"It is the duty of this branch of the government to pass finally upon the construction of a law, and determine whether the legislature in its action has transcended its constitutional limits, and the community has a right to expect with confidence we will adhere to decisions made after full argument and upon due consideration. The members of the court may change totally every six years, and, if each change in the organization produces a change in the decisions and a different construction of laws under which important rights and interests have become vested, it is easy to see that the consequences will be most pernicious." Fisher v. Horicon Iron & Mfg. Co. 10 Wis. 351.

The most indispensable guaranty of civil liberty, according to Mr. Hallam (1 Const.

Hist. 230), is the "open administration of justice according to known laws." The law can be known only if fixed rules once established are consistently adhered to. Decisions of the courts are the highest evidence of what the law is. "Respect for precedents alone can secure the stability and uniformity of the law. Without such respect it would be a shifting quicksand."

If ever there should be an adherence to former decisions, it should be in cases of construction of the Constitution involving the rights of citizens as declared by that instrument. There is no higher privilege of citizenship in the state than that of suffrage. For more than twenty years that privilege has been enjoyed by women, and the courts have recognized and declared their constitutional right to it. Women have been elected trustees of the State University, school directors, and members of boards of education in innumerable instances. By their votes elections have been decided, important offices have been filled, and important public business controlled. Ought they to be summarily deprived of their constitutional rights because of a change in the personnel of the court, because the judges who decided People ex rel. Ahrens v. English and Plummer v. Yost are all dead except one, even if the successors who sit in their seats should hold different views? The Constitution does not change with the judges. The court is the same, though the judges change, and it will not overturn a deliberate decision upon the constitutional power of the legislature under which the highest political rights have been held and exercised without question for many years. The object of the general assembly in passing the present act was to confer upon women the right of suffrage to the fullest extent permitted by the limitations of the Constitution. No one would imagine that the act would not have been passed if the general assembly had known that the right of voting on the few, and for the most part comparatively infrequent and unimportant, questions mentioned in the Constitution, could not be extended to women. For all other purposes the act is a constitutional and valid enactment.

The decree of the Superior Court will be affirmed.

Farmer, J., dissenting:

It is my view that, while the legislature has the power to create and provide for the election of officers not named in the Constitution, it has no power to provide qualifications for voters at the election of such officers different from the qualifications prescribed by the Constitution. The qualifications of electors fixed by the Constitution apply, as I believe, to voters, as that instrument says, at "any election," and the Constitution is not subject to the construction that these qualifications apply only to voters at elections for offices created by the Constitution. In my opinion, when the constitutional convention acted and prescribed the qualifications of voters at "any election," the legislature was left no power to provide different qualifications for voters at elections for officers to offices created by it. I can understand the Constitution in no other sense than that it was the intention that the right to vote at "any election," which is the equivalent of "all elections," should be limited to those possessing the qualifications defined in § 1 of article 7. Many of the offices created by statute are as important political offices as those named in the Constitution, and there seems to me no intimation in the language of the suffrage article that it was to be restricted in its application to elections for offices provided for in the Constitution. I concede my views are not in harmony with Plummer v. Yost. That case, I think, supports the opinion of the court in this case, and if my view prevailed it would necessarily overrule that decision. For that reason I have felt reluctant to express my dissent; but, no rule of property being involved in this decision, I do not believe it a case for the application of the doctrine of *stare decisis*. This court in 1832, in Bowers v. Green, 2 Ill. 42, and repeatedly since that time, has, when convinced a previous decision involving no rule of property was erroneous, refused to adhere to it. This and other state courts of last resort, as well as the Supreme Court of the United States, have refused to be bound by former decisions involving a construction of the Constitution or of statutes. Allardt v. People, 197 Ill. 501, 64 N. E. 533; Burdick v. People, 149 Ill. 600, 24 L.R.A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; People ex rel. Brackett v. McGowan, 77 Ill. 644, 20 Am. Rep. 254; State ex rel. Guilbert v. Lewis, 69 Ohio St. 202, 69 N. E. 132; Willis v. Owen, 43 Tex. 41; Robinson v. Schenck, 102 Ind. 307, 1 N. E. 698; People ex rel. Atty. Gen. v. Cassiday, 50 Colo. 503, 117 Pac. 357; Beck v. Allen, 58 Miss. 143; Pollack v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Garland v. Washington, 232 U. S. 642, 58 L. ed. 772, 34 Sup. Ct. Rep. 456.

In The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058, the Supreme Court of the United States overruled its former decision in The Thomas Jefferson Case, 10 Wheat. 428, 6 L. ed. 358. In the opinion by Chief Justice Taney it was said: "It is the decision in the case of The Thomas Jefferson which mainly embarrasses

the court in the present inquiry. We are sensible of the great weight to which it is entitled; but at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell when the great importance of the question as it now presents itself could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided, for the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy and of little importance, and but little regarded compared with that of the present day."

In the Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287, the Supreme Court overruled Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513, and in doing so said: "The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right, . . . and it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced, as we are, that Congress has not transgressed its powers, we regard it as our duty so to decide, and to affirm both these judgments."

In Pollack v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, the court said: "Manifestly, as this court is clothed with the power and intrusted with the duty to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."

The same rule has been acted upon by state courts in the cases above cited and many others that might be referred to. Certainly the decision in Plummer v. Yost should be followed if it is correct; but if it is erroneous, as I believe it to be, it should not be adhered to under the rule of *stare decisis*. If the constitutional qualification that only male citizens may vote can be disregarded in the election of officers to offices created by statute, then as to the election of such officers the legislature may also prescribe different qualifications as to age, residence, etc. It is my belief that it was not within the contemplation of the framers of our Constitution that the legislature should have the power to prescribe the qualifications of voters, but that until the Constitution is amended voters at all elections, whether for constitutional or statutory offices, must possess the qualifications prescribed by § 1 of article 7.

Cooke, J., dissenting:

I cannot concur in the views expressed in the majority opinion or the conclusion reached therein. The questions involved are of such importance that I deem it my duty to state somewhat extensively the basis of my dissent.

Appellant has advanced three reasons in support of his claim that the act under consideration is unconstitutional: (1) That it is in conflict with § 1 of article 7 of the Constitution; (2) that, as the Constitution itself provides for the submission of certain propositions to a vote of the electors, the legislature in no event has the power to give women the right to vote on all questions or propositions; and (3) that the act violates § 13 of article 4 of the Constitution, in that it amends § 65 of the election act without inserting that section at length in the new act. I deem it necessary to discuss only the first of the reasons urged. If the act is unconstitutional, as I believe it is because of the first reason assigned, the second reason urged becomes of no importance, for the reason that it is wholly improbable that the legislature would have enacted that part of the statute alone. It is so fragmentary and incomplete when severed from the other portions of the act that it could not be held to be an independent piece of legislation. As to the third reason urged, I concur with the conclusion of the majority that the act does not violate § 13 of article 4 of the Constitution.

The contention of the parties as made under the first reason urged may be briefly summed up thus: By appellant, that § 1 of article 7 of our Constitution, as to the qualifications of voters, applies not only to offices expressly provided for in the Constitution, but also to offices created by statute, and that the words "any election," used in that section, refer not only to each election for offices created by the Constitution itself, but also to any election for offices created by the legislature; by appellees, that the qualifications of voters contained in said section apply only to the offices expressly provided for by the Constitution.

The majority rests its opinion upon the doctrine of *stare decisis*, and holds that this question has been decided in People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678, and Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191, and that the question of the power of

the legislature to extend the right of suffrage to women for all offices created by it is not now an open one in this state. Whether the interpretation placed upon the Constitution by the English Case and the Yost Case, supra, as they have been construed by the majority, is correct, has not been discussed or argued in the majority opinion. I shall first take up the act under consideration, and discuss, without reference to the English Case and the Yost Case, supra, whether it is in violation of the Constitution, and I shall then discuss what I conceive to be the proper construction of the English and Yost Cases and the basis for the conclusions therein reached.

The question presented for our consideration in this case is one of construction, only. We are called upon to determine only whether the Constitution has imposed any limitations upon the legislature in regard to prescribing the qualifications for voters for offices not expressly provided for by the Constitution. In determining this question we are permitted simply to construe the Constitution itself, and to announce whether, from the language of that instrument, such a limitation has been imposed. We have nothing to do with the question of the policy of the state with reference to what the qualifications of a voter should be. Whether it is wise or unwise to restrict the right of suffrage is a matter upon which it is not proper for this court to express any opinion.

Our Constitution is the fundamental law of the state. It constitutes the limitations imposed by the people themselves upon the legislature. Its provisions must not be ignored or lightly considered. By reason of the simplicity of its language it is not a difficult matter to construe this instrument and to determine definitely its true intent and meaning. In laying down the rules for the interpretation of Constitutions, Mr. Justice Story says, in § 451 of his work on the Constitution: "In the first place, then, every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss."

I shall bear in mind this expression in construing the Constitution as applied to the act under consideration.

Article 7 of our Constitution deals with the question of suffrage. It is composed of seven sections, and, as I will have occasion to refer to practically all of them, I will set out the article in full. It is as follows:

"Section 1. Every person having resided in this state one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this state on the 1st day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this state prior to the 1st day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election.

"Sec. 2. All votes shall be by ballot.

"Sec. 3. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from the same. And no elector shall be required to do military duty on the days of election, except in time of war or public danger.

"Sec. 4. No elector shall be deemed to have lost his residence in this state by reason of his absence on business of the United States, or of this state, or in the military or naval service of the United States.

"Sec. 5. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed therein.

"Sec. 6. No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding the election or appointment.

"Sec. 7. The general assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes."

It is a well-known rule, as appellees suggest, that the state Constitution is not a grant of power, but is a limitation on the otherwise sovereign power of the legislature, and where not prohibited by the Constitution the legislature has full power to enact such legislation as it may see fit. Like most rules it is subject to an apparent exception. The right to vote at political elections is not a natural or inherent one. It must be conferred by some body having the power to grant it. The right to vote was originally

conferred upon the inhabitants of the territory of which the present state of Illinois was a part, by act of Congress. By the enabling act of April 18, 1818, (3 Stat. at L. 428, chap. 67), Congress finally conferred upon certain citizens of the United States residing in the territory of Illinois the right to vote for representatives to compose a convention to form a Constitution and state government for the people within the territory. The Constitution, in turn, granted the right of suffrage to certain persons. It is universally conceded that, where the Constitution prescribes the qualifications of the electors of the state, those qualifications cannot be changed by the legislature, either by prescribing additional qualifications for voters at elections within the state, or by extending the right of suffrage to persons not possessing the qualifications prescribed by the Constitution. Cooley, Const. Lim. 599; People ex rel. Ahrens v. English, supra; McCafferty v. Guyer, 59 Pa. 109; Coffin v. Election Comrs. 97 Mich. 188, 21 L.R.A. 662, 56 N. W. 567. Section 1 of the suffrage article is therefore not merely a guaranty that the classes therein named shall not be deprived of the right of suffrage; it is a limitation upon the power of the general assembly to grant the right to any persons other than those named, to vote at such elections as are referred to in that section.

It is conceded at the outset, on the part of appellees, that no one except those designated in § 1 of the suffrage article of the Constitution is entitled to vote for any office specifically provided for by the Constitution. That section limits the right of suffrage to male citizens above the age of twenty-one years. A determination of what is meant by the words "any election," as used in this section,—that is, whether they refer only to such elections as are provided for by the Constitution, or whether they refer also to such elections as may be provided for by the legislature,—will determine the question of the validity of the woman's suffrage act so far as the first objection made is concerned. That act specifically names the offices for which women are permitted to vote, and they are such offices as were not expressly provided for by the Constitution. The list consists of presidential electors, members of the state board of equalization, clerk of the appellate court, county collector, county surveyor, members of board of assessors, members of board of review, sanitary district trustees, all officers of cities, villages, and towns, except police magistrates, and the following township officers: Supervisor, town clerk, assessor, collector, and highway commissioner.

The word "election" is necessarily used in the Constitution in the sense of a political election, and is the method by which various officers for the government and administration of the affairs of the the state, counties, townships, and municipalities are selected. The use of the word in that sense is well understood. What constitutes an election? Is there anything in the Constitution which indicates that the word is there used in any different sense than it had always been used by the legislature? The adoption of the Constitution in 1870 did not operate to annul and wipe out all statutes of the state. No statute fell by reason of the adoption of the Constitution except such as were clearly in conflict with its terms and provisions. Section 1 of the Schedule of the Constitution expressly provides: "That all laws in force at the adoption of this Constitution, not inconsistent therewith, . . . shall continue to be as valid as if this Constitution had not been adopted."

At that time many elections were provided for by the statutes, including the election of practically all the officers named in the woman's suffrage act, and these statutes were expressly continued in force. The constitutional convention was composed of eminent and learned men, who gave the preparation of each section of each article of the Constitution their most careful consideration. There is no indication anywhere in the provisions of the instrument that the members of the constitutional convention intended that the word "election," as used by them in the suffrage article, should have any special, local, or unusual meaning, nor that they considered that the word "election," as therein used, would not include all offices created by the legislature as well as those specifically provided for by the Constitution. The word "election" has never been understood to have a different meaning when applied to the selection of a governor or any of the other state officers provided for by the Constitution, than it has when applied to the selection of presidential electors or members of the state board of equalization, or such other officers as have a statutory origin. A political election has always been understood to be the act of choosing the governmental officers of the state, districts, counties, cities, villages, and townships, without regard to whether the offices being filled at such election were of statutory or constitutional origin. One election may suffice for the selection of a number of these officers. The voting for a number of offices at the same time and on the same ballot does not constitute the holding of a separate election for each office. Where a number of offices are to be filled at the same time, the voting for all of them constitutes but a single election. Prior to

the adoption of the Constitution of 1870, many of the identical offices specified in the woman's suffrage act were filled at the same election with many of the offices perpetuated by that Constitution.

By § 1 of the suffrage article it is provided that every person having resided in the state one year, in the county ninety days, and in the election district thirty days "next preceding any election therein," and who possesses the required qualifications, "shall be entitled to vote at such election." The Constitution nowhere provides for the creation of election districts. They were in existence at that time, having been created by the legislature, and necessarily continued in existence under said § 1 of the Schedule. An election district is a governmental subdivision of the county. The Constitution recognized its existence in prescribing the qualifications of voters. The election district at that time was, and since has been, the unit for the holding of all political elections, whether for the selection of officers to fill the offices provided for expressly by the Constitution or to fill the offices created by the legislature. It would be doing violence to the plain language of the Constitution to hold that when it referred to "any election" held within an election district, it meant to exclude such elections as might be held to fill the offices created by statute.

The conditions existing at and prior to the time of the adoption of the Constitution may properly be considered in determining what was meant by the use of the words "any election." At the time the Constitution was adopted, and long prior thereto, presidential electors were voted for and elected at the general elections in the state. Cities and towns had been incorporated and the election of the officers for these municipalities had been provided for by the legislature. Townships had been organized, and township officers and their election had been provided for. The office of member of the state board of equalization had been created, and an election had been held for the same. Thus, it will be seen that at the time of the adoption of the Constitution, and prior thereto, practically all of the officers enumerated in the woman's suffrage act were elected by the people, and in many instances were voted for and elected at the same elections held for the offices which were perpetuated by and specifically named in the Constitution. It will be noted that the Constitution does not use such language as "any election under this Constitution," or "any election named in this Constitution," or "any election provided for by this Constitution," or "any election for offices named in this Constitution." It uses the broad, simple, and comprehensive term, "any election." When we consider that prior to the adoption of the Constitution presidential electors, officers known as members of the state board of equalization, city officers, and township officers were elected by popular vote in the same manner and under the same requirements as all other officers were elected, it seems to be conclusive as to the sense in which the words "any election" were used in the Constitution.

That it was not intended to give these words the restricted meaning placed upon them by the majority is apparent from many of the provisions of the Constitution. For instance, § 3 of the suffrage article provides that electors shall, except in certain cases, be privileged from arrest during their attendance at elections and in going to and returning from the same. Can it be seriously contended that it was meant to thus protect an elector attending an election for the purpose of voting for constable, but such protection was not meant to be extended to one attending for the purpose of voting for presidential electors? Such a construction must follow if the act in question is valid. Under the contention of appellees, an "elector," as the word is used in the Constitution, refers only to such as are qualified to vote for the so-called constitutional offices, and does not apply to one voting for an office created by the legislature. This same section also provides that no elector shall be obliged to do military duty on the days of election except in times of war or public danger. Was it meant that only those who are qualified to vote for so-called constitutional offices were to be thus protected?

By § 4 of the suffrage article it is provided that no elector shall be deemed to have lost his residence in this state by reason of his absence on business of the United States or of this state or in the military or naval service of the United States. Was it intended by this section that one who is absent from his home, engaged on business of the United States of such a nature that his permanent residence is required to be at the seat of government, shall be protected in his right to vote for a justice of the peace, but not in his right to vote for the important offices of member of the state board of equalization or of presidential electors? Almost every county in the state has one or more of its citizens thus absent on business of the Federal government. Such a person may have disposed of all his property in the county where he resided when he entered the service of the government, and the circumstances be such that without this constitutional provision he has unquestion-

ably lost his residence there, yet under this provision he is permitted at election times to return to the place where he resided when he entered into such service and there cast his vote for the candidates of his choice. If the Constitution is to be construed as contended, such a citizen is protected only in his right to return and vote for such offices as are specifically provided for by that instrument. That the legislature has never so interpreted this section of the Constitution is evidenced by the fact that it has neither made such an exemption in favor of one thus absent on business of the United States, nor provided for a separate ballot and a separate ballot box for his use, but, on the other hand, has adopted an act one section of which is in the language of § 1 of the suffrage article, and the succeeding section of which provides that "a permanent abode is necessary to constitute a residence within the meaning of the preceding section." If the Constitution means what the appellees contend, then the legislature has disfranchised such a citizen by the provisions of our election laws. Under our ballot law the names of all candidates to be voted for at any particular election are placed upon a single ballot, which the elector is required to take with him into a booth and mark in secret. Such a citizen would be deprived of his right to vote at all, as it would be highly improper to place in his hands a ballot containing the names of candidates for offices for which he had lost his right to vote by reason of his nonresidence. It certainly was not the intention of the legislature to disfranchise this citizen, and, if that is true, then the legislature has heretofore construed the words "any election," in § 1 of the suffrage article, to mean an election for an office created either by the Constitution or by statute.

Section 5 of the suffrage article provides that no soldier, seaman, or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed therein. By making this a part of the article on suffrage the framers of the Constitution made the purpose of this section quite evident. It was meant to prevent any soldier, seaman, or marine in the army or navy of the United States from claiming to possess the qualifications of an elector, and to prevent him from voting in the election district in which he resided at "any election therein." Under the doctrine of the majority opinion this section of the Constitution may be rendered nugatory so far as offices created by the legislature are concerned. If there are no restrictions whatever upon the right of the legislature to prescribe the qualifications of voters for such offices as it creates, the persons prohibited by said § 5 from becoming residents, and thereby from becoming electors, may be permitted to vote for all except the so-called constitutional offices, under a provision which the legislature would have the power to enact, allowing such persons to vote for all offices created by it.

The contention of appellees is also inconsistent with §§ 6 and 7 of the suffrage article.

Section 18 of article 2 (the Bill of Rights) provides that "all elections shall be free and equal." If the Constitution refers only to such elections as it has specifically provided for, then this guaranty extends only to a part of the elections which have always been held in this state, both before and since the adoption of the Constitution.

Section 22 of article 4 provides that the general assembly shall pass no local or special law for the opening and conducting of any election. If the legislature has the right to ignore the qualifications prescribed by § 1 of the suffrage article, then it can ignore this limitation in so far as the elections for offices created by it are concerned. Section 22 of article 4 further provides, in part, as follows: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . providing for the election of members of the board of supervisors in townships, incorporated towns or cities."

By this section the people, in adopting the Constitution, recognized the fact that the law already had provided for the election of supervisors, and guarded against the passage of local or special laws in reference to such elections. The act in question specifically gives to women the right to vote for supervisors. Without regard to whether this act may be special legislation in reference to providing for the election of supervisors, it is significant and helpful in construing what is meant by the use of the language employed in § 1 of the suffrage article. The members of the constitutional convention no doubt used the word "election" advisedly in said § 22. Can anyone say it was used in any different sense than in the suffrage article?

Section 32 of article 6 provides the method by which vacancies shall be filled in all the offices provided for in that article. When the unexpired term does not exceed one year, it provides that a vacancy in the office of judge shall be filled by the governor; of a clerk of court, by the court to which the office pertains; and of all other offices provided for in that article, which include various county offices, by "the board of supervisors or board of county commissioners in the county where the vacancy oc-

curs." The Constitution nowhere creates the office of a member of the board of supervisors, or requires the election or appointment of such an officer. That fact was appreciated and taken advantage of by the legislature when it included supervisors in the list of officers for which women were authorized to vote. Article 10 relates to counties, and directs the general assembly to provide by general law for township organization, permitting the electors of each county to determine whether they shall have township organization or not. At the time of the adoption of the Constitution, many of the counties of the state were not under township organization. Many others were under township organization and were authorized by statute to elect members of the board of supervisors to conduct the affairs of the county. It will be observed that each of the offices enumerated in article 6 which the board of supervisors is authorized to fill by appointment in case of vacancy is necessarily a constitutional office, and its incumbent can be elected only by electors possessing the qualifications prescribed by § 1 of the suffrage article. It is conceded that women are not permitted, under the Constitution, to vote for such offices, yet by the terms of the act under consideration they may vote for, and themselves constitute, members of the board of supervisors, who, in turn, are empowered by the Constitution to fill vacancies occurring in such so-called constitutional offices.

Article 10 further provides that in each county of the state not under township organization a board of county commissioners shall be elected to transact the business of the county as shall be provided for by law. Will anyone contend that the Constitution contemplates one qualification for an elector for the office of county commissioner, and another and different qualification for an elector for supervisor? The functions of the two offices are the same; the only difference being that in counties under township organization all county affairs are managed by the board of supervisors, whereas in counties not under township organization that power and duty are vested in and devolve upon the board of county commissioners. Why should women be permitted the right to vote for one of these offices, and denied the right to vote for the other?

Section 28 of article 4 of the Constitution provides that "no law shall be passed which shall operate to extend the term of any public officer after his election or appointment."

If the theory of the majority is correct, then this section of the Constitution applies only to such officers as have been provided for by the Constitution itself. If it does not apply to officers whose offices have been created by the legislature, then it is possible for the legislature to extend the term of any such officer for such time as it may choose, without compelling him to submit the question of his re-election to the voters. It seems too clear to me to admit of argument that the election referred to by said § 28 means any election, whether it be of an officer whose office was expressly provided for by the Constitution or created by the legislature.

Section 5 of article 10 requires the general assembly to provide by general law for the adoption of township organizations by any county. This section further provides: "And in any county that shall have adopted a township organization, the question of continuing the same may be submitted to a vote of the electors of such county, at a general election," etc.

If the act under consideration is valid, then we have presented to us this situation: Women possessing the qualifications prescribed may vote for the township offices enumerated in the act, but the electors of such county—that is, the electors recognized and defined by the Constitution, male citizens above the age of twenty-one years—are the only persons authorized to vote upon the question whether township organization will be continued and women or anyone else given the further opportunity to vote for township offices.

By § 11 of article 10 it is provided that the fees of township officers shall be uniform in the class of counties to which they respectively belong, thus again expressly recognizing the existence of township organization and township officers. Section 12 of article 10 also provides that all laws fixing the fees of township officers shall terminate with the terms of those who may be in office at the meeting of the first general assembly after the adoption of the Constitution, and that the general assembly shall by general law provide for and regulate the fees of said officers and their successors. The fact that municipal corporations then existed, and would continue to exist and to elect officers, is recognized by §§ 9 and 11 of article 9, which provide that the general assembly may vest the corporate authorities of cities, towns, and villages with certain powers, and that no person who is in default as collector or custodian of money or property belonging to a municipal corporation shall be eligible to any office in or under such corporation, and that the fees, salary, or compensation of any municipal officer who is elected or appointed for a definite term of office shall not be increased or diminished during such term.

Other sections of the Constitution might be pointed out as having a bearing upon this

question, but I do not deem it necessary to make any further comparisons. That by § 1 of the suffrage article the people of the state, on the adoption of the Constitution of 1870, meant to restrict the right of suffrage at all elections, whether for offices provided for by the Constitution or created by statute, is evident. If it would be helpful to be advised of the construction put upon this section by the framers of the Constitution, a reference to the constitutional debates would clearly furnish it. I do not deem it necessary, however, to make any specific reference to the constitutional debates. It seems to me to be inconceivable that the members of the constitutional convention in submitting this instrument, and the people in adopting it, intended that the right of suffrage should be restricted to male citizens of the age of twenty-one years and upwards for all offices created by it, whereas the qualifications of voters for any other office which had theretofore been or might thereafter be created by statute should be determined by the legislature. It is highly improbable that reasonable men should determine that no one except male citizens above the age of twenty-one years should have the right to vote for constable, justice of the peace, or police magistrate, and then leave it to the legislature to say that not only females, but even aliens, non-residents, and infants, might vote for the important offices of presidential electors or member of the state board of equalization. Is it possible that the people, by the adoption of the Constitution, intended to require a higher qualification for one desiring to vote for police magistrate than for the mayor or councilmen of the city, or that the qualifications of one desiring to vote for constable should be more strict than of one desiring to vote for supervisor? I think it clear, from a consideration of the Constitution itself, that the right of suffrage at all political elections was meant to be extended only to male citizens above the age of twenty-one years, and that the words "any election" refer not only to such elections as are provided for by the Constitution, but to such as are provided for by the legislature.

In a number of the states of the Union suffrage has been extended to women upon equal terms with men, but in each instance this right has been conferred by express constitutional provision. In some of the states the right was conferred by the original Constitutions adopted at the times such states were admitted into the Union. In six other states having Constitutions similar to ours, it was deemed necessary to amend the Constitution in order to confer this right of suffrage upon women. While the action of those states in thus amending their Constitutions is not conclusive that they deemed their legislatures without power to extend the partial right of suffrage to women which our legislature has attempted to give them, it is significant, nevertheless, that in no instance did the legislature of any of those states assume to have the power to extend the right of suffrage in the absence of express constitutional authority.

I come now to the consideration of the question whether our Constitution has been so construed by the English Case, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678, and the Yost Case, 144 Ill. 68, 19 L.R.A, 110, 33 N. E. 191, as to permit the legislature to pass such an act as the one under consideration. I confess at the outset of this discussion that if the question presented by the Yost Case were to be now presented as an original proposition, my view would be that the act there involved is unconstitutional. I do not deem the English Case to have any bearing whatever upon the question here under consideration. While I do not believe that the Yost Case was decided upon a logical basis, when the ground for that decision is considered and the cases upon which it is based have been carefully analyzed, it will be seen that the Yost Case will not bear the construction placed upon it by the majority. If, as the majority opinion holds, the English and Yost Cases have determined the question of the power of the legislature to extend the right of suffrage to women for all offices created by it, then I would favor overruling those cases, as I consider the inroad made by the act under consideration upon the limitations prescribed by the Constitution to be so momentous that no decision of this court ought to be permitted to stand as against the plain provisions of the Constitution. As I have stated, I do not regard that either the English Case or the Yost Case holds as it has been construed by the majority opinion. In the English Case the only question involved was whether the legislature had power to confer upon women the right to vote for county superintendent of schools, and it was held that it did not have such power, as to confer that right would be in violation of the Constitution. Whether the legislature could give women the right to vote for school directors and other school officers not mentioned in the Constitution was not decided, but that question was expressly reserved. It was pointed out that the office of county superintendent of schools was created by the Constitution and the election of that officer provided for by that instrument. No one questions the proposition that no one except an elector specified in the Constitution can vote for any office which is expressly created by the Constitu-

tion, and the election for filling which is provided for by that instrument. It is frankly conceded by appellees in this case that there is no authority for the position that anyone except qualified electors specified in the Constitution can vote for any office expressly provided for in that instrument. It would seem, then, that there can be no question of the soundness of the holding in the English Case.

The majority opinion calls attention to the quotation found in the English Case from Belles v. Burr, 76 Mich. 1, 43 N. W. 24. From this isolated quotation some basis for the position of the majority can be found; but when the real basis of the holding in Belles v. Burr, supra, has been ascertained, the claim which the majority make as to the effect of this quotation is destroyed. I shall hereafter discuss at length the case of Belles v. Burr, supra, and point out the basis for the holding of the Michigan court in that case. It can hardly be presumed that this court, in the English Case, quoted from Belles v. Burr without any regard to the view taken by the Michigan court in that case.

Re Gage, 141 N. Y. 112, 25 L.R.A. 781, 35 N. E. 1094, decided by that court since the decision in the English Case, a distinction was made that might well have been pointed out in both the English and Yost Cases. The question considered in the Gage Case was whether a woman might vote for school commissioner in her proper district within the state. The court said: "To that class of school officers intrusted with the government and control of the simple school district by itself alone, and within its own boundaries, the constitutional provisions have never been applied; but I have yet to find an instance in the statutory history of the state prior to the act in question, where an officer whose authority was not confined to the school district, but extended over many of them, with a power of superintendence and control, has been regarded as anything other than a town or county officer and within the constitutional provisions."

After setting out the history of the legislation relative to the election of superintending school officers, the opinion proceeds: "It follows that there are two definite and distinct classes of school officers, which are, those of the school district—the unit of the system—and those of superintendence over a larger or smaller number of such units aggregated; and that the latter are, and always have been, as clearly either town or county officers as the former have not been. I am unable to see therefore that any practical construction, prior to the act of 1892, has ever been given to the Constitution which takes the elective officers charged with superintendence out of the category of constitutional officers, or puts a constituency behind them having other qualifications than those necessary for the election of town and county officers. The Constitution, in article 2, § 1, prescribes the qualifications of voters 'for all offices that now are, or hereafter may be, elective by the people,' and confines the franchise specifically to 'male citizens.' The office of school commissioner, was one thereafter made 'elective by the people' through the operation of the alternative given by article 10, § 2, which provides that 'all officers whose offices may hereafter be created by law shall be elected by the people or appointed as the legislature may direct;' that is, in such cases it may choose between election and appointment, and in the latter event may dictate the authority and mode of appointment. The legislature chose that the office should be elective, and, becoming such, it fell within the scope and terms of the constitutional provisions applicable to elections by the people. The only possible answer is the one which was attempted and derived from a supposed practical construction. We have seen that the facts do not justify that answer. Indeed, the cases cited from other states do not go far enough to support the appellant's argument."

The Yost Case is more particularly relied upon by appellees and forms the chief basis for the majority opinion. That was a contest over the election of members of the board of education of a school district, and the question raised was as to the right of women to vote at that election pursuant to an act of the general assembly giving women the right to vote for any officer of schools, under the general or special school laws of the state, at elections held in the school district. We referred to and quoted from the English Case, and, after pointing out that the question raised in the Yost Case was left open by the opinion in the English Case, we called attention to the fact that by article 8 of the Constitution it was made the duty of the general assembly to provide for a thorough, efficient system of free schools, where all the children of this state may receive a good common school education, and that the mode in which the required system of free schools should be organized, and the officers by whom it should be controlled and directed and its affairs administered, were left to the legislative discretion of the general assembly. After pointing out that it was held in the English Case that the state superintendent of public instruction and the county superintendent of schools must be elected by electors possessing the qualifications prescribed in § 1 of article 7 of the Constitu-

tion, we said: "But the Constitution contains no direction as to what other school offices shall be created, or as to the mode in which the incumbents of those offices shall be designated and chosen. Those matters are left wholly to the discretion of the general assembly. . . . The general assembly, having complete control of the subject, had, of course, the power to provide for the choice of these officers by popular vote; but such an election is not necessarily a proceeding identical with the elections provided for by the Constitution, nor is it necessary that the qualifications of those voting for school officers should be the same as those of electors, as defined by the Constitution."

This holding is in harmony with that of many other jurisdictions. The election of district school officers has generally been regarded as not controlled by the suffrage articles of the Constitutions of the various states, and the various legislatures have been permitted to prescribe such qualifications for voters at district school elections as they should see fit. In some instances additions to the qualifications prescribed for electors in the Constitution have been made. In other instances certain restrictions have been removed, and a larger class has been given the right to vote at such elections or meetings. Legislatures have thus generally been permitted to proceed in this matter without regard to such qualifications as the Constitution prescribes for electors. This may have arisen originally from the fact that the school district rarely, if ever, coincided with the election district. It may have been for the reason that public school districts were regarded in the light of quasi public corporations, during the same work and having in view the same object that private institutions of like character were doing and had in view.

In the Yost Case two cases were discussed and relied upon and two others were referred to. The earliest of the cases cited and discussed was Wheeler v. Brady, 15 Kan. 26. That was a contest for the selection of a school district treasurer, and the question involved was the right of women to vote for this office at a school district meeting. Section 1 of article 5 of the Constitution of Kansas, as it then existed, read, in part, as follows: "Every white male person of twenty-one years and upwards belonging to either of the following classes who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote, at least thirty days next preceding such election shall be deemed a qualified elector."

The statutes of Kansas at that time provided that all white female persons over the age of twenty-one years, possessing certain qualifications, should be entitled to vote at any district school meeting. In passing upon the constitutionality of the act, the court calls attention to the section of the suffrage article just quoted, and points out that the elections there contemplated were to be held in the township or ward, neither of which was coextensive with the school district. By § 2 of article 4 of the Kansas Constitution but two elections were provided for; that section being, in part, as follows: "General elections and township elections shall be held biennially on the Tuesday succeeding the first Monday in November, in the years bearing even numbers." These were the only elections provided for by that Constitution. Section 1 of article 15 provided that "all officers whose election or appointment is not otherwise provided for, shall be *chosen* or appointed, as may be prescribed by law."

The right of the legislature to provide for the formation and regulation of public schools was recognized by the Constitution. After calling attention to the provisions of the Constitution which I have pointed out, as well as to other provisions, the court in that case said: "Now, as we have before stated, there is no school district election or meeting provided for in the Constitution. There is no provision as to how school district officers shall be elected, appointed, or *chosen*, and we suppose no one will claim that they are by the terms of the Constitution to be elected at either of the elections provided for in the Constitution; hence it would seem that the legislature would have full and complete power in the matter; that the legislature might provide for the election or appointment of school district officers as it should *choose*, when it should *choose*, in the manner it should *choose*, and by whom it should *choose*."

I have italicized the words of this opinion and of the Kansas Constitution which I think are significant of the ground upon which the court based its decision. Thus, it will be seen that the Kansas decision is based upon a construction of its own Constitution, and not, as are the decisions of many other jurisdictions, upon the right the legislature has assumed to possess, to exercise complete control over the election of school district officers.

State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N. W. 682, is cited in the Yost Case as presenting a state of facts very similar to those appearing in Wheeler v. Brady, supra, and as being decided the same way and upon the same principles. While State ex rel. Crosby v. Cones, supra, cites Wheeler v. Brady, supra, and relies upon it, there is nothing else in the opinion to indicate

that the facts were similar. In that case a section of the Nebraska statute is referred to which provides that every voter and every woman who has resided in the district forty days and is over twenty-one years of age, and who owns personal property assessed in his or her name, shall be entitled to vote at any district school meeting. The opinion then states: "An examination of the Constitution will convince anyone that the provisions in regard to elections were not intended to apply to school districts. The organization of district schools is one of the modes by which the state provides for the education of all persons residing therein between the ages of five and twenty-one years. The continued existence of free government depends to a great extent upon the intelligence, love of right, and good morals of the people. That women are successful educators is fully shown by experience, and the common law permitted them to fill any office of an administrative character the duties of which they were competent to discharge. . . . The statute merely permits women possessing the necessary qualifications to have a voice in the choice of school officers, selection of teachers, and general management of schools. And being entitled to vote, they are also entitled to act as trustees. We have no doubt therefore that the act allowing women possessing the qualifications prescribed in the act to vote at school meetings is constitutional and valid."

The Yost Case refers to Opinion of Justices, 115 Mass. 602. That was an answer given by the justices of the supreme court of Massachusetts to an interrogatory propounded by the general assembly, whether, under the Constitution of Massachusetts, a woman can be a member of a school committee. The question was answered in the affirmative, upon the ground that "the common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them," and that the duties of a school committee were of such a nature that they could be well and efficiently performed by women. In that case the question whether a woman, under the Constitution of Massachusetts, could be permitted to vote for school district offices, was not involved, and it therefore throws no light upon that question.

The other case discussed, and the one chiefly relied upon, in the Yost Case, was Belles v. Burr, 76 Mich. 1, 43 N. W. 24. This is a well-considered case, and points out clearly the ground upon which it bases the holding that the legislature may prescribe qualifications for voters at school district meetings different from the qualifications prescribed for electors in the Constitution. The school law of Michigan provided that every person twenty-one years of age who has property liable for assessment for school taxes in any school district, and who has resided in the district three months next preceding any school meeting, should be a qualified voter at the school meeting upon all questions, and that all other persons twenty-one years of age who are the parents or legal guardians of any children included in the school census of the district, and who have been residents in the district for three months, at the time of holding any school meeting, should be entitled to vote on all questions which do not directly involve the raising of money by taxation. It was contended that this statute, in so far as it attempted to confer upon women the right to vote, was in violation of a provision of the Constitution similar to § 1 of article 7 of our Constitution. The Constitution of Michigan which was being considered in that case was adopted in 1850. A previous Constitution had been adopted in 1835. The Constitution of 1850 contained an educational article similar to that afterwards incorporated in our Constitution. The suffrage article of the Constitution of 1835 provided that in all elections every white male citizen above the age of twenty-one years who had resided in the state six months preceding any election should be entitled to vote at such election. That Constitution also directed the legislature to provide for a system of common schools. The court points out in Belles v. Burr that in 1838 the Michigan legislature provided for a system of primary schools, which included the formation of school districts and the selection of a moderator, director, and assessor at an annual meeting; that it is also provided that "every white male inhabitant of the age of twenty-one years, residing in such district, liable to pay a school district tax, shall be entitled to vote at any district meeting;" that in 1846 this provision was amended by adding thereto the following: "And all persons who are entitled by the laws of this state to vote at township and county elections, and residing in said district, shall be entitled to vote on all questions arising in said district excepting when the raising of money by tax is in question," etc.; and that in 1847 this section was again amended by striking out that portion which had been added in 1846, and the statute remained in this form until after the adoption of the Constitution of 1850. It will thus be seen that the Michigan legislature had assumed to possess the power to name the qualifications for voters at district school meetings, and prescribed different

qualifications than were prescribed by the Constitution for the electors therein named. In discussing the question the court said: "It requires but a cursory review of the above *résumé* to show that the qualifications of voters for school officers, or upon questions arising at school meetings, have never been identical with those of electors, as defined in the Constitution. . . . Viewing the question historically, it is apparent that for fifty years it has never been considered that the qualifications of voters at school district meetings must be identical with those prescribed in the Constitution as qualifications of electors entitled to vote under that instrument. The authority granted by the Constitution to the legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, their term of office, and how and by whom they should be chosen. School districts are regarded as municipal corporations. School Dist. v. Gage, 39 Mich. 484, 33 Am. Rep. 421; Seeley v. Board of Education, 39 Mich. 486. As such they preceded the Constitution (Stuart v. School Dist. 30 Mich. 69), and were recognized by that instrument (Const. 1835, art. 10, § 3; Const. 1850, art. 13, § 5). But no officer of the school district is mentioned or recognized by that instrument. The reason is that the whole primary school system was confided to the legislature, and it cannot be said that the officers of school districts chosen pursuant to the system adopted by the legislature are constitutional officers. The Constitution provided for no municipal subdivisions smaller than towns, except cities and villages, and it authorized the legislature to incorporate these. Const. 1850, art. 15, § 13. While it must be conceded that no person can vote for the election of any officer mentioned in the Constitution unless he possesses the qualifications of an elector prescribed by that instrument, it does not follow that none but such electors can vote for officers which the legislature has the right to provide for, to carry out the educational purpose declared in that instrument."

Morse, J., filed a concurring opinion, which becomes important in view of a later decision of the Michigan court. In his concurring opinion Justice Morse said: "The law thereafter remained as in 1838 until 1855, and was in force at the time the present Constitution was adopted, in 1850. Therefore for twelve years before 1850 the electors at school meetings had possessed different qualifications than those of electors under the Constitution of 1835 and from the beginning of our school system. This must have been known to the framers of our present Constitution, and they must have acted in reference to it when they ordained article 13, § 4, of the Constitution of 1850."

The subsequent amendments to the school law are then set forth, and the opinion then proceeds: "In view of this history of the qualifications of voters at school meetings since the first formation and development of our common school system in this state, I am constrained to concur with Mr. Justice Champlin in the opinion that the qualifications of an elector at school meetings have never been identical with those of an elector under the Constitution; and in view of this fact it must have been the intention of the framers of the Constitution of 1850, when they provided that the legislature should establish a school system, following the Constitution of 1835 in that respect, that under such provision the legislature should have full power to fix and determine the qualifications of voters under such system, and this without regard to the qualifications prescribed by the Constitution for electors at other elections. To hold otherwise, it seems to me, would be to ignore the fact that the members of the constitutional convention of 1850 were men of intelligence and practical common sense, and must have known what the practice of the legislature had been under the Constitution of 1835, and what it would naturally be, following precedents, under the present Constitution, unless they inserted therein some prohibition against enlarging the right of suffrage or prescribed what the qualifications of voters should be at school district meetings. This they did not do, and the inference is plain to me, and the conclusion, to my mind, irresistible, that the convention of 1850 meant to confer upon the legislature the same power that they had exercised in this respect under the Constitution of 1835, and that they did do so by article 13, § 4."

The case of Belles v. Burr clearly sets out the ground upon which it is held in most jurisdictions that the suffrage article of the Constitution was not intended to prescribe the qualifications of voters at district school meetings. From the language used in Belles v. Burr, and from the fact that it was the principal case cited and relied upon in the Yost Case, it is apparent that the decision in the Yost Case was based upon that ground. The Michigan Constitution discussed in Belles v. Burr was adopted twenty years before the adoption of our present Constitution. It contained an article on education similar to the one incorporated in our Constitution of 1870. In thus incorporating this article on education in our Constitution, it must be presumed that it was done with full knowledge that in states where the same or similar articles were con-

tained in Constitutions, the legislatures had been permitted to assume, under those articles, the power to prescribe such qualifications as they saw fit for voters at school district elections, and, if it was not intended that the legislature should have that power under that article of our Constitution, it should have been expressly prohibited.

It is a matter both of interest and importance to note the state of the law in each of the states of the Union in reference to the qualifications prescribed for voters at school district elections at the time of the passage of the act of 1891, which was involved in the Yost Case. At that time the legislatures of sixteen states having suffrage articles in their Constitutions similar to that of Illinois had passed laws prescribing different qualifications for voters at school district elections than those prescribed by the general suffrage articles of their several Constitutions. Of these sixteen states, fifteen had Constitutions in force at that time containing educational articles or clausea. At that time school district officers were made appointive by statute in seven other states. In five states the election of school district officers was controlled by constitutional provisions. In one state it was provided by statute that qualified voters only should be permitted to vote for school district officers, but that only those who had property subject to taxation upon which taxes were paid would be entitled to vote upon any proposition affecting the expenditure of money or the raising of money by taxation. The remainder of the states, fourteen in number, at that time prescribed the same qualifications for voters at school district elections as were prescribed for electors by their several Constitutions; Illinois having, by the passage of that act, become the seventeenth state which prescribed special qualifications for voters at school district elections. Soon after the passage of the Illinois act, several of the fourteen states which had theretofore required the same qualifications for voters at school district elections as those contained in their respective Constitutions prescribed by statute different qualifications for voters at school district elections, thus adding to the number of states wherein the legislatures had assumed to prescribe special qualifications for voters at school district elections. It is a significant fact that in but few instances did the legislatures of any of these states thus assuming the right to prescribe special qualifications for voters at school district elections assume to have the right to prescribe different qualifications for voters at the election of officers not specifically provided for in their Constitutions. In the majority of the instances where the legislatures did attempt to extend that doctrine, the courts held that such action was in violation of the Constitution of the state where such enactment was made.

In 1893 the legislature of Michigan enacted a statute providing that in all school, village, and city elections thereafter held, women who are able to read the Constitution of the state of Michigan, printed in the English language, should be allowed to vote for all school, village, and city officers, and on all questions pertaining to school, village, and city regulation, on the same terms and conditions prescribed by law for male citizens. In Coffin v. Election Comrs. 97 Mich. 188, 21 L.R.A. 662, 56 N. W. 567, the validity of that act was determined. The contention there was that the act was in violation of the suffrage clause of the Constitution. The same arguments were there advanced as have been urged upon us in the present case in favor of the validity of the act. Belles v. Burr, supra; Wheeler v. Brady, 15 Kan. 26; State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N. W. 682, and Plummer v. Yost, supra, were there relied upon as they are here. In holding the act invalid the court said: "The general rule is that the source of all authority to vote at popular elections is the Constitution, that the electorate is constituted by the fundamental law, and that the qualifications of electors must be uniform throughout the state. . . . Section 1 of article 7 of the Constitution provides who shall be electors and entitled to vote, and is, according to its terms, applicable 'in all elections.' To empower the legislature to confer the elective franchise upon classes of persons other than those named, some other provision must be pointed out which confers that authority in express terms or by necessary implication. The only provisions to which we are cited are §§ 13 and 14 of article 15, which are as follows: 'Section 13. The legislature shall provide for the incorporation and organization of cities and villages.' 'Section 14. Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct.' In support of the act in question, it is contended that the sections last quoted empower the legislature to provide qualifications for voters in village and city elections, and Belles v. Burr, 76 Mich. 1, 43 N. W. 24, Wheeler v. Brady, 15 Kan. 26, State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N. W. 682, Opinion of Justices, 115 Mass. 602, and Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191, are relied upon to support this contention. These cases involved the validity of acts conferring upon females the right to vote for school district officers un-

der Constitutions which, like our own, name no school district officer, do not prescribe or suggest how such officers shall be chosen, but in express terms relegate to the legislature the duty of providing for and establishing a system of primary schools."

The court then quotes that portion of the majority opinion in Belles v. Burr, supra, which we have above quoted, and, after quoting from the concurring opinion of Mr. Justice Morse and the dissenting opinion of Mr. Justice Campbell, proceeds: "The majority in that case held that the Constitution of 1835, as well as that of 1850, had in terms authorized the legislature to construct a primary school system, and that for years antedating the present Constitution the legislature had construed a similar provision as conferring the power to determine the qualifications of voters for district school officers."

Referring to the question under discussion, the court then said: "The legislature had for many years prior to the adoption of the present Constitution exercised the power of providing for the incorporation of cities and villages, and in the exercise of that power had in each instance determined what officers should be elected and what appointed, and the time and manner of both election and appointment. . . . Yet this is the first instance in which the legislature has attempted to extend the right of suffrage to persons other than those named in the Constitution. Many of the charters granted for the incorporation of cities and villages contain no reference whatever to the qualifications of voters. The power to provide for the incorporation of cities is not unlike that given for the organization of counties, and the authority to direct the time and manner in which judicial officers shall be elected and the other officers elected or appointed does not involve the power to determine who shall constitute the electorate. . . . The Constitution had already provided for electors, and when it provides that an officer shall be elected, it certainly contemplates an election by the electorate which it has constituted. No other election is known to the Constitution, and when it provides that the legislature may direct the manner in which an officer shall be elected, it simply empowers the legislature to provide the details for the holding of such election."

It will thus be seen that the Michigan court did not consider Belles v. Burr as holding the doctrine contended for in the Coffin Case, and that it construed the Yost Case as based upon the same ground as its own decision in Belles v. Burr.

Although the Yost Case is based principally upon Belles v. Burr, supra, the majority hold that the bases of these two cases are entirely different, and that the Yost Case was decided, not upon the proposition that the legislature had been permitted to assume, by reason of the educational article in our Constitution, to prescribe different qualifications for electors at school district meetings, but upon the proposition that the legislature had the right to prescribe such qualifications as it should see fit for so-called nonconstitutional offices. If that was the view of the court when the Yost Case was decided, why was it necessary for it to discuss, as it did at some length, article 8 of the Constitution, commonly known as the educational article? Unless the holding in the Yost Case was placed upon the same basis as the holding in Belles v. Burr, supra, why was it necessary for this court to make any reference whatever to the educational article of the Constitution? As I have pointed out, the educational article of the Michigan Constitution played an important part in the determination of Belles v. Burr, and the only purpose this court could have had in discussing the educational article of our Constitution in the Yost Case was to indicate, in connection with the reliance placed upon Belles v. Burr, the basis of the holding in that case.

The position taken by the majority of the court in this case establishes a peculiar relationship between Belles v. Burr and Coffin v. Election Comrs. supra, the Yost Case, and the present case. In the Yost Case we relied upon Belles v. Burr, in which the Michigan court very clearly and unmistakably stated the basis of its holding. In the Coffin Case the Michigan court referred to the Yost Case as being in harmony with Belles v. Burr and placed upon the same basis. Either this court misconstrued the holding in Belles v. Burr when it relied upon it in the Yost Case, or the Michigan court in the Coffin Case misconstrued both what it had held in Belles v. Burr and what this court held in the Yost Case.

In Harris v. Burr, 32 Or. 348, 39 L.R.A. 768, 52 Pac. 17, the question whether women were entitled to vote at a district school meeting for director was involved. The statute of that state permitted a woman twenty-one years of age, owning property in the district upon which she pays a tax, to vote at such meeting. The Constitution provided that male citizens only should be entitled to vote at all elections authorized by law. The Constitution also contained an article on education and school lands, whereby the legislature was directed to provide by law for the establishment of a uniform and general system of common schools. The court there held that women had the right to vote at such district school meeting, and

based its decision upon the same grounds as Belles v. Burr and Coffin v. Election Comrs. supra. In the Oregon case the Yost Case, and each of the cases cited therein, were referred to. The court quoted at some length from Belles v. Burr, and, after discussing that case, the Yost Case was correctly referred to as one of similar tenor. It was pointed out that when the Oregon Constitution was adopted, a territorial law was in force which prescribed different qualifications for voters at school meetings than those prescribed by the act of Congress authorizing the territorial government of Oregon, and the suffrage provision enacted by the territorial legislature; that the Constitution continued all the laws of the territory consistent therewith in force until altered or repealed, and that after the adoption of the Constitution the legislature continued to prescribe different qualifications for voters at school elections than were prescribed by the Constitution. The court then said: "Thus, we have a direct legislative interpretation of the fundamental law, not only approximately contemporaneous with the adoption of that instrument, but by its every subsequent act whenever it has legislated upon the subject. If we ascribe to the constitutional convention cognizance of the laws of Congress, and the territorial regulations thereunder, touching the common school system, as we must, because of the learning and sagacity of its members, there is strong reason for believing that they legislated fundamentally with reference to the conditions as they found them, especially as we find the legislature of 1862, so near the time of the adoption of the Constitution, and composed of some of the same members, revising the school system, and to that end specially repealing acts at least supposed by them to have been carried over and continued operative by the very terms of the Constitution itself. These considerations lead to the conclusion that the power ascribed to the legislature under the Constitution, to provide for the establishment of a uniform and the general system of common schools, carries with it plenary power to establish the unit of that system, denominated a school district, to determine what officers shall administer its affairs, who and what manner of persons shall be eligible to office, and how and by whom they should be chosen. The elective franchise conferred by § 2, article 2, does not, nor was it intended to, fix and define the qualifications of voters at school meetings, but was designed only to govern in all general and special elections not otherwise provided for by the Constitution, and applies to the election of all officers known to the Constitution as well as to such as may be provided for thereunder, aside from those provided for under the special power of the legislature to establish a uniform and general system of common schools."

Among the cases cited and relied upon in the Oregon case was Re Gage, 141 N. Y. 112, 25 L.R.A. 781, 35 N. E. 1094. In the Gage Case the court said: "He [referring to counsel for appellant] concedes that under article 2, § 1, and article 10, § 2, of the Constitution, no woman has the right to vote for constitutional officers, because the franchise is conferred explicitly upon 'male citizens;' but he contends that school officers are not such constitutional officers, because the practical interpretation of that instrument has long and invariably been to the contrary. That is true, and only true, of the officers of the school district, as the fundamental unit of the school system. The trustees of such a district are the authorized business managers of the school within its boundaries, and the legislature has always assumed, and been permitted to assume, the right to determine who might vote for such trustees, and what qualifications should or should not be requisite and necessary."

The Yost Case is cited in support of the position taken by the New York court in Re Gage. In Menton v. Cook, 147 Mich. 540, 111 N. W. 94, the Michigan court again refers to the Yost Case as in harmony with its former decisions. In State ex rel. Mills v. Board of Elections, 9 Ohio C. C. 134, 6 Ohio C. D. 36, in discussing the question of the constitutionality of an act conferring upon women the right to vote at school district elections (an act which was passed since the Illinois act of 1891), the circuit court referred to the Michigan case and also to the Yost Case. In referring to the disposition of the matter in the Michigan courts, the Ohio court said: "These questions have been determined by the supreme court of Michigan under constitutional provisions that are certainly not more favorable to the power of the legislature to pass an act of this character than are ours." And again, in referring to the holdings in the two Michigan cases, the court said further: "This conclusion is placed upon the ground that 'the authority granted by the Constitution to the legislature to establish a common or primary school system carried with it the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, their term of office, and how and by whom they should be chosen.' This result was reached, although, as was shown in a dissenting opinion, the election of other school officers is provided for by the Constitution of that state."

After referring to the Yost Case as one

holding the Illinois act valid upon like reasoning, the court then said: "It must be admitted that the rule that persons not having the constitutional qualifications of electors may be authorized to vote at any election that is not held to fill an office created by the Constitution does not obtain everywhere, . . . but it is believed that all the reported cases in which this limitation has been considered are consistent with the view that the ample powers for the establishment and maintenance of public schools which are conferred upon the legislatures by the Constitutions of most of the states carry with them power to extend the right to vote for school officers to persons not within the constitutional definition of electors, unless such officers are designated by the Constitution, or are officers of municipal or political divisions recognized by the Constitution."

This case was appealed to the supreme court of Ohio and was affirmed by a memorandum decision in Mills v. City Bd. of Elections, 54 Ohio St. 631, 47 N. E. 1114.

The Oregon court in Livesley v. Litchfield, 47 Or. 248, 114 Am. St. Rep. 920, 83 Pac. 142, again referred to the Yost Case, and construed it as it had been theretofore construed by that court and by the courts of Michigan, New York, and Ohio, and the Yost Case is there referred to as one which illustrates and points out the distinction between the right to vote at a school district meeting and at an election for city and municipal officers.

The English Case and the Yost Case will thus be seen to be in harmony with the holdings of the courts of other states which have Constitutions similar to ours. As the legislatures of other states had assumed, and been permitted to assume, under the educational article of their Constitutions, the right to determine who should vote for district school officers and what the qualifications of such officers should be, so the right of our legislature, by the holding in the Yost Case, as I construe it, to assume the same power under the educational article of our Constitution, was recognized.

In none of the states having Constitutions similar to ours has the right of suffrage been extended to women otherwise than in respect to school district meetings or elections. In Michigan, where it was claimed that the legislature had the same power that it is now claimed our legislature has, and where the same cases were relied upon as authority, the right was denied. In Kansas the legislature never presumed to extend the doctrine announced in Wheeler v. Brady beyond elections for district school officers, but when it was desired to further extend the franchise to women it was done by amendment to the Constitution.

The majority opinion cites State ex rel. Lamar v. Dillon, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; Buckner v. Gordon, 81 Ky. 665; and Hanna v. Young, 84 Md. 179, 34 L.R.A. 55, 57 Am. St. Rep. 390, 35 Atl. 674, in support of the conclusion reached. The suffrage clause of the Constitution of Florida provides that certain male persons therein described shall, under the conditions there indicated, be deemed qualified electors "at all elections under this Constitution." In reading State ex rel. Lamar v. Dillon, supra, this provision of the Florida Constitution must be borne in mind, and a reason can be readily perceived for the holding of the Florida court that municipal elections are not elections under the Constitution, but, as that case holds, are expressly exempted therefrom. In Buckner v. Gordon, supra, the holding of the Kentucky court is based upon the fact that "long prior to and ever since the adoption of the Constitution, it has been the legislative rule, rather than the exception, to fix in the charters of towns and cities a qualification for electors different from that prescribed in the Constitution for state, county, and district electors." And the court holds that "the fact that such governments were at the time of the adoption of the Constitution, and have even since been, controlled by the legislature, taken in connection with the 6th section of the 6th article, clearly shows the intention of the framers of the Constitution to leave all these matters to the legislative will."

It will thus be seen that the two cases last mentioned cannot be relied upon in support of the holding of the majority, but, on the contrary, are in accord with the construction that I have placed upon the English and Yost Cases. I concede that Hanna v. Young, supra, is clearly against my view, and I make no attempt to distinguish it, but merely content myself with saying that I disagree with the view therein expressed.

A pioneer case on the question whether the legislature has the power to prescribe different qualifications for voters for statutory offices than is prescribed in the Constitution for electors is People ex rel. Van Bokkelen v. Canady, 73 N. C. 198, 21 Am. Rep. 465, decided in 1875. The Constitution of North Carolina prescribed, among other qualifications, that to be an elector one must reside in the county thirty days. The legislature attempted to prescribe, as one of the qualifications for a voter for statutory city offices, that he must have resided ninety days in the lot, block, and ward in which he resides at the time of applying for registration. In passing on the validity of this statute, the court said: "The Constitution provides that every male person twenty-one years old, resident in the state twelve

months and in the county thirty days, shall be an elector. Article 6, § 1. An elector for what? The Constitution does not say for what. Does it mean elector for president, or for members of Congress, or for governors, or for judges, or for members of the general assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation,—that every such person shall be an elector, a voter. It evidently means to designate those persons as a class, to vote generally whenever the polls are opened and elections held for anything connected with the general government or the state or local governments,—just as a class of persons are designated as qualified for jurors. . . . But cities and towns, like counties and townships, are parts and parcels of the state, organized for the convenience of local self-government, and the qualifications of their voters are the same. It follows that the general assembly cannot in any way change the qualifications of voters in state, county, township, city, or town elections."

The majority opinion notes that under the doctrine of contemporaneous, long-continued, and uniform legislative construction, the courts of New York, Michigan, and Oregon have recognized the right of the legislature to fix different qualifications for district school officers from those prescribed by the Constitution for electors in other cases, and states that this doctrine has no application in Illinois. I have attempted to point out wherein it does have an application in this state. Whether or not it may be properly said to have such an application, the courts of New York, Michigan, Oregon, and Ohio have experienced no difficulty in construing the English and Yost Cases in harmony with the true intent and meaning of our own Constitution. It would seem that this court should have no great difficulty in construing the English and Yost Cases as the courts of other states have construed them, and especially should this be true when we consider the fact that by so construing these cases the integrity of our Constitution can be preserved.

The majority opinion makes no defense of the English or Yost Cases as having been properly decided as it construes them. If, by placing the construction on those cases which has been placed upon them by the majority, violence will be done to our Constitution, this court should not hesitate to adopt the construction which has been universally placed upon these cases by courts of other jurisdictions. It is pointed out that the English Case and the Yost Case have been followed in a number of other cases by this court. While this is true, the basis of the holdings of the English and Yost Cases has never been questioned or explained in any of the later cases. The later cases are therefore of no assistance in determining this question and are of no weight as authority. The most casual reading of the Yost Case should be convincing that the court did not consider the question here involved, but that the theory of the Michigan case controlled the conclusion there reached. It is highly improbable that the court there meant to hold as the majority finds it did, without any discussion of the many important points involved. An opinion making a holding of such importance and fraught with such consequences should certainly state the basis of its conclusions with such clearness that it would leave no doubt in the mind of the reader. This the court evidently failed to do, and we should now place that construction upon the Yost Case which is in harmony with the plain language of the Constitution.

In my opinion the legislature is without power to prescribe any different qualifications for electors for political offices than those prescribed by the Constitution. If it is desired by the people of the state to prescribe different qualifications for electors, and to extend the right of suffrage, it must be done by way of an amendment to the Constitution.

In my opinion the legislature clearly exceeded its authority in the passage of the act in question, and the decree of the superior court should be reversed.

Craig, J., dissenting:

As a republican form of government is based upon the right of suffrage, it is essential that the exercise of that right be fixed by the fundamental law, which in this state is the Constitution. When the Constitution has determined who shall exercise the elective franchise, there is no power to change it except the people themselves, by the adoption of a new Constitution or amending the old one. This proposition is fully supported by the authorities on constitutional law (Cooley's Const. Lim. 7th ed. 58; Black, Const. Law, 649); and it seems to me to be self-evident, for the reason that the only way in which a government by the people can exist is that at stated elections the power to change the laws and officers of government shall return to the people. If the legislative branch of the government can change the qualifications of the electors who vote for a large and important number of officers, even though the offices held by such officers are created by legislative authority, by enlarging or restricting the class of those who are declared to be voters by the Constitution, it amounts to depriving the

people of the power they have expressly reserved to themselves.

The decisions in the cases of People ex rel. Ahrens v. English and Plummer v. Yost, cited in the opinion of the majority of the court, are based largely, if not solely, upon the fact that the subject of education was made a matter of special constitutional regulation, and its officers, therefore, with the exception of those mentioned in the Constitution, might be considered an exception to those included within the constitutional provision prescribing the qualifications of electors. While the court did not so hold in People ex rel. Ahrens v. English, 139 Ill. 622, 15 L.R.A. 131, 29 N. E. 678, it intimated that such might be the case. In the subsequent case of Plummer v. Yost, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191, the court adopted the suggestion made in People ex rel. Ahrens v. English, and held that such a distinction did exist. But in neither of the above cases did the court hold that as to any other officers than school officers such a distinction might be made. In neither of these cases did the court lay down the broad rule that as to statutory officers, or offices of statutory creation, the will of the legislature was supreme, and it could prescribe and fix such qualifications for electors as it saw fit. As I read those cases, it was not intended to so hold. In each case the court pointed out particularly that what was said was said with reference to minor school offices in school elections, and the language used would indicate that it was intended not to apply to other officers or other elections. My views in this respect are also sustained by the decision in the subsequent case of Sanner v. Patton, 155 Ill. 553, 40 N. E. 290, a contested election for the office of highway commissioner,—a statutory officer,—in which the court, in defining the extent of the power of the legislature to restrict the right of suffrage, among other things, said: "Under § 1, art. 7, of our Constitution, every male citizen of the United States above the age of twenty-one years, who has resided in the state one year, in the county ninety days, and in the election district thirty days next preceding any election, is entitled to vote at such election. To exercise this right there is one exception, and but one, so far as we have been able to find, and that is found in § 7 of the same article, which declares that the general assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes. Adopting the well-known maxim or rule of construction that the expression of one thing is to be regarded as the exclusion of another, the legislature does not possess the power to take away from a resident citizen the right of suffrage, unless he has been convicted of an infamous crime."

The only instance to which my attention has been called where any exception has been made in the qualifications of electors as prescribed by the Constitution is in school elections for minor officers. But the matter of education was the subject of special constitutional regulation, and school officers are not classed as municipal officers. As to the nature of these officers, this court in People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools, 78 Ill. 136, said: "These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage the school fund of the township, and pay the teachers of schools taught in their jurisdiction. This is the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose, nor are they provided with the officers or the power to exercise the functions of government."

To the same effect is People ex rel. Biddison v. Board of Education, 255 Ill. 568, 99 N. E. 659, where People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools, supra, is cited with approval and the same rule announced.

That there is, in fact, no distinction between the qualifications of electors for constitutional and statutory officers, is clear from the recent holdings of this court in the long line of cases known as the "Primary Election Law Cases." In 1905, 1906, and 1908 the legislature passed what are known as the primary election laws. These elections were of purely statutory origin, and the election laws embraced within their provisions not only constitutional officers and the statutory officers included in § 1 of the act under consideration, but also all of the various officers created by it for perfecting and carrying on the party organization. These laws were each in turn declared unconstitutional and void in their entirety. In passing upon their constitutionalty no attempt was made to distinguish the difference between the legislature's power over statutory and constitutional officers, or to distinguish between the valid and invalid portions of those laws, as should have been done under the holding of this court in the present case and Chicago v. Wolf, 221 Ill. 130, 77 N. E. 414, cited in the majority opinion, had there been any difference in that respect; but each act, and as to all officers therein mentioned, was declared unconstitutional and void in its entirety. In passing upon the constitutionality of the act of 1905, this court in People ex rel. Breckon

v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562, said: "It is undoubtedly true that at the time the Constitution was adopted, primary elections, as such, were not within the contemplation of the convention or the people, for the reason that up to that time they had not been made part of the election system or subject to regulation by law. At that time candidates for office were nominated by means of the caucus and convention of delegates, and such nominations were purely private affairs of the political organizations. Since that time there has been a considerable extension of the election system. The election laws had already been extended by providing for registration in advance of the election, so that all electors might know beforehand who claimed the right to vote, and to make necessary investigations to determine whether the right existed. . . . All these acts relate to the same subject, and in combination are designed to constitute a single and harmonious system, under which the people may exercise the elective franchise and make their choice between the candidates for public offices. They all relate to elections, and are within the meaning of that word as used in the Constitution. It seems clear that the elections protected by the Constitution are all such elections as are held under authority of law, at which qualified electors may vote; and when statutes are enacted which regulate the form of the ballot to be used, what shall appear upon the ballot, and how the candidates whose names shall so appear shall be chosen, the provision of the Bill of Rights applies to the new condition."

People ex rel. Breckon v. Election Comrs. supra, is cited with approval in Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109, and People ex rel. Phillips v. Strassheim, 240 Ill. 279, 22 L.R.A.(N.S.) 1135, 88 N. E. 821, in neither of which is any distinction made in the application of the provisions of the Bill of Rights and the provisions of § 1 of article 7 of the Constitution to all elections held under authority of law, no matter what the character of the election or the nature of the officer to be elected thereat. Both provisions of the Constitution were held alike applicable to all elections held under the authority of law. Thus, in People ex rel. Phillips v. Strassheim, supra, in passing upon the constitutionality of the act of 1908, this court, after quoting the provisions of § 1 of article 7, said: "This court has held that a law providing for the nomination of candidates for public office by a primary election is an election law, and that all primaries held under it are elections, within the meaning of the Constitution, and that such a law, to be valid, must sustain the constitutional rights of voters, and not curtail, subvert, or injuriously restrict such rights."

If the rule announced in these decisions is still the law, they are decisive of this question. It is contradictory to say that the provisions of the Constitution apply to primary elections and all officers to be nominated thereat,—a species of elections provided by the legislature, and not even within the contemplation of the framers of the Constitution or the people at the time the Constitution was adopted (People ex rel. Breckon v. Election Comrs. supra),—and do not apply to the elections for such officers after they are nominated.

In my judgment this court in People ex rel. Breckon v. Election Comrs., Rouse v. Thompson; and People ex rel. Phillips v. Strassheim,—supra, correctly applied the law in this state to the matter then under consideration. Those decisions are in perfect harmony with the universally understood and accepted interpretation of § 1 of article 7 of our Constitution. The words "any election therein"—meaning the voting district or precinct—are as broad and comprehensive as any that could have been used for that purpose; the word "any" being equally as comprehensive as the word "all," and synonymous with it. 2 Am. & Eng. Enc. Law, 2d ed. 414; 2 Cyc. 472; Purdy v. People, 4 Hill, 384; People ex rel. Ocean Acci. & G. Corp. v. Van Cleave, 187 Ill. 125, 58 N. E. 422; Johnson v. Grand Forks County, 16 N. D. 363, 125 Am. St. Rep. 662, 113 N. W. 1071; Leonard v. Com. 112 Pa. 622, 4 Atl. 220; State v. Haug, 95 Iowa, 413, 29 L.R.A. 390, 64 N. W. 398; West Chicago Park Comrs. v. McMullen, 134 Ill. 170, 10 L.R.A. 215, 25 N. E. 676. In the American & English Encyclopedia of Law, supra, it is said: "The word 'any' is frequently used in the sense of 'all' or 'every,' and when thus used it has a very comprehensive meaning." And in 2 Cyc. supra, it is said: "The word 'any' may mean 'all,' 'each,' or 'every.'" The same definition of the word is adopted and approved in People ex rel. Ocean Acci. & G. Corp. v. Van Cleave, 187 Ill. 125, 58 N. E. 422, where it is said: "Bouvier, in his Law Dictionary, says that the word 'any' is given the full force of 'every' or 'all.' Logan v. Small, 43 Mo. 254; McMurray v. Brown, 91 U. S. 257, 23 L. ed. 321; Davidson v. Dallas, 8 Cal. 227; Manchester v. St. Pancras, L. R. 4 Q. B. Div. 409, 41 L. T. N. S. 218, 27 Week. Rep. 885; Chicot County v. Lewis, 103 U. S. 164, 26 L. ed. 495."

In People v. Purdy, 2 Hill, 35, the words "any body politic or corporate," used in the Constitution of New York, were held broad enough to include public corporations. It was there said: "These words are as broad

in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to all corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government."

The cases of People ex rel. Dunham v. Morgan, People ex rel. Akin v. Kipley, People ex rel. Akin v. Loeffler, and People ex rel. Sadler v. Olson, cited in the majority opinion, do not announce a contrary doctrine. The case of People ex rel. Wies v. Bowman, also therein cited, has reference to officers in drainage districts, which are quasi municipal corporations, and their officers are not municipal or political officers. 28 Cyc. 128–130. In none of the other cases did the court hold that the legislature had the power to prescribe any different qualifications for electors for statutory officers than those fixed and prescribed by the Constitution. All that they hold is that the power to create an office carries with it, as an incident to such power, the right to determine the manner in which the office shall be filled,—that is, whether by appointment or by election by the people,—the length of the term of office, the compensation to be paid such officers, and to abolish such office altogether. But they do not hold that, when the legislature determines that the office shall be filled by an election of the people, it has the power to provide that it may be done by the votes of any other persons than those possessing the qualifications of constitutional electors. They are therefore in no way controlling in this case.

No reason has been given for the distinction between the qualifications of electors for the constitutional offices and the statutory offices. Many of the statutory offices are of equal or greater importance than the constitutional offices to be filled by votes of the electors. The only true rule, and the only rule which will avoid great confusion and embarrassment in the future, is to adopt the literal wording of § 1 of article 7 of the Constitution, and apply it in its true sense to all elections for all offices, whether constitutional or statutory.

I have thus far dealt with the question as one solely of constitutional construction. So viewing it, the proper construction of the section can no longer be considered either an open or debatable one, when the well-settled rules of constitutional construction are adhered to and applied. The right to vote and to be voted for as a candidate for office is purely a political right (Fletcher v. Tuttle, 151 Ill. 41, 25 L.R.A. 143, 42 Am. St. Rep. 220, 37 N. E. 683), and in this case a court of chancery would have no jurisdiction, were it not for the fact that the bill charges that the providing of additional ballots, ballot boxes, etc., made necessary by the act of June 26, 1913, under consideration, will require additional expenditures of taxes and revenues for that purpose. Fletcher v. Tuttle, supra.

As the questions in this case involve political rights, it is important to note that for many years, and ever since the adoption of the first Constitution, in 1818, the legislature, the courts, and all other departments of the state government have recognized and accepted the Constitution as declaratory of the sole qualifications of electors for all elections for all offices in this state. Spragins v. Houghton, 3 Ill. 377. This contemporaneous exposition by the legislature and the courts, universally sanctioned and acquiesced in by the people and all departments of the state government for nearly a century, is so strong an indorsement of its correctness that the proper construction ought now to be considered as settled. Ibid.; People ex rel. Lynch v. La Salle County, 100 Ill. 495; Nye v. Foreman, 215 Ill. 285, 74 N. E. 140; Boehm v. Hertz, 182 Ill. 154, 48 L.R.A. 575, 54 N. E. 973. When the section is construed as it has been heretofore universally understood and interpreted by the legislature, the courts, and the people of the state generally for nearly a century, there can be no question but that the act is contrary to our fundamental principles of government, that it transcends the legislature's power, and is therefore unconstitutional and void.

In my judgment, it should be so held by this court, and the decree of the superior court be reversed.

Petition for rehearing denied October 7, 1914.

KANSAS SUPREME COURT.

MARY FALK
v.
WILLIAM BURKE, Appt.

(93 Kan. 93, 143 Pac. 498.)

Marriage — breach of promise — failure to act on day fixed.

1. An omission to marry upon a particular day is not necessarily a breach of a promise of marriage; the contract necessarily continues in force until the one or

Headnotes by PORTER, J.

the other of the parties, by conduct or words, manifests an unwillingness to proceed to carry it out, and a bona fide offer to marry is a defense to an action for a breach of promise to marry, where it is made before the plaintiff has signified her intention to end the matter, although the defendant may have been guilty of conduct that would warrant the plaintiff in considering the engagement at an end.

Same — effect on contract.

2. The failure of one to carry out such contract of marriage at the appointed time does not terminate the contract, unless there is an unequivocal election on the part of the other to consider the contract as terminated; and if following such failure to carry out the contract at the designated time, negotiations are entered upon for the purpose of arranging a subsequent date for the marriage, such negotiations in law constitute a waiver of whatever rights may have accrued by the failure to be married at the designated time.

Same — election as to continuance of contract.

3. Plaintiff and defendant entered into a contract of marriage in March, 1912, and

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Note. — Refusal or failure to keep agreement for marriage at a specified time or place as breach of the marriage contract.

This note supplements the note in 66 L.R.A. 798.

Many other phases of breach of promise to marry are treated in notes that will be found by consulting the Index to L.R.A. Notes, under the title, "Breach of Promise."

Anticipatory refusal.

Supplementing note in 66 L.R.A. 798.

One who agrees to marry a woman as soon as his mother gets well may be sued at once, without waiting for the time of performance to come, where he absolutely renounces the contract before the time for performance. Anderson v. Kirby, 125 Ga. 62, 114 Am. St. Rep. 185, 54 S. E. 197, 5 Ann. Cas. 103.

A breach of a man's promise to marry a woman after his former wife, from whom he is divorced, is dead, is made by his marrying another woman during the life of the divorced wife, notwithstanding the fact that there is a possibility that upon her death he may be able and ready to perform his promise. Brown v. Odill, 104 Tenn. 250, 52 L.R.A. 660, 78 Am. St. Rep. 914, 56 S. W. 840.

So, also, in Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425, it was held that where an agreement had been made for marriage at Christmas time, and before such time the man married another woman, he thus put it out of his power to marry the plaintiff and gave her a right to bring suit.

Effect of postponement.

Supplementing note in 66 L.R.A. 799.

The mere postponement of the wedding day with the consent of plaintiff does not relieve the defendant from the promise to marry. Nearing v. VanFleet, 71 Hun, 137 54 N. Y. S. R. 308, 24 N. Y. Supp. 531 (affirmed in 151 N. Y. 643, 45 N. E. 1133).

Failure to fulfil agreement at appointed time or place.

Supplementing note in 66 L.R.A. 799.

The position taken in the first headnote in FALK v. BURKE is sustained by Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441, which is cited in the earlier note. But as shown by other cases there cited, the plaintiff may elect to treat the refusal of the defendant to comply with his promise at a designated time and place as a breach thereof.

And so, where a man fails to perform his agreement to marry a woman at a specified time, and renounces the agreement, and closes his attentions to her, it is unnecessary that the woman offer performance on her part as a basis for an action for damages for breach of promise. Lemke v. Franzenburg, — Iowa, —, 141 N. W. 332.

Acts subsequent to time agreed upon as constituting refusal.

Supplementing note in 66 L.R.A. 801.

Where a man promises to marry a woman at a certain date, but fails to do so and subsequently marries another woman, a demand to marry is unnecessary. Hunter v. Hatfield, 68 Ind. 416.

So also in Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581, it was held that where a man failed to keep his promise to marry a woman at a specified time, and, subsequent to the time fixed for the marriage, married another woman, it was not necessary that she object to and protest against the marriage, in order to entitle her to bring an action against him.

When cause of action accrues.

Supplementing note in 66 L.R.A. 801.

In Bracken v. Dinning, supra, it was held that an action for breach of promise to marry at a specified time could not be maintained if the contract of marriage was not made or confirmed within a year before the filing of the suit.

In Cooper v. Bower, 78 Kan. 156, 96 Pac. 59, rehearing denied in 78 Kan. 164, 96 Pac. 794, it was held that where, in an action for damages for breach of promise of marriage, the principal contention of the defendant was that he never made such a promise, and the evidence conclusively showed that, if an engagement to marry ever existed, it had been utterly repudiated by the defendant, he was not in a position to claim that the action was prematurely brought by reason of its having been begun within six months from the time a divorce had been granted to him.

A. H. N.

the date for the ceremony was afterwards fixed for the 25th of September. The marriage did not take place on the date fixed through the fault of the defendant, or on account of circumstances over which he had no control. Held, the plaintiff could not, after said date, continue to treat the contract as still in existence, and negotiate with the defendant for the setting of a future date, and then afterwards elect to treat the contract as having been broken by the postponement of the marriage on the original date.

New trial — verdict contrary to evidence.

4. Upon the facts stated in the opinion, held, that certain answers of the jury to special questions are in conflict with the undisputed testimony, and require the granting of a new trial, that there was error in the refusal to give certain instructions, and that, in view of all the facts and circumstances of the case and the financial worth of the defendant, a verdict awarding the plaintiff $10,000 damages is excessive.

(October 10, 1914.)

APPEAL by defendant from a judgment of the District Court for Atchison County in plaintiff's favor in an action brought to recover damages for breach of a promise of marriage. Reversed.

The facts are stated in the opinion.

Messrs. **S. M. Brewster** and **Waggener & Challiss** for appellant.

Messrs. **James W. Orr, S. E. Harburger,** and **C. J. Conlon,** for appellee:

Where parties agree to be married in accordance with the rules of any particular church, those rules become a part of the marriage contract, and the parties must be prepared to consummate the marriage contract in accordance with such rules and ceremonies.

Wanecek v. Kratky, 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651.

Where a great number of instructions are thrust upon a trial court, many of them stating the same proposition in different ways, but all intended to entrap the trial court, it is not error for the court to refuse all such instructions.

Wheeler v. Joy, 15 Kan. 389; Jackson v. Linnington, 47 Kan. 396, 27 Am. St. Rep. 300, 28 Pac. 173; White v. Deming, 72 Kan. 311, 83 Pac. 830; Spellman v. Metropolitan Street R. Co. 87 Kan. 415, 124 Pac. 363, Ann. Cas. 1913E, 230.

To make the defense of waiver available, it must be pleaded in definite terms.

Dwelling-House Ins. Co. v. Johnson, 47 Kan. 1, 27 Pac. 100; Western Home Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; Vogel v. People's Mut. F. Ins. Co. 9 Gray, 23; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285; East Texas F. Ins. Co. L.R.A.1915B. v. Dyches, 56 Tex. 565; McCormack v. North British Ins. Co. 78 Cal. 468, 21 Pac. 4; Weed v. Schenectady Ins. Co. 7 Lans. 452; Palmer Oil & Gas Co. v. Blodgett, 60 Kan. 712, 57 Pac. 947.

That the defendant was willing to marry the plaintiff at any time after October 17, 1912, after suit was commenced, does not constitute a defense.

McCarty v. Heryford, 125 Fed. 46; Liefmann v. Soloman, 7 Abb. Pr. 409 and note; Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; Wood v. Hagan, 13 Ky. L. Rep. 173; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Southard v. Rexford, 6 Cow. 254; Holloway v. Griffith, 32 Iowa, 409, 7 Am. Rep. 208; Wanecek v. Kratky, 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651.

It was proper to instruct the jury that they must, in returning their verdict, inquire not what the defendant can pay, but what plaintiff ought to recover.

Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; Fidler v. McKinley, 21 Ill. 308; Collins v. Mack, 31 Ark. 685; Reed v. Clark, 47 Cal. 194; Wilbur v. Johnson, 58 Mo. 600; Royal v. Smith, 40 Iowa, 615; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Chellis v. Chapman, 125 N. Y. 214, 11 L.R.A. 784, 26 N. E. 311; Goodall v. Thurman, 1 Head, 209; Herriman v. Layman, 118 Iowa, 590, 92 N. W. 710; Collins v. Mack, 31 Ark. 698.

Porter, J., delivered the opinion of the court:

The plaintiff recovered a judgment against the defendant for $10,000 in an action for breach of promise to marry. The defendant appeals.

Mary Falk, the plaintiff, lived near Purcell in Doniphan county. She was twenty-three years of age and the daughter of a prosperous farmer. William Burke was thirty-three years of age, and lived on a farm near Horton. They commenced going together in January, 1912, and became engaged in March of that year. On the 4th of August of the same year they each signed the following paper:

Purcell, Kas. Aug. 4–12.

This is to certify that there is a promise of marriage between William Burke of Horton, Ks., and Mary Falk of Purcell, Ks., whereto they affix their signatures.

Will Burke.
Mary Falk.

Witness: Fr. Raphael, O. S. B.

Some time thereafter they agreed on the 25th of September, 1912, as the date for the wedding, and it was to take place at 7 o'clock in the morning at St. Mary's

church in Purcell. The parties were communicants of the Roman Catholic Church, and the bans were published under the rules of that church in both the Purcell and Holton parishes. On September 15th the defendant received a letter from the plaintiff, in which she informed him that she had been talking to Father Raphael, the priest of the parish, and that he had asked her to tell the defendant to write to the parish where he was baptized and get a record of the baptism, and she also notified him that Father Raphael would like to see him. The defendant, with his brother, went to see the priest, and informed him that the defendant had been baptized in Ireland when about two days old and according to the rules and customs of the Catholic Church. The demand for the baptismal record by Father Raphael was made under the authority of an edict or decree issued by the Pope, which became effective on March 6, 1911, and which prescribed that priests were not permitted to assist at a marriage unless assured of the free condition of the contracting parties, and required that the baptismal certificate be demanded from the parties if they had been baptized in another parish. It being apparent that the defendant would be unable to obtain such a certificate from Ireland in time for the day fixed for the wedding, Father Raphael prepared a paper to be signed and sworn to by Mrs. Mary Burke, the defendant's mother. The defendant made some objection to this paper, claiming that it was not called for by the rules of the church, and the matter was talked over a good deal between the plaintiff and the defendant. The parties went together to see Father Raphael, and at that time the certificate had not been signed by the defendant's mother. The plaintiff testified there had never been any trouble of any kind between her and the defendant. The defendant's failure to appear at the church on the 25th appears to have grown out of this demand for a baptismal record or a sworn statement and his refusal to have it signed by his mother. The defendant wrote the plaintiff a letter which she received on the same day after the hour fixed for the wedding. The letter is as follows:

Horton, Kansas, Sept. 25th, 12.
Miss Mary Falk,
Huron, Kansas.

Well, Mary, I thought I would drop you a few lines. I am sorry that things had gone so far. Mary, if you and Father Raphael have done all of this planning, you can see what your good friends have done for you. But whenever Father Raphael or anybody else think that they can run a bluff on me, they are badly fooled. He was greatly worried about me and my genealogy, but my history in Horton, where I have lived since I left Ireland when I was fifteen years old, although Father Raphael being a priest, my character can compete with his any old day. He cannot throw any slur on me or my people, to tell me that he didn't know whether I was baptized or not. I am defiant to him. When it goes that far I don't have to go to his parish to get a wife. Both myself and my people have hunted Fr. Raphael for two days. Mike was at his house at half-past eight on Monday evening, and no tidings of him.

So while your people have planned so well together, I wish you luck.

I am, very respectfully,
Will Bourke.

The plaintiff testified that he came to see her the following Sunday on the 29th, and they talked about his not coming to the wedding; that soon thereafter they went together to see Father Raphael; that on this occasion the defendant asked her to set another day for the wedding; that she told him she would like to have next day to think it over, and she would then let him know whether she cared to marry him or not; that he took her home and on the next day she wrote him a letter which was sent to him by registered mail. The letter reads:

Purcell, Kans. Sept. 30–12.
Mr. Wm. Burke,
Horton, Kansas.

Answering your question of yesterday, will say that I will again be ready to be married Friday, Oct. 4.

As ever,
Mary Falk.

Please leave me know of your arraingments.

The defendant replied as follows:

Horton, Kansas, Oct. 2th, 12.
Miss Mary Falk,
Huron, Kansas.

Well, Mary. Your note was received, which of course you know by the receipt, but it is impossible for me to be ready by next Friday the fourth, as I only got your note this evening. As the notice is too short, we will have to set another date. Also I have to make arraingments on where to be married, as Fr. Raphael never will marry me. All of those things takes a little time, and we will have to decide on some future date if satisfactory to you.

I am most respectfully,
Wm. Bourke.

October 4th she sent him another letter by special delivery, as follows:

Purcell, Kans., Oct. 4-12.
Mr. Wm. Bourke,
Horton, Kansas.

You told me Sunday a week ago to make arrangements for another date. I did so and you put the wedding off again. I cannot stand the pressure any longer, you must come over by Sunday and make final arrangements. Yours truly,

Mary Falk.

The defendant answered as follows:

Horton, Kansas. Oct. 7th, 12.
Miss Mary Falk,
Purcell, Kansas.

Mary, your note of the fourth was received. Well, Mary, you asked me to go over yesterday and make final arrangements. Well, I couldn't see the use in me go over yesterday, as my visits to your place of late only seem to add fire to fuel, more especially I have no special arrangements to make. I think that I asked you in my last letter where you wanted to be married and you didn't make me any the wiser of subject. I told you definitely that I will not be married by Fr. Raphael, not under any circumstance. You fix this up the best you can and let me know immediately.

Mary, if you think I am putting this off you are mistaken, as you fully understand who has put it off, and who has caused all of the trouble. The very gentleman has tried to put me and my dead father who is molding into dust, also my Mother's honor in her old age as a Christian and a Catholic, by compelling her to sware to my Christianity, or to think that they should raise infidels or heathens and have the presumption of going up to the altar railing and receive the blessed sacrament. Fr. Raphael's blunder might seem all right to your people, but it certainly does not to me. There are a great many Priests as well as lay people that get things mixed up in to their noodles which they fully do not understand, for instance I will cote you a clipping from the paper about Fr. Phelan of the Watchman.

"Father Phelan of the Western Watchman, persisted in his foolish explanation of the recent decision of the Vatican on the Netemere marriage decree until Archbishop Glennon wrote him a letter on the subject."

Now Mary, you are the same with me in my estimation as you were when I first met you although you don't seem to think so, even by your letters, but of course you are poisoned against me, but I am only holding to my principal and of those that are near and dear to me, had you occasion perhaps you would act as I have, there is not any other priests that sees the situation as Fr. Raphael sees it. Now in conclusion I will say that I will be ready to get married at any time after the 17 of this Month except on Friday. I don't want to marry on Friday. Any other day of the week will be pleasing to me, so you may state where you want to get married and by whom. I have stated positively that Fr. Raphael won't marry me, either do I want to go to see his reverence any more.

So hoping to hear from you soon,
I am as ever your friend,

Wm. Bourke.

The correspondence was closed October 9th, by the following letter from the plaintiff, which she sent by special delivery:

Purcell, Kans. Oct. 9-12.
Mr. Wm. Bourke,
Horton, Kans.
Dear Friend:—

Yours of yesterday received and contents noted. Now, Will, you know that I can make no arrangements as to who is to marry us.

I never placed any impediments in the way of our getting married. You yourself raised all the objections. This is a matter entirely between you and me, and Fr. Raphael, according to your own words, has nothing to do with it any more.

For my part I am perfectly willing to be married from St. Mary's.

So I expect you to make all necessary arrangements as soon as possible, and I must have definite word from you before Tuesday 15th.

I cannot stand this delay and misery any longer. You have failed to appear twice at appointed dates and I do not expect you to fail a third time.

If you have a spark of manhood left in you, do for Heaven's sake, say what you intend to do.

This letter to you is final.
As ever, your friend, Mary Falk.

There is not much conflict in the evidence. Plaintiff testified: That the defendant told her Father Raphael had given him the certificate to be signed by his mother, but that he did not think he would have it signed, as he did not want to bother his mother about signing it; that on the Sunday before September 25th, the first date fixed for the wedding, she and the defendant went twice to the home of Father Raphael to see him, but he was not present. They went to talk further about the certificate. That she knew all the time that the certificate had

not been signed, and that the defendant talked to her over the telephone the afternoon before the 25th and said he had not seen Father Raphael. That she at first wanted to be married from the home parish and wanted Father Raphael to perform the ceremony, but was willing afterwards to be married in another parish and by another priest. That she had told defendant that the rule of the church required the certificate, and that it ought to be procured. That she was willing to marry him, but expected him to have the certificate. That she knew he could make the arrangements if he wanted to, because it was within his power to do so. That the night before the date fixed for the wedding she was expecting the defendant to come to rehearse for the wedding ceremony. That after having waited until after 9 o'clock, her brother called the defendant's brother, Mike Burke, and asked him if the defendant was coming out, and received word that he did not know whether Will was coming at all or not. She testified that when she wrote the defendant on October 7th, she understood that if he did not say marry by the 15th, she would have nothing to do with him any more; that she went to Atchison on the 15th, and commenced this action on the 16th, and that Father Raphael came to the office of her attorney the day the suit was commenced. The defendant testified that up until the time fixed for the wedding he was doing all he could to overcome the obstacles to his marriage; that he had been to see the bishop of the diocese, and the bishop informed him that Father Raphael was exceeding his authority in making the demand for the baptismal record. It appears from the evidence that Father Raphael went to the bishop and showed him the rule under which he was acting, and the bishop conceded that Father Raphael was right.

While there is no evidence of any quarrel between the plaintiff and the defendant, the letters that passed between them indicate that they had never been ardent lovers. The defendant sought to show that the interference of Father Raphael was the cause of the trouble and delay.

The defendant submitted six special questions to the jury, which they answered as follows:

Q. 1. When the marriage contract was made in March, 1912, was it determined upon what day it was to be celebrated; if so, what day?

A. No.

Q. 2. Was it expressly agreed at the time the contract was made in March, 1912, that the marriage was to be performed according to the rules and regulations of the Catholic Church?

A. Yes.

Q. 3. When was the defendant first informed that it was necessary to secure a certificate of his baptism, or a statement that would take its place, before he could be married?

A. September 15, 1912.

Q. 4. Had such certificate, or its equivalent, been secured by 7 A. M. September 25, 1912?

A. No.

Q. 5. After the 25th of September, 1912, did the plaintiff and defendant continue these negotiations for the purpose of setting another date for the marriage?

A. No.

Q. 6. Did the parties, plaintiff and defendant, after September 25, 1912, by their negotiations, conferences, and correspondence upon the subject, treat the marriage contract of March, 1912, as still in force and only requiring the setting of a date which was mutually agreeable?

A. No.

The defendant requested and the court refused to submit special questions 7 and 8, as follows:

Q. 7. If you answer the last preceding questions "No," then state what was the purpose of the negotiations, conferences, and letters passing between the plaintiff and the defendant after September and before the institution of this action.

Q. 8. Were the letters of the plaintiff, written to the defendant subsequent to September 25, 1912, and prior to the institution of this action, written for the purpose of arranging a date for the marriage in good faith and for the purpose of arranging for a date certain upon which the ceremony was to be performed?

The errors complained of are the refusal of the court to sustain a demurrer to the plaintiff's evidence, error in the admission of testimony, error in the instructions given and in the refusal to give requested instructions, error in the refusal to submit the two special questions 7 and 8, and the further contention that certain of the answers to special questions are in direct conflict with the evidence, that the verdict is excessive, and that the court erred in refusing a new trial.

We think the plaintiff's contention that the evidence shows the parties agreed to be married in accordance with the rules of their own church, and that those rules became a part of the marriage contract, is correct. Wanecek v. Kratky, 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651. The defend-

ant's contention that the jury ignored the undisputed testimony in their answers to special questions 5 and 6 must be sustained. In response to these questions the jury said that after September 25th the plaintiff and defendant did not continue negotiations for the purpose of setting another date for the marriage, and that they did not by their conferences, negotiations, and correspondence treat the marriage contract made in March as still in force. Both answers are in direct conflict with the undisputed facts as shown by the written letters that passed between the parties, as well as by the admission of the plaintiff as a witness at the trial. The plaintiff testified that on September 29th, the Sunday following the day the marriage was to have taken place, the defendant asked her to set another date for the wedding; that she told him she would like to have the next day to think it over, and then would let him know whether she cared to marry him or not, and on the next day she wrote him:

Answering your question of yesterday, will say that I will again be ready to be married Friday, Oct. 4.

As ever, Mary Falk.

Please leave me know of your arraingments.

On cross-examination she testified:

Q. When Will came out there Sunday you and he discussed the proposition of another date for the marriage, didn't you?

A. He asked me to set another date, and I told him I wanted to think it over until the next day and then I would decide.

Q. And after thinking it over, what did you decide?

A. To have the marriage next Friday. . . .

Q. State whether you considered it broken or going ahead—is that right?

A. I considered it broken; but I had the right to say yes or no, whether I cared to marry him or not.

Q. But it was with reference to go ahead with this same ceremony; he hadn't again proposed to you?

A. No; but he asked me to set another date, and I did so.

Q. And you said you were not sure you would set another date or not?

A. I told him I would like to think it over.

Q. And, after thinking it over, you thought you could get married on the 4th?

A. I told him I would again be ready on the 4th."

At another place she testified:

Q. Now, at the time you . . . received the letter of October 7th from Will Burke, you understood that you and he were still negotiating about a date for a marriage between you?

A. When I wrote to him I understood that if he didn't say marry by the 15th, I would have nothing to do with him any more.

Aside from the admissions made by the plaintiff on the witness stand no one could read the correspondence without coming to the conclusion that the parties did continue negotiations for the purpose of setting another date for the marriage. The conflict between the evidence and the findings is sufficient of itself to require that the verdict be set aside and a new trial granted. Undoubtedly the plaintiff had the right, if she had seen fit, to consider the contract as breached on the 25th, and in such case might have maintained her action. In Wanecek v. Kratky, 69 Neb. 770, 66 L.R.A. 798, 96 N. W. 651, the parties had mutually agreed on the date and hour of the marriage. In the opinion it was said: "The violation of this part of their agreement. without just cause, amounted to a breach of the contract on the part of the plaintiff in error, and defendant in error, as she well might do, elected at the time to consider the contract ended and to sue for damages." p. 772.

In the present case the undisputed evidence is that the plaintiff did not elect to treat the contract as broken and to sue for damages, but on the contrary saw fit to waive the breach occurring on the 25th of September, and to enter into further negotiations for a marriage at a subsequent date. In Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441, it was held that an omission to marry upon a particular day is not a breach of an engagement of marriage; that the contract necessarily continues in force until the one or the other of the parties, by conduct or words, evinces that he or she is unwilling to proceed to the ordinary result, and that a bona fide offer to marry is full defense to action for a breach of promise to marry, where it is made before the female has signified her intention to end the matter, although the defendant may have been guilty of conduct that would warrant the plaintiff in considering the engagement at an end. In the opinion it was said: "In the present case, it cannot be doubted, the lady was entirely warranted in considering the engagement as terminated so soon as the note of her suitor was communicated to her; but until she manifested her intention to consider it in that light it cannot be construed into a refusal to marry. In our judgment, if the defendant afterwards, in good faith, proposed to pro-

ceed to consummate the contract with her, in a reasonable time, he can in no sense be said to have refused to marry the plaintiff. We do not wish to be understood as asserting the law will tolerate that a man may trifle with the affections and feelings of a virtuous female, and afterwards avoid the consequences of his inhumanity by a simulated offer to marry; but if the offer is made bona fide, and before the female has signified her determination to end the matter, such an offer is a full defense to a suit for a breach of the contract. This seems to be the result of the decision in Southard v. Rexford, 6 Cow. 254." 9 Ala. 328.

Upon this theory of the law defendant requested instruction No. 8, as follows:

"A mutual promise of marriage is a contract equally binding upon both parties, and cannot be annulled excepting by mutual consent, and the failure of one to carry out such contract of marriage at the appointed time does not terminate the contract, unless there is an unequivocal election upon the part of the unoffending party to consider the contract as terminated, and if, following such failure to carry out the contract at the designated time, negotiations are entered upon for the purpose of arranging a subsequent date for the marriage, such negotiations in law constitute a binding waiver of whatever rights may have accrued by the failure to be married at the designated time."

And also instruction No. 19, as follows:

"If the plaintiff and the defendant entered into contract of marriage in March, 1912, and the date for such marriage was afterwards fixed for the 25th of September, 1912, and such marriage was not consummated at such time through the fault of the defendant or on account of circumstances over which he had no control, the plaintiff cannot continue after said date to treat said marriage contract as still in existence and negotiate with the defendant for the setting of a future date, and then afterwards elect to treat said contract as having been broken by the postponement of the marriage on the original date."

A number of other instructions were requested which presented substantially the same defense. We think the defendant was entitled to have instruction No. 19, or some similar charge, given. It was predicated upon facts which the defendant alleged in his answer, and upon which he offered evidence. The petition alleged a promise to marry on the 25th of September, and a breach on that day. The court instructed, upon the theory upon which the plaintiff's petition was drawn, that she could recover if the jury believed from the evidence that on September 25th the defendant, "without justifiable cause, failed and refused to carry out the contract on his part." Instruction No. 6, which the court gave, reads:

"By the admission of the parties hereto, you will find that there was a contract of marriage between plaintiff and defendant, and the wedding day was set for September, 25, 1912, and if you find from the evidence that the defendant, without justifiable cause, failed and refused to carry out the contract on his part, then your verdict should be for the plaintiff, for such sum as to you may seem just and proper under the evidence and these instructions, not to exceed, however, the sum of $25,000."

The plaintiff relies upon the rule that facts constituting an estoppel *in pais* must be specially pleaded. Among the cases cited is Dwelling-House Ins. Co. v. Johnson, 47 Kan. 1, 27 Pac. 100, 101. In that case it was said in the opinion: "The assured replied by a mere denial, which was nothing more than to say that no breach had occurred. . . . If the acts of waiver and estoppel had been pleaded, there was sufficient testimony produced by plaintiffs below to warrant the instructions given by the court." p. 4.

That case and others cited by the plaintiff can hardly be said to apply to the situation here, where the answer set forth all the facts upon which defendant relied as a defense, and expressly states that "she and he both understood that the engagement heretofore existing between them was still in full force and effect," referring to the conversation of the 29th of September, and the fact that the plaintiff notified the defendant that she desired to be married on October 4th. In Way v. Bronston, 91 Kan. 446, 138 Pac. 601, it was said: "It is not necessary to label a cause of action. Its nature is determined by the facts stated." p. 448.

To the same effect, see Re Johnson, 92 Kan. 59, 62, 139 Pac. 1161.

It is true that the answer, after alleging the conversations and conferences which took place between the parties subsequent to September 25th, and the letters passing between them, makes the statement that defendant has at all times been and is now ready, willing, able, and anxious to marry the plaintiff, and was willing to marry her prior to the 25th of September, and after that date, and that it was mutually understood between the parties that the wedding be postponed on the 25th and take place at a later date. These averments are not, in our view of the pleading, open to the objection that they are inconsistent with the defense of waiver. As we understand the answer, it pleads the facts showing that plaintiff waived the breach of September

25th and elected to negotiate with the plaintiff for a postponement of the marriage. The two averments are consistent. The plaintiff contends the evidence shows there never was a bona fide offer on defendant's part to marry her after his breach of the contract on the 25th of September, but that was a question for the jury to determine.

In addition to the facts specially referred to in the foregoing part of the opinion, there were other facts proved, showing that plaintiff did not consider the engagement at an end by defendant's failure to marry her on the day first agreed upon for the ceremony. Father Raphael testified that he took dinner at plaintiff's house on September 25th and talked with her. Afterwards on the same day he went to Michael Burke, the brother of the defendant, and got the certificate which he had previously prepared for Mrs. Burke to sign, and said: "I will secure the certificate which you refuse to secure." Then he called on Mrs. Burke about 5 o'clock in the afternoon; that she expressed slight hesitation about signing it, not knowing what it meant; that he explained it to her, and she signed it: that on October 23d, he wrote to the defendant, informing him that the bishop of the diocese had kindly requested the witness to authorize Father Hildebrand, who was the priest of the parish where the defendant lived, to perform the marriage ceremony for the defendant and the plaintiff. The letter contained this statement:

"Although on Sept. 25th at Horton I granted you permission to have the marriage ceremony performed by any priest of this diocese, I hereby renew this same permission in writing."

As a new trial must be ordered, it is proper to say that we discover no prejudicial error in the admission or rejection of evidence. The questions asked in cross-examination of Father Raphael touching the character of proof that would have satisfied him of defendant's baptism were proper, but the same witness, as well as the bishop of the diocese, testified as to what would have satisfied the rules of the church in this respect. We think the defendant was entitled to have special questions Nos. 7 and 8 submitted to the jury.

In view of all the circumstances of the case and the financial resources of defendant as shown by the evidence, the amount of the judgment, if defendant is liable at all, seems excessive.

The judgment will be reversed, and the cause remanded for another trial in accordance with the opinion.

MINNESOTA SUPREME COURT.

A. H. BJORGO et al.
v.
FIRST NATIONAL BANK OF EMMONS et al.

(127 Minn. 105, 149 N. W. 3.)

Appeal — new trial — cross appeal.

1. A party whose motion for new trial has been granted is not aggrieved by the order, so that the rulings adverse to him on the trial may be reviewed on his cross appeal.

Same — notice — scope.

2. The notice of plaintiffs' appeal from the order granting their motion for a new trial does not in terms embrace an appeal from the court's orders on the demurrers interposed, even if such orders were appealable.

Bank — draft to order of — notice.

3. The fact that a bank draft issued by a small village bank was made payable to the order of the defendant bank is held sufficient to put the defendant bank on inquiry as to the ownership of the proceeds before paying the same to the person presenting the draft.

(October 9, 1914.)

CROSS APPEALS from an order of the District Court for Freeborn County granting a new trial after dismissing an action to recover the proceeds of a draft deposited by plaintiffs in the defendant bank to pay for certain shares of stock and paid out by the defendant bank to a third person. Affirmed.

The facts are stated in the opinion.

Messrs. **T. A. Kingland** and **Mayland & Peterson**, for plaintiffs:

The appellant bank and its cashier did not cash the draft in question in the usual course of business.

Norton, Bills & Notes, § 159, pp. 233, 234, 258; Dispatch Printing Co. v. National Bank, 109 Minn. 440, 50 L.R.A.(N.S.) 74, 124 N. W. 236; Sims v. United States

Headnotes by HOLT, J.

Note. — Does the fact that a draft or check is payable to the order of a bank put it upon inquiry as to right or title of holder.

Research has disclosed little authority on the above question, and that found is conflicting. The conclusion of the United States Supreme Court in Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 33 L. ed. 747, 10 Sup. Ct. Rep. 450, infra, seems opposed to that of the court in BJORGO v. FIRST NAT. BANK; but there are several cases supporting the latter decision. Of the latter class, in accord with the decision in the BJORGO CASE, and cited therein, are Bristol Knife Co. v. First Nat. Bank,

Trust Co. 103 N. Y. 472, 9 N. E. 605; Rowe v. Scott, 28 S. D. 145, 132 N. W. 695; Stewart v. Gregory, C. & Co. 9 N. D. 618, 84 N. W. 553; Doubleday v. Kress, 50 N. Y. 413, 10 Am. Rep. 502; Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295; William Deering & Co. v. Kelso, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 59 L.R.A. 657, 93 Am. St. Rep. 113, 65 N. E. 136; 3 Randolph, Com. Paper, 1451; 1 Randolph, Com. Paper, § 362; Kerr v. People's Bank, 158 Pa. 305, 27 Atl. 963; Coffin v. Henshaw, 10 Ind. 277; Tiedeman, Com. Paper, 77, 312, 431.

Where a party has knowledge of facts sufficient to put him on inquiry, and neglects to make that inquiry, and thereby suffers loss, such loss must be attributed to his own negligence.

29 Cyc. 1113–1115, notes 5 & 6; Union Nat. Bank v. Mailloux, 27 S. D. 543, 132 N. W. 168; Rowe v. Scott, 28 S. D. 145, 132 N. W. 695; Norton, Bills & Notes, § 159, pp. 233, 234; Randolph, Com. Paper, 2d ed. § 362; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; Bispham, Eq. 5th ed. 268.

The appellant bank and its cashier were grossly negligent in cashing the draft without making any inquiries, and gross negligence constitutes bad faith.

Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402.

If Haugan be considered the agent of the plaintiffs in making the deposit in defendant's bank, then it devolves on it to show that he had authority to receive money represented by draft, and the bank or its cashier paid the money to him at their peril.

Pluto Powder Co. v. Cuba City State Bank, 153 Wis. 324, 141 N. W. 220; Sims v. United States Trust Co. 103 N. Y. 472, 9 N. E. 605; Whitaker v. Ballard, 178 Mass. 584, 60 N. E. 379; Kerr v. People's Bank, 158 Pa. 305, 27 Atl. 963; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Coffin v. Henshaw, 10 Ind. 277; Mechem, Agency, § 337.

The rule that when one of two innocent parties must suffer from the act of a third person he shall sustain the loss who has enabled the third person to do the injury, does not apply to the plaintiffs.

Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 117 Am. St. Rep. 333, 77 N. E. 295.

The draft was payable to "order," and not to "bearer," and the bank was put upon inquiry by the draft itself.

Norton, Bills & Notes, 1893 ed. § 159, pp. 233, 234; Sims v. United States Trust Co. 103 N. Y. 472, 9 N. E. 605.

To pay the draft to B. B. Haugan would not be in "due course of business," because it could only be paid in due course to the bank itself, and the mere fact of possession would not give B. B. Haugan the right to demand payment.

Cochran v. Stein, 118 Minn. 323, 41

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41 Conn. 421, 19 Am. Rep. 517, and Sims v. United States Trust Co. 103 N. Y. 472, 9 N. E. 605. In both of these cases, banks which had paid out money on checks to one who misappropriated it were held liable, the language of the check being regarded as putting the bank upon inquiry. In the former case the check was not made payable to the order of the bank, but was indorsed by the payee to the order of the cashier of the bank, and was given to a messenger known by the indorser to be untrustworthy, instructions being given to deposit the check to the indorser's credit. The money was paid to the messenger on his misrepresentation as to the purpose for which it was desired, and he absconded with the money. The messenger was, it appears, a stranger to the bank; and the uniform practice in such cases was found to have been the crediting of checks to the account of the other party, instead of their payment, as in this instance. It is said that "the form of indorsement, 'pay to the order of the cashier,' was unnatural, if the plaintiffs intended to have the bank pay the money to the messenger. The object of this special indorsement was, undoubtedly, to prevent the bank from paying the check to anyone except the plaintiffs . . . and, under such circumstances, we think the presentation of this check at the bank by a perfect stranger, who called for the currency on it, ought to have aroused suspicion."

In Sims v. United States Trust Co. supra, a check was drawn on a bank payable to the order of the defendant trust company, with verbal directions to a messenger to whom it was given to deposit the check with the defendant; but the messenger took a certificate of deposit payable to himself, and afterwards converted the money. It was held that the trust company which had collected the money upon the check was liable to the drawer, as the check upon its face imported that the ownership of the money belonged to him, and the use of the defendant's name as payee was indicative of the drawer's intention to place the money on deposit. It was said that nothing further than this was inferable from the language of the check, which, making the funds payable only upon the order of the defendant, imposed upon it the duty of seeing that they were not, through its agency, improperly disbursed after it had received them.

On the other hand, in Armstrong v. American Exch. Nat. Bank, supra, the court, without extended discussion of the point, held that the fact that a draft was made payable to the order of the bank did not charge it with notice that the holder was not its purchaser or remitter; and a

L.R.A.(N.S.) 391, 136 N. W. 1037; Schmidt v. Garfield Nat. Bank, 138 N. Y. 631, 33 N. E. 1084; Norton, Bills & Notes, § 159, pp. 233, 234.

Messrs. **Henry A. Morgan** and **John F. D. Meighen** for defendants:

The defendant bank cashed the draft in good faith for full value and in the regular course of business. In order to charge a purchaser with notice, it is not sufficient to charge him with notice or knowledge of facts which would put an ordinarily prudent person on his guard or on inquiry. He must have knowledge or notice of such facts that his failure to make inquiry amounts to bad faith.

Park v. Winsor, 115 Minn. 256, 132 N. W. 264; Merchants' Nat. Bank v. McNeir, 51 Minn. 123, 53 N. W. 178; Dekalb Nat. Bank v. Thompson, 79 Minn. 151, 81 N. W. 765; Gale v. Birmingham, 64 Minn. 555, 67 N. W. 659; 7 Cyc. 942; note to McPherrin v. Tittle, 44 L.R.A.(N.S.) 395; Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; 1 Dan. Neg. Inst. 4th ed. § 775; Hamilton v. Vought, 34 N. J. L. 187.

The evidence shows conclusively that the negligence of the plaintiffs in intrusting Mr. Haugan with the draft without advising defendant bank, either independently or by words on the draft, was the sole cause of any loss plaintiffs may have sustained.

Timpson v. Allen, 149 N. Y. 513, 44 N. E. 171; American Exch. Nat. Bank. v. Ulm, 21 Mont. 440, 54 Pac. 563; Mann v. Dublin Cotton-Oil Co. 91 Tex. 617, 45 S. W. 373.

There is no evidence or offer to prove that the Kensett Bank made any claim to the proceeds of the draft or the disposition thereof, or that inquiry of the Kensett bank would have given the Emmons Bank any knowledge of the claimed instructions on the part of the plaintiffs.

7 Cyc. 942; Donovan v. Fox, 121 Mo. 236, 25 S. W. 915; Collins v. McDowell, 65 Minn. 110, 67 N. Y. 845; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

When one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury.

McWilliams v. Mason, 31 N. Y. 295; Walsh v. Hartford F. Ins. Co. 73 N. Y. 5; Argersinger v. MacNaughton, 114 N. Y. 540, 11 Am. St. Rep. 687, 21 N. E. 1022; State ex rel. Carroll v. Corning Sav. Bank, 139 Iowa, 338, 115 N. W. 937; Timpson v. Allen, 149 N. Y. 513, 44 N. E. 171.

As the defendant bank was conclusively shown to be a good-faith purchaser for value, the court properly excluded the evidence tending to show a defense which was available only between the plaintiffs and Haugan.

First Nat. Bank v. Busch, 102 Minn. 365, 113 N. W. 898.

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bank to which a draft payable to its own order was presented by one of its regular customers, the amount of the draft being placed to the latter's credit and the money paid out on his checks, was regarded as a bona fide purchaser for value. The previous dealings of the parties and the surrounding circumstances were such, however, as to tend to allay suspicion on the part of the bank as to the rights of the holder to the draft.

In Bank of Venice v. Clapp, 17 Cal. App. 657, 121 Pac. 299, the court, after citing the case of Sims v. United States Trust Co. supra, to the effect that where checks upon one bank payable to another are delivered to a third person, the use of the payee's name indicates the drawer's intention to lodge the money in the payee's control, said that this might be accepted as the rule in the absence of any other agreement, but that an express agreement must control the inference; and it was held in this instance that the plaintiff bank to whose order a check drawn by the defendant on another bank was payable, having paid out the money on the check to the holder thereof, a third party, and having failed to realize on the check because the defendant had stopped payment, could recover its amount from the latter, on the ground that the check in fact belonged to the third party, it having been given to and received by him from the defendant in lieu of cash.

A case bearing upon the question here considered is Weirick v. Mahoning County Bank, 16 Ohio St. 297, in which, however, there was involved, instead of a draft or check payable to the bank, a letter addressed to it, and stating that a deposit to its credit had been made by a certain party in another bank. In this case the defendant gave a note to the plaintiff bank for the debt of a third party, and afterwards received from another bank in which he had deposited money of the third party a letter addressed to the plaintiff, stating that its account had been credited with the sum named, deposited by the defendant. The letter was indorsed in blank by the defendant, and given to the third party for deposit with the plaintiff for credit on the note; but the third party, through misrepresentation, obtained the money from the bank. It was held that the defendant was liable on the note, as the circumstances were not sufficient to put the bank on inquiry in paying the money, even though it knew that the third party was insolvent.

Generally as to rights and duty of one who receives a check or note payable to his own order from the hands of one not a party thereto, see note to Bowles Co. v. Clark, 31 L.R.A.(N.S.) 613. R. E. H.

Holt, J., delivered the opinion of the court:

The plaintiffs allege, in substance, that on or about February 21, 1911, one B. B. Haugan was soliciting subscriptions for stock in a corporation then organized by him and two other persons; that Haugan represented to plaintiffs that the corporation had an option on certain lands in Texas; that until the corporation should procure title to these lands the money paid for subscriptions to stock should be deposited in the defendant bank; that the bank and its cashier, the defendant Rasmussen, on February 25, 1911, knew of these representations, and that subscriptions were thus obtained and money paid thereon conditionally; that on last-named date plaintiffs subscribed for 20 shares of stock in the corporation, and about said date deposited in the defendant bank $600 by draft drawn to the order of and delivered to the bank as a deposit to pay for said shares of stock when the corporation should obtain title to the Texas lands, which was to be acquired on June 1, 1911; that said Haugan and one of the other two incorporators and officers of the corporation absconded about March 1, 1911; that the title to said land has never been acquired by the corporation, and the option has expired; and that plaintiffs' demand for payment of the $600 has been refused. The defendant Rasmussen demurred, and the demurrer was, by a verbal order, sustained at the time the case was reached for trial, but before the introduction of any testimony. In its answer the bank admits the demand for the money, and alleges that B. B. Haugan presented at its banking house in the usual course of business a $600 draft, being the draft referred to in the complaint, drawn upon the Commercial National Bank of Chicago by the Kensett Bank of Iowa, dated February 25, 1911, and payable to the order of the defendant bank, and that, at the request of Haugan, in good faith, without knowledge or notice that plaintiffs, or either of them, claimed any interest in the draft or the proceeds, the defendant bank paid the full sum of $600 to Haugan. Other allegations of the complaint were denied. Plaintiffs interposed a demurrer to the answer, which was overruled by a verbal order at the same time that the demurrer of the defendant Rasmussen was submitted. The evidence of the alleged agreement between plaintiffs and Haugan as to how the proceeds of the draft should be disposed of having been excluded, in the absence of any proof that the bank had any knowledge thereof, and the form of the draft not being deemed sufficient notice to charge the bank with negligence in following Haugan's directions in paying the money, the court dismissed the case on the merits. Thereafter plaintiffs moved for a new trial, alleging various errors, among others the rulings on the demurrers. The court granted a new trial upon the sole ground that it was for the jury to say whether the fact that the draft was made payable to the defendant bank was sufficient to put the bank "upon notice as to the character of the transaction between plaintiffs and Mr. Haugan . . . which notice upon inquiry would have led to knowledge that Mr. Haugan was not entitled to the proceeds of said draft." Both parties appeal.

There is nothing to plaintiffs' appeal. It is clear that, having obtained what they asked—a new trial—they are not aggrieved. If the record shows errors which necessitate a new trial, the order will stand, although the error assigned as the sole ground by the court for its action should be no error at all.

The order overruling plaintiffs' demurrer to the bank's answer is not appealable, even if it could be said to be embraced within the scope of the notice of appeal. But we do not think their notice is so framed that the rulings on either demurrer are properly before us. When the defendant Rasmussen's demurrer was sustained he dropped out as a party, so that the subsequent trial, dismissal, and order granting a new trial, did not affect him. Therefore the only question for review relates to the correctness of the order granting a new trial, challenged by the appeal of the bank.

The contention of plaintiffs that the order is, as to the bank, not appealable, is not sound; for the order expressly states that it was granted exclusively upon an error occurring at the trial, and is thus within the terms of the statute. Gen. Stat. 1913, § 8001, subdiv. 4.

We come, then, to the question whether the dismissal on the merits was error. The basis of plaintiffs' cause of action is perhaps somewhat obscure. It is alleged that the money paid for stock subscriptions should be deposited in the defendant bank; but there is no allegation that it was the money of the several subscribers. The reasonable inference is rather that it belonged to the corporation, but was to remain in the bank until the title of certain land was acquired by it. Nor is it alleged that plaintiffs' subscription was conditional. The gist of the allegations is that plaintiffs made a special deposit with the bank of $600, which was to pay for the shares of stock purchased by them when the corporation acquired the land mentioned. This, however, is not deemed material, under the view taken by the majority of the court, for the

defendant bank admits collecting the draft, and cashing it, or paying the proceeds to Haugan, who presented the same. The question is: Was there sufficient evidence in the fact that the draft was payable to the order of the defendant bank to put the bank on inquiry as to the ownership or disposition of the proceeds, so that it justified a submission of the bank's liability to the jury when plaintiffs rested? Nothing appeared on the face of the draft disclosing plaintiffs' interest; and in that the case at bar differs from Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517, and Sims v. United States Trust Co. 103 N. Y. 472, 9 N. E. 605, relied on by plaintiffs, where checks made payable to the bank (held liable) indicated who was the owner of the funds. We, however, think the fact that the draft being payable to the bank, instead of to Haugan, who presented it and claimed ownership, was so out of the ordinary mode of doing business, if Haugan was entitled to the proceeds, that it placed a duty upon the bank to take some precautions before paying out the money. It is therefore considered that the court erred when dismissing the case on the merits, and properly granted a new trial.

The writer would concur in this disposition of the appeal were it not for these facts appearing: Plaintiffs pleaded a special deposit; they intrusted Haugan to make it for them without disclosing, on the face of the draft or otherwise, their identity or ownership of the funds; the cashier of this bank knew Haugan, knew that he was taking subscriptions for shares of stock and receiving payment, having himself bought and paid Haugan for stock a few days before; there was not the slightest proof, or offer of proof, that, had the defendant bank communicated with the drawer bank, any information could have been obtained as to plaintiffs' ownership, or alleged agreement with Haugan; and furthermore, the plaintiff Bjorgo testified that Haugan bought the draft from the bank, paying therefor to the extent of $300 with the personal check of Bjorgo executed and delivered to Haugan in payment of his part of the stock subscription. It seems to me, taking the whole evidence as it stood when the court dismissed the case, it did not justify a recovery. Plaintiffs had chosen Haugan to do their business with the bank without disclosing themselves; the bank was in a measure justified in acting on his directions; it undoubtedly paid out the money in good faith, believing Haugan owned it or had authority to obtain the same; and I think the rule "that, when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third party to do the injury," should protect the bank here, the same as in the very similar case of Timpson v. Allen, 149 N. Y. 513, 44 N. E. 171, where the rule was stated as above and applied.

On both appeals the order of the court is affirmed.

NEW MEXICO SUPREME COURT.

ABEL MARTINEZ, Appt.,
v.
JUAN VIGIL, Admr., etc., of Donaciano Vigil, Deceased.

(— N. M. —, 142 Pac. 920.)

Damages — conversion of personalty.

1. Ordinarily, and except in special circumstances not present in this case, the measure of damages for the conversion of personal property is the value of the property at the time of conversion, and interest.

Trial — instruction — damages.

2. An instruction in such case, which submits to the jury as the measure of damages both the value of the property at the time of conversion and the value of its use during the time of its detention, is erroneous.

(August 7, 1914.)

APPEAL by defendant from a judgment of the District Court for Union County in plaintiff's favor in an action brought to recover damages for conversion of certain property conveyed by a bill of sale, and for

Headnotes by PARKER, J.

Note. — Value of use of property as element or measure of damages in action for conversion of personal property.

This note is concerned with damages for use of converted property, and not with damages for detention of such property, and is limited, therefore, to cases involving actions for the value of converted property, and does not include cases where the property has been returned to the owner, or where the action itself is brought for the purpose of recovering the specific property.

Practically all the courts seem to be in harmony with MARTINEZ v. VIGIL in holding, as a general proposition, that the value of the use of converted property is not recoverable as damages in an action for conversion. Tatum v. Manning, 9 Ala. 144 (use of slave); McGowan v. Lynch, 151 Ala. 458, 44 So. 573 (use of mare); Blaisdell v. Scally, 84 Mich. 149, 47 N. W. 585 (use of piano in continuing musical education); Hinds v. Terry, Walk. (Miss.) 80 (use of slave); Polk v. Allen, 19 Mo. 467 (hire of slave); Funk v. Dillon, 21 Mo. 294 (serv-

the cancelation of the bill of sale. Reversed.

The facts are stated in the opinion.

Mr. **J. Leahy**, for appellant:

If damages could be allowed at all for the alleged conversion, the same would consist of the reasonable value of the property at the time of the unlawful conversion, if such there was, as disclosed by the evidence, and legal interest thereon to day of trial.

13 Cyc. 170; Sutherland, Damages, 2d ed. § 105; Edwards v. Beebe, 48 Barb. 106; Cunningham v. Sugar, 9 N. M. 105, 49 Pac. 910.

When plaintiff sued for the value of the property, it was error to allow damages for the use thereof.

Sherman v. Clark, 24 Minn. 37; Barney v. Douglas, 22 Wis. 464.

Mr. **Hugh J. Collins**, for appellee:

The general rule for the measure of damages for the wrongful detention of personal property is the value of the use of that property during the detention, coupled with the actual value of the property if not returned.

Hoyt v. Fuller, 43 C. C. A. 466, 104 Fed. 192; Fullerton Lumber Co. v. Spencer, 81 Iowa, 549, 46 N. W. 1058; Chambers v. Upton, 34 Fed. 473; DePalma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; Pridgin v. Strickland, 8 Tex. 427, 58 Am. Dec. 124; McCarthy v. Cabrera, 17 Tex. 629.

Parker, J., delivered the opinion of the court:

This is an action for damages for the conversion of the sheep, cattle, and horses which were conveyed by a certain bill of sale, the cancelation whereof is also sought in the same proceeding. There was an attachment issue in the case, and counsel have devoted much of their briefs to questions arising upon the sufficiency of the amended attachment affidavit. We do not understand the materiality of the discussion, for the reason that no judgment was rendered upon the attachment issue. There is a recital in the judgment that the court had di-

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ices of slave); Dakin v. Elmore, 127 App. Div. 457, 111 N. Y. Supp. 519 (use of flue rollers, swedge, and caulking tools); Hofreiter v. Schwabland, 72 Wash. 314, 130 Pac. 364 (use of house).

This rule is based on the fiction that the owner parts with his title at the time of conversion, and that the measure of damages should, therefore, be the value of the property at the time of conversion, together with interest thereon.

Thus, the abstract of the unreported case of Levi v. Stallard, 6 Ky. L. Rep. 656, says: "In actions for conversion of personal property the value of the property at the time of its conversion, with interest, is the general and recognized rule for measuring damages. The plaintiff cannot recover the value of the property and also the value of its use by the defendant."

And in Texarkana Water Co. v. Kizer, — Tex. Civ. App. —, 63 S. W. 913, an action for the conversion of a pipe line, it is held that the proper measure of damages is the value of the property, with interest; and that no circumstance is shown why damages should be assessed for rent for such property.

And under a Code provision limiting the recovery for conversion to the value of the property at the time of the conversion, no recovery can be had for the use of converted horses. Lynch v. McGhan, 7 Cal. App. 132, 93 Pac. 1044.

A slightly different rule is laid down in Cutler v. James Goold Co. 43 Hun, 516, where it is held that an allowance of damages for the use of a converted carriage up to the time of the decision is improper, and that, "assuming that its place could reasonably have been supplied by another, the value of the use as damages in this case should . . . have been limited to a reasonable time within which to do that, after the sale of the carriage was made by the defendant."

In Sunny South Lumber Co. v. Neimeyer Lumber Co. 63 Ark. 268, 38 S. W. 902, where an owner of a sawmill and machinery made such use of it as amounted to conversion of the interest of one who held a mortgage thereon, damages for the rental thereof were refused on the ground of the owner's peaceable acquisition of possession, and his claim to such possession as a matter of right.

But there seem to be grounds for an exception to the general rule in a case where the plaintiff in the action of conversion is entitled only to the use of the property.

Thus it is held in Hickok v. Buck, 22 Vt. 149, that where the owner of a farm, who has contracted to furnish his lessee with a horse during the term of the lease, takes the horse away from his lessee, the lessee may recover, in an action of trover, the value of the use of the horse for the remainder of the term of the lease.

A second exception is made in Arwine v. Arwine, 3 Tex. App. Civ. Cas. (Willson) 193, on the ground of the wilful commission of the tort, in which case it is held that where mules are taken from the vendee's possession secretly in the night by the vendor, who has parted with title therein, the circumstances constitute legitimate grounds for assessing the reasonable value of their use as a part of the damage.

And formerly an exception was made in case of the conversion of slaves.

Thus it is said in Banks v. Hatton, 1 Nott & M'C. 221, that "in the action of trover the correct measure of damages is the value of the property and interest there-

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rected judgment upon the attachment issue, but we find no such judgment in the record. The jury rendered a verdict in favor of the plaintiff upon all the issues involved, but the court rendered simply an ordinary judgment for $3,000, which was the amount of damages awarded by the jury. It therefore becomes immaterial to inquire into the sufficiency of the attachment affidavit.

The cancelation of the bill of sale was sought on the ground that the same was obtained from appellee's decedent when he was *non compos mentis;* that he received no consideration for the conveyance, and that the same was obtained by defendant and appellant with full knowledge of plaintiff's incapacity, and with the object of overreaching him and obtaining the property for his own use and advantage; that, upon receiving the bill of sale, appellant recorded the same and converted the property to his own use. It was alleged that the value of the use of the property during the time it was held by appellant was $1,000, and recovery was sought for the same, as well as the value of the property at the time of conversion. After the filing of the amended complaint, the plaintiff died, and the present plaintiff and appellee, as administrator of his estate, was substituted.

The appellant complains of the rule as to the measure of damages which was submitted to the jury by the court, and which is, as stated in the eighth instruction, as follows: "In fixing the amount of said damages, you should take into consideration the reasonable value of said property at the time it was so taken, and also the reasonable value of its use from that time until now, and allow plaintiff such a sum as, in the exercise of sound discretion, you may believe, from all the facts and circumstances in evidence, will be a fair and just compensation for the taking and detention of said property."

This instruction was clearly erroneous. Conversion of personal property amounts to an attempt, on the part of the person doing the act, to wrongfully transfer the title to himself. The bringing of an action of trover amounts to an action on the part

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on; or, if the action be for the conversion of negroes, the value of their labor, in addition to the value of the negroes."

This rule is supported in the following cases: Schley v. Lyon, 6 Ga. 530; Clements v. Glass, 23 Ga. 395; Buford v. Fannen, 1 Bay, 273, 1 Am. Dec. 615 (*obiter*); Pridgin v. Strickland, 8 Tex. 427, 58 Am. Dec. 124.

Still another exception is found in Texas in cases where the value of the use of the converted property exceeds the amount of interest allowed by the general rule.

In upholding a verdict for the value of a wagon and its use, the court in Moore v. King, 4 Tex. Civ. App. 397, 23 S. W. 484, says: "The very fact that interest upon the value is allowed, which is now generally admitted by all of the authorities, is upon the theory that it is equivalent to the use of the property detained. When the facts of the given case show that just compensation for detention or use of the property is more than the rate of interest allowed by the general rule, why should not the reason for an application of the general rule cease, and that value of detention and use of the property be ascertained to the extent that compensates the injured party, and which results as the proximate consequences of the trespasser's wrongful act?"

So, in Waller v. Hail, — Tex. Civ. App. —, 46 S. W. 82, an action for the conversion of a mule, it is said: "The ordinary measure of damages in cases of conversion is the value of the property at the date of conversion, with interest; but in cases where it is alleged and proved that a party has been deprived of the use of the property, the value of the use will be allowed instead of interest."

And see Pridgin v. Strickland, supra.

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Even in cases where it may be permissible to assess damages for the use of property, recovery cannot be had both of the highest value of the converted property between the time of conversion and the trial and the value of the use of the property during such time. Hair v. Little, 28 Ala. 236; Jaques v. Stewart, 81 Ga. 81, 6 S. E. 815; Langdale v. Bowden, 139 Ga. 324, 77 S. E. 172.

The exception as applied by the Texas cases seems to accord with practical justice and equity in the circumstances which evoke it. Nor does it seem that the theory that the owner parts with his title at the time of the conversion should form an insuperable objection to the exception, since that theory rests upon the fiction of relation back from the time the plaintiff elects to treat the taking as a conversion to the time of the taking, and that fiction should yield in the exceptional case when the value of the use of the property between the time of taking and election to treat it as a conversion exceeds the interest on the value of the property during that time. Doubtless however, the exception should not be applied so as to permit the recovery of the excess of the value of the use of the property over the interest unless the plaintiff's loss of that excess may be regarded as the proximate result of the taking of the property by the defendant, rather than of the plaintiff's fault in failing to replace the property promptly. Unless such an exception is allowed, there is apparently no way adequately to compensate one whose lack of capital prevents him from replacing the converted property until he has recovered its value from defendant, without depriving him of his election to bring trover rather than replevin. E. L. D.

of the owner to ratify that which was before illegal, and to make it legal. The title then passes completely as of the date of the illegal taking. Hence the rule that the measure of damages for conversion is the value of the property at the time of conversion, with interest. 2 Sedgw. Damages, 9th ed. § 493; 4 Sutherland, Damages, 3d ed. § 1109; 13 Cyc. 170; Cunningham v. Sugar, 9 N. M. 105, 49 Pac. 910.

When, however, the property is returned to the owner, either voluntarily, or at his suit, or by purchase by him, an entirely different principle intervenes. In that case compensation to him would be measured, not by the value of the property attempted to be converted, but by the deterioration in value, if any, between the time of the illegal taking and the return to the owner, the reasonable value of its use, if it was of such a character as to be valuable for use, during the period of detention, costs and expenses in recovering the same, and perhaps other items in special circumstances. In this way the injured owner would be fully compensated, and this is always the object of the law.

The two principles above stated are necessarily antagonistic and can have no concurrent application in any given case. If an owner elects to ratify a conversion of his property, and thus effect a transfer of the title thereon to the trespasser, he no longer owns the property, has no right to its use, and is damaged only to the extent of its value and interest. If, on the other hand, he disavows the attempted conversion and recovers the property, it was his property all the time, and he may recover for loss of its use, if valuable for use, during the time of its detention. He cannot have both the value of the property at the time of the conversion and the value of its use. This would seem to be clear on reason, and is supported by authority.

"Ordinarily the plaintiff cannot recover the value of the use, because he recovers the value of the property as of the time when it was taken from his possession, very much as if it were the case of a forced sale. Consequently it is error to render judgment for rent or hire." 2 Sedgw. Damages, 9th ed. § 493a.

"Although the conversion generally deprives the owner of the property, it does not necessarily do so. The property may, on return by the wrongdoer, be accepted. In that case, of course, the measure of damages is not the whole value of the property, but compensation for the injury done to the property, which would usually be the value of the use or interest on the value of the property while it was withheld from the plaintiff, together with the deterioration in its market value, if any." Id. § 494.

"The reason of the rule that the value of the goods, with interest, is the measure of damages where the property has not been restored to the owner is that such value is equal to the goods themselves; and interest thereon is the legal damage for withholding such value. But, where the property is returned to the owner, the reason for allowing interest ceases after that time; and, in place of interest for its previous detention, compensation for the use, if valuable, should be allowed." 4 Sutherland, Damages, 3d ed. § 1139.

In Texarkana Water Co. v. Kizer, — Tex. Civ. App. —, 63 S. W. 913, it is said: "The court erred, however, in rendering a judgment for the sum of $1,250, when, by its findings, the value was only $1,200. There was also error in rendering judgment for $80 as rents for said property after the bringing of said suit. Ordinarily the measure of damages for wrongful conversion of property is its value at the date of conversion, with legal interest from that date."

In Ewing v. Blount, 20 Ala. 694, followed in Renfro v. Hughes, 69 Ala. 581, it is said: "The reason of the rule that the value of the goods, with interest, is the measure of damages, where the property has not been restored to the owner, is founded on the idea that the value of the goods recovered is equal to the goods themselves; and interest on that value is the legal damages resulting from withholding such value. But, when the property is returned to the owner, then the foundation for allowing interest is gone, for its value cannot be recovered; and we must then consider the plaintiff as the owner of the property, who has been wrongfully deprived of its use for a time. Consequently no other rule will do complete justice than to allow a recovery of damages equal to the loss sustained; and this can only be done by allowing damages equal to the value of the use or service of the property."

See also Cutler v. James Goold Co. 43 Hun, 516; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Curtis v. Ward, 20 Conn. 204.

In considering the general rules above mentioned, it is to be borne in mind that they are not inflexible, and that they admit of certain more or less well-defined exceptions. The object of any rule is to afford just compensation for the injuries received by the plaintiff. Thus, articles having no market value, but having special value to the owner, may be valued according to the latter standard. Articles, the value of which are subject to great and rapid fluctuation, may be assessed at the

highest value between the time of conversion and the time of bringing suit, according to the doctrine in some states. Work animals and vehicles having a daily earning capacity furnish reason for awarding compensation according to the value of their use, in some of the states. Many other special circumstances might authorize a departure from the general rules above mentioned, but it is sufficient to say that in this case no such special circumstances are shown, and that therefore the general rules apply.

We have examined the cases cited by counsel for appellee, and find that they all are cases where the property had been returned to the owner, and the question was as to the value of their use during the period of detention, or are cases otherwise different in circumstances. They therefore have no application to this case; the property here not having been returned by the alleged trespasser.

It follows, from the foregoing, that the trial court committed error in submitting to the jury a measure of damages which included both the value of the property at the time it was converted and the value of its use during the period of detention.

For the reasons stated, the judgment of the lower court will be reversed, and the cause remanded, with instructions to award a new trial; and it is so ordered.

Roberts, Ch. J., and **Hanna**, J., concur.

NORTH CAROLINA SUPREME COURT.

W. A. SAWYER, Appt.,
v.
J. E. WILKINSON.

(166 N. C. 497, 82 S. E. 840.)

Bailment — animal — liability for loss.

An undertaking by one hiring a mule for work to return it in as good condition as when he received it does not render him liable for its accidental destruction by fire, in the absence of anything to show fault or negligence on his part.

(September 16, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Hyde County in his favor for a less sum than claimed in an action brought to recover the value of property which defendant had hired from plaintiff for a period of two weeks, and which was accidentally destroyed by fire during that time. Affirmed.

Statement by **Brown**, J.:

This is a civil action, tried before Ferguson, Judge, spring term, 1914, Hyde county, superior court, upon these issues:

(1) Did the defendant contract with the plaintiff that he would return and deliver to plaintiff at the end of two weeks the mule and harness in as good condition as he received them, as alleged? Answer: Yes.

(2) Did the defendant comply with said contract? Answer: No.

(3) What was the value of said mule and harness? Answer: Mule $100 and harness $5.

(4) Was said mule and harness destroyed by the negligence of the defendant? Answer: No.

The plaintiff tendered judgment for $105, which his honor refused and rendered judgment against the defendant for the sum of $5 and costs. The plaintiff excepted and appealed.

Messrs. **S. S. Mann** and **Ward & Thompson**, for appellant:

Plaintiff was entitled to recover for the mule.

Robertson v. Plymouth Lumber Co. 165 N. C. 4, 80 S. E. 894; Sprinkle v. Brimm, 144 N. C. 401, 12 L.R.A.(N.S.) 679, 57 S.

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Cases dealing with the rights and liabilities of common carriers and innkeepers as bailees are excluded herefrom.

As to presumption and burden of proof as

E. 148; Robinson v. Threadgill, 35 N. C. (13 Ired. L.) 39.

Messrs. **Spencer & Spencer, John Tooley, and Ward & Grimes**, for appellee:

The contract of hiring contained no more than the law raised by implication; to wit, to return the mule; and his return is excused by an intervening impossibility to perform which operates as a release from the obligation of the contract.

Seevers v. Gabel, 94 Iowa, 75, 27 L.R.A. 733, 58 Am. St. Rep. 381, 62 N. W. 669; Stewart v. Stone, 14 L.R.A. 218, and notes, 127 N. Y. 500, 28 N. E. 595; Grady v. Schweinler, 15 Ann. Cas. 162, note; 5 Cyc. 204; Howeth v. Anderson, 25 Tex. 557, 78 Am. Dec. 538; Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814; Pratt v. Waddington, 21 Ann. Cas. 843, note; Fortune v. Harris, 51 N. C. (6 Jones, L.) 532, 1 Am. Neg. Cas. 708; Chaffin v. Lawrence, 50 N. C. (5 Jones, L.) 179; Henderson v. Bessent, 68 N. C. 224, 1 Am. Neg. Cas. 925; Heathcock v. Pennington, 33 N. C. (11 Ired. L.) 640; Stone v. Case, 34 Okla. 5, 43 L.R.A. (N.S.) 1168, 124 Pac. 960.

Brown, J., delivered the opinion of the court:

The plaintiff hired a mule to the defendant for plowing purposes for a period of two weeks. The evidence tends to prove, and the jury have found, that the defendant contracted that he would return the mule at the end of two weeks in as good condition as he received it. Before the expiration of two weeks, the mule, together with some of the defendant's stock, was burned to death by a fire, which burned the defendant's stables. It is admitted that the

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to care or negligence in respect to subject of bailment, see note to Stone v. Case, 43 L.R.A.(N.S.) 1168.

I. In general.

In Kettle v. Bromsall, Willes, Rep. 118, it is said that if goods are delivered to be kept safely, though the bailee is robbed of them, detinue will lie against him; but if the goods are delivered to him to take care of as his own goods, it is a good plea that he has been robbed of them. To the same effect is Southcote's Case, 4 Coke, 83b.

And in 2 Blackstone Commentaries, 453, it is said that if the bailee "undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own." The above is quoted with approval in Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502.

As a possible ground of distinction and reconciliation between cases holding the bailee liable on an express undertaking for the safety of the property for loss or damage thereto without his negligence, where there is a mere pledge or storage, and cases holding him not liable on similar contracts where the goods are to be carried or work to be performed thereon, it was said in Jaminet v. American Storage & Moving Co. 109 Mo. App. 257, 84 S. W. 128: "That when property is bailed for hire to a party who is to do something with it for the bailor,—like transporting it,—an agreement to do so safely is referred to the task to be performed, and held to mean no more than that skill and care will be devoted to that task; but when the bailee is not employed to do anything with the property, yet nevertheless binds himself to return it safely, the obligation is taken to be general, and without exception, as none is named, and there is no particular undertaking in regard to the property to which the obligation to return in safety can be referred and confined."

II. Express contract to return property.

a. In general.

In the ordinary contract of bailment, it would seem that by a mere promise on the part of the bailee to return the property the parties do not intend that he should incur a greater obligation than the law would otherwise imply. And it has been generally so held.

For instance, a mere verbal promise by one who hired a wagon for a month to return the same at the end of the month in good order was held, in Field v. Brackett, 56 Me. 121, not to render the hirer liable where the wagon was stolen during the month without his negligence. The agreement was regarded as imposing on the bailee only the ordinary obligation in cases of bailment, and not as rendering him an insurer against losses occurring without his fault.

And a provision in a charter party that the charterer would use the boat in a certain manner, "and return her to the owner" at a certain place, was construed in Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. 723, as a mere expression of the obligation to return the boat which would otherwise be implied, and not as rendering the charterer liable for loss of the boat without his negligence. It was said that under the general rule of bailments the bailee is not liable for loss without his fault, and that no sound reason appears for excepting a charter party from such rule unless the liability as insurer is based on a provision stronger than the mere covenant for a return of the property at the end of the term, —a covenant which is clearly implied without expression.

So, an agreement between a brewing company and a malting company, whereby the former agrees to deliver to the latter a certain number of bushels of barley to be malted, and the latter agrees to receive the same, haul it to its plant, store and malt the

fire was not caused by any negligence of the defendant.

In refusing to give judgment for the value of the mule, we think his Honor was correct. His Honor gave judgment for the value of the harness, because there is no evidence that the harness was destroyed. The transaction between the plaintiff and the defendant constituted an ordinary bailment, and the contract contained no provisions or conditions which have been violated touching the stabling or the management of the mule. Nor does the contract contain any condition to pay for the mule in case it is not returned.

As we view the contract, it is an ordinary bailment, determined by the doctrines of the common law relating to bailments for hire. It is not a contract of insurance, and the defendant is only liable in case he fails to exercise reasonable care in the preservation and protection of the property bailed. There is a class of cases which fastens liability upon the bailee upon failure to return the property, or its value in money. In these cases the bailee is regarded as an insurer. Grady v. Schweinler, 16 N. D. 452, 14 L.R.A.(N.S.) 1089, 125 Am. St. Rep. 674, 113 N. W. 1031, 15 Ann. Cas. 161; Drake v. White, 117 Mass. 10.

The contract of hiring in this case imposes no more upon the bailee by its terms than the law raises by implication; namely, to return the mule, and its return is excused by intervening impossibility to perform, which operates as a release upon the obligation of the contract in the absence of neglect on the part of the bailee.

An interesting case on all fours with this is Seevers v. Gabel, 94 Iowa, 75, 27 L.R.A. 733, 58 Am. St. Rep. 381, 62 N. W. 669, in which it is held that a hirer of personal

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barley, "and deliver" the malt to the brewing company at its brewery, does not bind the malting company absolutely to delivery of the malt, irrespective of inevitable accident or destruction of the property without its negligence, or enlarge its liability to that of an insurer for the return of the property. So that the malting company was held not liable where, without its negligence, the malt was destroyed by the burning of its warehouse. Standard Brewery v. Bemis & C. Malting Co. 171 Ill. 602, 49 N. E. 507.

But in Bagley v. Brack, — Tex. Civ. App. —, 154 S. W. 247, the court intimated that had an express contract been proved to return a colt given to a bailee to pasture, it would have been no defense to an action for breach of the contract that the bailee was without negligence.

b. Hiring of slaves.

It has generally been held that an express agreement by the hirer of a slave to redeliver the slave at the end of the term is not an absolute covenant for redelivery in any event, but that the hirer is excused if, without his negligence, the slave escapes and cannot be apprehended by due diligence. Graham v. Swearingen, 9 Yerg. 276; Ellett v. Bobb, 6 Mo. 323; Perkins v. Reeds, 8 Mo. 33; and Singleton v. Carroll, 6 J. J. Marsh. 527, 22 Am. Dec. 95.

The same rule has been applied in the case of the death of the slave without the bailee's negligence before the expiration of the term. Young v. Bruces, 5 Litt. (Ky.) 324; Perry v. Hewlett, 5 Port. (Ala.) 318.

But in Alston v. Balls, 12 Ark. 664, it was held not to be a defense to an action that the slave escaped without the negligence of the bailee, and could not be apprehended by due diligence, where the hirer expressly agreed to return him on a certain day. The court distinguished cases where the failure to return was due to the slave's death without the hirer's negligence, which was an act of God, and cases where such failure was due to its escape, as in this instance.

The rule that the death of the slave relieves the hirer from liability for breach of an express covenant for redelivery was applied in Harris v. Nicholas, 5 Munf. 483, although it appeared that the wound from which the slave died was caused by excessive whipping by an overseer; the court taking the position that the covenant by the hirer was not to insure the return of the slave, and that, admitting that the overseer in question was the servant or agent of the hirer, the act causing the death was not authorized nor committed in the usual course of the overseer's duty, but was a wilful and unauthorized trespass.

The rule that the hirer of a slave is relieved from his covenant to return the slave at the end of the term, by his death or escape without the negligence of the hirer, was approved in Keas v. Yewell, 2 Dana, 249, although the action in this case was on a bond conditioned for the forthcoming of the slave in an action to foreclose a mortgage thereon, the obligors being held relieved by the escape of the slave without their negligence.

In Perry v. Hewlett, supra, a case of death of a slave, the court distinguished between obligations imposed by law and those created by the terms of a contract, saying that in the latter case the obligation is not impaired by events which will excuse a party in the former. The distinction, however, was said to rest on authority rather than on principle. But a distinction was made between cases where an injury is produced by unavoidable accident which does not prevent the party from performing his contract, as in case of an express covenant of a tenant to leave the premises in good repair where they are injured by an act of God, and a case where an express covenant for the return of a chattel, as a horse or slave, is rendered impossible by its death.

property under an agreement to return it at the expiration of the lease in as good condition as when taken, the usual wear excepted, is not liable for its loss by fire without his fault.

The duty assumed by the defendant in this case was to exercise ordinary care for the preservation and protection of the mule, and he is chargeable only with the liability to the plaintiff for loss occasioned by his failure to discharge such duty. Mallory v. Willis, 4 N. Y. 76; Foster v. Pettibone, 7 N. Y. 433, 57 Am. Dec. 530; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595.

In Seevers v. Gabel, supra, the subject of the bailment was one "saw rig complete." The contract was to pay a stipulated rent per month and to return the property "in as good condition as it now is."

In McEvers v. The Sangamon, 22 Mo. 188, a barge was hired by the defendant under an agreement that it was "to be delivered in good order, usual wear and tear excepted." The barge was destroyed by ice without negligence upon the part of the steamboat company. The Missouri court held that the steamboat company was not liable on the contract for the nondelivery of the barge, in the absence of a finding of negligence.

In Young v. Bruces, 5 Litt. (Ky.) 324, the subject of bailment was a slave, hired until December 25, 1819, to be returned well clothed and in good condition. The slave was drowned by accident without

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Where the hirer of a slave who had been directed to return him in a certain manner, returned him in a different way, and the slave was drowned during the return, it was held that the hirer was liable for the loss. Clagett v. Speake, 4 Harr. & McH. 162. The principal point considered, however, was whether the directions as to the manner of the return had been subsequently modified.

III. Contract to return or pay for property.

For earlier cases on this point, see note to Grady v. Schweinler, 14 L.R.A.(N.S.) 1089.

A contract by the hirer of a team that if they were not in as good condition when returned as when received, he would pay for them, was construed in Wright v. Smith, 16 West. L. Rep. (Can.) 709, as meaning that if the horses were not returned in as good condition as when received, the hirer should pay for their use, and not as meaning that he should pay for any deterioration that they might suffer by reason of not being in as good a condition.

Where the plaintiff loaned to the defendant a horse on condition that he would return it at a certain time in good condition, unless he desired to purchase it, in which case, or in the event of failure to return it in good condition, by reason of accident or otherwise, the defendant should pay to the plaintiff a stated sum, and before the time for the return the horse died, it was held in Whitehead v. Vanderbilt, 10 Daly, 214, that the defendant was discharged from liability under his special contract.

See also Wilmington Transp. Co. v. O'Neil, under subd. IV. b, infra.

IV. Contract for return of property in good condition, or of similar import.

a. In general.

See SAWYER v. WILKINSON.

There is a conflict in the authorities as to whether an express undertaking by a hirer of personal property to return the same in good condition, in as good condition as received, or undertakings of similar import, bind him absolutely as to the redelivery, or whether such redelivery is excused by act of God, inevitable accident, or other injurious acts occurring without his negligence. Obviously the question depends upon the particular wording of the contract, the circumstances of the parties, and the subject of the bailment, as the intention of the parties is what it is desired to ascertain.

On the one hand, the broad rule has been adopted that a hirer of personal property under an agreement to return it at the expiration of the lease in as good condition as when taken, usual wear excepted, is not liable for its loss by fire without his fault. Seevers v. Gabel, 94 Iowa, 75, 27 L.R.A. 733, 59 Am. St. Rep. 381, 62 N. W. 669.

And under the following circumstances it has been held that a hirer of personal property is not liable for its injury or destruction without his negligence during the term of hire:

—where, in a contract of hire of a mule, the hirer agreed to return the animal at the end of two weeks in as good condition as when he received him, and the mule was lost in a fire, SAWYER v. WILKINSON;

—where, in a contract for the hire of a horse, the hirer agreed to redeliver the property on one day's notice in the same condition as when received, and the horse died before notice, American Preserves Co. v. Drescher, 4 Misc. 482, 24 N. Y. Supp. 361;

—where a lessee of furniture agreed to return "in as good a condition as reasonable use and wear thereof would permit," and the furniture was destroyed by fire. Hyland v. Paul, 33 Barb. 241, 1 Am. Neg. Cas. 921;

—where, in a contract of bailment for hire of railroad cars, it was agreed that the bailee should redeliver the cars to the bailor in the same condition as when received, ordinary wear and tear accepted, and the cars were destroyed by fire, St. Paul & S. C. R. Co. v. Minneapolis & St. L. R. Co. 26 Minn. 243, 37 Am. Rep. 404, 2 N. W. 700.

The express agreements were construed in

fault of the defendants, whereby they were prevented from returning him. The court held that the defendants were not responsible for the death of the slave without fault of the defendants.

In Harris v. Nicholas, 5 Munf. 483, the contract of bailment was construed, and the court held that the defendants were not liable for the destruction of the property, unless brought about by their own negligence. See also Maggort v. Hansbarger, 8 Leigh. 532; Warner v. Hitchins, 5 Barb. 666; Wainscott v. Silvers, 13 Ind. 497; David v. Ryan, 47 Iowa, 642; Van Wormer v. Crane, 51 Mich. 363, 47 Am. Rep. 582, 16 N. W. 686; 5 Cyc. 204; 3 Decen. Dig. Bailments, § 14, subsec. 1; Miller v. Morris, 55 Tex. 412, 40 Am. Rep. 814; Pratt v. Waddington, 23 Ont. L. Rep. 178, 21 Ann. Cas. 843; Fortune v. Harris, 51 N. C. (6 Jones, L.) 532, 1 Am. Neg. Cas. 708; Chaffin v. Lawrence, 50 N. C. (5 Jones, L.) 179; Henderson v. Bessent, 68 N. C. 224, 1 Am. Neg. Cas. 925; Heathcock v. Pennington, 33 N. C. (11 Ired. L.) 640.

The plaintiff insists that this case is controlled by our decision in Robertson v. Plymouth Lumber Co. 165 N. C. 4, 80 S. E. 894. There is quite a distinction between the two cases. It is true the court said that "under the contract as testified to by Hopkins, it is only necessary to prove a breach of the contract, namely, that the boat was not kept in good repair nor returned in good condition, and there is abundant evidence of that."

SAWYER v. WILKINSON and Hyland v. Paul, supra, as imposing no greater obligation on the bailee than the law would have raised by implication, and in the latter case it was said that the duties of a bailee are not increased by simply reducing to writing the agreement which the law implied.

On the other hand, where the defendant hired a piano from the plaintiff, and agreed to return it in as good order as when received, customary wear and tear excepted, it was held in Harvey v. Murray, 136 Mass. 377, that the defendant was liable for injury thereto by inevitable accident through the blowing over of the defendant's house.

And it has been held that a contract by the hirer of a horse to return it in good order and condition, enlarges his common-law obligation, and that he is not relieved from a failure so to return the horse by the use of reasonable and ordinary care. Barrere v. Somps, 113 Cal. 97, 45 Pac. 177, 572.

And the bailee's responsibility for injuries was said to be absolute, and not dependent on failure to employ due care and diligence, where, in consideration that the plaintiff would let him have a yoke of oxen to keep for a certain time, he promised to return the oxen at the expiration of the term in as good condition as they then were, without charge for keeping, and to pay the plaintiff any damage they might sustain while in his possession. Smith v. McGill, 27 Mich. 142.

Also in Laughren v. Barnard, 115 Minn. 276, 132 N. W. 301, a contract for the hiring of horses was construed as imposing upon the bailee the unconditional obligation to return them in as good condition as when received, and not as imposing upon him simply the duty of exercising reasonable care. The provisions of the contract as to the care and return of the property were as follows: "Said horses to be returned to . . . [the bailor] August 1, 1909. Said horses and harness to be returned in same condition as received or as good. . . . By . . . [the bailee] it is further agreed that said horses shall be properly fed and cared for, and not overworked."

So, in Commercial Electrical Supply Co. v. Missouri Commission Co. 166 Mo. App. 332, 148 S. W. 995, a contract for the hire of a motor containing a provision, "it is distinctly understood that while the motor is in your [the bailee's] possession you . . . are responsible for any damage thereto, barring ordinary wear and tear, and that after you have no further use for same you will return said motor in as good condition as when received, barring ordinary wear and tear," was construed as rendering the bailee liable for the value of the property upon its destruction by fire while in his possession, although without his negligence. The contract was construed as an absolute one by the bailee to pay any damages, with the exception stated, the court saying that the fact that the parties expressly excepted ordinary wear and tear from the damage for which the bailee was to be responsible indicated that they realized that the words "any damage" were broad enough to include every kind of damage, even ordinary wear and tear, unless expressly excepted; and that if the words "any damage" had been intended to mean only damage resulting from the bailee's negligence, it would have been unnecessary to make the exception; and that it might be assumed that by recognizing the necessity for stating exceptions, and yet stating only one, the parties intended that the comprehensive language used should otherwise be given its full effect.

The case of Commercial Electrical Supply Co. v. Missouri Commission Co. supra, was distinguished by the court from cases where the obligation of the bailee was merely to return the property, or to return it in good condition, and the obligation was rendered impossible by its destruction without his fault, or where the destruction occurred by a peril incident to the nature of the property, or of the hiring, as in McEvers v. The Sangamon, 22 Mo. 187 (destruction of a boat by ice), or where the bailee was to do something with the property for the bailor, as transporting it, and, the bailee agreeing to do so safely, the agreement was construed as referring to the manner of doing the thing, rather than the result. And the

L.R.A.1915B.

In that case it was found by the jury that the plaintiff's boat was injured by the negligence of the defendant, and that the plaintiff was damaged to the extent of $250. The boat was not destroyed by an inevitable accident, which ordinary care upon the part of the bailee could not have prevented. The boat was returned to the bailor, but in a damaged condition, and that damage brought about by the negligence of the defendant. There is a marked difference between the facts in that case and the one we are now considering.

The judgment of the Superior Court is affirmed.

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court intimated that if the fire which destroyed the property in this case had been due, for example, to friction of the motor, or other like cause, unavoidably incident to its use, the bailee might not have been liable; also that in this case there was no implied condition of the continued existence of the property, but an express provision as to liability in the event of its destruction, for the word "damage," it was said, is broad enough to include "destruction."

b. Hiring of vessels.

A clause in a contract of lease of a boat by which the lessee agrees to return the property at the expiration of the contract "in good order and condition, ordinary wear and tear excepted," has been held not to render the lessee liable for injury to the property by fire without his negligence. D'Echaux v. Gibson Cypress Lumber Co. 114 La. 626, 38 So. 476.

So, in Young v. Leary, 135 N. Y. 569, 32 N. E. 607, it was held that a contract by the charterer of a boat to redeliver the same at the expiration of the term "in the same good condition as she is now in, ordinary wear and tear excepted," was not an absolute undertaking by the charterer to redeliver, and did not obligate him for the value of the boat, where it was burned without his fault. It was said that such language implies the continued existence of the property, and as thus interpreted created no greater obligation than that which the law raised without an express promise; and that when language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.

And it has been held that an agreement in a charter party for the return of boats "in as good condition as they now are, with the exception of the ordinary use and wear" does not render the bailee an insurer against the perils of the sea or risks of navigation, and he is not liable for the loss of the boats without his negligence, in a storm. Ames v. Belden, 17 Barb. 513. It was said that a covenant to insure should never be implied, that it does not appertain to contracts of bailment, and if superadded it should only be by clear and explicit agreement; that it should not be implied from language peculiar to contracts of bailment which can receive a proper signification as importing a common-law obligation without such implication; and that the agreement in this case, being simply what the law would have implied from the nature of the contract, does not increase or vary the common-law liability of the bailee.

Also in McEvers v. The Sangamon, 22 Mo. 188, where the defendant hired a boat from the plaintiff for a stated sum per day, excluding the time the boat might be frozen in the ice, and the contract contained the words that the boat was "to be delivered in good order, the usual wear and tear excepted," it was held that the defendant was not liable for nondelivery where, without his fault, the boat was destroyed by the ice. The court took the position that whether or not the bailee entered into an absolute undertaking to return the property depends on the intention of the parties; and in this case the general undertaking to return the property in good order was not such a clear and express assumption of all risks as to render him liable, where he was prevented by an overpowering force from returning the property.

On the other hand, in Direct Nav. Co. v. Davidson, 32 Tex. Civ. App. 492, 74 S. W. 790, an undertaking by a bailee of a boat to return the same in as good condition as when received was construed as an absolute obligation to return the boat in such condition, the bailee not being relieved from liability by destruction of the boat by act of God. Such a contract, it was said, differed materially from an ordinary contract of bailment, and the rights and obligations of the parties should be determined by the special contract.

And a contract for the hire of a lighter by which the hirer agreed to redeliver the property "in the same good condition as when received," and that if it was lost or damaged to the extent that it could not be put in such condition, the hirer should pay the owner a stated sum, was construed in Wilmington Transp. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705, as rendering the hirer liable for the loss of the lighter during a storm, without his negligence. The contract to redeliver or make the payment was regarded as absolute, and the decision based on the rule that "where a party has expressly undertaken, without any qualification, to do anything not naturally or necessarily impossible under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided, in his contract."

And where a bond was given for the return of a vessel, containing an express covenant to return the vessel "in as tight, staunch, and good condition as she now is,

reasonable wear and tear excepted," it was held that performance of the conditions of the bond was not excused by the destruction of the vessel by a storm without the fault of the bailee. Steele v. Buck, 61 Ill. 343, 14 Am. Rep. 60. The court regarded the covenant as an absolute one for the return of the vessel, and said that "a distinction has been taken between implied contracts, or such as the law raises, and express contracts. The performance of duties implied by law may be excused when performance becomes impossible by inevitable accident, but a duty or charge created by the express terms of an agreement may not be so excused;" and the reason for the rule was said to be that when an event happens which will render loss to one or the other contracting parties, the party who contracts that the event shall not happen, although he may be unable to perform his contract, by reason of the act of God, shall nevertheless stand the risk and make good the loss.

Also in Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, it was held that an absolute obligation to return a yacht at the expiration of the term of hiring was imposed upon the charterer by a charter party which, after providing for the surrender of the vessel at the expiration of the term, "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," and requiring the hirer to make all repairs and to assume liability for all loss and damages, fixed in express terms the value of the vessel, and made provision for security against any loss or damage sustained by failure of the hirer to comply with any of the obligations of the contract; so that the failure of the charterer to return the vessel was not excused by its loss without his fault.

A provision in a charter party that the charterer would return the boat in as good condition as received, natural wear and tear and the act of God excepted, was construed in Alaska Coast Co. v. Alaska Barge Co. 79 Wash. 216, L.R.A.1915C, —, 140 Pac. 334, as rendering him liable for damages to the boat, caused by striking an unknown submerged object, the court making a distinction between inevitable accident and act of God, and holding that the charterer had not sustained the burden of proof that the injury in this case was caused by an act of God.

And although it was found that the injury to a boat hired by the defendant from the plaintiff occurred through the former's negligence in running over an obstruction in the river, the court intimated in Robertson v. Plymouth Lumber Co. 165 N. C. 4, 80 S. E. 894, that without proof of negligence, the defendant would have been liable for breach of an express agreement to keep the boat in repair and return it in good condition.

An agreement by the hirer of a barge to be responsible for all loss and damage, "fair wear and tear to be allowed by the owner; and, when given up, to be in good working order, with all her rigging, gear, and implements complete," was held in Schroder v. Ward, 13 C. B. N. S. 410, not to mean that when returned the barge should be absolutely in good working order, but to mean that she should be relatively so,—"good with reference to the purposes which a barge of such an age and condition was capable of being used for,—the same sort of order it was in when the hiring took place, fair wear and tear excepted." And the court was of the opinion that evidence should have been admitted to show that the barge was not in good order when hired.

A breach of a stipulation in a contract for the hire of a boat that the hirer, at the expiration of the term, shall return the boat "in like good condition as when taken, reasonable use, wear, and tear excepted," does not entitle the bailor to refuse to accept the vessel upon return in a damaged condition, and to recover her value, his remedy being an action for damages arising from the depreciation in the value of the property because of the breach of contract. Detroit v. Grummond, 58 C. C. A. 301, 121 Fed. 963, later appeal on other points in 216 Fed. 273.

Where the hirer of a yacht agreed to redeliver the yacht in the same condition in which he received it, and when it was redelivered it was not in that condition, but the blades of both propellers were bent, it was held that the owner could recover from the hirer the amount which he had paid for the repair of the blades. Hills v. Leeds, 149 Fed. 878, affirmed in 85 C. C. A. 489, 158 Fed. 1020.

A charterer of a vessel who agrees to return it in good condition, or in as good condition as when received, is not liable for damages resulting from breach of an implied warranty of seaworthiness. Bartley v. Borough Development Co. 214 Fed. 296; Auten v. Bennett, 88 App. Div. 15, 84 N. Y. Supp. 689.

An express agreement by a charterer to redeliver the vessel in as good condition as when received, reasonable wear and tear and such damage as he might not be liable to make good excepted, has been construed as subject to an implied condition that the failure to redeliver shall not be due to the fault of the owner's servant. Hahlo v. Benedict, 216 Fed. 303.

V. Contract to be "responsible" for property.

A provision in a contract between a coal company and its selling agent engaged in the operation of docks and the marketing of coal therefrom, that the company shall insure the coal consigned, and deliver it safely alongside the agent's dock, who "shall thereupon be responsible to . . . (the company) for all coal after such delivery alongside its dock," and shall insure the same, was held in Fairmont Coal Co. v. Jones & A. Co. 67 C. C. A. 265, 134 Fed. 711, not to render the consignee liable for dam-

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ages for loss of coal through the collapse of the dock without its negligence. The term "responsible" was construed as referring to the time when the duty of the bailee began, rather than as making it an insurer of the safety of the property.

And where the certificate of deposit for wheat left with a miller, for which the owner was to receive a stated amount of flour, contained a statement that the miller was not "responsible for deposit in case of fire or accident," it was held that the special agreement bound the parties, whether the contract be regarded as one of sale or bailment; and that the miller was not liable where the flour was destroyed without his negligence, by the burning of the mill. Wells v. Porter, 169 Mo. 252, 92 Am. St. Rep. 637, 69 S. W. 282.

In Grant v. Armour, 25 Ont. Rep. 7, where the hirer of a pile driver and scow agreed to be responsible for any damage thereto except damages to the engine and ordinary wear and tear, and by reason of a storm of unusual violence the scow was torn from her moorings and sunk, but was afterward raised and repaired by the hirer, it was held that he was liable for the repairs, and could not recover their amount from the owner.

See also Vigo Agri. Soc. v. Brumfiel, under VII. g. infra.

VI. Contract to insure property.

Performance of an agreement by a warehouse company to take out a policy of insurance on cotton stored with it, in the name of the owner, to be identified in the policy of insurance by the owner's individual mark, is not shown by evidence that the company covered all of the cotton in the warehouse, including that in question, with a general policy of insurance, payable to itself. Henderson Warehouse Co. v. Brand, 105 Ga. 217, 31 S. E. 551.

A bailor has a right to rely upon the representation in a warehouse receipt that the property named therein is insured for invoice amount against loss by fire, and upon destruction of the property by fire the bailee is liable to indemnify the bailor to the extent of the invoice value of the property. Schwirtz v. Woodford Distilling Co. 172 Ill. App. 67.

On the other hand, it has been held that a statement in a warehouse receipt for cotton, "all cotton stored with us fully insured," is not sufficient to constitute a contract to insure the cotton. Zorn v. Hannah, 106 Ga. 61, 31 S. E. 797; Atwater v. Hannah, 116 Ga. 745, 42 S. E. 1007.

A lessee of personal property who agrees to keep the same insured against loss by fire, and fails to take out insurance, cannot avoid liability in an action for the value of the property after it has been destroyed in a general conflagration, on the ground that the destruction was by act of God. Smith American Organ Co. v. Abbott, 11 Pa. Co. Ct. 319.

A circular issued by a firm of commission merchants to manufacturers, inviting their patronage, which contains the statement, "all consignments will be covered by insurance as soon as received in store," does not import that the firm is to be an insurer of the goods against fire, but is merely a promise that they shall be insured, and does not require that the insurance be effected in the name of the consignor, or that the policy be in his possession and control. Johnson v. Campbell, 120 Mass. 449.

A warehouse receipt which contained a condition exempting the warehousemen from liability for various causes, including loss by fire, but which contained the words, "insured $200, premium included in above rate of storage," was construed in S. E. Olson Co. v. Brady, 76 Minn. 8, 78 N. W. 864, to constitute an absolute agreement by the warehousemen to insure the goods to the amount of $200, and to render them liable to indemnify the owner against loss by fire.

And in Thompson v. Thompson, 78 Minn. 379, 81 N. W. 204, 543, a provision in a warehouse receipt, "this charge for storage shall recover loss by fire only," followed by exception from liability for damage by the elements or act of God, was held to constitute a contract by the warehouseman to insure the property against fire, and to render him liable for its value upon destruction by such cause.

In Ela v. French, 11 N. H. 356, one to whom goods were sent for sale on commission, who agreed to insure them against loss by fire, but failed to do so, was held liable for their value upon their being destroyed by fire, the principal question considered, however, being as to the measure of damages.

VII. Particular applications of special contracts.

a. Agistment.

On the theory that an express stipulation in a contract or bailment as to the care of the property excludes an implication upon the same point, an instruction was approved in Dunnell v. Davisson, 85 Ind. 557, that if, by the agreement of the parties, the defendant undertook to feed and care for the plaintiff's cattle, and the extent and character of the feed and care were agreed upon, the law would require of the defendant a substantial compliance with the contract, and no more; and that the question was not what should have been reasonable and proper care under the circumstances, provided the parties by their agreement stipulated as to the extent and character of the care and feed which the defendant should bestow upon the cattle.

It has been held that the same liability on the part of the bailee for loss of cattle arises as under the general principles of law applicable in the absence of a special contract, for their care and return, where the contract is that the bailee shall pasture, feed, and care for cattle, "caring for them in all respects as he would for similar property of his own," and in case of the death or

loss of any of the cattle through his fault, neglect, or improper care, he shall make just remuneration, but that he should not be liable for the return of the cattle in case of the death of any from disease, old age, or other causes which, by reasonable and ordinary care, he could not have prevented. Mattern v. McCarthy, 73 Neb. 228, 102 N. W. 468.

The agreement by the bailee in the above case to give the cattle the same care as his own was construed as meaning that he would give the cattle the same care that an ordinarily prudent man would exercise under like circumstances. Ibid.

A contract for "good" care and feeding of a certain herd of cattle was construed in Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012, as meaning such care and feeding as an ordinarily prudent man would bestow on his own cattle under like circumstances.

Under a contract of agistment, by which the agister agrees to employ a man who would give his entire attention to looking after the stock in the pasture, and who would see that they were properly salted, and had access to water, the contract providing that, having complied with the above, the owner of the pasture should not be responsible nor guarantee the return of the stock, the owner of the pasture is liable for stock lost because of an insufficient fence around the pasture in which it was contemplated the cattle should be kept, although fencing was not mentioned in the contract. Glassey v. Sligo Furnace Co. 120 Mo. App. 24, 96 S. W. 310.

An agister who agrees to keep cattle "constantly in good pasture (not less than 3 acres per head), with an abundance of fresh water," is not prejudiced in an action for loss of the cattle by an instruction that his obligation was to keep the cattle constantly in good pasture, "but not necessarily the very best pasture." Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026.

It was held also in Ware Cattle Co. v. Anderson, supra, that an instruction was properly refused to the effect that the bailee was only required to furnish pasturage of an average quality and quantity in the vicinity where the contract was to be performed.

The contention was also denied that under the above contract the bailee was to furnish only an average quality of pasture, depending on the season and climatic conditions. Ibid.

A contract by which an agister agrees to be responsible for the loss of any cattle that may get out of the pasture does not require him to pay for the loss of cattle which, being pelted by the hail and rain and driven by the wind, in an attempt to find shelter from an unusually severe storm, break through an otherwise sufficient fence, follow a creek, and, by the severity of the storm, are swept into the current and drowned. Wells v. Sutphin, 64 Kan. 873, 68 Pac. 648.

Failure of an agister to produce the brands on missing cattle, the production being impossible because, before the death of the cattle was discovered, the carcasses were mutilated and the brands obliterated, does not render him liable for the value of the cattle under a contract by which he agrees to return the full number of cattle received, unavoidable accidents excepted, and in the event of such accident to furnish evidence thereof, "which shall be the brand upon said missing cattle," where it is conceded that the cattle died without fault or negligence on the part of the agister. Humbert v. Crump, 66 Kan. 57, 71 Pac. 239.

And a contract for the care of a flock of sheep, by which the bailee agrees to redeliver at the expiration of the term the same number of sheep in good, marketable condition, does not require the redelivery of strong and healthy sheep, where it appears that when the sheep were delivered to the bailee, they were infected with a disease called the foot rot, of which the bailor had knowledge, but which was unknown to the bailee, and which the latter unsuccessfully attempted to overcome. Peck v. Brewer, 48 Ill. 54. The true meaning of the contract, it was said, was that, the disease being afterwards discovered, the sheep redelivered should be as good and marketable as could reasonably be expected, having the disease among them.

A person who takes cattle to keep and feed, and agrees to guarantee the owner against all loss or damage except by "unavoidable accidents," is not liable for the value of cattle which, on account of their bad condition when received, and the severity of the winter, without the fault of the bailee, die by reason of huddling together in a stable and falling down in a heap. O'Keefe v. Talbot, 84 Iowa, 233, 50 N. W. 978.

An absolute undertaking to return a colt received for pasturage, such as would render the bailee liable for damages in case of failure to return, although he was without negligence, is not shown by proof that he agreed to care for the colt, to treat it for minor sickness or injury, and to notify the bailor if it became seriously sick or injured. Bagley v. Brack, — Tex. Civ. App. —, 154 S. W. 247.

A person who receives cattle to feed, agreeing "to keep them as well as he could, considering the hay and the chance," is bound only to use ordinary care, where the place of keeping and the feed are examined by the owner before making the contract. Eastman v. Patterson, 38 Vt. 146.

Where, before making a contract for the pasturage of cattle, by which the bailee agreed not to overstock the pasture, the bailor examined the pasture, some of the bailee's stock being therein at the time, it was held, in McAuley v. Harris, 71 Tex. 631, 9 S. W. 680, that an instruction was error that if the bailor made an examination of the pasture and ascertained its contents, and then made the contract to put his cattle therein, the bailee was entitled to allow his stock in the pasture to remain, and such

action would not render him guilty of overstocking the pasture; and that an instruction should have been given that by the contract the bailee was not to put in the pasture nor to permit to remain therein at any time so many cattle as would render the grass unfit for ordinary purposes of pasturage.

As to whether the agister contracted to rent a particular pasture, or to furnish sufficient pasturage for a certain number of cattle, see Brown v. St. John Trust Co. 71 Kan. 134, 80 Pac. 37, where the former construction was adopted, the bailor having inspected the pasture before making the contract, which referred to the pasture by a particular name, although it also contained an agreement by the bailee not to overstock the pasturage, and not to put other cattle therein than the specified number of head belonging to the plaintiff and described in the contract.

See also Bagley v. Brack, under subd. II. a, supra.

b. Banks.

A provision in a rental contract of a safe-deposit box in a bank, that the bank shall use due diligence that no unauthorized person shall be "admitted" to any rented safe, and that beyond this the bank shall not be responsible for the contents of the safe, does not relieve the bank from using that degree of care in guarding the property which the law requires generally from a bailee for hire under like circumstances, but is intended only to fix the degree of care required of the bank in the identification of parties claiming to be its customers. Cussen v. Southern California Sav. Bank, 133 Cal. 534, 85 Am. St. Rep. 221, 65 Pac. 1099.

c. Cold storage.

A provision in a cold storage receipt that "perishable goods are received only at the owner's risk" does not relieve the warehouseman from damages resulting from his own negligence. Herzig v. New York Cold Storage Co. 115 App. Div. 40, 100 N. Y. Supp. 603, affirmed without opinion in 190 N. Y. 511, 83 N. E. 1126.

To a similar effect is Minnesota Butter & Cheese Co. v. St. Paul Cold Storage Warehouse Co. 75 Minn. 445, 74 Am. St. Rep. 515, 77 N. W. 977, where a provision in a cold storage receipt for cheese that "all the property is to be at owner's risk of any loss or damage" from water, deterioration, leakage, etc., or from being perishable or otherwise inherently defective when stored, was construed as not exempting the cold storage company from loss or damage from its own negligence through the dripping of water from overhead pipes. The court took the position that such a receipt did not exempt the company from liability for negligence, saying that the receipt was issued by it, for its benefit, and, if it was ambiguous, must be construed against the company; that an exemption from a loss or damage through any particular cause would not be construed to cover a negligent loss of that character; and that the receipt in question did not in terms provide against the negligence of the defendant.

In Hunter v. Baltimore Packing & Cold Storage Co. 75 Minn. 408, 78 N. W. 11, a cold storage receipt for eggs contained a provision, "all loss or damage by fire, water, ratage, leakage, breakage, frost, or to perishable property at owner's risk. This company will provide any desired temperature, but will not be responsible for results." The words "or to perishable property at owner's risk" were construed as referring to loss resulting from the inherent quality of the subject of the bailment, and the clause, "but will not be responsible for results," as referring to the result of the temperature requested by the bailor. So it was held that the provision did not exempt the cold storage company from injury to the eggs through the escape of gases from fruit or ammonia into the egg room.

So, in Rudell v. Grand Rapids Cold-Storage Co. 136 Mich. 528, 99 N. W. 756, 16 Am. Neg. Rep. 380, a condition in a cold storage receipt for butter that the cold storage company would furnish any desired temperature, but would not guarantee results, all goods being stored at owner's risk, was held not to relieve the company from the duty of using due care in maintaining a proper temperature and in protecting the property from injurious odors.

And it was held also in Rudell v. Grand-Rapids Cold-Storage Co. supra, that the company was not relieved from liability for failure to maintain a proper temperature and to protect the property from injurious odors by a provision in the receipt, "all loss or damage by fire, water, ratage, leakage, breakage, frost, or to perishable property at owner's risk."

d. Hiring of animals.

The hirer of a horse and buggy to drive to a particular place, who agrees to put the same in a livery stable in that place, and instead hitches the horse, with the buggy attached, to a public hitching rack, where they are stolen, is liable for their loss. Line v. Mills, 12 Ind. App. 100, 39 N. E. 870, 1 Am. Neg. Cas. 627.

Where the pleadings show only an ordinary contract of bailment, the complaint alleging the hire of a horse to the defendant, which the defendant promised to return, the defense being the death of the horse during the period of hiring, without the defendant's negligence, the plaintiff cannot recover on evidence of an express contract by the defendant to stand good for the horse. Epstein v. Cohen, 56 Misc. 579, 107 N. Y. Supp. 148.

Recovery of damages for failure to return stock hired by a bailee was denied in Wells v. Crawford, 23 Colo. App. 103, 127 Pac. 914, where it was contended that the bailee was liable in that he had guaranteed that the stock would be returned. The ground of the decision, however, was that, even if there was a guaranty, it was with-

out consideration, because made after the original contract of hire.

See also cases under subd. IV. a, supra.

e. Hiring of railroad cars.

Under a contract by a railroad company to repair all damages to cars of every kind, occasioned by accident or casualty, the cars being hired by it for its use, damage or destruction by fire is a casualty or accident within the meaning of the contract. Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

See also St. Paul & S. C. R. Co. v. Minneapolis & St. L. R. Co. under subd. IV. a, supra.

f. Private carriers.

An agreement by a private carrier engaged to move household goods, to move the goods with care and deliver them safely, was construed in Jaminet v. American Storage & Moving Co. 109 Mo. App. 257, 84 S. W. 128, as not an agreement to deliver safely in any event, or as one of insurance of the goods, but only an undertaking to exercise such care and skill as is ordinarily exercised by bailees for hire under the same circumstances; so that it was held that the carrier was not liable for loss of a painting without its fault, through the mischievous or malicious act of a third party.

A statement to the owner by one hired to cart goods, that, "I will warrant the goods shall go safe," was held in Robinson v. Dunmore, 2 Bos. & P. 416, 5 Revised Rep. 635, to render the carrier liable for damages to the goods by rain, although the owner sent one of his own servants along with the goods to look after them, the statement being regarded as amounting to a warranty for the safety of the property.

g. Public exhibitions or fairs.

Generally as to liability for loss of or injury to property upon exhibition, see note to Colburn v. Washington State Art Asso. L.R.A.1914A, 594. See that note for cases in which public exhibitors have attempted, sometimes after receipt of exhibits, to limit their liability by the adoption of resolutions or the making of general regulations.

It has been held that the duty of an association conducting a dog show to exercise ordinary care for the safety of dogs on exhibition is not lessened by a clause in the form of entry, to which an exhibitor assented, that the association would use diligence for the care and safety of dogs, that watchmen would be kept on duty day and night, but that it should be distinctly understood by all exhibitors that the management would not be responsible for the loss of or damage to any dog, whether the result of accident or other cause. Coltart v. Winnipeg Industrial Exhibition Asso. 17 West. L. Rep. (Can.) 372.

And association conducting an exhibition of pet animals, which, through its negligence, permits an animal to escape, is liable for its value, though by its rules under which the animal was entered for exhibition it was provided that the entry was to be made at the owner's risk, that all specimens would be cared for and returned at the close of the exhibition, that the association would exercise all reasonable vigilance in the care of the exhibits, but would not be responsible for loss by fire or otherwise. Moeran v. New York Poultry, Pigeon & Pet Stock Asso. 28 Misc. 537, 59 N. Y. Supp. 584.

A statement in an advertising pamphlet by an agricultural society conducting a fair that it "will keep an efficient police force on the grounds day and night to take care of articles on exhibition, but will not be responsible for any damages," has been held to render the association liable for theft of an exhibit if it failed to keep an efficient police force on the grounds. Vigo Agri. Soc. v. Brumfiel, 102 Ind. 146, 52 Am. Rep. 657, 1 N. E. 382, 1 Am. Neg. Cas. 883.

The clause, "but will not be responsible for any damages," in the above case, was construed as meaning that, having furnished an efficient police force, the association would not be responsible for losses, but as not affecting the direct promise to keep the efficient force. Ibid.

h. Slaves.

A provision in a contract for the hiring of a slave that the hirer would furnish clothing and board for the slave was construed in Sims v. Knox, 18 Ala. 236, as limiting his liability to the furnishing of the things mentioned, and relieving him from liability for medical services for which he would otherwise have been liable.

A provision in a contract by a railroad company for the hiring of a slave that "all risks incurred, or liability to accidents, while in said service, is compensated for, and covered by, the pay agreed upon; the said railroad company assuming no responsibility for damages from accident, or any cause whatever," does not relieve the railroad company from damages for the death of the slave, caused by its own wilful misconduct or gross negligence. Memphis & C. R. Co. v. Jones, 2 Head, 517.

A covenant by the hirer of slaves not to "expose" them to "dangers of any kind" was construed in Butler v. Walker, Rice, L. 182, to include an omission (when their overseer was present) to prevent the slaves from being in danger, as well as the placing of them in danger by command, and as including dangers incident to a railroad on which the slaves were hired to work by a contractor; so that the hirer was held liable for injury to a slave who, after quitting work for the day, attempted to reach the encampment by riding in company with the overseer after dark on a hand car across a pond, over which a railroad track was laid, instead of going around the pond, the injury being sustained in an attempt to avoid an approaching locomotive.

See also subd. II. b, supra.

i. Vessels.

The clause "at the risk of the masters and owners" in a contract for towing a vessel does not relieve the bailee from damages resulting from its gross negligence. Wells v. Steam Nav. Co. 8 N. Y. 375. It was said that the parties undoubtedly had reference to those perils of navigation which were not the result of the contractor's own negligence. To the same effect is Alexander v. Greene, 7 Hill, 533.

It has been held that an accidental fire which destroys a vessel is not one of the "dangers of the sea" within the meaning of a provision in the charter party by which the charterer agrees to redeliver the vessel in as good order as when received, ordinary wear and "dangers of the sea excepted." Airey v. Merrill, 2 Curt. C. C. 8, Fed. Cas. No. 115.

A provision in a charter party for a pleasure yacht, that "the charterer shall assume no responsibility for loss or damage to the yacht," was construed in McCormick v. Shippy, 59 C. C. A. 568, 124 Fed. 48, as relieving him from liability for loss through his own negligence, this construction being regarded as necessary because he would not, without it, be liable for loss without his negligence.

It was also held in McCormick v. Shippy, supra, that the above conclusion was not affected by the fact that the contract also provided that the charterer should maintain the yacht "in a thoroughly efficient state in hull and machinery," this clause only providing for the assumption by the charterer of an obligation to make wear and tear repairs, which otherwise would be imposed by law upon the owner.

See also subd. IV. b, supra, and Grant v. Armour, under subd. V., supra.

j. Warehousemen.

As to liability of warehouseman for goods damaged or destroyed while stored in building other than that called for by contract, see note to Locke v. Wiley, 24 L.R.A.(N.S.) 1117.

As to effect of stipulation exempting warehouseman from loss by fire, see note to Gulf Compress Co. v. Harrington, 23 L.R.A. (N.S.) 1205.

The destruction by an incendiary fire of wheat stored in a warehouse under a contract calling for its redelivery, "damage by the elements excepted," does not excuse the warehouseman from his obligation, since the exception of damage by the elements is equivalent to an exception of damages by the act of God. Pope v. Farmers' Union & Mill. Co. 130 Cal. 139, 53 L.R.A. 673, 80 Am. St. Rep. 87, 62 Pac. 384, 8 Am. Neg. Rep. 364.

The words "at owner's risk," in a warehouse receipt for the storage of apples, have been held not to release the warehouseman from the exercise of ordinary care. Denver Public Warehouse Co. v. Munger, 20 Colo. App. 56, 77 Pac. 5.

But it has been held that a provision in a warehouse receipt, that loss by leakage shall be at the risk of the owner of the goods, exempts the warehouseman from the duty of watching the packages to detect leakage resulting from any cause other than improper handling or storage. Taussig v. Bode, 134 Cal. 260, 54 L.R.A. 777, 86 Am. St. Rep. 250, 66 Pac. 259, 10 Am. Neg. Rep. 530.

Among possibly other cases holding that a warehouseman was not liable for breach of an alleged special agreement as to care of the property because there was in fact no such contract is Cole v. Oglesby, 13 La. Ann. 371, where the insertion of the words "fireproof warehouse" at the head of cotton receipts and advertisements was held not to constitute any part of the contract for the storage of goods.

See also Lake Michigan Car Ferry Transp. Co. v. Crosby, under subd. II. a, supra, and cases under subd. VI., supra.

k. Miscellaneous.

The acceptance of clothing by a garment maker from a wholesaler, to be made up into garments under an invoice containing the statement that the goods were to be at the bailee's risk against loss by fire or otherwise until returned, was held in Reinstein v. Watts, 84 Me. 139, 24 Atl. 719, to constitute an acceptance by the bailee of the terms of the bailment, and to amount to a contract by him to assume the risk of loss by fire, and to be accountable in all events for the return of the garments. The bailee was held liable for breach of contract to return the goods, although they were destroyed by the burning of his shop.

It has been held that a pledgee who agrees to keep the property in a bank vault is liable for its loss by theft, where it is removed from the bank, although the removal was caused by the refusal of the bank officers to permit it to remain in the vault. Butler v. Greene, 49 Neb. 280, 68 N. W. 496.

R. E. H.

COLORADO SUPREME COURT.
(In Banc.)

DANIEL A. LORD, Plff. in Err.,
v.
CITY AND COUNTY OF DENVER et al.

(— Colo. —, 143 Pac. 284.)

Municipal corporation — railroad aid — constructing improvement with option to railroad company to purchase.

A scheme by which a municipal corporation is to issue bonds for the major part of

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Note. — Construction of improvement by public body with option to private concern to purchase as violation of constitutional provision against lending credit.

As to power of legislature to authorize

the cost of a tunnel the title to which it is to retain, but which is to be used by a railroad company which is to pay the remainder of the cost and have an option to purchase the improvement, contravenes a constitutional prohibition against its lending its credit to any corporation or having joint ownership with it, although it is to have free perpetual use of the tunnel as a conduit for water and electricity, and the right to all minerals discovered in its construction, and the right to subject the railway tracks to the use of other companies.

(Gabbert, J., dissents.)

(July 8, 1914.)

ERROR to the District Court for Denver County to review a judgment in defendant's favor in an action brought to restrain defendants from issuing bonds to aid in the construction of a proposed tunnel. Reversed.

The facts are stated in the opinion.

Messrs. **Harry S. Silverstein** and **Harry L. Lubers** for plaintiff in error.

Messrs. **Harry A. Lindsley, Joseph C. Helm,** and **M. H. Kennedy,** with Mr. **I. N. Stevens,** for defendants in error.

Scott, J., delivered the opinion of the court:

This action is by a citizen and taxpayer, to restrain the city and county of Denver from issuing its bonds in the amount of $3,000,000, to aid in the construction of a proposed tunnel to be known as the "Moffat tunnel." It seems that a statement of the facts must be extended to an unusual length in order that the matters to be determined may be properly understood.

The questions raised were determined in the court below upon a demurrer to the complaint. The complaint alleges the organization and existence of the city and county of Denver under the 20th article of the Constitution, and that on the 20th day of May, 1913, an amendment to the charter of the city and county was adopted, known as § 355. This section purported to create a tunnel commission, to consist of three members, and at the same election the members of such commission were elected. Among other things provided by the said amendment were the following:

"All the powers granted to the city and county of Denver by article 20 of the Constitution of the state of Colorado, and otherwise existing by operation of law, including the power of eminent domain and authority to make all necessary filings under the laws of the state of Colorado and the United States, are hereby conferred upon said tunnel commission, to acquire, construct, build, assist in building and constructing, operate, maintain, lease, and dispose of, a transportation tunnel, together with necessary approaches thereto, through the main range or divide of the Rocky Mountains under or near James Peak, to be known as the 'Moffat tunnel,' for the purpose of transporting freight, passengers, water, and electricity, or for any one or more of such

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counties or other political divisions to build, purchase, or operate railroad or street railway, as affected by limitations or restrictions on power to aid private enterprise, see note to Atkinson v. Ada County, 28 L.R.A.(N.S.) 412.

LORD v. DENVER appears to be the only case involving the constitutional provision against lending credit, in which a private concern was given an option to purchase an improvement procured by public funds.

It has been held that the constitutional provision against the loaning of credit is not violated by the erection of an improvement at public expense, the leasing of which to a private concern under a long-term lease is contemplated.

Thus, in Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 503, it was held that a provision for the lease of a road and for the successive renewals thereof, in a statute giving a municipality power to build a railway in its streets, and providing that the road shall be and remain the absolute property of the municipality, does not make bonds issued in aid of the construction of the road a loan of the credit of the city to the persons leasing the road. To the same effect is Admiral Realty Co. v. New York, 76 Misc. 345, 135 N. Y. Supp. 384, affirmed in 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054.

And in Prince v. Crocker, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446, it was held that the building of a subway under the streets of a city for the carriage of such passengers as pay the regular fare on a street railway to which it will be leased is for public use, and it is within the constitutional power of the legislature to order or sanction taxation for it.

A statute authorizing counties to erect bridges for the use of railroads, or of pedestrians, wagons, and railroad trains combined, and to issue county bonds to pay for the same, is unconstitutional in so far as it authorizes the county to erect bridges for railroad purposes, as a loan of credit in aid of an indivdual or corporation operating a railroad. Garland v. Montgomery County, 87 Ala. 223, 6 So. 402. To the same effect is Colburn v. Chattanooga Western R. Co. 94 Tenn. 43, 28 S. W. 298.

In Brooke v. Philadelphia, 162 Pa. 123, 24 L.R.A. 781, 29 Atl. 387, it is held that a loan of the city's credit to a corporation is not made by a contract between the city and a railroad company by which one half of the expense of abolishing grade crossings in the city is to be reimbursed to the city by the railroad company. A. L. R.

purposes; provided, however, that in the event said tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be retained by the city and county in perpetuity, to construct and operate, or to authorize the construction and operation through such tunnel of an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal, for use by the city and county of Denver and its inhabitants for domestic purposes, irrigation, power, or other uses, also the right to extend or authorize the extension through the same, of cables, wires, or other apparatus for conveying electricity manufactured west of the western portal thereof, to be used for power, lighting, or other purposes, by the city and its inhabitants, and to permit the use thereof, upon some fair and equitable basis, by any and all railway lines desiring such use; but in enlarging said tunnel or otherwise preparing it for, and subjecting it to, the said water or electric uses, the original use to which it shall have been subjected shall not be destroyed, impaired, or needlessly interrupted. And if in constructing said tunnel, mineral in paying quantities shall be discovered therein, the commission shall have power to make such contracts and take such other steps in relation thereto as will secure for the city and county the benefit of such discovery or discoveries.

"The construction, management, operation, lease, and sale or disposition of said tunnel, and its subjection to the transmission of water and electricity, shall be in the exclusive control of said tunnel commission, including the disbursement of all funds provided in connection therewith.

"The commission shall institute and defend all litigation affecting its duties or powers or arising from the exercise thereof, or in relation to its trusts, and all expenses of such litigation shall be paid by the treasurer out of the general fund upon the warrant of the commission.

"The commission may also provide that a portion of the funds needed for construction of the tunnel may be furnished by individuals or corporations interested in the same, and may enter into contracts with such individuals or corporations interested in the same with reference to the construction, control, management, operation, and future lease, sale, or disposition of the same; provided always that until the city and county shall have been reimbursed in full for any and all moneys so expended by it, together with interest thereon, and is released from all financial liability in connection therewith, it shall retain the ownership of said tunnel and the right to regulate and control the same itself, or by its representative or agent, or by contract as hereinbefore provided.

"And provided further that the rights in and to said tunnel hereinbefore reserved to the city and county in perpetuity shall be perpetually retained, notwithstanding any lease, sale, or other disposition of said tunnel or its use. If upon investigation the commission shall decide that said tunnel is desirable and its construction feasible, that body shall determine the amount of general bonds of the city and county necessary to be issued, and the rate of interest the same shall bear per annum; and the commission may by ordinance of the city council submit to the vote of the taxpaying electors at any time at any election held in the city and county after the adoption of this amendment, for whatever purpose such election may be called, whether such election be general or special, or at a special election called upon their request for the purpose, the question of whether the city and county shall issue its general bonds maturing in not less than fifteen, nor more than fifty, years for such purpose in such amount and at such rate of interest as has been determined by said commission, and the council shall pass the necessary ordinance to call said election at the time so fixed by said commission, and the clerk and election commission shall publish the necessary notices for calling and holding said election at the time so fixed, and they and all other officers shall perform the duties incumbent upon them by law for the legal holding of said election.

"The commission may also submit any proposition concerning its powers or trust at any municipal election. All propositions shall be submitted in the way, at the time, and in the manner and form prescribed by said commission.

"When there is so submitted to the taxpaying electors the question of incurring a general indebtedness of the city and county, for the foregoing purpose, if a majority of the votes cast thereon shall be in favor of the proposition so submitted, it shall thereby be adopted, and such adoption shall be a sufficient authorization for the issuance of the bonds in the amount thereby provided for, and maturing on the date therein fixed, and the same, when issued, shall be and constitute a valid general indebtedness of the city and county of Denver for said purpose, and the provisions of this section relative to the issue, sale, and redemption of bonds shall apply thereto, the vote upon such election shall be canvassed and the result declared by the proper officers as provided by law.

"The council shall pass such ordinance as said commission shall deem necessary re-

specting the issuance of said bonds, or to the full exercise of all the powers herein given it, in the form recommended by the commission and without amendment, and the mayor shall sign the same.

"The city and county of Denver shall annually levy a sufficient tax for the creation of a sinking fund to discharge in full the principal of, and interest on, the bonds issued hereunder, unless the ordinance adopted, as hereinabove provided, shall contain suitable provisions, otherwise to insure the prompt payment of said interest as the same shall become due, and also for the creation of a sinking fund sufficient to discharge in full the principal of said bonds at maturity.

"This section and any provision of the charter referred to herein shall remain in full force so far as may be necessary for the purpose of securing the prompt payment of the bonds issued hereunder, and until said bonds are fully paid shall be irrepealable.

"The inhabitants of the city and county of Denver by the adoption of this charter amendment do find and declare that the said tunnel will, in their judgment, be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of said city and county."

It is then alleged that the tunnel commission so created proceeded to determine, and did determine, the approximate cost of the tunnel, together with the necessary approaches thereto, through the main range or divide of the Rocky Mountains, under or near James Peak, and for that purpose the same could be constructed for not to exceed $4,420,000, and that, acting under the authority assumed to be conferred by the city charter amendment, the commission, on the 8th day of October, 1913, entered into a written agreement with the Denver & Salt Lake Railroad Company, for the construction of such tunnel.

This agreement recites that the railroad company owns and operates a railroad from the city of Denver to Steamboat Springs, Colorado, and is engaged in the extension thereof to Craig, Colorado, and it shall be further constructed and extended to Salt Lake City, Utah; that the railroad company desires to use, lease, operate, and maintain, and ultimately to acquire, the said tunnel for railroad and transportation purposes, subject to the city's use for conveying water and electricity, and the city's power and control over said tunnel for the purpose of assuring fair and equitable rates to other railroads using said tunnel, and that, in consideration of the premises, the railroad company is willing to grant the use of its tracks for the distance of 30 miles east of the eastern portal of said tunnel, and for a distance of 75 miles west of the western portal of said tunnel, in perpetuity, to other railroads desiring to use the tunnel on the terms and conditions afterwards provided in the agreement; that a survey has theretofore been made by the Continental Tunnel Railroad Company, and rights of way have been secured by said company in the Land Office of the United States for the location of the proposed tunnel.

It is then agreed that in pursuance of the power conferred by the said charter amendment, the tunnel commission will procure the services of engineeers of experience, in the construction of the proposed tunnel, and fix the compensation to be paid such engineers, and that this payment shall be made from the funds provided for the construction of the tunnel, or in case of failure of the city to vote the bonds provided in the agreement, that the railroad company shall pay one third, and the tunnel commission two thirds, of said expenses; that an estimate of the costs of the tunnel shall be made by the engineers, and which tunnel shall be adapted for and with a single-track railroad, having an inside clearance of not less than 16 feet in width, and not less than 21 feet in height, and suitable for said city's use, not only for railroad transportation purposes, but also for the conveyance of an ample supply of water for domestic and irrigation purposes, and electricity for power and lighting purposes for the city and county of Denver and the inhabitants thereof, and which said tunnel shall have grades not exceeding 2 per cent cut for railroad purposes.

The tunnel commission further agreed that in case the engineers report the probable cost of construction of the tunnel and the approaches, ready for the installation of facilities for the transportation of water and electricity for use by the city and county of Denver, and ready for the electric operation of a single-track railroad, shall be $4,500,000 or less, then the tunnel commission shall undertake the construction, building, and completion of said tunnel, approaches, and stationary railroad facilities, and provide and pay $3,000,000 by and through the issuance of general bonds of the city and county of Denver, to be issued in accordance with the amendment; such bonds to bear interest at not more than 5 per cent per annum, interest payable semi-annually, and shall be payable fifty years after their date.

It was also provided for the retirement of such bonds and the creation of a sinking fund. It was then agreed by the com-

mission that if the probable costs reported by the engineers did not exceed $4,500,000, and if the lowest satisfactory bid confirms such estimate, the tunnel commission shall build said tunnel upon conditions that the railroad company shall pay the entire excess of costs over and above the sum of $3,000,000; further, that the payments required by the railroad company shall be deposited as thereafter agreed, and that the consideration of such payments, together with the right to use the tracks of said railroad company, are for an option provided for in the agreement by which the railroad company is granted the right to use, lease, operate, and maintain, and ultimately to acquire, the said tunnel from said tunnel commission, as provided in the agreement. The tunnel commission was to institute and defend all litigation affecting its duties and powers, or arising from the exercise thereof, or relating to the administration of its trusts, and to exercise the power of eminent domain, and all of the expenses therein incurred are to be included as a part of the costs of the tunnel.

The tunnel commission further agreed that the railroad company may at any time purchase said tunnel for railroad transportation purposes, upon the payment by the railroad company of the $3,000,000 of the bonds provided for, or so much thereof as may be sold for the purposes thereof, with all accrued interest, and that the title of the said tunnel and its approaches shall thereupon immediately vest in the railroad company. The tunnel commission is, on demand of the railroad company, to execute and deliver to the railroad company such other and further assurance of title as may be necessary in the premises; subject, however, to a perpetual easement in the city for the transmission of water and electric current for light, heat, and power, and also subject to the perpetual right reserved by the city and county to have said tunnel equipment and approaches, and tracks of said railroad for a distance of 30 miles east of the eastern portal, and for a distance of 75 miles west of the western portal, used by other railroads, as provided in the agreement.

The railroad company agreed that if the estimate of the engineers for the reasonable cost of said tunnel, necessary approaches, and stationary railroad facilities, ready for laying of pipes and the installation of facilities for the transportation of an ample supply of water for domestic and irrigation uses and of electricity for power and lighting purposes, for the city and county of Denver, and including said single-track railroad, be $4,500,000 or less, then one third of said estimated costs of construction, building, and completion of said tunnel, approaches, and facilities shall be deposited by said railroad company concurrently with the two thirds thereof deposited by the tunnel commission.

The railroad company further agreed that the tunnel commission should build and construct the tunnel, necessary approaches thereto, and facilities for transportation of water and electricity, as aforesaid, including said single track, and that the railroad company should pay any excess of cost above the said sum of $3,000,000.

It was also agreed that the title to the said tunnel and its necessary approaches shall be vested in the city and county of Denver, and shall remain the property of said city and county, until the same shall have been purchased and fully paid for by the railroad company.

It was further agreed that the railroad company should pay the interest on all the bonds to be issued and sold by the city, so long as any such bonds are unpaid and outstanding, plus 1 per cent per annum on all said bonds outstanding to comply with the sinking fund for the provision of the retirement of said bonds, and should also pay the entire cost of maintenance, equipment, and operation of said tunnel, including the necessary motive power.

The railroad company further agreed to provide trackage rights for the use of said tunnel and its approaches by other railroads under fair and reasonable trackage agreements, containing the usual proper covenants and conditions customarily embodied in trackage agreements between railroads, and upon condition that each other railroad desiring to use the said tunnel and its approaches may do so only upon payment of one half of the interest upon the actual cost of construction and equipment of the tunnel and its approaches, on a basis of 5 per cent, of all sums paid by the constructing parties, for construction and equipment and motive power of said tunnel and its approaches, together with such proportion of the cost of maintenance and operation of said tunnel and its approaches as the number of car wheels of each road so using said tunnel shall bear to the total number of car wheels passing through said tunnel.

The railroad company further agreed to furnish at its own cost, and to provide, all electric current necessary for the operation of the tunnel and its approaches, and to supply all the necessary equipment including motive power for the operation of the tunnel. The railroad company further agreed to permit to the railroads having trackage rights to the use of the tunnel, use of its tracks and facilities for a distance

of 30 miles from the east portal, and 75 miles from the west portal, provided that any such railroad so using the tracks and facilities shall pay interest at the rate of 3 per cent per annum based upon the reasonable cost of reproducing the tracks so used at the time of acquiring the right of way, and that each railroad shall, in addition, and as a condition precedent, pay to the railroad company for maintenance and repairs a percentage of the actual cost thereof based upon the car wheels estimate. The railroad company further agreed that it would, on or before the maturity of the bonds of the city, exercise its option to purchase said tunnel by the payment of the principal of the $3,000,000 or so much thereof as may have been sold.

It is further agreed by the railroad company that it will immediately, upon the beginning of the construction of the tunnel, proceed in the construction of its lines from Craig, Colorado, toward the Colorado and Utah line, and will, within five years from the date of the completion of the tunnel, have its lines fully and continuously in regular, daily operation to the city of Salt Lake.

It was also agreed between the parties that before any contract is let for the construction of the tunnel or any part thereof, the tunnel commission shall deposit, with a depositary to be agreed upon, $3,000,000 of bonds of the city and county of Denver, and that the railroad company will deposit with the said depositary its proportion of the total cost of the said tunnel in cash or current marketable securities so deposited, to be sold by the party so depositing as it may desire, and all proceeds to be deposited with the depositary.

It was mutually agreed, further, that the money so deposited by the contracting parties shall be paid out in the same ratio or proportion as the total amount furnished by the parties shall bear to each other.

It was further mutually agreed that the exclusive right shall forever be reserved in perpetuity in the city and county of Denver "to construct and operate through said tunnel an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal for use by the said city and county of Denver, for domestic, power, and other purposes, also the right to extend through the same, cables, wires, and other apparatus for conveying electricity, to be used for power, light, and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

It was further agreed that the tunnel commission shall take such steps as may be permissible under the existing laws, or by procuring such appropriate legislation, as will secure exclusively to the city the benefit of any or all veins of mineral or mineral deposits that may be discovered in constructing the tunnel, provided that no mining operations or mining development shall, at any time or in any manner, interfere with, impede, endanger, or destroy the use of said tunnel or its approaches for transportation purposes. All funds were to be paid out upon order of the tunnel commission. Contracts were to be let by bid, the tunnel commission to reserve the right to accept or reject any such bids.

It was also provided that upon completion of the tunnel and its approaches, the railroad company should be entitled to the possession and operation of the same for railroad transportation purposes, such possession and operation being subject to the use, rights, and easements reserved to the city.

It was further agreed that the cost of the special election to determine the question of issuance of the $3,000,000 bond issue shall be paid, one half by the city, and one half by the railroad company. It was likewise provided that, in case of failure of the railroad to pay the interest on the outstanding bonds of the city, or to deposit the 1 per cent sinking fund as provided, or failure in any other of the material provisions of the contract for a period of three months, then the tunnel commission may declare the contract terminated, and all sums paid by the railroad company shall be held as liquidated damages.

The complaint further alleges that after the execution of this agreement the question of the issuance of $3,000,000 in bonds was properly submitted and adopted.

There are but two questions presented for determination: (1) Is the issuance of the bonds by the city, and for such a purpose, inhibited by the Constitution? (2) If not, then is the provision of the contract and proposition to issue such bonds, extended for the full period of fifty years, in contravention of § 8, art. 11, of the Constitution, limiting the period for the extinguishment of a city debt to fifteen years?

Sections 1 and 2 of article 11 of the Constitution provide:

"Section 1. Neither the state nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to or in aid of any person, company or corporation, public or private, for any

amount or for any purpose whatever, or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.

"Sec. 2. Neither the state nor any county, city, town, township or school district, shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state, by escheat or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township or school district, or to either or any of them, jointly with any person, company or corporation, by forfeiture or sale of real estate for nonpayment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties or forfeiture of recognizance, breach of condition or official bond, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested."

Prior to the adoption of our Constitution, the policy of extending public aid to private corporations had grown to be alarming. Judge Dillon, in his work on Municipal Corporations, 1 Dill. §§ 313, 318, points out the evil effects arising therefrom. This policy he suggests had become a mania, particularly in the West; that it had resulted in attempted repudiation upon the part of both states and municipalities, and says: "The most noted of extraordinary or extramunicipal powers conferred upon municipal and public corporations is the authority to aid in the construction of railways by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred; . . . Regarded in the light of its effects, whatever may be thought of its constitutional soundness, there is little hesitation in affirming that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree."

To prevent this evil, there began the adoption of constitutional amendments by many of the states, denying the right of the legislature to grant such powers. Our Constitution was adopted at a time when the subject was much in the public mind. An examination of the proceedings of the constitutional convention shows the introduction of several resolutions upon the subject, and repeated redrafts of these sections, with the result that §§ 1 and 2 of article 11 are broader in scope, and more specific in the matter of restriction, than any similar constitutional provision considered or brought to our attention. Indeed, it would seem that language could not make plainer the intent of the framers of the Constitution to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever.

These sections of the Constitution have been before this court for interpretation, at least, as to the spirit and intent. The case of Colorado, C. R. Co. v. Lea, 5 Colo. 192, was decided within a very short period after the adoption of the Constitution. Two of the three judges then constituting the supreme court had served as members of the constitutional convention. The question of public benefit was urged in that case, as here. It was there said: "That the construction of the proposed line of railroad would be of great benefit to the county and its citizens; that it would give them increased and superior facilities for traffic and commerce with both the Atlantic and Pacific seaboards, do not make it any the less a donation within the intent of the inhibition. These and similar considerations of public benefit and advantage had constituted for years, under our territorial government, the basis of appeals for and grants of county and municipal aid to railroad companies, and it was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new state, all public aid to railroad companies, whether by donation, grant, or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads. I understand the framers of the Constitution and the people who adopted it to have intended, by this provision, the declaration of a broad policy of prohibition, forbidding state, county, and municipal aid to railroad and other companies in any of the modes specified. If the existence of a public benefit is to give such an agreement the character of a sale of the stock, and take it out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case."

Speaking of the sections of the Constitution under consideration and other provisions in restriction of authority to incur public debt, in the case of People ex rel. Seeley v. May, 9 Colo. 80, 10 Pac. 641, it was said: "It was their duty not only to provide against the recurrence of evils, pa-

tent and already expierienced, but also to guard every point where abuses were liable to creep into the administration of public affairs. The waste, extravagance, frauds, peculations, defalcations, and tax burdens disgracing and encumbering the administration of American municipalities, county, town, and city, had long been national topics of discussion, written about by publicists, denounced by the press; and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical administration of affairs, whether town, city, county, or state, practically the most important question that came before the convention."

It may be well to consider briefly the material facts as presented by the record. The railroad company owns and operates a railroad, beginning in the city of Denver and extending westward and over and beyond the range of mountains through which the tunnel is proposed to be constructed. The agreement is in effect that the city will issue and sell its bonds in payment of two thirds of the expense of the construction of such tunnel and its approaches, and to provide the same with railroad tracks for the operation of the company's trains through said tunnel; the railroad company to contribute one third of the expense of such tunnel. The city is to sell, and the railroad to purchase, the city's interest in the tunnel upon payment to the city of the amount invested, with interest, within a specified time, and in the meantime to use the same as a part of its railroad line, and to pay the interest on the city's bonds.

The city has not projected, provided for, nor has it declared, its intention to build, construct, own, or operate a water system, power plant, or any other public utility of which the tunnel is to form a component part, or in which it is to be of any use to the city whatsoever.

Stripped of nonessentials for consideration here, and of improbable contingencies and remote possibilities, the foregoing statement presents the gist, or rather the meat, of the agreement between the city and the railroad company.

The railroad company operates its line over the mountains. It is important, and may be necessary, for it to reduce its grade by going through the mountain by means of a tunnel. The city agrees with it to issue its bonds in payment of two thirds of the expense of driving the tunnel, constructing the railroad tracks and proper approaches, with the other necessary equipment to enable the railroad company to connect with its tracks at both ends of the tunnel. For this the company agrees to pay the interest on the bonds, and finally the principal, and upon such payment is to receive full title to the tunnel as constructed, for its purposes. Plainly this is in violation of the constitutional provisions, in that the city pledges its faith and credit for the benefit and use of the railroad corporation, and as plainly this is in aid of the railroad corporation. It is likewise just as clear that this constitutes a joint enterprise between the city and the company, to last until the company shall have purchased the city's interests. By every legal test it is a partnership. Do the other provisions of the agreement relieve it from this limitation of power?

Counsel for the defendants in error assert that there are four reservations in the contract that take it out of the inhibition of the Constitution. We will consider these in the order and in the exact language presented:

"(1) The perpetual right to use the tunnel free of rental or charge, as an aqueduct, and to install conduits therein for the purpose of bringing water from the western slope to be used by the city and its inhabitants."

The agreement specifically provides that all the money contributed by the city shall be expended in the construction and equipment of the tunnel for railroad purposes alone. Not a dollar of this fund is to be used to install conduits or other means for the purpose of bringing water from the western slope to be used by the city and its inhabitants. The engineers were to report the probable cost of the tunnel ready for the installation of facilities for the transportation of water and electricity for use by the city and county of Denver, and ready for the electrical operation of a single-track railroad, and for the building and completion of said tunnel, approaches, and railroad and stationary railroad facilities. The tunnel is thus to be ready only, for the installation of city facilities, but is to be fully equipped for the purpose of railroad operation by the company, including the approaches and tracks. In another part of the agreement it is said the tunnel is to be "ready for the laying of pipes" by the city. In the agreement, the rights of the city are specifically referred to as "easements." The agreement specifically provides, not for construction for the city's use, but the right only to the city of an easement "to construct and operate through said tunnel an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal for use by the said city and county of Denver, for domestic, power, and other purposes; also the right to extend through the same, cables, wires, and other apparatus

for conveying electricity, to be used for power, light, and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

Counsel for the city in their brief say: "For drainage and other purposes, it is necessary to have the center of the Moffat tunnel slightly higher than either portal; and, as a matter of fact, the western portal of the tunnel, as now proposed, will be 50 or 60 feet lower than the eastern portal. These facts have given rise to a doubt in the minds of many intelligent people as to the ability of the city to bring water through the tunnel from the western slope. This doubt does not, however, exist in the minds of educated engineers. It arises through a want of knowledge and experience on the part of the ordinary, though educated and intelligent, laymen. In reality, the circumstances detailed present no difficulty whatever. By employment of what may be termed the 'inverted siphon' principle all difficulty is overcome."

They also submit a drawing showing a vertical section of the mountain, the line of the proposed tunnel, the portals, and the line of level, and argue that the conveyance of water through the tunnel after its construction for railroad purposes is an engineering possibility. But this is not intended or suggested as a part of the agreement under which the city is to spend its money, to obtain which it must levy a tax upon its citizens. Besides this, it is conceded that the city has no rights to the use of water west of the proposed tunnel, or that it has declared a purpose to acquire any such right, or has any intention to so do, or that it has a purpose to convey water through such tunnel, or by any other means, for the use of its inhabitants or otherwise, or that it has a purpose to attempt to convert such an engineering possibility into an accomplished fact. Indeed, under the express provision of the charter amendment, the purpose of the tunnel is not necessarily for the conduct of water or electricity, but for any one of four purposes, for it recites—"for the purpose of transporting freight, passengers, water, and electricity, or for any one or more of such purposes."

And the amendment again recites: "But in enlarging said tunnel or otherwise preparing it for, and subjecting it to, the said water or electric uses, the original use to which it shall have been subjected shall not be impaired or needlessly interrupted."

The "original use" can be none other than for railroad transportation purposes, and by the Denver & Salt Lake Road.

The second reservation to the city, relied on by counsel to sustain their contentions, is as follows: "(2) The perpetual right, free of rental or charge, to install wires, together with all other apparatus that may be necessary, and bring electricity through the tunnel for lighting and power and other uses by the city and its inhabitants."

What has been said concerning the first proposition applies with equal force to this one, which deals with the possible transmission of electric current. Clearly the record discloses no intent or purpose upon the part of the city to acquire power for the generation of electricity at a point beyond the tunnel or at any other point, or to engage in the generation and distribution of electricity for any municipal or other purpose. And if it did so intend, certainly it would not undertake the construction of a tunnel at an expense to the city of $3,000,000, in the face of the common knowledge that electric current may be as easily conveyed over the mountains as through a tunnel, and at comparatively insignificant expense.

The third reservation in the agreement, cited by counsel, and upon which reliance is had, is: "(3) The ownership of mineral veins discovered in constructing the tunnel, and the perpetual right, free of charge, to locate the same and mine the ore therein, provided the city acquires the legal right to such veins, and provided also that such mining shall not interfere with, impede, endanger, or destroy the use of the tunnel for transportation purposes."

Certainly it will not be seriously contended that a municipality as such can have the lawful right to levy a tax upon its citizens, in the absence of specific constitutional authority, for the purpose of locating mining claims, and engaging in the mining of metalliferous ores. If it may do so in Grand and Gilpin counties, it may with equal right and more propriety so engage in the well-known mining districts of Cripple Creek, Telluride, or Leadville. We know of no authority wherein it has even been suggested that such a business comes within the range of municipal purposes. Besides, the discovery of valuable ores in the proposed tunnel can be said to be nothing more than a very remote possibility, and it will hardly be said that prospecting for ores is a municipal power. But by what right may the city and the railroad company contract as to the ownership of ores located upon premises to which neither of the contracting parties have any right, title, or interest?

The fourth and last proposition upon which counsel rely is the following: "(4)

The perpetual right to subject the tunnel and the railway tracks therein to use by any other railroad desiring such use, including outside trackage rights over the line of said Denver & Salt Lake Railroad for such other railroads, covering a distance of 75 miles westerly from the western portal of the tunnel and 30 miles easterly from its eastern portal, such use of the tunnel and trackage rights to be upon reasonable terms to the other railroads so using the same; said terms being already specified in the written contract of October 8, 1913, between the city and the railroad company."

If it is within the constitutional prohibition for the city to make donation or grant to, or in aid of one railroad, or to lend or pledge its faith or credit in aid of one railroad, or to become a joint owner with one railroad, clearly it is within such prohibition to so do with two or more railroads. This proposition is but a repeated offense against the Constitution. It involves another and only a possible contingency. It does not appear that any other railroad company desires, or ever will desire, to avail itself of any such privilege, if it be a privilege. And, if so, then under the agreement it must be by a future contract with the Denver & Salt Lake Railroad Company alone, and upon terms dictated by that corporation. Such agreements are to be the usual trackage agreements between railroads, in addition to other specific charges. It is true that in general the basis of the terms of such contracts are set out in the contract between the city and the Denver & Salt Lake Company, but the latter company is to avail itself of all financial benefit. For instance, it is provided that each railroad so using the tunnel must pay one half of the interest upon the actual cost of construction and equipment of the tunnel and its approaches, on the basis of 5 per cent of the cost both to the city and the Denver & Salt Lake Company, including motive power, and the proportionate cost of maintenance. Thus, if four of the great railroad companies whose lines now enter the city of Denver, and some of which now extend both east and west of the city, with connections extending to both seaboards, should conclude that the use of the proposed tunnel would be of benefit to them in making shorter through routes, or for other reasons, and if the city should conclude that this would be of material commercial advantage to it, an object apparently much desired by the citizens of Denver, then under this provision of the contract the Denver & Salt Lake Railroad Company is empowered to charge each of such roads $112,500 annually, under the fictitious item of interest, in addition to the usual trackage agreements and other fixed charges provided by the agreement now being considered. Not because there would be any such interest to pay, for the interest provided for would, in the case suggested, amount to but one half of what these four railroads alone must pay. Upon the estimated cost of construction at $4,500,000, and of 5 per cent as the rate of interest, these four roads would pay, as an annual, arbitrary, and indefeasible sum, not to the city, but to the Denver & Salt Lake Railroad Company, $450,000. This right is thus given to that railroad company in perpetuity. Thus, during the life of the proposed bonds alone, fifty years, each road so to use the tunnel must first agree to pay to the Denver & Salt Lake Railroad Company the sum of $5,625,000 for the use and benefit of that company. And this same right is given to the railroad company to so tax every additional railroad that may desire to use the tunnel. Certainly such manifest inequality and injustice, both to the city and to other companies, cannot act as an inducement for such companies to make use of the tunnel. Indeed, it would seem to present such a serious obstacle to the accomplishment of such purpose as may be absolutely prohibitive. In this feature alone the contract between the city and the Salt Lake Company, if not a grant of subsidy, is infinitely worse, for it confers the power upon the Salt Lake Company to levy tribute upon every other railroad company that may desire to make use of the tunnel. This is a flagrant violation of the constitutional provision. From our consideration of these provisions inserted in the contract, we are irresistibly forced to the conclusion that they were inserted, not for the accomplishment of a legitimate municipal purpose, but rather in an effort to evade the constitutional prohibition.

Counsel urge that the question here is one for legislative determination, and point out that by elections, both by the voters and taxpayers separately expressed, the legislative will of the municipality has been manifested in terms not to be mistaken. This manifestation of the will of the people of the municipality has been constantly before us in the consideration of the case. But the question we are now considering is not one of the will of the municipality, but is solely a question of limitation of power. We have not overlooked the rule of construction adopted by this court in an opinion written by the late Chief Justice Steele, in the case of Denver v. Hallett, 34 Colo. 398, 83 Pac. 1068, but rather reiterate and emphasize it. It was there said: "In a number of cases before this court, as well as the court of appeals, it has been

held that with respect to municipal corporations, except as limited by the Constitution, the general assembly has plenary power; that it is clearly a legislative function to determine what power shall be granted, what withheld, and what restrictions shall be imposed in the exercise of the powers granted. . . . The supremacy of the legislative authority over municipal corporations is not, however, in all respects unlimited, but the limitation must be sought in the national or state Constitution."

It will certainly not be contended that either by the legislature of the state, or by the legislative powers of a municipality, such powers as are expressly prohibited by the organic law may be exercised by either. Ours is a constitutional government, wherein the sovereign will of all the people, as expressed in the Constitution, is supreme, beyond the express limitations of which a municipality may not go. If the municipality may offend, then so may the individual. If this may be done in case of the levy of a prohibited tax, it follows that it may be done in a case involving life or liberty; the Bill of Rights is then no protection, and the Constitution becomes a rope of sand.

It is said that under the provisions of § 1, art. 20, there is the implied power to do that which is attempted in this case. The provision relied on is: "The municipal corporation known as the city of Denver, . . . shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided."

Nowhere in § 1, art. 20, can there be found express alteration or limit of the prohibition contained in §§ 1 and 2 of article 11, and all municipalities operating under the 20th article are clearly subject to such limitations.

It is said in 1 Dill. Mun. Corp. 237, and heretofore approved by this court: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

From what has been said, it is clear that the declaration in the amendment to the charter, § 355, to the effect that the tunnel will be of local use and convenient to the public, and is essential to the future growth and welfare of the city and county, cannot prevail as against an express constitutional prohibition of the power therein attempted to be exercised.

Higgins v. San Diego Water Co. 118 Cal. 537, 50 Pac. 674, was a case where there was an attempt to violate constitutional limitations similar to ours. In that case a flume company was the owner of a water supply and system of pipes by which it brought water to the city limits. A water company had pipes and all necessary facilities for distributing water to consumers throughout the city. These two companies entered into an agreement constituting the water company sole agent for the flume company for the sale of its water to the city. The entire distributing plant was then turned over to the city. This was in form of a lease to five citizens of the city, who in turn granted a sublease to the city. One of the considerations of the lease was that the water company should cause a railroad to be constructed from the city of San Diego to a point in Mexico. The court held that "for these reasons, and for these alone, the contract was held invalid by the learned judge of the superior court. As to the other objection above stated he says in the opinion referred to: 'While it is very evident from the terms of the contract that the hope that a railroad would be constructed was one of the moving causes for the city authorities entering into the contract,

it was not, in my opinion, a consideration of the contract, but merely a condition subsequent which falls because invalid without affecting the other provisions of the contract.' And in his conclusions of law he holds 'that said lease and sublease were not void because the amount agreed to be paid was a subsidy to or in aid of the construction of a railroad.' These conclusions are based upon findings to the effect that the city waived the construction of the railroad, and that neither the city, nor its mayor acting in its behalf, was induced to enter into the contract by any promises or representations of the officers or agents of the water company that the railroad would be built."

And again the supreme court said: "The result of the foregoing discussion is that the contract of the city with the water company is held invalid upon at least two grounds: (1) Because the city was led by the contrivance of the water company to agree to pay, under the name of rent, a subsidy to a railroad; and (2) because the mayor had not sufficient authority to execute it on the part of the city."

Counsel for the city cite many cases upon which they rely, and which it seems proper to carefully consider. Among these is Denver v. Hallett, supra. But that case involved simply whether or not the issuance of bonds by the city for the construction of an auditorium within the city and for public use was a municipal purpose within the meaning of the laws of the state. The question did not involve that of aid to a private corporation, or any joint ownership or partnership with such person or corporation. It was an entirely different and distinct proposition, and can in no way aid in the determination of the case at bar. I apprehend that if the proposition there involved an agreement between the city and a private party, wherein the city was to pay two thirds of the cost and a private person or corporation was to pay one third of the cost, with each party reserving the right to separate and different uses of the building, or to different parts thereof, and coupled with the provision that the city should thereafter sell its interest therein to the private party for its own uses, the bond issue could not and would not have been sustained.

From a careful examination of the authorities cited in the able and exhaustive briefs of counsel on both sides of this controversy, and from such examination as we have been able to make in the limited time at our disposal, we do not find one that even hints that it is within the ordinary powers of a municipal corporation to construct an improvement, convenience, or necessity with the avowed and declared purpose of selling the same, or an interest therein, to a private person or corporation. This seems to be repugnant to every conception of the term, "municipal purpose."

In this case, however, counsel contend that the agreement to sell was a mere option. But the city has expressly agreed to sell and convey title to the railroad company for a stipulated price, and the railroad company has agreed to buy and pay the agreed price. This constitutes an executed contract, not an option. But if it were said to be an option, it is still a contract to sell, and for such reason the purpose of the city is the same.

Council for the city cite also, as tending to sustain the validity of the proposed bond issue, the following cases: Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 245, Ann. Cas. 1914A, 1054; Haeussler v. St. Louis, 205 Mo. 656, 103 S. W. 1034.

Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24, involved the validity of an act of the legislature authorizing cities of 150,000 or more inhabitants, under conditions specified in the act, to provide for the construction of a line of railway over terminals, of which one should be within the city. The specific case was that the city of Cincinnati voted bonds for the construction of, and did construct, a railroad extending from the city of Cincinnati to the city of Chattanooga, in the state of Tennessee. The provision of the Ohio Constitution said to be violated was: "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of any such company, corporation or association."

It will be seen that the provision of the Colorado Constitution is broader and more exclusive than the one stated, in that it denies this power to the state as well as to corporate subdivisions, and uses the terms, "directly," or "indirectly," "in any manner," "public or private," "for any amount," or for "any purpose whatsoever," or "become responsible for any debt," "contract or liability," "in or out of the state," "make any donation to," "grant, or in aid of," "subscribe to," "shareholder in," "joint owner with," etc. But in that case the purpose of that section of the Constitution was distinctly stated to be: "The mischief which this section interdicts is a business partner-

ship between a municipality or subdivision of the state and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named, permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations, and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same whether the public suffered from the cupidity of a single person or from that of several persons associated together."

Such action of the city was there sustained upon the sole ground that it was the exclusive enterprise of the city. This is the view expressed by the same court in later cases, and it was expressly stated in Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520, that in Walker v. Cincinnati, "the constitutionality of the act is there placed upon the ground that the construction of an improvement of that kind, to be owned exclusively by the municipality, does not involve an alliance of public and private capital or credit, nor constitute a loan of municipal credit to, or raising money for, or in aid of, other parties, incorporated or unincorporated, and therefore it is as competent by legislation to authorize municipal corporations to construct improvements of that nature and provide means therefore by taxation, when deemed essential to the public interests, as to authorize them to acquire and hold property for other needed public uses, and make other municipal improvements."

In the case of Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215, the court, speaking through Mr. Justice Brewer, so recognized the distinction made by the Ohio court in the Cincinnati case. This was a case arising under the provision of the Ohio Constitution, and under which aid to a railroad corporation was held to be repugnant. Discussing the spirit of such a constitutional provision as we are now considering, it was said: "The significance of its inhibition is read in the evil which it was intended to remedy. Common was the practice, theretofore, of issuing municipal bonds to aid in the construction of railroads. The practice was felt to be evil, stimulating unnecessary railroad enterprises, and injuriously affecting the interests of the taxpayer. The universal method of railroad enterprises was through private corporations. The possibility of other methods was unknown, or not seriously contemplated. So, when the people by their Constitution prohibited public aid to private corporations, obviously the thought was that all public assistance to the building of railroads was prohibited. The ingenuity of the lawyer and the legislator, by means of which the letter of this prohibition was avoided and a city enabled to construct a railroad running from itself to other parts of the country, as a great highway of approach and distribution of its business, was obviously not expected or foreseen. We are not criticizing the decision in Walker v. Cincinnati, 21 Ohio St. supra, as an erroneous construction of the constitutional provision. We simply note the fact that the statute therein construed was a skilful avoidance of its generally understood scope."

Since the Cincinnati case was decided, the supreme court of Ohio has considered the same question in other cases, and, in each of these, has denied the validity of a statute authorizing a grant of aid to a railroad corporation. Taylor v. Ross County, 23 Ohio St. 22; Wyscaver v. Atkinson, 37 Ohio St. 80; Counterman v. Dublin Twp. 38 Ohio St. 515.

Taylor v. Ross County, supra, is a very exhaustive discussion of the question, and it was there said, among other things: "But the 10th section is a constituent part of the plan or method provided by the act for accomplishing its objects. That section provides that the 'county commissioners shall have power, and they are hereby authorized, to lease said road, constructed under the provisions of this act, before or after completion, . . . or to sell the same for such compensation and upon such terms as may be agreed upon by said commissioners and lessee or purchaser. . . . Thus, by § 10 it appears the commissioners, or other public authorities operating under the act, are invested with authority to sell or lease the road either before or after completion. It would be within their power to sell what is called the road at any time, certainly after the making of the contract. Now, in such case, what is sold? Substantially the right to use the public bonds to construct a work which becomes the property of the purchaser as fast as it is built."

And again: "The extent of such aid can make no difference. The mandate of the Constitution is that such aids shall never be authorized. Whatever is furnished must be exacted by taxation; and, whether the amount be large or small, to recognize the authority under which it is sought to be imposed would be to deny the protection guar-

anteed by the Constitution to every taxpayer."

In Wyscaver v. Atkinson, supra, after quoting and approving the doctrine of other Ohio cases it was said: "And I will add that it makes no difference whether the scheme for the union of public and private money or credit originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination, in any form whatever, of the public funds or credit of any county, city, town or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever. From these views it is plain that the statute before us manifests an intent to do that indirectly which, if done directly, would constitute a palpable infraction of the Constitution, for which reason it must be declared inoperative and void."

Sun Printing & Pub. Asso. v. New York, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499, involved the validity of a statute authorizing cities of over 1,000,000 inhabitants to construct railroads therein which shall be deemed public highways, at their own expense, etc. This was a case where the city of New York constructed at its own expense a system of subways for transporation purposes. The city was to own these in perpetuity and to lease the use thereof to a private corporation for a limited term. The subways were to be constructed entirely within the city and for the use of the public therein. The court held that this was not in violation of a constitutional limitation similar to our own, for the reason that the improvement was to be constructed entirely by the city, to be owned by the city, and in perpetuity, and that it was not in aid of a private corporation, nor was there any joint ownership, nor mingling of public funds with that of private persons or corporations. But it was held in that case that such a lease by the city in perpetuity would be in violation of the Constitution, and construed the leases proposed to be for a limited term only. That case clearly distinguishes the right of a city to construct and perpetually own as its sole property such a public improvement, from a joint ownership, or aid of, or the loan of the city's faith or credit to, a private corporation. Speaking of the constitutional inhibition, the court said: "This provision should be construed with reference to the evils it was intended to correct. It first found place in the Constitution in 1874. Prior to this there had been upon the statute books that which was commonly known as the town bonding act. Under it numerous railroads had been built upon the bonds procured from towns through which they were constructed, in return for stock issued by the corporations. The inhabitants of the towns were induced to give their consent through supposed benefits that would result to their property, and upon representations that the earnings of the road would provide dividends upon the stock, with which they could pay their bonds. In some instances the bonds were procured and sold and the roads never built. In many other cases the roads in a few years were sold out under foreclosure of mortgages, and the stock cut off. So great was the evil and so heavy was the burden upon the towns that relief was sought through a constitutional provision. It was this evil that the provision in question was intended to correct, and with this situation in view it should be construed. There had been, at that time, no attempt on the part of municipalities to construct and own railroads. Such a project had not been publicly promulgated, discussed, or contemplated. The towns had subscribed for the stock in private corporations and in most instances they had lost. Hence the provision that they should not give any money or loan their credit to or in aid of any individual, association, or corporation, or become owners of stock or bonds of any such individual, association, or corporation. This was not intended to nor does it, prohibit municipalities from constructing their own roads and paying therefor when necessary and authorized by the legislature."

It was further said in that case that "we do not understand that the views above expressed are in conflict with the Ohio cases. In that state the Constitution does not limit municipal expenditures to 'a city purpose.' We do not, however, wish to be understood as approving of those cases, especially in so far as they sustain the right of a city to construct a railroad mainly outside of its own territory and state."

In the case at bar, there is not only the objection that there is a grant of lease in perpetuity, but of an absolute sale of the tunnel itself, reserving only an easement for the possible purpose of conducting water and electricity through it, and which shall in no way interfere with the railroad's exclusive and perpetual use for railway transportation purposes.

The case of Admiral Realty. Co. v. New York, 206 N. Y. 110, 99 N. E. 245, Ann. Cas. 1914A, 1054, involved the question of the lease of the subways then constructed and owned by the city, and of the construction of additional subways by the city and to be owned by it, and the lease by the city of all these. This was no different in principle from the case of Sun Printing & Pub.

Asso. v. New York, supra, and it was expressly said: "It is to be noted that there is no provision that the city shall loan its credit by guaranteeing payment of the bonds by which it is assumed the Interborough Company will raise the money which it is to expend."

The case of Haeussler v. St. Louis, 205 Mo. 656, 103 S. W. 1034, was one which involved an issue of city bonds for the following purpose: "For the construction and maintenance of a municipal bridge for public use by railroads, street cars, vehicles of all kinds, and pedestrians over and across the Mississippi river, and located within the corporate limits of said city of St. Louis, and the state of Illinois, and for the purchase of all lands to be used for approaches in connection therewith, and which said bridge shall at all times be and forever remain a free bridge; provided, however, the city reserves the right to grant franchises for the use of such bridge for public service purposes upon such terms and compensation as may be prescribed by ordinance; and, provided further, that no such franchise shall confer an exclusive right in respect to such public service purposes upon the grantee thereof."

This was authorized by a state statute, and by an act of Congress permitting one end of the bridge and the approach thereto in the state of Illinois. But here, likewise, the city exclusively was to construct and forever own the bridge, and which was to remain a free bridge forever, with the right of the city to grant franchises, but not exclusive, for the use of such bridge for public service purposes. It was held in that case that this was not in violation of a constitutional provision similar to the one we are discussing, and the reason therefor was expressly stated as follows: "These ordinances in no wise violate the constitutional provisions quoted. Under these ordinances not a dollar is given to any individual or corporation, . . . nor by them has the city become a subscriber to the capital stock of any railroad or other corporation. On the other hand, the city is to be the absolute and sole owner of the proposed public improvement, and is to have the absolute and sole control and management thereof. Similar constitutional provisions in like cases have been discussed by the courts, and in practically every case the holdings are against the contentions of the plaintiffs. Sun Printing & Pub. Asso. v. New York, supra; Brooke v. Philadelphia, 162 Pa. 123, 24 L.R.A. 781, 29 Atl. 387; South St. Paul v. Lamprecht Bros. Co. 31 C. C. A. 585, 60 U. S. App. 78; 88 Fed. loc. cit. 454; Prince v. Crocker, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446; Walker L.R.A.1915B. v. Cincinnati, 21 Ohio St. loc. cit. 55, 56, 8 Am. Rep. 24; Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. loc. cit. 74, 34 L. ed. 867, 11 Sup. Ct. Rep. 215. It may be true that, under the terms of the ordinances and the law, the city can grant to railway and street car corporations the right to use the public highway, so constructed, owned, and controlled by it, but that does not change the ownership nor the control. Such is true of every highway controlled by the city. Such privileges can be granted, provided the public way is not seriously impaired for public use.

It should be noted that in no case brought to our attention, involving a similar constitutional provision, has the right of a state, city, county, township, or other corporate entity of the state been sustained to aid a private corporation, by means of subscription to stock, the issue of bonds, by joint interest or ownership, or through direction or indirection, or by any means or device whatsoever. Indeed, this question has been so well settled by the Supreme Court of the United States, and appellate courts of the states, that we find no recorded case since that of Pleasant Twp. v. Ætna L. Ins. Co. 138 U. S. 74, 34 L. ed. 867, 11 Sup. Ct. Rep. 215, decided in 1891, in which there has been an attempt to violate or evade such a constitutional limitation, until the present case.

All cases cited as tending to sustain the contention of the city here are those wherein the municipality is the sole contributor to the enterprise and the sole owner thereof, and in perpetuity. In none of such cases was there a commingling of public and private funds, in any form or manner whatsoever. That a city may, with the good-faith purpose of constructing or enlarging a municipal water plant, construct a tunnel or other improvement, reasonably necessary to convey its supply of water or an essential part thereof, to the city and at any point beyond the limits of the city, cannot be questioned. This power is clearly conferred by § 1 of the 20th article, and has been universally held to exist, as implied within the express power to construct, own, and maintain such municipal water plant. But this must be by the municipality alone, and as being a public purpose for which taxes may be levied.

The question presented here is entirely different from that where a city undertakes to construct such a tunnel, with such necessary and good-faith purpose, with its own funds, and to be so exclusively owned by the city. But the proposed bond issue here is clearly, both in letter and spirit, within the inhibition of §§ 1 and 2 of article 11 of the Constitution, and is void. So holding,

it becomes unnecessary to consider the question concerning the length of time for which such bonds may run.

The judgment is reversed, with instruction to overrule the demurrer and proceed in accordance with the views expressed in this opinion.

Gabbert, J., dissenting:

At an election held May 20, 1913, § 355 of the charter was adopted by the electors of the city. By this section a tunnel commission was created, and provisions made for the issuance of bonds to raise funds with which to construct the "Moffat tunnel," and on February 17th last the taxpayers of the city voted in favor of issuing such bonds. It is the validity of these bonds which is the subject of inquiry, and the only question involved in this proceeding, and the question thus presented must be determined by ascertaining whether the city, by our fundamental law, the Constitution of the state, is without power or is inhibited to create an indebtedness by the issuance of the bonds in question, for the purposes and under the conditions specified in § 355, supra, and the contract hereafter noticed, in order to raise funds with which to construct the tunnel. The amendment to the charter, § 355, and the authorization of the voters to issue the bonds, are legislative acts adopted by the people of Denver under their charter. It is elementary, as often declared by this court, that a legislative act will not be declared unconstitutional, unless it is clearly and palpably so, and in cases of doubt every intendment will be made in favor of its constitutionality, and that courts will only interfere in cases of clear and unquestioned violations of the fundamental law. In other words, a legislative act must be held constitutional, unless its unconstitutionality is established beyond a reasonable doubt.

The majority opinion declares the city is without authority to authorize the issuance of the bonds involved, because inhibited by §§ 1 and 2, article 11, of the Constitution. With due deference to the majority, it is submitted that this is not tenable. In substance, so far as material to consider, §§ 1 and 2, article 11, provide that a city shall not lend or pledge its credit, directly or indirectly in any manner to or in aid of any corporation for any amount for any purpose, or become responsible for any debt or liability of any corporation, nor shall it make any donation to or in aid of any corporation, or become a joint owner with such corporation. That neither of these provisions is violated is clear when § 355 of the charter and the contract entered into between the tunnel commission and the Denver & Salt Lake Railroad Company are analyzed. Section 355 creates a tunnel commission, and confers upon that body all the powers granted to the city by article 20 of the Constitution, and otherwise existing by operation of law; authorizes the commission to acquire, construct, build, or assist in building, a tunnel through the main range of the Rocky Mountains, in the vicinity of James Peak, and the necessary approaches thereto, to be known as the "Moffat tunnel," for the purposes of transporting freight, passengers, water, and electricity, provided that in the event the tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be reserved by the city in perpetuity to construct and operate through such tunnel suitable apparatus for conveying water and electric current from the western to the eastern portal for the use of the inhabitants of the city, and to permit the use of the tunnel, upon a fair and equitable basis, by any and all railway lines desiring such use. It also provides the commission may arrange that a portion of the funds needed for the construction of the tunnel may be furnished by corporations, and that the commission may enter into contracts with such corporations with reference to the construction, control, future lease, sale, or disposition of the tunnel, but expressly provides that until the city shall have been reimbursed in full for all moneys expended by it with interest, and is discharged from all financial liability in connection therewith, it shall retain the ownership of the tunnel, and that the rights reserved to utilize it for the transportation of water and electricity shall be perpetually retained, notwithstanding any sale or lease of the tunnel. The section then provides that if, on investigation, the commission shall find that the construction of the tunnel is desirable and feasible, that body shall determine the amount of bonds necessary to be issued for that purpose, and may, by ordinance of the city council, submit to the vote of the taxpaying electors the proposition of issuing such bonds, and, if it is carried, that annually thereafter a tax shall be levied to raise funds to discharge the interest and the principal of the bonds as they mature, unless suitable provisions for these purposes are otherwise made; and finally declares: "The inhabitants of the city and county of Denver, by the adoption of this charter amendment, do find and declare that the said tunnel will, in their judgment, be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of the said city and county."

After the adoption of this section the commission entered into a contract with the Denver & Salt Lake Railroad Company, which owns and is operating a line of railroad from Denver west, the salient features of which are as follows: The tunnel shall be constructed by the commission, and two thirds of the cost, or $3,000,000, is to be paid by the city, and one third by the railroad up to $4,500,000, and the excess above that amount, if any, is to be paid by the company; that the amount to be paid by the company shall be deposited with a depositary, to be mutually agreed upon, or secured in a suitable manner; that the company shall pay the interest on the bonds and provide a sinking fund to discharge them at maturity; and that the consideration for the obligations which it thus assumes is the right to operate and maintain the tunnel for railroad purposes, and ultimately acquire it for this purpose. It requires the railroad company, upon the request of the city, to allow any other railroad company to use the tunnel, and its tracks and facilities for a distance of 30 miles east and a distance of 75 miles west of the tunnel, upon specified conditions. The contract requires the company to commence work upon the extension of its road from Craig to Salt Lake contemporaneously with the commencement of work upon the tunnel, and complete it within five years after the completion of the tunnel. By the contract the company is given the option, on or before the maturity of the bonds, to purchase the tunnel by the payment of the principal of such bonds, and accrued interest thereon; but this option is subject to the perpetual right of the city to transport through the tunnel, water and electric current, and also subject to the perpetual right reserved by the city to have the tunnel, approaches, and tracks outside used by other railroads. In other words, the option extends only to the purchase of the tunnel by the company for its own railroad operation purposes, and does not give the company the right, in the event of such purchase, to interfere with the use of the tunnel by the city for any of the other purposes for which it is to be built by the city. The company is to operate the tunnel for railroad purposes at its own expense. Finally, the contract provides that if the company, after completion or during the construction of the tunnel, fails to pay the interest on the bonds or deposit the necessary amount in the sinking fund, or comply with any other material provision of the contract for three months, it may be terminated by the commission, and all moneys paid by the company thereunder forfeited and held as liquidated damages. It contains other provisions which are not of any moment in determining the validity of the bonds.

From the foregoing synopsis of the provisions of § 355 and the contract, it is apparent that there is not a word or line in either which violates, in letter or spirit, the inhibitions contained in §§ 1 and 2, article 11, of the Constitution. The city has not loaned or pledged its credit to or in aid of the railroad company in any amount, or in any manner, for any purpose whatever; it has not become responsible for any debt, contract, or liability of the company, neither has it made any donation or grant to or in aid of the company. In brief, the construction of the tunnel is undertaken by the city alone for its own benefit, and the tunnel is and remains its own exclusive property until the option to purchase is exercised. True, the company is to furnish at least one third of the cost of the tunnel, but the city is not obligated to refund the sum thus advanced, and incurs no liability of any kind in connection with such advancement. On the contrary, if the company fails to comply with the obligations imposed upon it by the contract, it forfeits the advancement to the city. The consideration for the advancement by the company is an option to purchase the tunnel, and a lease or license to lay tracks in the tunnel and operate its trains through the same. It would certainly be an anomalous proposition to say that because the city had undertaken to construct the tunnel it was without authority, for a valuable consideration, to contract in advance to sell or lease it for one of the purposes for which it was constructed. No such inhibition is found in the provisions of the Constitution under consideration, and it is impossible, in my opinion, to deduce from either § 355 of the charter or the contract that by this arrangement the city has pledged its credit to or in aid of the company, become responsible for its debts, or made a donation to it. The option to purchase and lease or license given the company is nothing more than the exercise of wise business judgment on the part of the commission, which assures the use of the tunnel for one of the main purposes for which it was designed, and in effect provides for a return upon the investment by the city until the option to purchase is exercised, and then, if exercised, leaves such rights in the city as will enable it to require the purchaser to permit the use of the tunnel by other railroad companies, and the other purposes for which it is designed. Nor in the event the company purchases the tunnel, nor under the arrangement existing, until the option to purchase is exercised, is there any joint

ownership which the Constitution inhibits. The tunnel is the property of the city. It has no interest whatever in the railroad or its operation; this belongs exclusively to the railroad company, and in case it purchases the tunnel its ownership is for a purpose with which the city is in no manner connected. The city will still have the right to use the tunnel for the transportation of water and electricity, but this right belongs to it alone. The joint ownership which the Constitution inhibits is a joint ownership for the same purpose or use. Neither can it be said that because the section provides that the commission may assist in building the tunnel, it thereby lends aid to a corporation, which the Constitution inhibits, as that would depend upon whether, under any contract the commission entered into, by virtue of provisions of the section, aid was given contrary to constitutional restrictions. It is therefore manifest that plaintiff in error has not only failed to establish beyond a reasonable doubt that § 355 of the charter or the contract violate the constitutional provisions under consideration, but it appears clearly and beyond question that they do not.

Suppose the tunnel commission had been given power in the first instance to construct the tunnel at the expense of the city, by the issuance of bonds, and after it had been constructed had been authorized in a legal manner to enter into a contract with a railroad company operating a line of road from the city west, to lease the tunnel to the company for railroad purposes, and give it an option to purchase the tunnel, it certainly could not be said that such authority was inhibited by the Constitution. Between such an arrangement and the one made there is no difference in effect or principle, except that the commission by entering into the arrangement it has in advance, as authorized to do by § 355, has exercised sound business sense, for the reason provision has been made, before any money is expended, which assures the use of the tunnel for the transportation of freight and passengers, the payment of a valuable consideration upon the money expended, and for a sale which will reimburse the city for all expenditures. Such an arrangement is to be commended, rather than condemned upon the theory that thereby constitutional limitations are violated, when in effect it is simply the exercise of good business judgment.

Counsel for plaintiff in error contend that the city is without power to issue the bonds because a municipal corporation cannot exercise any powers except those expressly granted or fairly implied as incident to such powers, or those essential to the declared objects and purposes of the corporation. This is a sound proposition of law, but in no sense applicable. Denver is operating under a special charter by virtue of the provisions of article 20 of the Constitution. In Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24, an act of the legislature of Ohio which empowered the city to build a railroad from the city to Chattanooga was under consideration. The supreme court of Ohio held that unless prohibited by the Constitution it was within the legitimate scope of legislative power to authorize a city to construct a railroad in which it had a special interest. In this connection it should be noted that Judge Dillon in his work on Municipal Corporations, from which counsel for plaintiff in error have quoted extensively, says, in effect, that in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal corporation to construct railways in which such corporation has a special interest, and impose upon its citizens taxes for that purpose. If Denver could construct a railroad to Salt Lake, including the tunnel, clearly it may construct one of the important links in the line, namely, the tunnel alone, on its own account, and, in consideration of a railroad company aiding in constructing it, give such company a lease and option to purchase. Otherwise the tunnel would not benefit the city. Our own court has repeatedly held that the object of article 20 was to confer upon the people of Denver, not only the powers expressly mentioned in that article, but every power the legislature theretofore possessed in making a charter for Denver.

It was upon the basis that the people of the city of Denver possessed power to legislate with respect to charter provisions, that we held in the auditorium case (Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066) it was within the power of the people of the city of Denver to provide by charter for the erection of an auditorium, and to issue bonds to discharge the indebtedness for that purpose, for the reason that the people of the city possessed the power to legislate on this subject. That is precisely the situation in the case at bar. Authority has been conferred upon the tunnel commission to build the Moffat tunnel, through legislation by the people of the city, which they have the power to enact. They have provided for the issuance of bonds for this purpose; they have declared that the tunnel will be of local use and convenience to the people, and that it is absolutely essential to the future growth and welfare of the city. It is manifest from the topography of the country west of the city, the neces-

sities of the city, and the beneficial results which will follow the construction of the tunnel that these declarations have ample foundation upon which to base them. If the city could build an auditorium, which it was evident was not necessary for any municipal purpose, in the ordinary meaning of that term, and could not result in any financial benefit to the people of the city, except as it would serve to attract national conventions of various organizations which might meet here at long intervals of time, it certainly cannot be successfully asserted that the electors of Denver may not make provision, by appropriate legislation, to construct a tunnel for the transportation of freight and passengers, which will be of benefit to the people every day in the year.

Counsel for defendants in error contend that special authority is conferred upon the city to construct the tunnel under article 20 of the Constitution. It is unnecessary to discuss this question as it is clear the city is not inhibited from constructing such tunnel by that section.

Counsel for plaintiff in error suggest that some portions of § 355 are invalid because they undertake to empower the city to engage in business which it cannot be permitted to engage in. In answer to this it is only necessary to say that where a part of an act is unconstitutional it does not vitiate the part that is good, when the good and bad can be clearly separated, and the good is complete in itself, and does not depend upon the void portion. They also urge that the section violates § 8 of article 11 of the Constitution. In the opinion of the writer this contention is not tenable.

In my opinion the judgment of the district court sustaining the validity of the bonds should be affirmed.

Petition for rehearing denied October 5, 1914.

CONNECTICUT SUPREME COURT OF ERRORS.

ADOLPHUS VALIN, Appt.,
v.
LYMAN B. JEWELL et al., Trustees.

(88 Conn. 151, 90 Atl. 36.)

Highway — unsafe sidewalk — liability of property owner to tenant.

1. A tenant who by requirement of a municipal ordinance attempts to remove from the sidewalk in front of the leased property ice which has formed from water dripping from a roof of the leased building cannot hold the property owner liable for injuries caused by his falling upon the walk, on the theory that he was entitled to the rights of a traveler.

Landlord and tenant — common passageway — sidewalk.

2. A tenant cannot hold his landlord liable for injury due to a fall on the sidewalk in front of the property which was made slippery by ice formed by water dripping from a roof of the leased building, on the theory that the walk was a common passageway which the landlord was bound to keep in repair.

Same — duty of landlord to repair — obvious conditions.

3. A tenant cannot hold his landlord liable for injury due to a fall on ice accumulated on the sidewalk from water dripping from a roof of the leased property because of absence of devices to care for it, where the condition was obvious when the lease was made and the landlord did not undertake to repair it.

(March 19, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County sustaining a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

Statement by **Prentice**, Ch. J.:

The substituted complaint, upon which the questions presented for review arise, alleges that on February 3, 1912, the defendants were owners of a tenement or dwelling house in Hartford, known as No. 87 Trumbull street; that on this day the plaintiff was a tenant of the defendants and one of the occupants of said tenement; that, "owing to the defective construction of the roof on the porch at the entrance of said tenement, water and melted snow gathering on said roof was allowed to flow off said roof directly on the sidewalk in front of said premises, there being no conductor or any

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Note. — The liability of a landlord for injury to tenant from defects in promises is treated in the notes to Hines v. Willcox, 34 L.R.A. 824; Walsh v. Schmidt, 34 L.R.A. (N.S.) 798; Bailey v. Kelly, 39 L.R.A. (N.S.) 378; and Mesher v. Osborne, 48 L.R.A.(N.S.) 917; and see later cases, Stone v. Lewis, 50 L.R.A.(N.S.) 471, and Howard v. Washington Water Power Co. 52 L.R.A.(N.S.) 578.

As to the liability of a landlord to a third person for condition of premises in possession of tenant, including injury to person on sidewalk, see note to Knight v. Foster, 50 L.R.A.(N.S.) 286, and other notes there referred to, especially note to Cerchione v. Hunnewell, 50 L.R.A.(N.S.) 300, as to the liability of landlord to third person for snow and ice or obstructions upon the sidewalk.

device provided to prevent water flowing from said roof directly onto said sidewalk," and that, "without some device to prevent it, water would be carried by the roof directly onto the sidewalk and accumulate there, and in cold weather freeze, making such sidewalk icy and dangerous to passers-by," as the defendants well knew; that, by force of a penal ordinance of said city, it was the plaintiff's duty, as an occupant of said tenement, to remove snow or ice gathering on said sidewalk; that on said day, while the plaintiff, acting pursuant to the duty and liability imposed upon him by said ordinance, was attempting to remove ice and snow which had formed on said sidewalk from water flowing from said roof, he, without negligence on his part, slipped and fell on the ice so formed, sustaining personal injuries described; and that these injuries so occasioned were wholly due to the negligence of the defendants in suffering the premises to remain in the defective condition described.

The demurrer sustained contained several reasons, charging in substance that the complaint failed to show that the defendants were guilty of negligent conduct in respect to the plaintiff, and that it showed that the plaintiff was guilty of contributory negligence and assumed the risk. The only error assigned was the sustaining of the demurrer.

Messrs. **William F. Henney** and **David B. Henney**, for appellant:

If plaintiff were a traveler on the sidewalk, injured under the circumstances set forth in the complaint, the defendant would be liable.

Field v. Gowdy, 199 Mass. 568, 19 L.R.A. (N.S.) 236, 85 N. E. 884; Maloney v. Hayes, 206 Mass. 1, 28 L.R.A.(N.S.) 200, 91 N. E. 911, 3 N. C. C. A. 137; Smith v. Preston, 104 Me. 156, 71 Atl. 653; Marston v. Phipps, 209 Mass. 552, 95 N. E. 954; Hynes v. Brewer, 194 Mass. 435, 9 L.R.A.(N.S.) 598, 80 N. E. 503.

Plaintiff was on this sidewalk for a lawful purpose, and passing from place to place upon it at the time of his injuries. He was a traveler on the highway to such an extent at least as to make defendant liable.

Higginson v. Mahant, 11 Allen, 530; Reed v. Madison, 83 Wis. 171, 17 L.R.A. 733, 53 N. W. 547.

The actionable negligence was the failure to repair.

Smith v. Preston, 104 Me. 156, 71 Atl. 653.

There is nothing in the fact that plaintiff was a tenant of the building to excuse the landlord from liability.

L.R.A.1915B.

Koskoff v. Goldman, 86 Conn. 415, 85 Atl. 588.

Mr. Arthur L. Shipman, for appellees:

The presence of snow and ice on a sidewalk, even if in existence for a long period, gives no right to an injured person to hold the adjoining property owner responsible for an accident caused thereby.

Hartford v. Talcott, 48 Conn. 532, 40 Am. Rep. 189.

The owner of a tenement house owes no duty in respect to his tenants to remove snow and ice from the sidewalk in front thereof.

Little v. Wirth, 6 Misc. 301, 26 N. Y. Supp. 1110; Moore v. Gadsden, 87 N. Y. 84, 41 Am. Rep. 352.

Plaintiff was running a risk voluntarily assumed or imposed by law; he knew of the risk, and its cause.

Gallagher v. Button, 73 Conn. 172, 46 Atl. 819, 8 Am. Neg. Rep. 5; Miner v. McNamara, 81 Conn. 690, 21 L.R.A.(N.S.) 477, 72 Atl. 138.

It is of no moment that the plaintiff was doing his duty as a citizen of Hartford or acting as a volunteer.

Hartford v. Talcott, 48 Conn. 525, 40 Am. Rep. 189.

Mr. **Charles Welles Gross** also for appellees.

Prentice, Ch. J., delivered the opinion of the court:

This is an action of tort. If a cause of action is stated, the complaint must show a primary right in the plaintiff invaded by the defendants' wrong. Conduct on the part of the defendants, which amounts to a breach of some duty owed by them to the plaintiff, must appear in the averments.

The facts relied upon as constituting a breach of duty are in substance that the roof on a porch over the entrance to a tenement building owned by the defendants, and of which the plaintiff was one of the occupants as a tenant, was so constructed that water and melted snow gathered upon it, and that no conductor or other device was provided to prevent the moisture thus accumulated from flowing directly upon the sidewalk in front of the premises, where in cold weather it would freeze. The complaint charges that, as the direct result of this condition of things, moisture from rain or snow fall intercepted and diverted from its natural course to the earth by the roof was thereby caused to flow upon the sidewalk, where it froze, forming ice, and that the plaintiff, falling upon the ice so formed, was thereby injured, without fault upon his part. It is conceivable that out of such a situation a breach of duty towards some one might arise. Marston v. Phipps, 209

Mass. 552, 554, 95 N. E. 954; Smith v. Preston, 104 Me. 156, 161, 71 Atl. 653; Hartford v. Talcott, 48 Conn. 525, 532, 40 Am. Rep. 189. It does not, however, follow that the plaintiff was such an one. It remains, therefore, to inquire what duty the defendants owed to the plaintiff which would be invaded by the conduct recited, and what its source.

It is contended that the duty was one due from the defendants as landowners to the plaintiff as a traveler in the adjacent highway. The latter was indeed in the highway when he received his injury, but he was not a traveler thereon. He was not using the sidewalk for purposes of passage, or as a way. He was not attempting to proceed from one point to another, using the sidewalk therefor. Assuming that in reaching the icy spot he might have been using a few feet of the walk for purposes of passage, a fact which does not appear, that use had ceased, and at the time he fell he was engaged in the performance of a duty cast upon him by law to repair a defect in the highway. He was no more a traveler at that time than a laborer engaged in the immediate work of filling a hole in the street. He was engaged in the attempt to remove from the walk the ice and snow which had gathered there, and not in an attempt to go anywhere or to reach any point to which the way would lead him. Bartram v. Sharon, 71 Conn. 686, 695, 46 L.R.A. 144, 71 Am. St. Rep. 225, 43 Atl. 143, 6 Am. Neg. Rep. 10; Salzman v. New Haven, 81 Conn. 389, 393, 22 L.R.A.(N.S.) 333, 71 Atl. 500; Blodgett v. Boston, 8 Allen, 237, 240; Ball v. Winchester, 32 N. H. 435, 444; Varney v. Manchester, 58 N. H. 430, 431, 42 Am. Rep. 592.

As the plaintiff was not a traveler in the highway, we have no occasion to inquire whether or not the complaint shows that, if he had been one, the defendants, as owners of the adjacent premises, would have owed to him, a tenant therein, a duty, as respects the presence of the ice upon the walk, which was not performed.

The plaintiff was a tenant in the defendants' building, in front of which he was injured, and of which the porch roof complained of formed a part. It is urged that the sidewalk where the ice accumulated was in reality the approach to the building, and that for that reason the defendants, as the landlords, were responsible for its safe condition. Appeal in thus made to the familiar doctrine recognized by us in Koskoff v. Goldman, 86 Conn. 415, 424, 85 Atl. 588, 592, that "the duty of maintenance and repair rests upon a landlord, in respect to common passageways and approaches in or to a building occupied by several tenants, which passageways or approaches are retained under his control for the use of the several tenants as a means of access to the portions of the premises leased to them." This contention meets with the insurmountable obstacle that the icy spot which caused the plaintiff's fall was not a portion of the premises affected by the tenancy. Not only so, but it was in the highway, where of necessity it could not come within the conditions stated in the citation just made. Beyond this it does not appear that those conditions were satisfied in respect to any portion of the building. It does not appear that any portion of it was retained in the landlord's control for the use of the several tenants as a means of access to the portions of the premises leased to them respectively. We may surmise that such was the case, but the isolated allegation that the plaintiff was one of the tenants occupying the building furnishes the only foundation for such a surmise which well might be unfounded. For aught that appears, the plaintiff himself, by the terms of his tenancy, may have assumed the duty of caring for any common approach or passageway. Special conditions creating a liability on the part of the landlord, where prima facie that liability does not exist, must be averred. Shindelbeck v. Moon, 32 Ohio St. 264, 276, 30 Am. Rep. 584.

Eliminating this special feature from the relation of landlord and tenant, which existed between these parties, we are brought to inquire whether, in any other way incident to the tenancy, a duty was imposed upon the defendants in respect to the ice formation, or its cause, which was not fulfilled by them. This formation is in the complaint attributed to the porch-roof projection, with its absence of conductors, as its ultimate cause. This porch and its roof were part of the structure of the building. Its character, method of construction, and lack of conductors, were apparent. What it would accomplish in intercepting, accumulating, or diverting from its natural course falling rain or snow was obvious. There was no lack of repair, no secret infirmity or peculiarity, no change of character or condition during the plaintiff's tenancy, and no warranty or special agreement to alter the usual obligations of parties to a tenancy.

"The general rule is that, under such a contract, the lessee takes the risk as to the condition and quality of the hired premises, and that the landlord is not liable to the tenant for injuries sustained by reason of the defective condition of the building leased. By such a lease the lessee purchases an estate in the premises rented, and the rule of *caveat emptor* applies, making it ordinarily the duty of the lessee, as such purchaser, to make such examination of the

premises as is required in order to ascertain whether the premises have 'so fallen into decay, or become so dangerous, that a person occupying the same is liable to be injured.'" Gallagher v. Button, 73 Conn. 172, 175, 46 Atl. 819, 820, 8 Am. Neg. Rep. 5.

"The law does not imply any warranty on the part of the landlord that the house is reasonably fit for occupation; much less does it imply a warranty that no accident should befall the tenant from external forces, such as storms, tornadoes, earthquakes, or snowslides. . . . A tenant is a purchaser of an estate in the land or buildings hired; and . . . no action lies by a tenant against a landlord, . . . in the absence of an express warranty or of active deceit. This is the general rule of *caveat emptor*." Doyle v. Union P. R. Co. 147 U. S. 413, 423, 425, 37 L. ed. 223, 228, 229, 13 Sup. Ct. Rep. 333, 337, 338.

"A tenant who hires premises takes them as they are," at least in as far as obvious conditions are concerned, "and cannot complain that they were not constructed differently." Woods v. Naumkeag Steam Cotton Co. 134 Mass. 357, 359, 45 Am. Rep. 344. See also Miner v. McNamara, 81 Conn. 690, 694, 21 L.R.A.(N.S.) 477, 72 Atl. 138; Harpel v. Fall, 63 Minn. 520, 523, 524, 65 N. W. 913.

We fail to discover in the allegations a breach on the part of the defendants of a duty owed by them to the plaintiff.

There is no error.

In this opinion the other judges concur.

MONTANA SUPREME COURT.

VALLEY MERCANTILE COMPANY et al., Respts.,
v.
ST. PAUL FIRE & MARINE INSURANCE COMPANY, Appt.

(49 Mont. 430, 143 Pac. 559.)

Insurance — against larceny of automobile — taking car for joy ride.

A policy insuring the owner of an automobile against loss by theft does not cover a loss caused by an accident to the car while it is in possession of employees of a shop to which it had been taken for repairs, who had taken it from the shop, after working hours, for a joy ride, intending to return it to the shop when they were through with it.

(September 30, 1914.)

APPEAL by defendant from a judgment of the District Court for Missoula County in plaintiffs' favor and from an order denying a motion for new trial in an action upon an insurance policy insuring plaintiffs' automobile against loss by theft. Reversed.

The facts are stated in the opinion.

Mr. **William Wayne**, for appellant:

A mere taking does not constitute a theft or larceny of the property.

State v. Rechnitz, 20 Mont. 488, 52 Pac. 264; Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782; Re Mutchler, 55 Kan. 164, 40 Pac. 283; State v. Shepherd, 63 Kan. 545, 66 Pac. 236; People v. Brown, 105 Cal. 66, 38 Pac. 518; 25 Cyc. 45, 47B, 49 (i); State v. Hanson, — Mont. —, 141 Pac. 669; Smith v. State, — Tex. Crim. Rep. —, 146 S. W. 547; Rigus v. Pacific Coast Casualty Co. 145 Mo. App. 170, 129 S. W. 982; Daugherty v. Thomas, 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615; Travelers' Indemnity Co. v. Fawkes, 120 Minn. 353, 45 L.R.A. (N.S.) 331, 139 N. W. 703.

Mr. **Henry C. Stiff**, for respondents:

The question of the existence or nonexistence of a felonious intent on the part of LeVasseur and Ellis when they took the automobile from the place where the owners had left it was one for the jury.

People v. Grider, 2 Cal. Unrep. 285, 3 Pac. 492; Hart v. State, 57 Ind. 102; State v. South, 28 N. J. L. 28, 75 Am. Dec. 250; Ellis v. People, 21 How. Pr. 356; State v. Watson, 7 S. C. 63; Banks v. State, 7 Tex. App. 591; State v. Carr, 13 Vt. 571.

Holloway, J., delivered the opinion of the court:

In November, 1910, the Valley Mercantile Company and Ralph C. Stiff secured a policy of insurance upon their automobile. In April following, while the policy was in full force and effect, the owners placed the car in a paint shop in Missoula to be repainted, and while there it was taken by Ed. Le Vasseur and Victor Ellis, employees in the paint shop, and by them driven to De Smet and damaged. Under the terms of the policy the owners were insured against loss in excess of $25 on any single occasion, resulting from the theft of the automobile "by persons other than those in the employ, household, or service of the assured." Demand was made upon the insurance company for an amount sufficient to cover the loss, and, upon refusal, this action was insti-

Note. — The general subject of automobile insurance, including insurance against theft, is treated in the notes to Harris v. American Casualty Co. 44 L.R.A.(N.S.) 70, and Patterson v. Standard Acci. Ins. Co. 51 L.R.A.(N.S.) 583.

tuted. The complaint, after formal recitals relating to the insurance, alleges that "the automobile . . . was, by some person or persons not in the employ of plaintiffs, nor in the household or service of plaintiffs or either of them, and without the consent and against the will and wish of plaintiffs, stolen and taken from the place where the same was at the time kept in the city and county of Missoula, state of Montana, and said automobile was, by the said person or persons so taking and stealing the same, injured and damaged in the sum and to the extent of $400."

Issues having been framed, the cause was tried to the court sitting with a jury. A motion for a nonsuit and a motion for a directed verdict were denied. Plaintiffs prevailed, and defendant has appealed from the judgment and from an order denying it a new trial.

But one assignment needs to be considered. If the evidence is sufficient to sustain the verdict, the slight errors occurring at the trial ought not to work a reversal of the judgment. If the evidence is insufficient, it is apparent that a new trial would be useless.

A day or two after the automobile was left in the paint shop Le Vasseur and Ellis, at the close of the working day, about 5 P. M., in the absence of the owner of the shop and without his knowledge or consent, or the knowledge or consent of the plaintiffs, or either of them, took the automobile from the shop, ran it to a point near De Smet, where an accident occurred which caused considerable damage to the car. A telephone message was sent to a public garage in Missoula for help, and James Hartley responded. When he reached De Smet he found Le Vasseur and Ellis at the broken car,—the car headed toward Missoula,—and they assisted him in towing it into the city and in replacing it in the paint shop. Both of these men continued to work at the shop for a considerable time after the injury to the car was discovered by the owners. The owner of the paint shop locked the front door—the only one through which the automobile could be moved——before he left the shop on the day in question. This was the only evidence which tended to characterize the taking at the time plaintiffs rested, and defendant interposed its motion for a nonsuit. On behalf of the defendant Le Vasseur, one of the men who took the car testified that it was taken only for a "joy ride" and without any intention of stealing it; that they intended to take a ride about Missoula and restore the car to the paint shop; that after they had reached a point a short distance beyond the station at De Smet they turned and started back to Missoula; that when opposite the station the car "blew up;" that they immediately telephoned in to the garage in Missoula and waited at the car until Hartley came for them. On cross-examination he testified that they secured gasolene to run the car from the paint shop; that it belonged to Wilburn, who owned the shop, and was kept for cleaning and for cars in the shop that run short; that they left the shop with the car about 5:30 or 5:45, April 13th, in daylight, and were seen by employees of a near-by laundry, and that they took the car at a time when the owner of the shop and the owners of the car would not likely see them. With certain testimony touching the efforts of plaintiffs to effect a settlement, the foregoing is, in substance, all the evidence produced upon the trial of this cause.

The liability or nonliability of the insurance company depends entirely upon the answer to the question: Does this evidence prove that the car was stolen from the paint shop? It is earnestly contended by counsel for respondents that, the taking being admitted, the question of the intent with which the car was taken was one for the jury's determination; and this is true, provided there is direct evidence of such intention or facts and circumstances from which such intention can be inferred. The only direct evidence of intention is that given by Le Vasseur above. Since this is a civil action, plaintiffs were required to prove their case only by a preponderance of the evidence, but to recover at all they had the burden of proving every element of the crime of larceny. Section 8112, Revised Codes, so far as applicable here, provides: "In every crime or public offense there must exist a union or joint operation of act and intent."

The fact that the taking was altogether wrongful, and that it was the intention of Le Vasseur and Ellis to appropriate the car to their own use during the ride, and to that extent to deprive the owners of the use of their property, are not sufficient to constitute their acts larceny. They must have had a criminal intent—the intention to steal the car, without which the act of taking, however reprehensible and wrongful, amounted only to a trespass or a civil wrong.

In State v. Rechnitz, 20 Mont. 488, 52 Pac. 264, this court adopted the very terse expression of the rule from the court of appeals of New York, as follows: "Every taking by one person of the personal property of another, without his consent, is not larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this there must have

been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury." McCourt v. People, 64 N. Y. 583.

To constitute the crime of larceny the intent which accompanies the act of taking must be the criminal intent to deprive the owner of his property, not temporarily, but permanently. In Re Mutchler, 55 Kan. 164, 40 Pac. 283, the supreme court of Kansas said: "A felonious intent means to deprive the owner, not temporarily, but permanently, of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

This is quoted with approval in State v. Shepherd, 63 Kan. 545, 66 Pac. 236. In People v. Brown, 105 Cal. 66, 38 Pac. 518, the trial court instructed the jury that larceny may be committed even though it was only the intent of the party taking the property to deprive the owner of it temporarily. Of this instruction the supreme court said: "But the test of law to be applied to these circumstances for the purpose of determining the ultimate fact as to the man's guilt or innocence is, Did he intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent, and his acts constitute but a trespass. While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof."

Many other cases holding to this same view are collected in the notes in 25 Cyc. 45.

Considered in the light of these rules, the facts stated do not warrant the inference that the car in question was taken by Le Vasseur and Ellis with the criminal intent to deprive the owners of it permanently, and therefore the car was not stolen, and this case does not come within the provision of the insurance policy referred to above. Upon facts very similar this same conclusion was reached in Bigus v. Pacific Coast Casualty Co. 145 Mo. App. 170, 129 S. W. 982; Smith v. State, — Tex. Crim. Rep. —, 146 S. W. 547, and Travelers' Indemnity Co. v. Fawkes, 120 Minn. 353, 45 L.R.A.(N.S.) 331, 139 N. W. 703.

The facts do bring the case clearly within the rule that "Where one without permission borrows goods of another, intending and having the power to restore or replace them, the taking, although wrongful, does not constitute larceny." 25 Cyc. 49 (i).

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The motion for a directed verdict should have been sustained. The judgment and order are reversed and the cause is remanded, with directions to dismiss the complaint.

Brantly, Ch. J., and **Sanner**, J., concur.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, Appt.,
v.
NORFOLK SOUTHERN RAILROAD COMPANY.

(— N. C. —, 82 S. E. 963.)

Railroad — punishment for blocking street crossings.

A railroad company cannot be punished for blocking a street crossing under an ordinance forbidding any railroad company or engineer to block a crossing, and providing that any engineer of any locomotive of any railroad violating the ordinance shall be fined.

(Clark, Ch. J., and Hoke, J., dissent.)

(September 30, 1914.)

Note. — Criminal or penal responsibility for blocking street or highway railroad crossing.

For act of a third person as an excuse to a railroad for blocking a street crossing, see Com. v. New York C. & H. R. R. Co. 23 L.R.A.(N.S.) 350, and note thereto.

For violation of statute or ordinance in relation to blocking railroad crossing as affecting civil liability for injury, see note to Denton v. Missouri, K. & T. R. Co. 47 L.R.A.(N.S.) 820.

As to the damages recoverable for delaying a person by blocking a railroad crossing, see note to Terry v. New Orleans G. N. R. Co. 44 L.R.A.(N.S.) 1069.

As to the duty and liability of a railroad company toward one who goes upon its property to pass around a train blocking the crossing, see note to Hasting v. Southern R. Co. 5 L.R.A.(N.S.) 775.

As to the duty of a railroad company toward a person attempting to cross a train obstructing a highway, see note to Gesas v. Oregon Short Line R. Co. 13 L.R.A.(N.S.) 1074.

As to liability of a railroad company for the act of an employee in inviting a pedestrian to cross a train obstructing a highway, see notes to Southern R. Co. v. Clark, 13 L.R.A.(N.S.) 1071, and Westbrook v. Kansas City, M. & B. R. Co. 34 L.R.A.(N.S.) 469.

And as to contributory negligence in attempting to cross a train standing at a crossing, see notes to Jones v. Illinois C. R. Co. 13 L.R.A.(N.S.) 1066; Curtis v.

APPEAL by the State from a judgment of the Superior Court for Wilson County acquitting defendant of the charge of violating a municipal ordinance forbidding the blocking of street crossings. Affirmed.

Statement by **Walker, J.:**

The defendant was charged in the recorder's court of the town of Wilson with blocking Tarboro street crossing, in said town, for twenty minutes, with a freight train, in violation of the following town ordinance: "No railroad company nor engineer in charge of any train of any railroad company shall run or operate in or through the town of Wilson any locomotive or car or train of cars at a higher rate of speed than 10 miles per hour, and every engineer in charge of any train or locomotive running through the town of Wilson, shall ring the bell of such locomotive while same is being run and operated through said town; no railroad train or locomotive shall block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense: Provided, nevertheless, that the rate of speed hereinbefore prescribed shall not apply to any train running in or through the said town between the hours of 11 o'clock P. M. and 6 o'clock A. M., but all trains operating between such

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St. Louis & S. F. R. Co. 34 L.R.A.(N.S.) 466; and Platt v. Vicksburg, S. & P. R. Co. 50 L.R.A.(N.S.) 1012.

Generally.

The general rule seems to be well settled that a railroad company is subject to indictment for unreasonably obstructing a street or highway crossing. Reg. v. Great North of England R. Co. 9 Q. B. 315, 16 L. J. Mag. Cas. N. S. 16, 10 Jur. 755, 2 Cox. C. C. 70, 7 Eng. Rul. Cas. 466 (by cutting through the highway with its railroad, and carrying the highway over the railroad by a bridge not satisfying the statutory provisions); State v. Minneapolis & St. L. R. Co. 88 Iowa, 689, 56 N. W. 400 (by placing its track 2 feet above the surface of the ground, and making an excavation 6 feet deep in the highway on one side of the track); Louisville & N. R. Co. v. Com. 117 Ky. 350, 78 S. W. 124, rehearing denied in 117 Ky. 356, 79 S. W. 275 (with its trains or cars; indictable as for a common nuisance); Louisville & N. R. Co. v. Com. 33 Ky. L. Rep. 991, 112 S. W. 573; State v. Morris & E. R. Co. 23 N. J. L. 360 (by so placing cars across the highway and leaving them there, as to create a nuisance); State v. Western North Carolina R. Co. 95 N. C. 602 (by permitting its cars to stand across the highway longer than is reasonably necessary for them to do in crossing the same); Louisville & N. R. Co. v. State, 3 Head, 523, 75 Am. Dec. 778 ("contrary to the powers granted in their [its] act"); State v. Louisville & N. R. Co. 91 Tenn. 445, 19 S. W. 229; State v. Vermont C. R. Co. 30 Vt. 108 ("contrary to the powers granted to them [the railroad company] in their charter").

Thus, a railroad company is liable to indictment for obstructing a public highway for more than three years by making a cut across it for its road, and failing to construct a bridge to remove the nuisance, as it was its duty to do. Louisville & N. R. Co. v. State, 3 Head, 523, 75 Am. Dec. 778.

And under a statute providing that any person who shall obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein, shall be guilty of a misdemeanor, and liable to indictment, the remedy by indictment is an appropriate one against a railroad company which obstructs a public highway at a point where its railroad intersects the same, by building and failing to keep in repair an embankment across the highway. St. Louis, A. & T. R. Co. v. State, 52 Ark. 51, 11 S. W. 1035.

So, under a statute providing that any person who shall obstruct any public road by building any fence across or into it, or who shall wilfully cause any other obstruction in such road or any part thereof, shall be liable to be indicted, a railroad company is subject to indictment for unreasonably obstructing a highway with ditches, embankments, and tracks at a place where its authorized route crosses the highway. Palatka & I. River R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. 158.

And under statutes providing that "no engine or train is to be run across a highway near the compact part of a town, at a greater speed than 6 miles an hour. Nor is any way to be unreasonably and negligently obstructed by engines, tenders, or cars. The corporation forfeits not exceeding $100 for every offense;" and that "all fines and forfeitures, imposed as a punishment for any offense, or for a violation or neglect of any statute duty, when no other mode is expressly provided, may be recovered by indictment,"—a railroad company is liable to indictment for unreasonably and negligently obstructing a highway by placing locomotive engines, cars, and trains, and suffering them to be and remain in, upon, and across the highway for a long time. State v. Grand Trunk R. Co. 59 Me. 189.

But no criminal prosecution can be maintained under a statute which simply declares that a railroad company shall not obstruct a public highway or street by cars or trains for more than five minutes at any one time, but fails to provide a penalty for such breach of duty. Illinois C. R. Co. v. Com. 20 Ky. L. Rep. 115, 45 S. W. 367.

hours may be run and operated at a reasonable rate of speed."

Defendant was adjudged guilty by the recorder, and appealed. In the superior court the jury rendered a special verdict, finding that a train of cars belonging to defendant blocked the said crossing on November 27, 1913, for more than ten minutes, and that there was an engineer in charge of the train at the time, his name being unknown to the jurors. This finding was based upon the admission of the facts by the defendant only for the purpose of the trial. No charge was made against the engineer. The jury having submitted to the court the question as to defendant's guilt in the usual form, and the presiding judge, Hon. William M. Bond, having ruled that, under the said ordinance and the findings of fact in the verdict, the defendant was not guilty, as the penal provision is confined to the engineer, the jury so found and returned their verdict of not guilty. Judgment was entered for the defendant, and the state appealed.

Messrs. **Thomas W. Bickett**, Attorney General, and **T. H. Calvert**, Assistant Attorney General, for the State.

Walker, J., delivered the opinon of the court:

We may as well say *in limine* that our able and learned attorney general and assistant, in their argument before us, admitted, with their usual frankness and candor, that, as the ordinance prohibited any rail-

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Effect of existence of other available remedies.

Where it is provided by statute that, if any engineer or other agent of any railroad company shall obstruct or block up any crossing of a public street or road with the company's locomotives or cars, he or the company shall be subject to a penalty, to be recovered with costs in the name of the commonwealth, etc.; and it is also provided by another statute that, in all cases where a remedy is provided by any act or acts of assembly of the commonwealth, "the directions of the acts shall be strictly pursued, and no penalty shall be inflicted or anything done agreeably to the provision of the common law in such cases further than shall be necessary for carrying such act or acts into effect,"—an indictment cannot be sustained against the conductor of a train for obstructing a highway by allowing cars to stand upon a crossing, as this offense is the same as that mentioned in the statute first above set forth, and is not indictable, but the statutory remedy must be strictly pursued. Com. v. Capp, 48 Pa. 53.

On the other hand, where, by statute, corporations are subject to prosecution the same as natural persons for creating, continuing, or maintaining a public nuisance, or for obstructing a public highway, and it is made a criminal offense to obstruct a public highway, a railroad company may be prosecuted criminally, by indictment, for so constructing a bridge and the approaches and embankments thereto, at the crossing of its railroad and a public highway, as to obstruct travel on the highway and render it very dangerous and hazardous, notwithstanding there is a remedy by writ of mandate to compel the corporation to remove the obstruction or nuisance. State v. Baltimore, O. & C. R. Co. 120 Ind. 298, 22 N. E. 307.

So, a railroad company is liable to indictment for illegally obstructing a highway by building therein abutments for a bridge to carry its railroad across the highway above grade, notwithstanding a statute providing "that 'when any company shall not properly construct and maintain the bridges or other crossings of highways by its railroad tracks as required by law,' the township or other municipality wherein such crossings are located may themselves perform this work, and collect the cost thereof from the railroad, or may compel the performance of the duty by bill in equity." State v. Lackawanna R. Co. 81 N. J. L. 181, 79 Atl. 1030, affirmed in 82 N. J. L. 747, 82 Atl. 851, and reversed on other grounds, on rehearing, in 84 N. J. L. 289, 86 Atl. 386: this point reaffirmed on subsequent motion on certiorari to quash the indictment in 90 Atl. 1103.

And under a state statute providing that railroad corporations shall not obstruct public highways by trains or cars except to receive or discharge passengers, or to take fuel or water, and in no case longer than ten minutes, and that for each offense such corporation shall forfeit the sum of not less than ten, nor more than one hundred dollars, a railroad company may be found guilty and fined for blocking a city street which its tracks cross, by permitting cars to remain standing on one of its side tracks, although the state has given the city power to legislate generally upon the subject of preventing and removing obstructions to streets and the use of streets, and the city has, by ordinance, undertaken, pursuant to its authority, to regulate and prevent such obstructions on its street. Ohio, I. & W. R. Co. v. People, 39 Ill. App. 473.

Where a state statute, although providing no penalty for its violation, makes it unlawful for a railroad company to obstruct any public highway or street by cars or trains for more than five minutes at a time, a town ordinance imposing a fine if a locomotive or train remains across a street of the town for a longer period than ten minutes is void so far as it conflicts with the state statute, and is incompetent as evidence on behalf of a railroad company indicted for an unreasonable obstruction of a street crossing, for the purpose of showing that an obstruction of less than ten minutes is legal. Louisville & N. R. Co. v. Com. 117

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road train or locomotive from blocking any street crossing for a longer period than ten minutes, and provided that any engineer in charge of the train or locomotive of any railroad company violating the provision shall be fined not more than $10, and there was an engineer in charge of the train, the ordinance, in its penal aspect, was manifestly aimed at the engineer as the sole offender and the one who should be made to suffer for doing the forbidden act. He then added: "We know of no principle of law, or any authority to which we can refer the court, against the decision of the trial judge."

In this view of the case we concur. It will hardly be contended that the town did not have the right to make the engineer solely responsible for the blocking of the crossing, if it saw fit to do so, and we think it is equally clear that the ordinance was intended to penalize the engineer alone for doing, or permitting to be done, the forbidden act. Defendant is not charged with running its trains at an excessive rate of speed, and the portion of the ordinance where that is prohibited is the only one in which the words "railroad company" are used. When requiring the ringing of the bell and forbidding the blocking of the crossing, the engineer only is mentioned, it being reasonably supposed by the draftsman of the ordinance and the town board that if the prohibited act was committed, the engineer would be the one directly responsible for it, and the only one who could well prevent it,

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Ky. 350, 78 S. W. 124, rehearing denied in 117 Ky. 356, 79 S. W. 275.

Who liable.

Under a statute prohibiting all railroad corporations from obstructing any public road or highway, by stopping trains or leaving cars standing on any crossing except for the purpose of receiving passengers, etc.; and providing that "every engineer or conductor violating the provisions of the preceding section shall, for each offense, forfeit the sum of not less than $10 nor more than $100, to be recovered in an action of debt, in the name of the People of the State of Illinois, for the use of any person who may sue for the same, and the corporation on whose road the offense is committed shall be liable for the like sum,"—the engineer, the conductor, and the corporation are subject, indifferently, to the prescribed fine of not less than $10 nor more than $100, for a violation of the provision of the act; and a railroad company may be convicted and subjected to a fine for obstructing a highway crossing without the necessity of first convicting its engineer or conductor as a condition precedent to its conviction, and of limiting its liability to the same amount as that of the fine imposed on its servant. Toledo, W. & W. R. Co. v. People, 81 Ill. 141.

But see STATE v. NORFOLK SOUTHERN R. Co.

—liability of railroad company in the hands of a receiver.

A railroad company for which a receiver has been appointed is not liable to indictment for obstructing a public road crossing. State v. Norfolk & S. R. Co. 152 N. C. 785, 26 L.R.A.(N.S.) 710, 67 S. E. 42, 21 Ann. Cas. 692.

So, a railroad company is not subject to indictment for a nuisance in the obstruction of a public highway by freight trains running over the railroad, which have been allowed by the conductors in charge thereof to remain in the highway, where the railroad, at the time, is in the hands and under the control of receivers appointed by the court, and the railroad company has no authority or control over the road, conductors, or trains. State v. Vermont C. R. Co. 30 Vt. 108.

And a railroad company cannot be convicted for erecting or maintaining an obstruction (2-foot embankment and 6-foot excavation) over or upon a highway which its track crosses, at the crossing, during the time its business and property are in the hands of a receiver. State v. Minneapolis & St. L. R. Co. 88 Iowa, 689, 56 N. W. 400.

Generally, as to criminal prosecution of a corporation for acts or omissions while in the hands of a receiver, see note to State v. Norfolk & S. R. Co. 26 L.R.A.(N.S.) 710.

—liability of receiver in control of railroad company.

Receivers in possession of a railroad are indictable individually for obstructing a highway crossing with its trains in such a manner as to constitute a nuisance. State v. Norfolk & S. R. Co. supra.

Facts constituting offense—generally.

A railroad company which wilfully and continuously suffers and permits its freight trains to stand for long and unreasonable periods of time across a public street in a city is guilty of the common-law offense of maintaining a common public nuisance. Illinois C. R. Co. v. Com. 20 Ky. L. Rep. 115, 45 S. W. 367.

So, an indictment against a railroad company, which charges that the company "did unlawfully, wilfully, repeatedly, continuously, unreasonably, and for long and unnecessary and unreasonable periods of time, and for longer than five minutes at any one time, allow, permit, and suffer its freight and passenger trains to stand and remain coupled and hooked together over and across the public road," etc.,—sufficiently charges the offense of maintaining a common nuisance by obstructing a public highway, and is not subject to demurrer. Illinois C. R. Co. v. Com. 104 Ky. 362, 47 S. W. 255.

And an unreasonable obstruction by a

and they very wisely and justly restricted the imposition of a penalty for disobedience of the ordinance to him. It may be seriously questioned if the part of the ordinance relating to the speed of trains is not also confined to him, but we do not decide this, as it is not before us. The ordinance is too plainly worded for any doubt to be entertained as to the intention that the penal clause should be confined to the engineer. It says that very thing, in so many words, and with such directness and perspicuity as to exclude any other conclusion. The words are: "And any engineer, in charge of any train or locomotive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense."

The law of the case is as well settled as the meaning of the ordinance is obvious. It is fully considered by Justice Connor in Nance v. Southern R. Co. 149 N. C. 366, 63 S. E. 116. It is there held that we cannot punish even a corporation by the unwarranted extension of the terms of a statute, and especially we cannot insert words, or imply them, for the purpose of amplifying a penal clause, so as to embrace persons or acts not within its spirit and clear intent. It is the penal clause that gives life and vigor to the enactment, and by which alone can it be enforced. It must be remembered that this was not an offense at common law, but solely the creation of this ordinance. The rule then prevails, and must be applied, that when a particular offense is created, and the

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railroad company of a street which crosses its tracks, if caused intentionally or knowingly, is sufficient to render the company criminally liable and to justify a conviction therefor, without showing that the company or its employees acted maliciously. State v. Chicago, M. & St. P. R. Co. 77 Iowa, 442, 4 L.R.A. 298, 42 N. W. 365.

But it has been held that an indictment against a railroad company for obstructing a public road by suffering one of its trains to remain standing across the road for a longer time than is allowed by law is not sustained by proof of one obstruction only, without other evidence to show that the defendant either authorized or approved it, as the defendant's authorization or ratification of the unlawful act cannot be inferred from the one act alone. State v. Baltimore & O. R. Co. 68 W. Va. 193, 69 S. E. 703.

And under a municipal ordinance forbidding the obstruction of any street by a railroad train "for a longer period than is absolutely necessary for the safe and expeditious discharge of passengers, and for the purpose of making up and drilling freight, coal, and iron trains; provided, that when a train shall stand on said sidewalk or crossing for a longer period than five minutes, the person in charge of said train shall break the same at said crossing upon the request of any pedestrian or other person wishing to go over said crossing,"—a railroad company is not liable for a penalty for violation of the ordinance, where it has merely caused a train of cars to stand across a street for a period exceeding five minutes, and has failed to break the train at the crossing, during the period, unless either the obstruction continued longer than was absolutely necessary for the purposes mentioned in the ordinance, or some pedestrian or other person wishing to go over the crossing requested that the train should be broken. Central R. Co. v. Elizabeth, 64 N. J. L. 534, 45 Atl. 978.

Where a railroad company originally built a trestle over a public highway which its line crossed, at sufficient height over the highway to permit free travel and use thereof, but the town in which the crossing is located has subsequently become incorporated, and, without attempting to require the railroad company, as it might have done, to change the level of its crossing over this street, has so raised the level of the street at the crossing that the trestle is not now high enough to permit the passage under it of high loads, and it is an obstruction to the free use of the road,—the railroad company is not liable to indictment for obstructing the public highway, as the obstruction was caused by the act of the town, and the town, if anyone, is liable to indictment therefor. Southern R. Co. v. State, — Tenn. —, 169 S. W. 1173.

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—nature of obstruction.

An indictment alleging, in substance, that the defendant, a railroad corporation, built concrete abutments in and upon a public street at a point where its tracks crossed the same, whereby the street was greatly obstructed and narrowed, so that the citizens of the state could not pass on such public street, as they ought and were accustomed to do, to the common nuisance of all the citizens of the state, etc., charges a violation of the criminal law. State v. Lackawanna R. Co. — N. J. L. —, 90 Atl. 1103.

And a railroad company is guilty under an indictment charging it with obstructing a public road at a crossing by so maintaining its track across the road as to render the latter impassable, where the company has so constructed its track across the road as to constitute an unlawful obstruction, although the road is not thereby rendered wholly impassable,—unless the company proves in defense that it has complied with the conditions of its franchise or license to cross the road, by restoring the road to its former state, or to such state as not unnecessarily to impair its usefulness. State v. Western Maryland R. Co. — W. Va. —, 81 S. E. 1039.

So, a railroad company which obstructs a public road at a point where it crosses the railroad, by intentionally leaving upon the road a hand car with buckets and cloth-

penalty for its commission prescribed, we are confined to that particular remedy, to the exclusion of all others. This is too familiar a rule to be doubted. But in State v. Southern R. Co. 145 N. C. 496, 13 L.R.A. (N.S.) 966, 59 S. E. 570, we followed the law as stated by Justice Ruffin in State v. Snuggs, 85 N. C. 542, as follows: "The statute not only creates the offense, but fixes the penalty that attaches to it, and prescribes the method of enforcing it; and the rule of law is that, wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell, Crimes, 49; State v. Loftin, 19 N. C. (2 Dev. & B. L.) 31."

We are convinced that his Honor's ruling in quashing the indictment is correct, in view of the fact that the statute creates the offense, affixes the penalty, and prescribes the mode of proceeding,— the mention of the particular method operating to the exclusion of every other. 1 McClain Crim. Law, § 8, thus states the principle: "If the act prohibited has been previously an indictable offense, it will be presumed that the civil penalty therefor is cumulative; but when the act creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty

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ing hanging upon it, whereby the horses of people using and passing upon the road are frightened and the lives of persons endangered, is guilty of the offense of a public nuisance. Cincinnati R. Co. v. Com. 80 Ky. 137.

And a statute providing that "whoever being a conductor or other person having charge of or running a railroad train carrying or used for carrying freight permits or suffers the same or any car or locomotive engine composing the same to remain standing across any . . . street" shall be fined applies to a cut of cars which are being switched from place to place for the purpose of setting cars at different places, to be used in the consignment of freight, and a charge that a switchman having charge of running such a cut of cars unlawfully suffered and permitted the cars to remain standing across a certain public street, and thereby obstructed the street, is within the spirit and intent of the statute. Becker v. State, 33 Ind. App. 261, 71 N. E. 188.

But an indictment charging a railroad company with merely the frequent and rapid passing and repassing of its trains over a highway crossing, whereby the same is obstructed and rendered dangerous, does not charge any crime against the company. Com. v. Baltimore & O. R. Co. 223 Pa. 23, 132 Am. St. Rep. 723, 72 Atl. 278, reversing 35 Pa. Super. Ct. 474.

And a railroad company is not shown to be guilty of the statutory offense of obstructing a public road "by a fence, bar, or other impediment," by evidence that one of its employees pushed a freight car across the road, where it remained about seven hours, when it was removed, as the car was not an "impediment" of like character with "fences, bars, and gates," which class of obstructions alone this clause of the statute can be construed to mean. Central of Georgia R. Co. v. State, 145 Ala. 99, 40 So. 991.

—duration of obstruction.

An indictment against a railroad company for maintaining a nuisance by tearing down and keeping down for three months an overhead bridge erected by and belonging to it, where a public road crossed its track, whereby the public road was obstructed and the traveling public inconvenienced,—is subject to demurrer, if it does not also state that the company suffered its bridge to remain down an unreasonable length of time, or failed to replace it within the shortest practicable time. Com. v. Illinois C. R. Co. 104 Ky. 366, 47 S. W. 258.

And a railroad company cannot be found guilty of maintaining a common public nuisance upon proof merely that it has permitted one of its trains to stand across a public highway or street longer than five minutes at one time, although a statute, without providing a penalty for such breach of duty, declares that a railroad company shall not obstruct a public highway or street by cars or trains for more than five minutes at any one time, as it was not the intention of the legislature to declare a railroad company guilty of a common public nuisance whenever it permits one of its trains to stand across a street or public highway for more than five minutes at one time. Illinois C. R. Co. v. Com. 20 Ky. L. Rep. 115, 45 S. W. 367.

—necessity for presence of persons desiring to cross.

Under a statute prohibiting any railroad corporation from obstructing any public highway by stopping any train upon, or leaving any car or locomotive engine standing on, its track, where the same intersects or crosses such public highway, except for certain purposes, and in no case to exceed ten minutes, it is not necessary, in order to render a railroad company liable, that there should be persons actually present, desiring to cross, who are prevented from doing so by reason of the obstruction, but only that the train, car, or locomotive engine be so situated with reference to the highway as to present an obstruction to persons desiring to cross, if there were any such persons there at the time. Chicago & A. R. Co. v. People, 82 Ill. App. 679.

and mode of procedure, that penalty alone can be enforced."

We reviewed many of the authorities upon this question in State v. Southern R. Co. supra, but the following extract from that case will suffice to show the decided trend of judicial thought since the early days of the law up to the present time: "In Rex v. Wright, 1 Burr. 543, it was held that 'an indictment lies not upon an act of Parliament which creates a new offense and prescribes a particular remedy.' Lord Mansfield said in that case: 'I always took it that, where new-created offenses are only prohibited by the general prohibitory clause of an act of Parliament, an indictment will lie; but where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued, for otherwise the defendant would be liable to a double prosecution,—one upon the general prohibition, and the other upon the particular specific remedy.' And when afterwards informed that the counsel for the Crown 'gave up the matter,' he replied, 'I do not wonder at all at it; I thought he would do so. I have looked into it, and there is nothing in it. That Case of Crofton, 1 Vent. 63 (where the contrary is supposed to have been decided) has been denied many times.' In Rex v. Robinson, 2 Burr. 799–803, the great Chief Justice (Lord Mansfield) said: 'But where the offense was antecedently punishable by a common-law proceeding, and a statute prescribes a particular remedy by a summary

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—character of way obstructed.

Under a statute subjecting a railroad company to a fine (1) for obstructing travel upon a "highway" for a longer period than five minutes, and (2) for obstructing a "street" for a longer period than shall be prescribed by ordinance of the city, town, or village, by stopping any train at a crossing, a railroad company is not liable in a criminal prosecution for obstructing a street for more than five minutes at a crossing in an incorporated town which has no ordinance prescribing a period beyond which the street cannot be obstructed, as the word "highway," as used in the statute, relates alone to highways in the country, and the case is not within the second clause of the statute. Illinois C. R. Co. v. State, 71 Miss. 253, 14 So. 459.

And under a penal statute which prohibits a railroad corporation from negligently obstructing or unnecessarily occupying "a highway, townway, or street," a railroad company is not liable for unreasonably obstructing and occupying with cars a mere private way. Com. v. Boston, B. & G. R. Co. 135 Mass. 550.

—number of offenses.

Under a statute providing that "whoever, being a conductor or other person having charge of or running a railroad train carrying or used for carrying freight, permits or suffers the same to remain standing across any public highway, street, or alley; or who, whenever it becomes necessary to stop such train across any highway, street, or alley, fails or neglects to leave a space of 60 feet across such public highway, street, or alley, shall be fined not more than $20 or less than $3,"—an affidavit upon which a criminal prosecution is based, and which charges that the defendant, a freight train conductor, did "unlawfully permit and suffer" the train "to remain standing across" the street, and did "fail and neglect to leave a space of 60 feet across such street," is not bad for duplicity in that it charges the defendant, in one and the same count, with having committed two distinct offenses, as "where the acts charged were done by the same person, at the same time, and as a part of the same transaction, and subject the offender to the same punishment, they constitute but one offense, and may all be joined in one count." State v. Malone, 8 Ind. App. 8, 35 N. E. 198.

And to like effect is Becker v. State, 33 Ind. App. 261, 71 N. E. 188.

But where one train extends across and obstructs three streets at the same time, the obstruction of each highway is a separate offense, under a statute providing that "no railroad corporation shall obstruct any public highway by stopping any train," etc. Chicago & A. R. Co. v. People, supra.

Defenses—accident.

Under a statute declaring that "no railroad corporation shall unnecessarily or unreasonably use or occupy a highway; nor in any case with cars or engines for more than five minutes at one time," and providing a penalty for each violation of the act, it is no defense to a railroad company indicted for occupying a street crossing with cars and engines for more than five minutes at one time, that the obstruction was accidental, and could not have been avoided or sooner removed by the exercise of reasonable care. Com. v. New York, N. H. & H. R. Co. 112 Mass. 412.

—temporary necessity.

It is no defense to an indictment against a railroad company for obstructing a street which crosses its track, by placing engines and cars across the street, and causing and permitting them to remain there, that the obstruction of the street was necessary for the carrying on of the company's business, and was only occasional; and the necessity or convenience of the obstruction cannot be considered in determining the question of the company's guilt or innocence. State v. Chicago, M. & St. P. R. Co. 77 Iowa, 442, 4 L.R.A. 298, 42 N. W. 365.

So, in Chesapeake & O. R. Co. v. Com. 7 Ky. L. Rep. 745, it is said that "the obstruction of the public road for fifteen or

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proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute, because there the sanction is cumulative, and does not exclude the common-law punishment. 1 Salk. 45, Stephens v. Watson, was a resolution upon these principles. In that case keeping an alehouse without license was held to be not indictable, because it was no offense at common law, and the statute which makes it an offense has made it punishable in another manner.' And again in the same case, when discussing the same point, he sums up, at page 805, as follows: 'The true rule of distinction seems to be that where the offense intended to be guarded against by statute was punishable before the making of such a statute prescribing a particular method of punishing it, there such particular remedy is cumulative and does not take away the former remedy; but where the statute only enacts "that the doing any act not punishable before shall for the future be punishable in such and such a particular manner," there it is necessary that such particular method by such act prescribed must be specifically pursued, and not the common-law method of an indictment.' In Castle's Case, 2 Cro. Jac. 644, it was resolved that where a statute imposes a penalty for doing a thing which was no offense before, and provides how it shall be recovered, it shall be punished by that means, and not by indictment. The offense being new, the particular mode of punishment must be pursued."

And Justice Connor, in Nance v. Southern R. Co. supra, to which we have already referred in a general way, states the rule to the same effect as to penal statutes or ordinances. He says (149 N. C. at page 373): "'We have no authority to extend the law to cases not included in its terms. It is a penal law. . . . It would be contrary to well-settled rules to give this act the con-

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twenty minutes was not excused in this case by the fact that it was not possible to stop an ordinary train at the depot just before reaching an intersecting railroad without obstructing the public road with the cars in the rear."

—violation of instructions by employees.

Under a statute declaring that "no railroad corporation shall unnecessarily or unreasonably use or occupy a highway; nor in any case with cars or engines for more than five minutes at one time," and providing a penalty for each violation of the act, it is no defense to a railroad company indicted for occupying a street crossing with cars and engines for more than five minutes at one time, that the defendant employed suitable agents, and gave them proper instructions to prevent the alleged illegal occupation of the crossing, and had no notice of the obstruction, otherwise than through these servants. Com. v. New York, N. H. & H. R. Co. supra.

And it has been held to be no defense to an indictment against a railroad company for a public nuisance, created by permitting a train of cars to stand across a public road an unreasonably long time (from twenty to thirty minutes), thereby impeding the use of the road by the traveling public, that, under the rules and regulations of the company, its employees in charge of its trains were prohibited from permitting trains to stand across a public road in such manner as to obstruct travel for more than five minutes, as the agent in charge of the train was acting within the scope of his duty in operating the train and in stopping it across the public road, and the company is liable for his acts, notwithstanding his violation of its rules. State v. Louisville & N. R. Co. 91 Tenn. 445, 19 S. W. 229.

But a railroad company is not criminally liable under an indictment for obstructing a public highway for forty minutes, at a railroad crossing, by a long freight train in charge of the company's train crew, where the rules of the company were that crossings were not to be blocked by trains for a longer period than five minutes, and the conductors had instructions to cut all trains at crossings, and there is no evidence that the crossing had ever been blocked before, or that the railroad company knew of this offense, or has in any way ratified or approved it so as to charge itself with the requisite knowledge or intent to commit the offense. State v. Baltimore & O. R. Co. 65 W. Va. 603, 64 S. E. 735.

And the superintendent of a railroad company cannot be convicted for wilfully obstructing a public road by placing, or causing to be placed, a car or train of cars across the road, where the car or train was so placed, and the road obstructed, not only without the authority of the superintendent, but in apparent disregard of his express orders to the contrary, for the violation of which orders he has punished the offending agents of the company by discharging or suspending them from its service. Gude v. State, 76 Ala. 100.

—public acquiescence.

Long acquiescence by the public authorities, and by the public in general, in the manner in which a railroad company has constructed its tracks across a public road, and in the grade and crossing established by the railroad company, does not bar the public, or constitute a defense to the railroad company, in a criminal prosecution of the latter for unlawfully obstructing the road by its track across it. State v. Western Maryland R. Co. — W. Va. —, 81 S. E. 1039. A. C. W.

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struction contended for, or to apply it to cases outside of its plain terms.' In Coe v. Lawrence, 1 El. & Bl. 516, it was sought to recover a penalty for violating a statute. Defendant claimed that he was not within its terms. It was insisted that the court could find an intention to include him. Lord Campbell, Ch. J., said: 'We are not justified in inserting words for the purpose of extending a penalty clause to cases not expressly comprehended in it. . . . By putting the correct grammatical construction on the words, we may, perhaps, induce greater care on the part of those who frame the laws.' Lord Coleridge said: 'I never heard that it was allowable to insert words for the purpose of extending a penal clause. . . . And even of that were not so, it is quite wrong to alter the language of a statute for the purpose of getting at its meaning'—and of the same opinion were all the judges."

And, again, something which is still more to the very point: "In State v. Cleveland, C. C. & St. L. R. Co. 157 Ind. 288, 61 N. E. 669, the learned justice said: 'The court must interpret such a statute as it finds it. It cannot supply omissions by intendment.' He quotes with approval these words: 'When the penal clause is less comprehensive than the body of the act, the courts will not extend the penalties provided therein to classes of persons or things not embraced within the penal clause, even when there is a manifest omission or oversight on the part of the legislature' "—citing also 26 Am. & Eng. Enc. Law, 660.

Now, in this case the penal clause is plainly restricted to the engineer, and the company is not mentioned at all. The legislature undoubtedly had the right to so provide, and if it had intended otherwise it would have been very easy to have expressed itself with perfect clearness. But the reason we find no such words is that it never intended any such thing. A penalty of $10 imposed on the real offender was deemed adequate for the purpose of prevention, or of punishment in case of a violation. We are warned, in McCluskey v. Cromwell, 11 N. Y. 593, that, in construing a statute or any ordinance, we should seek for the meaning first of all in the words, and the enactment should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of extending its operation. See Nance v. Southern R. Co. supra, 149 N. C. at page 372, where this case is cited with approval. The natural and obvious meaning of this ordinance is that no locomotive or train of cars shall be permitted by the engineer to block a crossing more than ten minutes, and, if he does permit it, he shall pay the penalty of $10. This is not only the natural rendering of the ordinance against blocking crossings, but it is the reasonable and just one. The engineer has control of the train, his hand is on the throttle, and he commands the brakes, and he can start or stop it whenever he pleases, and should be held responsible for violating the ordinance. Why punish both, when it is evident the board that passed the ordinance thought one punishment sufficient? As said by Justice Connor, in Nance v. Southern R. Co. supra, we must construe the ordinance as we find it, and not as we may think it should be: and, to use his language more exactly: "We are not permitted to apply rules of construction to corporations, for the purpose of bringing them within penalty laws, and refuse to do so in suits against other citizens."

That case we consider directly in point, as there it appeared that the words in the first part of the statute were broad and comprehensive, but the court restricted them to that class against whom the penalty was denounced; we being then of the opinion that the penal clause of the statute restricted the prior clauses, so as to confine the entire act, in its operation, to those named in the penal clause. This is a familiar doctrine, and has had frequent illustration and application in the cases. An eminent writer has said that the law delights in the life, liberty, and happiness of the subject, and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense as in derogation of his natural right or as curtailing his natural privilege; and for this and kindred reasons, as well as for the reason that every man should certainly know when he is guilty of a crime, statutes, and, of course, ordinances, which subject one to a punishment or penalty, or forfeiture, or to summary process, calculated to take away his opportunity of making a full defense, or in any way depriving him of his liberty, are to be strictly construed. "Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication; and all doubts concerning their interpretation are to preponderate in favor of the accused." 1 Bishop, Statutory Crimes, 1873 ed. 193, 194.

Thus Lord Mansfield, in construing 5 Eliz. chap. 4, § 31, against exercising a trade without serving the seven years' apprenticeship, said: "The constructions made by former judges have been favorable to the qualifications of the persons attacked for exercising the trade, even where they have not actually served apprenticeships. They

have, by a liberal interpretation, extended the qualifications for exercising the trade much beyond the letter of the act, and have confined the penalty and prohibition to cases precisely within the express letter."

And he further said: "I think Mr. Bishop has laid his foundations right, against extending the penal prohibition beyond the express letter of the statute. (1) This is a penal law; (2) it is a restraint of natural right; and (3) it is contrary to the general right given by the common law of this kingdom."

The defendant was adjudged not guilty, and was discharged of the penalty. Raynard v. Chase, 1 Burr. 2, Chief Baron Pollock said, in Bowditch v. Balchin, 5 Exch. 378:

When "the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute."

"In expounding penal statutes it is an established rule that the construction must be strict as against the defendant, but liberal in his favor." Gould, J., in Myers v. State, 1 Conn. 502.

"Penal statutes are construed strictly against the subject, and favorably and equitably for him." 1 Hawk. P. C. Curwood's ed. p. 90, § 8.

And see State v. Upchurch, 31 N. C. (9 Ired. L.) 454, and the observations of Lord Mansfield in Rex v. Parker, 2 East, P. C. 592, 1 Leach, C. C. 320, note. See also United States v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867. In State v. Upchurch, supra, Chief Justice Ruffin regarded it as a perfectly settled rule of construction that the interpretation of penal statutes is "to be benignant to the accused; and . . . words in his favor should not be rejected." And it has also been said that the circumstances will be rare in which any court will so extend an enactment by construction or implication as to involve penal consequences not within the express words. Of course, all rules should be so administered as not to work an absurdity or defeat the purpose of the law, but the rule of close, or even literal, construction, is generally invoked when construing a penal statute, in order to ascertain the intention and to confine its operation strictly within the limits fixed by the legislature. It is an ancient, but just and equitable, doctrine which extends a penal statute beyond its words in favor of a defendant, while holding it tightly to its words against him. But, whatever the rule may be, we should not be astute to include a person not within the terms of the penal clause, either by argument or construction. It should, at least, be very plain that he was intended to be embraced by it, and certainly that is not the case here, as it was clearly the intent to restrict the punishment, and in the form of a penalty, to the engineer. This is the natural and grammatical, as well as the legal, construction of the ordinance.

Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction, but we merely follow the intention, as thus plainly expressed. The argument drawn from inconvenience has no application in such a case. Whether it would be better that the law should be different is a matter solely for the lawmaking body to decide, and not for us. We simply enforce the law as we find it, and according to its plainly expressed meaning. Courts will not make any interpretation contrary to the express letter of a statute, for nothing can so well explain the meaning of the makers of it as their own direct words, since language is the exponent of the intention (*index animi sermo*); and, as Coke says, that is a very bad interpretation which corrupts the text (*maledicta est expositio quæ corrumpit textum*). Powlter's Case, 11 Coke, 34a; Broom, Legal Maxims, 6th Am. ed. *598. It is better to abide by the written word, in the interpretation of all written instruments, for our views as to what should be the law or what the public policy may not accord with that of the legislative body.

There was no error in the ruling of the court below.

Affirmed.

Clark, Ch. J., dissenting:

The defendant railroad company was charged with violation of § 1, chap. 7, of the ordinances of the town of Wilson. Said ordinance is as follows: "Railroads and Railroad Trains. Sec. 1. No railroad company, nor engineer in charge of any train of any railroad company, shall run or operate in, or through, the town of Wilson any locomotive or car or train of cars at a higher rate of speed than 10 miles per hour, and every engineer in charge of any train or locomotive running thru the town of Wilson, shall ring the bell of such locomotive while same is being run and operated thru said town; no railroad train or locomotive shall block any street crossing for a longer period than ten minutes, and any engineer in charge of any train or locomotive of any railroad company violating any of the provisions of this section shall be fined not more than $10 for each and every offense: Provided, nevertheless, that the rate of speed hereinbefore prescribed shall not apply to any train running in or thru the said town between the hours of 11 o'clock P. M. and 6 o'clock A. M. but all trains operating between such hours may be run and operated at a reasonable rate of speed."

On the trial in the recorder's court the defendant was found guilty, and appealed. In the superior court the jury rendered a special verdict as follows: "We, the jurors, find for our verdict the facts to be as follows: That a train of cars belonging to the Norfolk Southern Railroad Company blocked up the street or crossing as alleged in the town of Wilson on 27th November, 1913, for more than ten minutes. We find that there was an engineer in charge of said train, his name not being known to us. The above findings were based by us on admissions made by defendant for the purposes of this trial. There was no defendant except the corporation; no charge being made against the engineer who was in charge of said train."

Upon consideration of the special verdict, the court held that the defendant corporation was not guilty, because, "in its judgment, the language of said ordinance made only the engineer, and not the corporation, guilty." The court was probably so impressed because the ordinance imposes a fine of not more than $10 on any engineer violating any provisions of this section, and does not provide for any specific punishment upon the railroad company. The imposition of the punishment upon the engineer was not intended to put the sole responsibility upon him, but is additional punishment upon the engineer for a smaller sum than is allowable against the corporation itself under whose orders he is acting. The fact that no specific punishment is prescribed in the ordinance as to the corporation does not exempt it from liability. Revisal, § 3702, provides: "If any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding $50, or imprisoned not exceeding thirty days."

Revisal, § 2831 (6), provides: "The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary." State v. Ice & Fuel Co. 166 N. C. 369, 52 L.R.A.(N.S.) 216, 81 S. E. 737.

Here the railroad company was forbidden to run or operate its trains at a higher rate of speed than 10 miles an hour or without the engineer ringing the bell, and it is further provided: "No railroad train or locomotive shall block any street crossing for a longer period than ten minutes."

This made it unlawful for the railroad company *ex vi termini* to thus block the street with its train or locomotive, and it was liable for that unlawful act the same as any person; and by Revisal, § 3702, such unlawful act was a misdemeanor and punishable by a fine not exceeding $50 or imprisonment for thirty days. The fact that the railroad company could not be imprisoned did not exempt it from the fine. State v. Ice & Fuel Co. supra.

The power of the town to prescribe such ordinance is settled under a nearly similar ordinance of New Bern in State v. Atlantic & N. C. R. Co. 141 N. C. 736, 53 S. E. 290, which has been cited with approval in White v. New Bern, 146 N. C. 450, 13 L.R.A. (N.S.) 1166, 125 Am. St. Rep. 476, 59 S. E. 992; Staton v. Atlantic Coast Line R. Co. 147 N. C. 440, 17 L.R.A.(N.S.)-949, 61 S. E. 455.

The words of the ordinance, "no railroad train or locomotive shall block any street crossing for a longer period than ten minutes," makes that act unlawful, and necessarily makes the owner of the train or locomotive liable under Revisal, § 3702. The further provision that the engineer is punishable by a smaller fine in no wise exempts the owner of the train, who is responsible for such conduct as much so as if it were a "person." The engineer, unless thus named, would not be liable for the forbidden acts; but the owner would be. If the engineer had not thus been made liable, no one would question that the corporation would be liable for running its trains in town limits at the forbidden rate of speed, or without ringing the bell, or for blocking the crossing with its trains or cars. Adding liability (to a smaller fine) on the engineer no more relieves the corporation than the recent act making officers of illegal trusts individually punishable exempts the trusts themselves from punishment for their illegal acts. It would be inconvenient to take the engineer out of his cab and delay the train for his trial or to give bond (if he could do so). On the other hand, if he is allowed to proceed, the name of the engineer might be unknown, for the defendant has several hundred of them, and it would be impracticable to serve the warrant on him in a distant state to which he may be on his way, or even at a remote point in this state, and difficult to prove his identity. It is reasonable to presume that the intelligent authorities of the town of Wilson merely intended to make the engineer responsible as well as the railroad company for blocking their streets for more than ten minutes. They could not have intended to make the engineer alone responsible, exempting those "higher up" and the railroad company, whose cars and engines were allowed by the management to thus deprive the citizens of the use of their own streets. If this, however, is held to be what the town council really did, it practically repeals the ordinance; but they can easily amend their ordinance to express their true meaning be-

yond dispute, which was to make the engineer liable as well as the railroad company.

The judgment should be reversed, and the court below should impose sentence upon the special verdict in accordance with law.

Hoke, J., concurs in dissenting opinion.

OHIO SUPREME COURT.

FIRST NATIONAL BANK OF CORTLAND, Plff. in Err.,
v.
J. C. LOGUE, Trustee, etc., of H. C. Christy, Bankrupt, et al.

(89 Ohio St. 288, 106 N. E. 21.)

Judgment lien on interest of conditional vendee.

The interest of a vendee in the possession of real estate under a contract of purchase, the legal title being in the vendor, is a vested interest within the meaning of that phrase as used in § 11,655, General Code, and such interest is bound, under the provision of § 11,656, General Code, for the satisfaction of a judgment against such vendee.

(February 3, 1914.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment rendered upon cross petitions and an agreed statement of facts after judgment in the Common Pleas establishing a fund for distribution in a proceeding in the nature of a creditors' bill to reach property of Henry C. Christy, who was subsequently adjudged a bankrupt, which denied the lien of the judgment upon an interest in a land contract. Reversed.

Statement by **Newman, J.**:

The judgment the reversal of which is here sought was rendered in the circuit

Headnote by the COURT.

Note. — Interest of vendee under an executory contract for the purchase of real property as subject of lien of judgment, execution, or attachment against him.

I. Judgment and execution.
a. In general, 340.
b. Part payment, 342.
c. Full payment, 345.
d. Oral contract, 348.
e. Option, 349.
f. Effect of rescission or assignment, 349.
II. Attachment, 351.

Scope.

This note is confined to the subject indicated in its title, and does not deal with the equitable remedies available to creditors to reach the interest of purchasers under executory contracts.

The question as to whether the vendor's interest is subject to judgment, execution, or attachment is also beyond the scope of the note. The question whether the vendee's interest is subject to a judgment, execution, or attachment in favor of the vendor has also been excluded, as it involves some considerations foreign to the rights of judgment or execution creditors generally.

Cases relating to the sale of public lands or school lands are also excluded. On liability of claim or interest in public lands for debts contracted before issuance of patent, see 34 L.R.A.(N.S.) 405.

Some other phases of the general subject of the nature and character of the vendee's interest under an executory contract for the purchase of real property have been covered in previous notes, which may be of aid by way of analogy on the question now under annotation.

As to whether vendee under executory contract is owner for purposes of insurance where vendor holds legal title, see note to Arkansas Ins. Co. v. Cox, 20 L.R.A.(N.S.) 775.

As to whether a purchaser of real property under an executory contract is the owner thereof for the purposes of taxation, see note to Boles v. Oklahoma City, 24 L.R.A.(N.S.) 1300. Other notes are referred to in the Index to L.R.A. Notes, "Vendor & Purchaser."

I. Judgment and execution.

a. In general.

By the prevailing rule at common law equitable interests in real property were not subject to the lien of a judgment (23 Cyc. 1370), nor liable to be seized under execution (17 Cyc. 957).

And so, in the absence of a statute changing the rule, the equitable interest of a purchaser in possession under an executory contract for the purchase of real property is not subject to the lien of a judgment, nor liable to be seized and sold upon execution.

Thus, one whose only interest in real property is under a contract of sale evidenced by a bond for title has no interest which can be seized under execution, in the absence of a statute authorizing a levy and sale. Hence, when an effort is made to sell according to such a statute, it must clearly appear that the case falls within the terms of the statute. Goldman v. Dent, 102 Ga. 9, 29 S. E. 138.

And in Sweeney v. Pratt, 70 Conn. 274, 66 Am. St. Rep. 101, 39 Atl. 182, it was held that one who holds a bond for title, but has paid none of the purchase price, has no interest subject to the lien of a judgment, or to execution.

So, in Akin v. Freeman, 49 Ga. 52, it

court of Cuyahoga county on appeal. The case was submitted to that court upon the cross-petition of plaintiff in error, in which it sought to subject the real estate hereinafter mentioned to the satisfaction of certain judgments, the answer of J. C. Logue, trustee, the cross-petitions of H. C. Christy and Mary E. Christy, and an agreed statement of facts.

Henry C. Christy was adjudicated a bankrupt on an involuntary petition in bankruptcy filed in the United States district court at Cleveland on the 9th day of June 1911. In 1910 plaintiff in error recovered two judgments in the common pleas court of Cuyahoga county against Christy, one for $2,880 and the other for $3,420.63. On March 6, 1911, execution was issued on these judgments, and on March 7, 1911, a levy was made on the interest of Christy in the real estate described in the cross-petition of plaintiff in error.

Prior to the year 1910 Christy acquired a land contract for the purchase from one Lizzie H. Neff of the real estate described in said cross-petition, by the terms of which contract said real estate was to be purchased by Christy for the sum of $14,500. At the time of the rendition of the judgments in favor of plaintiff in error, there had been paid on said contract the sum of $6,500, leaving due a balance of $8,000, and interest. At all the times hereinbefore mentioned Christy had full possession of the property under said contract, and he and his wife occupied the dwelling house situate on the premises. The legal title to said property at all of said times was held by Lizzie H. Neff.

During the pendency of this action in the common pleas court, by agreement of all the parties interested, the real estate was sold for the sum of $12,000. Out of this there was paid to Lizzie H. Neff her claim, amounting, with interest, to $9,333.57; to said Christy, to apply on his claim for exemptions the sum of $500, and taxes, costs, and expenses, amounting to $299.77.

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was held that the naked equity of one who contracted for the purchase of property and took bond for title, but did not pay any part of the purchase price, was not subject to a judgment or levy and sale thereon, even though he had improved the property, so that equity would have authorized the judgment creditor to file a bill, tender the purchase price to the vendor, and sell the land. The Georgia Code at that time expressly provided for levy where part payment had been made, though that was subsequently changed (see infra, I. b).

In Van Cleve v. Groves, 4 N. J. Eq. 330, it is declared generally that a mere equitable interest such as that of a purchaser under an executory contract, though accompanied with possession, is not subject to the lien of a judgment at common law, or liable to levy and sale by virtue of an execution. And so in Dodge v. Brokaw, 32 N. J. Eq. 154, it was said that the interest of a purchaser under an executory contract was not the subject of a levy and sale under an execution at common law. It appears in both those cases that the purchaser had made improvements on the property, but it does not appear whether any part of the purchase price had been paid.

A purchaser of land who is in possession under a parol contract conditioned upon the building of a house thereon has no interest in land subject to execution, where he is not in possession and has not complied with the terms of the contract. Patterson v. Bodenhamer, 31 N. C. (9 Ired. L.) 96.

In Holmes v. Wolfard, 47 Or. 93, 81 Pac. 819, it was held that where one who was unable to purchase property entered into an agreement with a third person whereby the latter paid the entire consideration, and, as security therefor, took a deed from the vendor in his own name, agreeing to convey to the intended purchaser upon payment of the consideration and interest, part of which a fourth person paid, taking deed in his own name as security, and giving the intended purchaser a bond for deed, conditioned upon the payment of the sum loaned and interest,—such purchaser, never having had legal title to the land, had no interest which was subject to execution. The court stated that so long as any substantial thing remained to be done by the debtor before his equitable estate in real property ripened into the legal title, such interest could not be reached under an execution issued on a judgment in a law action, but, to subject such estate to the payment of the creditor's demand, resort must be had to a court of equity to establish the right.

One who is in possession under a contract of purchase, but has paid no part of the purchase price, has no estate subject to execution at law. Roddy v. Elam, 12 Rich. Eq. 343.

In Thomas v. Marshall, Hardin (Ky.) 19, the court, in construing the statute subjecting lands to the payment of debts, and holding that an entry for survey of land might be sold by virtue of execution, remarked that contracts for lands were not subject to execution.

In Canadian P. R. Co. v. Silzer, 3 Sask. L. R. 162, it was held that an execution could not bind the equitable interest of a purchaser of lands under contract, the title of which was registered in the vendor. It was contended in this case that the definition of "lands" in § 2, subsection 1, of the land titles act, which embraces equitable as well as legal interests, should be applied to the term "lands" as employed in the rule of the judicature act in relation to execution against lands; but that view was held to be negatived by other provisions of the land titles act, deemed to be inconsistent therewith, including a provision contemplat-

The balance, $1,866.73, is now held by J. C. Logue, trustee of the estate of Henry C. Christy, bankrupt, subject to the final determination of the issues in this case, and this fund is substituted for and instead of the property, and the rights of the parties are transferred to said fund.

The plaintiff in the common pleas court, the Western Reserve National Bank, and certain other defendants who claimed an interest in the property in that court, not desiring to further prosecute their claims, and not desiring to appeal from the judgment of the common pleas court, released and discharged the property in question and the fund derived from the sale of the same from any and all claims which they had, and consented to the dismissal of the petition and their cross petitions without in any way prejudicing the rights of said J. C. Logue, as trustee, the First National Bank of Cortland, Henry C. Christy, and Mary E. Christy, the four parties last named agreeing to save them free and harmless from all costs in the action.

The circuit court found that the First National Bank of Cortland acquired no lien prior to the four months before the filing of the involuntary petition in bankruptcy against Henry C. Christy; that by reason of the act of Congress relating to bankruptcy, its said lien acquired within four months of the filing of said petition in bankruptcy, is void and of no effect, and it now has no lien upon said premises or the funds derived from the sale thereof; that

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ing another remedy to reach the beneficial interest of the debtor in land the registered title of which is in another.

But the interest of a purchaser under a bond for title is subject to seizure and sale under execution, under a statute providing that it shall be lawful for an officer to whom a writ of fi. fa. shall be directed, to take, seize, and expose to sale any "equitable" interest which the defendant named in such writ may have or hold in any lands, tenements, or hereditaments. McMechen v. Marman, 8 Gill. & J. 58.

In Rand v. Garner, 75 Iowa, 311, 39 N. W. 515, it was held that where the purchaser of a lot under a parol contract takes possession of the lot, erects a dwelling house thereon, and occupies the premises as a place of residence, but makes no payments upon the purchase price, paying only the interest on a note given therefor, he has an equitable interest in the real estate which is subject to a judgment subsequently obtained. The court stated that the relationship between the purchaser and vendor was that of mortgagor and mortgagee, that the purchaser was the equitable owner, and that the vendor held the title as security for the price. The Iowa Code, § 2882, expressly provides that a judgment is a lien upon an equitable interest in real estate owned by the defendant at the time of its rendition or subsequently acquired.

And, in Anthony v. Rogers, 17 Mo. 394, the court held that where land was sold under a contract with bond for title, conditioned upon the payment of the purchase price on or before a certain date, the vendee, upon tender of the purchase price within the time stipulated, had an interest in the property which could be sold on execution.

The equitable interest of a vendee of land under a contract of sale may be sold under execution where the interest is coupled with an absolute possession of the premises. Rosenfield v. Chada, 12 Neb. 25, 10 N. W. 465.

And in Baldwin v. Belcher, 1 Jones & L. 18, 6 Ir. Eq. Rep. 424, it was held that the equitable interest of a purchaser of land under a contract was subject to the lien of a judgment against him, under a statute making all estates, legal and equitable, liable to a judgment against him.

b. Part payment.

In many cases, the interest of a purchaser under an executory contract, even though he has paid part of the purchase price, has been held not to be subject to the lien of a judgment, nor liable to be seized and sold upon an execution.

In Driver v. Clarke, 13 Ala. 192, it was held under a statute providing that the equitable title or claim to land or other real estate shall be made liable to the payment of debts by suit in chancery, and not otherwise, that a bond for title gives no more than a mere equity before payment of the purchase price in full, and that this interest cannot be sold by execution at law.

So, the interest of an assignee of a contract of sale of real property, who is in possession, but who has paid only part of the purchase price, is not a perfect equity, nor an equity of redemption, nor a vested legal interest, within the meaning of the statute, Code of 1886, § 2892, subjecting such interest in real property to levy and sale under execution at law. Bank of Opelika v. Kiser, 119 Ala. 194, 24 So. 11.

And where the mortgagor of land lost all right and title upon the expiration of the time to redeem from foreclosure, and entered into a contract with the certificate holder to purchase the land, subject to forfeiture for nonpayment of instalments, and made only part payment so that the contract might be forfeited for the nonpayment of future instalments, he had no interest to which a judgment lien could attach. Ross v. Nichols, — Colo. App. —, 138 Pac. 1013.

Land held under bond for title, with a portion of the purchase money paid, is not subject to execution sale as the property of the holder of the bond until he is invested with the title; and where an execution against a holder of a bond for title is levied upon the land held thereunder, without a conveyance to him of the title, a sale of such

the said Henry C. Christy is not entitled to $1,000, in lieu of a homestead, from said fund, but is entitled to the sum of $500 as exemptions, which amount he has received; that Mary E. Christy is not entitled to dower in said property, and that said fund derived from the sale of said premises is the property of J. C. Logue, as trustee of said Henry C. Christy, bankrupt.

Judgment was rendered in favor of J. C. Logue, as trustee, for the amount in his hands growing out of the sale of the property, and against the First National Bank of Cortland, Henry C. Christy, and Mary E. Christy for costs.

The First National Bank of Cortland filed a motion for a new trial, which was overruled, and it is here asking for a reversal of the judgment of the circuit court.

Messrs. **Myers & Green**, for plaintiff in error:

The lien obtained by legal proceedings within four months prior to bankruptcy is not void, because the debtor was not shown to be insolvent at the time.

Re Chappell, 113 Fed. 545; Kimball v. Dresser, 98 Me. 519, 57 Atl. 787; Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Remington, Bankr. 847, § 1429; 1 Loveland, Bankr. 4th ed. 926; Brandenburg, Bankr. 2d ed. 668; Collier, Bankr. 8th ed. 785; Simpson v. Van Etten, 6 Am. Bankr. Rep. 204; Levor v. Seiter, 5 Am. Bankr. Rep. 576; W. S. Danby Millinery Co. v. Dogan, 47 Tex. Civ. App. 323, 105 S. W. 337.

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land made in pursuance of the levy passes no title to the purchaser, under the act of December 17, 1894 (Civil Code, §§ 5432, 5433), providing that when any person other than the vendor, or other than the holder of the purchase money or secured debt, shall have a judgment against a defendant in fi. fa., who does not hold the legal title to the property, but has an interest or equity therein, the plaintiff in fi. fa. may take up the debt necessary to be paid by the defendant in order to give such defendant legal title to the property, by paying such debt with interest to date if due, and interest to maturity if not due, and thereupon a conveyance to the defendant in fi. fa. shall be made by the vendor or holder of the title given to secure the debt; and when such conveyance has been filed and recorded, the said property may be levied on and sold as property of the defendant. Green v. Hill, 101 Ga. 258, 28 S. E. 692; Black v. Gate City Coffin Co. 115 Ga. 15, 41 S. E. 259. And this is recognized in Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

The earlier Georgia cases, Rawson v. Coffin, 55 Ga. 348; Estes v. Ivey, 53 Ga. 52; and Stewart v. Berry, 84 Ga. 177, 10 S. E. 601, holding that the interest of a purchaser in possession under a bond for title, who had paid part of the purchase price, was subject to sale under an execution, were decided under § 3586 of the Code, which expressly provided that when one holds property under a bond for title and the purchase money has been partially paid, the same may be levied on under judgments against such person, and the entire interest stipulated in the bond shall be sold.

Even under that section, it was held in Goldman v. Dent, 102 Ga. 9, 29 S. E. 138, that the owner of the beneficial interest in land sold under contract to a third person as trustee, bond for title being given to the latter, and part payment of the purchase price being made, had no interest which could be subjected to execution, as it was necessary that defendant in fi. fa. be a holder under a bond for title.

And in McEntire v. Berry, 85 Ga. 474, 11 S. E. 799, the mere payment of interest on purchase money notes was held not to constitute a part payment of the purchase money within that section.

In Louisiana it is apparent that payment in full upon a contract of purchase of real property must be made by the vendee or by a creditor before the creditor can subject the interest of the execution debtor to his judgment. Prater v. Pritchard, 6 La. Ann. 729.

The interest of a vendee in possession under an executory contract, who has paid only a part of the purchase price, is not liable to seizure upon execution under the 4th section of the New York statute of uses rendering lands liable to execution against the *cestui que use* or *cestui que trust*, as that statute applies only to those fraudulent or covinous trusts in which the *cestui que use* or *cestui que trust* has the whole beneficial interest in the land, and the trustee the mere naked or formal legal title. It was conceded, in effect, that if all the purchase price had been paid, the purchaser's interest would have been subject to the execution. Bogert v. Perry, 17 Johns. 351; Ellsworth v. Cuyler, 9 Paige, 418. But see apparently contra Jackson ex dem. Stone v. Scott, 18 Johns. 94, and Jackson ex dem. Cary v. Parker, 9 Cow. 73.

The interest of a vendee of land, where the contract rests in articles for conveyance when the purchase money shall have been paid, is not the subject of sale under execution at law while the purchase money or any part remains unpaid. Badham v. Cox, 33 N. C. (11 Ired. L.) 456; Frost v. Reynolds, 39 N. C. (4 Ired. Eq.) 494; Jennings v. Hardin, 45 N. C. (Busbee, Eq.) 275; Ledbetter v. Anderson, 62 N. C. (Phill. Eq.) 323; Justice v. Carroll, 57 N. C. (4 Jones, Eq.) 429. To the same effect is Richards v. M'Kie, 1 Harp. Eq. 184, citing and relying upon Bogert v. Berry, supra.

It is only when the whole purchase money has been paid that the interest of the vendee may be taken on execution, and then it is not as an equity of redemption, but as a pure trust, under the 1st section of the act. Frost v. Reynolds, supra.

Judgments of plaintiff in error became liens more than four months prior to bankruptcy.

Metcalf v. Barker, 9 Am. Bankr. Rep. 36; Hiller v. LeRoy, 12 Am. Bankr. Rep. 733; Collier, Bankr. 785; Re Blair, 6 Am. Bankr. Rep. 206; Remington, Bankr. § 1459; National Bank v. Tennessee Coal, Iron & R. Co. 62 Ohio St. 564, 57 N. E. 450.

Christy was the owner of an equitable estate in the land.

Coggshall v. Marine Bank Co. 63 Ohio St. 88, 57 N. E. 1086; Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863; Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. 523; Hayes v. Goode, 7 Leigh, 452; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94; McGillis v. McGillis, 11 App. Div. 359, 42 N. Y. Supp. 921.

Messrs. **White, Johnson, & Cannon,** for defendants in error:

It is not necessary, to set aside a lien obtained by legal proceedings within four months prior to the bankruptcy, to show that the debtor was insolvent at the time.

Clarke v. Larremore, 188 U. S. 486, 47 L. ed. 555, 23 Sup. Ct. Rep. 363, 9 Am. Bankr. Rep. 476; Metcalf Bros. v. Barker, 9 Am. Bankr. Rep. 36, 187 U. S. 176, 47 L. ed. 127, 23 Sup. Ct. Rep. 67; Cook v. Robinson, 28 Am. Bankr. Rep. 188; Bear v. Chase, 3 Am. Bankr. Rep. 746, 40 C. C. A. 182, 99 Fed. 920; Re American Brewing Co. 7 Am. Bankr. Rep. 463, 50

And it has been held that a contract purchaser of land with bond for title providing that if payment is not made by a certain date, the bond shall be void, has no interest which is subject to a judgment or execution, where the purchase price is not fully paid and the contract is mutually rescinded. Barton v. Rushton, 4 Desauss. Eq. 373.

Many cases, however, have held the interest of a purchaser under an executory contract, who has paid part of the purchase price, subject to the lien of a judgment, and liable to be seized and sold upon execution against him.

Thus, in Hardy v. Heard, 15 Ark. 184, and Young v. Mitchell, 33 Ark. 222, it is declared that the interest of a vendee under a bond for title, whether he has paid the purchase price or actually taken possession or not, is subject to execution under the comprehensive terms of the Arkansas statute declaring all real estate subject to execution whereof the defendant or any person for him is seised in law or equity. It appears in both these cases that the vendee had paid a part of the purchase price, and had taken actual possession of the property, so that the statement of the rule goes somewhat beyond the facts of the case.

In Fish v. Fowlie, 58 Cal. 373, it was held that the interest of a vendee who was not in possession under a contract of sale, and who had made only part payment of the purchase price, was an interest in land which was subject to execution.

The interest of a vendee in a contract for the sale of real property, who makes a partial payment on the purchase and takes possession of the premises, is subject to the lien of an execution issued upon a judgment subsequently obtained. Thomassen v. De Goey, 133 Iowa, 278, 119 Am. St. Rep. 605, 110 N. W. 581.

Under the statutes of Minnesota, General Statutes 1878, chap. 66, § 300, providing that all property, real and personal, belonging to the judgment debtor, may be levied on and sold on execution, and, under chap. 4 § 1, subdiv. 8, providing that land or real estate shall include lands, tenements, and hereditaments, and all rights thereto and interests therein, it was held that the interest of a vendee who was in possession under a land contract, although he has made only part payment, was an equitable interest which was subject to the lien of an execution. Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099.

In Hook v. Northwest Thresher Co. 91 Minn. 482, 98 N. W. 463, it was held that the equitable interest of a vendee under a contract of sale of real property is subject to the lien of a judgment obtained by a creditor subsequently to the making of the contract, under the General Statutes of 1894, § 5425, making a judgment when rendered and duly docketed a lien on all the real property of the debtor in the county owned by him at the time, and under the General Statutes of 1894, § 255, subdiv. 8, § 6842, subdiv. 14, defining land and real estate as including lands, tenements, hereditaments, and all rights thereto and interest therein. See also First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132, in which the point was not directly raised, but the court approved the holding in the Hook Case, supra.

In Thompson v. Wheatly, 5 Smedes & M. 499, infra, the court, while holding that the interest of a purchaser in possession under a bond for title, who had paid the full purchase price, had an equitable title which was subject to sale under execution under the statute set out infra, reserved its opinion as to whether an execution sale would be good where only part of the purchase money was paid. But under the original statute that question was answered in the negative. Goodwin v. Anderson, 5 Smedes & M. 730; Harmon v. James, 7 Smedes & M. 111, 45 Am. Dec. 296; Ellis v. Ward, 7 Smedes & M. 651, and Adams v. Harris 47 Miss. 144. But subsequently, under a statute declaring that estates of any kind holden or possessed in trust for another shall be subject to the debts of the *cestui que trust* "whether such trusts be fully executed or not," the interest of a purchaser who had paid only part of the purchase price was held subject to the lien of a judgment against the purchaser, and liable to sale under execution thereon.

In Brant v. Robertson, 16 Mo. 129, the court, while reversing the judgment and

C. C. A. 517, 112 Fed. 752; Re Hecox, 21 Am. Bankr. Rep. 314.

A judgment does not give a lien on the amount paid by the purchaser of land under a land contract.

Manley v. Hunt, 1 Ohio, 257; Haynes v. Baker, 5 Ohio St. 254; Baird v. Kirtland, 8 Ohio, 21; Roads v. Symmes, 1 Ohio, 314, 13 Am. Dec. 621; Gorrell v. Kelsey, 40 Ohio St. 117; Schuler v. Miller, 45 Ohio St. 325, 13 N. E. 275; Miller v. Albright, 60 Ohio. St. 48, 53 N. E. 490; Reynolds v. Coddington, 3 Ohio Dec. Reprint, 288; Tischler v. Tischler, 21 Ohio C. C. 166, 11 Ohio C. D. 370; Warner v. York, 1 Ohio C. C. N. S. 73, 25 Ohio C. D. 310; Brush v. Kinsley, 14 Ohio, 21.

Messrs. **Ford, Snyder, & Tilden** also for defendants in error.

Newman, J., delivered the opinion of the court:

The circuit court found that plaintiff in error had acquired no lien prior to the four months before the filing of the involuntary petition in bankruptcy against Henry C. Christy. Counsel challenge the correctness of this finding.

The section of the bankruptcy act (Act July 1, 1898, chap. 541, 30 Stat. at L. 564, Comp. Stat. 1913, § 9651) which invalidates and nullifies certain judgments and liens is as follows:

"Section 67f. That all levies, judgments,

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remanding the cause because of an imperfection in the finding, discussed the statute relative to what interests were liable to sale under execution, which provided that "all real estate whereof the defendant, or any person for his use, was seised in law or equity on the day of the rendition of the judgment, order or decree whereon execution issued or at any time thereafter" should be subject to sale on execution, and a further statute, Rev. Codes, 488, § 66, stating that the term "real estate," as used in the former act, should be construed to include all estate and interests in lands, tenements, and hereditaments. The court remarked that where parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser, and that the case is stronger when the purchaser has actually paid in whole or in part; and that in either case the interest of the purchaser may be sold on execution, upon the principle that the vendor is to be regarded as seised in equity to the use of the purchaser. The court further stated that if no money had been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seisin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him, which is liable to sale on execution.

And so in FIRST NAT. BANK v. LOGUE, the court holds that the equitable interest of a vendee of real estate, who was in possession and had made part payment, was a vested interest, within the meaning of the statutes making vested interests subject to a judgment lien from the date of the rendition thereof.

A judgment binds the equitable interest in lands existing at the time of the judgment, of one who has purchased land under a contract of sale, taken possession, and paid part of the purchase price. Catlin v. Robinson, 2 Watts, 373; Richter v. Selin, 8 Serg. & R. 425; Auwerter v. Mathiot, 9 Serg. & R. 397; Lynch v. Dearth, 2 Penr. & W. 111; Foster's Appeal, 3 Pa. 79; Russell's Appeal, 15 Pa. 319.

In Vierheller's Appeal, 24 Pa. 105, 62 Am. Dec. 365, it was held that a judgment against a vendee holding a contract of sale binds his interest, but nothing beyond.

So, in Texas it is held that the interest of a purchaser in possession under a bond for title is subject to execution. Mooring v. McBride, 62 Tex. 309; Matula v. Lane, — Tex. Civ. App. —, 56 S. W. 112.

In Davis v. Vass, 47 W. Va. 811, 35 S. E. 826, it was held that where land was sold on contract, possession taken, and part payment made, and the contract later was rescinded and a new contract made in favor of the wife of the original purchaser, credit being given for the payment by the husband, the interest of the husband was subject to a judgment entered against him while in possession under the contract.

In Grey-Coat Hospital v. Westminster Improv. Comrs. 1 De G. & J. 531, 26 L. J. Ch. N. S. 843, 3 Jur. N. S. 188, 6 Week. Rep. 120, it was held that under a statute making a registered judgment a direct charge upon an estate, whether legal or equitable, which a debtor had in land, the interest of one who purchased under a contract, accepted the title, went into possession, and paid part of the purchase price, was liable to the judgment, subject only to vendor's lien for purchase money.

c. Full payment.

Probably, in most states, by virtue of statutes more or less explicit, the interest of the vendee under an executory contract who has paid the purchase price in full, is now subject to the lien of a judgment and liable to seizure and sale under execution. This is, of course, sustained *a fortiori* by all the cases cited in supra, I. b, holding that even the interest of a purchaser who has paid only part of the purchase price is so subject; and some of the cases cited in that subdivision as holding that the interest is not so subject when only part of the purchase price is paid concede or assume that it becomes subject as soon as the equitable right of a purchaser has become perfected by full payment.

In Evins v. Sandefur-Julian Co. 81 Ark. 70, 98 S. W. 677, it was held that the inter-

attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate."

In determining whether a judgment is a lien, when the above section is to be applied, the law of the state where the judgment was rendered controls. This requires then an examination of two sections of the General Code relating to executions and judgment liens against property:

"Section 11,655. Lands and tenements, including vested interests therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided.

"Section 11,656. Such lands and tenements within the county where the judgment is entered shall be bound for its satisfaction from the first day of the term at which it is rendered, except that, judgment by confession and judgments rendered at the same term at which the action is be-

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est of a vendee under an oral contract for exchange of property, the vendee having taken possession and made improvements upon the property for which he traded, so as to be entitled to specific performance, was subject to sale and seizure under execution, under a statute declaring all real estate subject to execution, where of defendant or any person for him is seised "in law or equity."

And in Pitts v. McWhorter, 3 Ga. 5, 46 Am. Dec. 405, the court held that a purchaser with bond for title had a legal estate which was subject to sale under execution where he had paid all the consideration, if not under 27 Hen. VIII., commonly called the statute of uses, yet under § 10 of 29 Charles II. chap. 3 (expressly adopted in Georgia), making trust estates liable to the satisfaction of debts by execution.

In Adams v. Cauthen, 113 Ga. 1166, 39 S. E. 479, it was held that where land was sold, and three promissory notes payable to bearer were given for the purchase money, the vendee receiving bond for title, and the vendor reserving title in himself, and two of the notes were paid off, and the other transferred without indorsement or guaranty, and without any transfer of title to the land to the transferee, that this operated as a payment of the purchase money, that the vendor ceased to hold any interest in the land, the vendee's equity becoming complete, and that the land was subject to levy and sale at the instance of any transferee of the unpaid note. The court further stated that, while such transferee's claim could not be enforced as for purchase money, he did occupy the position of a creditor of the vendee.

So, in Thompson v. Wheatly, 5 Smedes & M. 499, it was held that a contract purchaser of land who was in possession, had bond for title, and had made full payment of the purchase price, had an equitable title to the land which was subject to sale under execution, under the statute Howard & H. 349, § 29, providing that "estates of every kind holden or possessed in trust, shall be subject to like debts and charges of the persons to whose use, or to whose benefit they were or shall be respectively holden or possessed, as they would have been subject to, if those persons had owned the like interest in the things holden or possessed as they own or shall own in the uses or trusts thereof." The court, however, expressly limited its decision to a case in which the whole purchase money had been paid at the time of the sheriff's sale, and reserved its opinion as to whether an execution sale would be good where only part of the purchase money had been paid.

And it was expressly held in Neef v. Seely, 49 Mo. 209, that where land was sold under verbal contract and the purchaser took possession, paid the purchase money, made valuable improvements, but did not receive a deed therefor, the purchaser had such an interest as was subject to a sale under execution.

See also Brant v. Robertson, 16 Mo. 129, supra. I. b.

As subsequently shown, although there was some apparent ambiguity in the cases, it was settled in New York, prior to the adoption of the Revised Statute, that the interest of a purchaser under an executory contract, who had paid the full purchase price, was subject to execution. That rule, however, was changed by the provision of § 4 of the Revised Statute, to the effect that the interest of a person holding under such an agreement is not bound by the docketing of any judgment or decree, nor can it be sold upon execution. The following cases were decided under that statute; Brewster v. Power, 10 Paige, 564; Boughton v. Bank of Orleans, 2 Barb. Ch. 458; Griffin v. Spencer, 6 Hill, 525; Grosvenor v. Allen, 9 Paige, 74; Ellsworth v. Cuyler, 9 Paige, 418; Bigelow v. Finch, 17 Barb. 394; Bates v. Lidgerwood Mfg. Co. 51 Hun, 644, 22 N. Y. S. R. 395, 4 N. Y. Supp. 524.

In some of these cases, the purchase price had not been paid in full.

Even under the statute in force in New York prior to the Revised Statutes, the interest of a purchaser under an executory contract was not bound from the time of docketing the judgment, but only from the time of issuing the execution. Jackson ex

gun, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor shall be bound from the time they are seized in execution."

The judgments obtained by plaintiff in error against Christy were rendered in the year 1910, more than four months before the filing of the petition in bankruptcy. If these judgments became liens on the real estate in question at that time, the liens would not be invalidated by the provisions of § 67f of the bankruptcy act, supra.

In the year 1910, at the time plaintiff in error obtained the judgments, Christy had full possession of the real estate in question, under and by virtue of a land contract with one Lizzie H. Neff for the purchase of the real estate. Under the provisions of this land contract the real estate was to be purchased by Christy for the sum of $14,500. At the time the judgments were rendered in favor of plaintiff in error there had been paid on account thereof the sum of $6,500.

It appears from the agreed statement of facts that during the pendency of this proceeding in the common pleas court by agreement of all the parties to the case, the real estate was sold for the sum of $12,000. Out of the proceeds of this sale Lizzie H. Neff was paid her claim, amounting with interest, to more than $9,000, and the sum of $500 was paid to Henry C. Christy to apply upon his claim for exemptions. Taxes, costs, and other expenses also were paid,

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dem. Seelye v. Morse, 16 Johns. 199, 8 Am. Dec. 306; Botts v. Cozine, Hoffm. Ch. 79; Ellsworth v. Cuyler, 9 Paige, 418. But see Jackson ex dem. Cary v. Parker, 9 Cow. 73.

In Damron v. Smith, 37 W. Va. 580, 16 S. E. 807, it was held that the interest of one who purchases land under a contract, with bond for title, and pays the full purchase price, is subject to a judgment, although the purchaser assigns the bond before rendition of the judgment, the assignment being unrecorded at the time of the rendition of the judgment.

But it has been expressly held that the statutory provision applies and prevents the sale of the interest of the purchaser under execution, even though he has paid the full purchase price. Talbot v. Chamberlin, 3 Paige, 219; Watson v. Le Row, 6 Barb. 484.

There are early cases holding that the interest of a purchaser under an executory contract, even though he had paid the full purchase price, was not subject to execution even in the absence of an explicit statutory provision like that in the New York Revised Statutes, so declaring.

Thus, where a purchaser of land under contract makes full payment therefor, enters into and retains possession, but has no other evidence of title than a bond conditioned to make him a conveyance in due form, he has not such interest as may be sold under execution, under a statute providing that the equitable title or claim to land or other real estate shall be made liable to the payment of debts by a suit in chancery, and not otherwise. Elmore v. Harris, 13 Ala. 360; Hogan v. Smith, 16 Ala. 600. The Elmore Case was followed in Collins v. Doe, 33 Ala. 91, in which it does not appear whether or not the purchaser (debtor) had made full payment of the purchase price.

The rule established by these Alabama cases so far as concerns the interest of a vendee in possession who has paid the entire purchase price was overthrown by a subsequent statute. See Shaw v. Lindsey, 60 Ala. 344, holding, however, that the statute did not apply to the interest of an execution debtor whose lands had been sold under a power in a mortgage and bought in for him by a third person, who was not repaid until after the execution sale.

In Modisett v. Johnson, 2 Blackf. 430, holding that the interest of a purchaser in possession of land under an executory contract, although he had paid the entire purchase price, was not subject to be seized and sold on execution, the court took the view, upon the authority of Jackson ex dem. Seelye v. Morse, 16 Johns. 199, 8 Am. Dec. 306, that the trust which the statute declares shall be subject to execution must arise from some deed or conveyance either expressly creating a trust or giving rise to a resulting trust.

In this connection, however, it is to be noted that the decision in the Jackson Case was merely to the effect that the interest of the purchaser was not subject to the lien of a judgment, and that at the time the execution was issued he had no interest, the property, at his instance, having in the meantime been conveyed to a third person to whom he was indebted. It is expressly held or recognized in other New York cases that, prior to the Revised Statute providing otherwise, the interest of the purchaser in possession who had paid the full purchase price was subject to execution. Jackson ex dem. Stone v. Scott, 18 Johns. 94; Talbot v. Chamberlin, 3 Paige, 219.

The view adopted in the Modisett Case was approved and adhered to in the subsequent case of Orth v. Jennings, 8 Blackf. 421, holding that a purchaser in possession under an executory contract, although he had paid the full purchase price, had no interest which was subject to the lien of a judgment or execution, under the Revised Statute which continued the provision of the statute of frauds under which the Modisett Case was decided, to the effect that real estate held in trust shall be liable to all judgments and executions against the *cestui que trust*, and enacted that the interest of persons holding contracts for the purchase of lands shall not be bound by the rendition of any judgment, and whenever

and the balance, amounting to $1,886.73, is in the hands of the trustee of the estate of Henry C. Christy, bankrupt, subject to the final determination of this case. By agreement, the fund arising from the sale of the property was substituted for, and instead of, the property, and the rights of the parties thereto were transferred to said fund without prejudicing in any way their respective claims.

Section 11,655, General Code, was formerly § 5374, Revised Statutes, but the words "including vested interests therein" were not in the section as originally enacted. They were added by the amendment of 1880. This section, as it stood before the amendment, was before this court in a number of cases, and it was the holding of the court that an equity could not be levied upon and sold to pay debts, and that a judgment did not create a lien upon an equity. These cases are cited by counsel in their briefs as throwing light upon the question arising here under the statute as amended. Manley v. Hunt, 1 Ohio, 257; Haynes v. Baker, 5 Ohio St. 254; Baird v. Kirtland, 8 Ohio, 21; Gorrell v. Kelsey, 40 Ohio St. 117; Schuler v. Miller, 45 Ohio St. 325, 13 N. E. 275.

Were it not for the fact that there has been a considerable and substantial change, as we regard it, in the statute, those cases, of course, would be helpful to us here. It is to be presumed that the legislature, in adopting the present form of the statute, did so with full knowledge of the decisions

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execution shall have been issued on such judgment and returned unsatisfied, the parties issuing out such executions may file their bills in chancery.

The doctrine of the Modisett Case was also followed in Doe ex dem. Cooper v. Cutshall, 1 Ind. 246, and Davis v. Cumberland, 6 Ind. 380, holding that the interest of a purchaser under an executory contract was not subject to the lien of a judgment; and in State Bank v. Macy, 4 Ind. 362, and Hutchins v. Hanna, 8 Ind. 533, holding that such interest was not subject to execution. It would appear from the statement of facts in the three cases last cited, that the purchase price had not been paid in full, but as there is no intimation that that fact limited the decision, it would seem to be immaterial in view of the doctrine of the Modisett Case.

The doctrine of the Modisett Case was also followed in Gentry v. Allison, 20 Ind. 481, and Jeffries v. Sherburn, 21 Ind. 112, denying that the interest of the purchaser was subject to the lien of a judgment or to execution, even after the enactment of a statute declaring that land, or any estate or interest therein, holden by anyone in trust for or to the use of another, shall be liable to be sold on execution. As pointed out in Bates v. Spooner, 45 Ind. 489, the courts in those cases did not advert to the statute. In the Bates Case it was not necessary to pass upon the question.

The doctrine of the Modisett Case was again followed in Evans v. Feeny, 81 Ind. 532, holding that a judgment against a purchaser of real estate, having no conveyance, is not in the absence of fraud, a lien upon the real estate, and that a sale under execution issued thereon vests no right in the purchaser. In this case it appears that only part of the purchase price has been paid, although apparently no importance is attached to that fact. There is no reference to the statute referred to in the Bates Case.

The view taken in the Modisett Case, that the statutes in relation to trusts did not subject the interest of a purchaser under an executory contract to execution, L.R.A.1915B.

for the reason that those statutes contemplated direct trusts raised by conveyance, or resulting trusts upon a conveyance, and did not embrace trusts articled or covenanted to be raised, was also adopted in Buford v. Buford, 1 Bibb, 305, holding that the acts subjecting "lands" to the payment of debts did not reach a mere equitable interest of an assignee of a bond for a conveyance of land. Allen v. Sanders, 2 Bibb, 94, and Shute v. Harder, 1 Yerg. 3, 24 Am. Dec. 427. It does not appear in those cases whether all or any part of the purchase price had been paid, but the fact in that respect would seem to be immaterial in view of grounds upon which the decisions denying that the purchaser had any interest subject to execution rested.

d. Oral contract.

If the circumstances are otherwise such as to subject the interest of a purchaser under an executory contract to the lien of a judgment or to an execution under the local law, it would seem that that result would not be prevented by the fact that the contract is oral, if there has been such part performance as to take the contract out of the statute of frauds and entitle the purchaser to specific performance, assuming, of course, that the local law does not, as in the case of Goldman v. Dent, 102 Ga. 9, 29 S. E. 138 (supra, I. b), make some particular form of written contract essential.

And so the local rule that the purchaser's interest under an executory contract is subject to the lien of a judgment or to execution has been applied to oral contracts where there was such part performance as to take them out of the statute of frauds and entitle the purchaser to a decree of specific performance. Evins v. Sandefur-Julian Co. 81 Ark. 70, 98 S. W. 677; Rand v. Garner, 75 Iowa, 311, 39 N. W. 515; Neef v. Seely, 49 Mo. 209; Auwerter v. Mathiot, 9 Serg. & R. 397; Pugh v. Good, 3 Watts & S. 56, 37 Am. Dec. 534.

And see Shanks v. Simon, 57 Kan. 385, 46 Pac. 774 (infra, II.), as to the attach-

of this court bearing upon the statute as originally enacted. It knew that the provisions of §§ 5374 and 5375, Revised Statutes, which bound "lands and tenements" for the satisfaction of judgments, were applicable to legal interests only. It cannot be claimed, then, that the words "including vested interests therein" were inserted without purpose or design. The same construction cannot prevail when there has been a substantial change in the law. To give to the amended statute here the same construction as was given it in its original form would not, we think, conform to the manifest intent of the legislature. Obviously the additional words were inserted to extend the operation of the statute and make a judgment binding upon certain interests in land to which formerly the provisions of the statute did not apply under the ruling of this court. If the provisions of § 11,655, General Code, apply to legal interests only, the insertion of the words "including vested interests therein" would serve no purpose.

A vendee in the possession of land under a contract for its future conveyance to him has an equitable interest in the land. Jaeger v. Hardy, 48 Ohio St. 335, 27 N. E. 863; Coggshall v. Marine Bank Co. 63 Ohio St. 88, 57 N. E. 1086.

An equitable interest, as well as a legal interest, in real estate, may be a vested one. "An estate is vested in interest when there is a present fixed right of future enjoyment,

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ment of the interest of a purchaser under an oral agreement.

The decision in Powell v. Bell, 81 Va. 222, denying the right to enforce the judgment against the property, was not upon the ground that the contract was oral, although that was the fact, but upon the ground that there had been a bona fide assignment of the vendee's interest prior to the judgment.

But unless there has been such a part performance on the part of the purchaser under the oral contract as to take the contract out of the statute of frauds, it seems that his interest is not subject to the lien of the judgment or execution, even though under the local rule it would be so subject if the contract were in writing.

Thus, in Merchant's Nat. Bank v. Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227, the court, after deciding that the taking of possession under an oral contract for the purchase of land, and the part payment of the purchase price, did not create an interest in land which is subject to execution, remarked that, even possession and payment of the purchase money in full, without evidence of the making of valuable improvements, would not be sufficient to confer such a title upon the contract purchaser as would be subject to levy upon execution.

So, the interest of a purchaser of land under a parol contract of purchase, made in consideration of performance of labor, is not subject to sale under execution. Le Gierse v. Getzendaner, 2 Posey, Unrep. Cas. (Tex.) 380.

In Patterson v. Bodenhamer, 31 N. C. (9 Ired. L.) 96, it was held that the purchaser of land under a parol contract conditioned upon the building of a house thereon had no interest in land which was subject to execution, where he was not in possession and had not complied with the terms of the contract.

e. Option.

One having an option to purchase real estate has not, before the exercise of the option, any interest in the real estate that is subject to execution. Provident Life & T. Co. v. Mills, 91 Fed. 435. It was so held even upon the assumption that in general under the local statute (Washington) an equitable interest of the debtor in real property is subject to levy.

Where one has not accepted an offer for the sale of real estate open for acceptance for a definite period, conditioned upon the payment of rent by the lessee of the premises and the insuring of the property for the vendor's benefit by the vendee, because of noncompliance with the condition to insure, and because the rent has not been paid by the lessee, not being in possession or having paid any money, he has no interest which can be sold under execution. Chadbourne v. Stockton Sav. & L. Soc. 4 Cal. Unrep. 535, 36 Pac. 127.

In Chadbourne v. Stockton Sav. & L. Soc. supra, it was unnecessary to decide whether a mere offer to sell land while it is unaccepted constitutes an interest in land which will pass under an execution sale, as the conditions necessary to keep the offer open had not been complied with at the time of the sale.

In Daugherty v. Cox, 13 Tex. 209, it was held that the interest of a purchaser of undesignated land which was to be selected from a large tract, with bond for title conditioned upon the conveyance of another tract of land which constituted the consideration for the contract, was not an interest and claim subject to execution under Hartley's Digest, art. 1345, providing that when a sale has been made and the terms thereof complied with, the sheriff or other proper officers should execute and deliver to the purchasers a conveyance of all the right of title, interest, and claim which the defendant in execution had in and to the property sold, where the purchaser did not select the land, and did not convey the other tract to the vendor.

f. Effect of rescission or assignment.

As to effect of rescission on lien of attachment, see infra, II.

Even though the interest of the purchaser

and an estate is contingent when a right of enjoyment is to accrue on an event, which is dubious and uncertain." Strode v. McCormick, 158 Ill. 142, 41 N. E. 1091.

Christy was in the possession of the real estate under a contract of purchase. His interest was not a contingent one, but a vested interest. There was a recognition of this fact when the property was sold by agreement of all the parties in interest, including the holder of the legal estate, and the proceeds, after the payment of the balance due under the contract, were turned over to Christy's trustee.

The case of National Bank v. Tennessee Coal, Iron & R. Co. 62 Ohio St. 564, 57 N. E. 450, bears upon the question involved here. The court uses this language:

"The statute was amended in 1880, § 5374 [§ 11,655, Gen. Code], so as to make 'lands and tenements, including vested interests therein,' subject to levy and sale for the payment of debts. Manifestly the interest which Mr. Patton retained in the surplus of the value of the real estate over and above the amount required to pay his note, and which was to be returned to him by the terms of the instrument, was a vested interest, and therefore subject to levy and sale to pay his debts. By the next § 5375

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under an executory contract would otherwise be subject to the lien of a judgment or to seizure and sale on execution, a prior rescission of the contract in good faith, without intent to defraud creditors, will prevent the lien of the judgment or execution from attaching. Alexander v. Tams, 13 Ill. 221 (contract rescinded by mutual consent after the purchaser had failed to comply with his contract); Welsh v. Richards, 41 Mich. 593, 2 N. W. 920; Raffensberger v. Cullison, 28 Pa. 426 (oral rescission); Barton v. Rushton, 4 Desauss. Eq. 373 (mutual rescission upon failure of purchaser to comply with conditions of bond as to time of payment).

So, in Wengert v. Zimmerman, 33 Pa. 508, affirming 31 Pa. 401, it was held that where the contract purchaser of land neglected to pay the purchase money, or to assert his equities when sued for the possession, and attorned to the vendor as tenant, he had no interest which was subject to execution against him.

But the rescission of a contract by the vendor and purchaser after a judgment against the latter, but before a levy, will not defeat the lien of the judgment. Stewart v. Berry, 84 Ga. 177, 10 S. E. 601.

In Davis v. Vass, 47 W. Va. 811, 35 S. E. 826, it was held that, although a contract was rescinded after possession had been taken and part payment made by the purchaser, still his interest was subject to a judgment rendered against him while in possession under the contract. In this case, however, the rescission was for the purpose of defrauding the purchaser's creditors, and with the view of a resale to his wife, who was allowed the benefit of the payments he had made.

In Thomassen v. DeGoey, 133 Iowa, 278, 119 Am. St. Rep. 605, 110 N. W. 581, it was held that where a levy was made upon an equity in land held by a debtor under a contract, he having made part payment and having taken possession, the seller and purchaser could not, by mutual subsequent agreement, wipe out the contract and defeat the levy, as otherwise an easy and effective avenue to gross fraud would be open. The court observed that if there had been

cause of forfeiture, it could have been enforced against the purchaser at the execution sale.

In Nelson v. Turner, 97 Va. 54, 33 S. E. 390, it was held that the interest of a contract purchaser of land was not subject to a prior judgment against the purchaser where the contract was subsequently rescinded by order of court, whether upon the ground of the vendor's fraud or the failure of the purchaser to comply with his covenants.

In First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132, the court, without considering the question whether a statutory notice of cancelation, if effective to terminate the rights of vendee, would also terminate the lien of a judgment which had previously attached to the vendee's interests, held that the notice was ineffectual because of nonpayment of a tax by the vendor.

In Prater v. Pritchard, 6 La. Ann. 729, it was held that the rights of execution creditors could not be defeated by an understanding between the execution debtor and his vendors that a small balance should remain unpaid, and that, upon payment of the balance, the execution creditor could acquire the right to subject the land in controversy to his execution.

In Salisbury v. La Fitte, — Colo. —, 141 Pac. 484, it was held that under a statute subjecting to execution all interests of the defendant or any person to his use held or claimed by virtue of any deed, bond, covenant, or otherwise for a conveyance, the interest of a purchaser under a contract for sale providing for payment in instalments was subject to execution issued after an unrecorded assignment of the contract, of which the creditor had no notice. And to the same effect is Damron v. Smith, 37 W. Va. 580, 16 S. E. 807, where the assignment of the bond for title was made before the rendition of the judgment, but was not recorded at that time.

But in Powell v. Bell, 81 Va. 222, it was held that a debtor's equitable claim under an executory verbal contract of purchase, a part of the purchase price having been paid, which claim he had parted with by a like parol contract for a valuable consideration

[§ 11,656, Gen. Code], it is provided that 'such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered.' 'Such lands and tenements,' in this section, embraces the same as 'lands and tenements, including vested interests therein,' in the preceding section. It is therefore clear that the judgment in question became a lien upon the vested interest of Mr. Patton in the lands covered by this instrument, from the 1st day of the April term, 1894, of the court of common pleas,—that is, April 7, 1894,—and that the lien of the judgment attached, by relation, under the statute, to such vested interest as he then had in said lands."

This vested interest of Christy became bound for the satisfaction of the judgments of plaintiff in error in 1910. The judgment lien attached then. These liens not having been obtained within four months prior to the filing of the petition in bankruptcy, the provisions of § 67f of the bankruptcy do not apply.

Plaintiff in error is entitled to the funds in the hands of the trustee, the same to be applied to the payment of its judgments against Christy.

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and in good faith, prior to the rendition of a judgment against him, was not subject to the judgment.

And in Loomis v. Smith, 37 Mich. 595, it was held that land purchased under a contract of sale is not subject to execution as property of the contract purchaser, where, before levy, the purchaser sells his interests in the contract to another, and agrees to assign it upon payment of the purchase price, and subsequently assigns his interest in the agreement with the subpurchaser to his wife for a bona fide indebtedness due to her. See also Jackson ex dem. Seelye v. Morse, 16 Johns. 199, 8 Am. Dec. 306 (supra, I. c.), as to effect of conveyance to a third person at the instance of purchaser after judgment and before execution.

The decision in Ellsworth v. Cuyler, 9 Paige, 418, holding that the title acquired by a bona fide assignee of the vendee's interest after the recovery of a judgment against the latter, but before execution, was not subject to the debt, even under the statute in New York in force prior to the Revised Statute, was upon the ground that under the former statute the equitable interest was not bound from the time of the docketing of the judgment, but only from the time of issuing the execution. See New York cases cited supra, I. c.

II. Attachment.

The act that the interest of a purchaser under an executory contract is not subject to execution does not necessarily prevent its being subject to attachment is illustrated by Higgins v. McConnell, 130 N. Y. 482, 29 N. E. 978, holding that the interest of defendant under a contract for the purchase of land, upon which he had made partial payments, and of which he was in possession, was subject to attachment under the Code of Civil Procedure, §§ 644 and 645, which provide in effect that any interest in real property, either vested or not vested, which is capable of being aliened by the defendant, shall be subject to attachment, notwithstanding, as already shown, it is expressly provided by statute that such an

interest shall not be subject to the lien of a judgment or execution.

One who made a parol agreement to exchange a stock of goods for a farm, pursuant to which a deed was executed with the name of the grantee blank, and placed in the hands of a third person to be delivered when the goods were delivered, was held in Shanks v. Simon, 57 Kan. 385, 46 Pac. 774, to have an attachable interest in the farm after he had shipped the goods, but before their arrival.

Under the Maine statute of 1829, chap. 431, providing that the estate, right, title, and interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate "upon conditions to be by him performed," whether he be the original obligee and assignee of the bond or contract, shall be liable to be taken by attachment on mesne process or on execution, the interest of a debtor who holds a bond for the conveyance of land is attachable, although the conditions of the bond have been performed. Whittier v. Vaughan, 27 Me. 301; Whitmore v. Woodward, 28 Me. 392.

Under such statute, the interest of one under a contract for the reconveyance to him of land deeded by him to a creditor in settlement of a debt upon certain conditions is subject to attachment. Stevens v. Legrow, 19 Me. 95.

Likewise, the interest of one who purchases land under a contract, with bond for title, pays part of the purchase price, and conveys his interest to another in order to defraud his creditors, is subject to an attachment levied after such fraudulent transfer. Wise v. Tripp, 13 Me. 9.

But an attachment made after a bona fide assignment of a bond for title is invalid. Lambard v. Pike, 33 Me. 141.

As to effect of assignment on lien of judgment or execution, see supra, I. f.

In Jameson v. Head, 14 Me. 34, it was held that the interest of a purchaser under a contract with bond for title was subject to the lien of an attachment from the date of seizure, and that a subsequent voluntary surrender of the bond without consideration could have no effect. As to effect

Inasmuch as the vested interest of Christy in the real estate became bound for the satisfaction of the judgments of plaintiff in error in 1910, and as a levy was unnecessary to perfect these judgment liens, the question whether the lien acquired by the levy made within four months from the time of the filing of the petition in bankruptcy is void under the provisions of the Federal statute is of no importance in the disposition of this case.

The judgment of the Circuit Court is reversed, and judgment is here rendered for plaintiff in error.

Nichols, Ch. J., and **Shauck, Johnson, Donahue, Wanamaker**, and **Wilkin**, JJ., concur.

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of rescission upon lien of judgment or execution, see supra, I. f.

And in Neil v. Tenney, 42 Me. 322, it was held that the mere surrender of the contract of sale of real property, to the obligor after the debtor's rights in it have become fully vested, for the simple reason that the holder regards himself as unable to pay the sum therein specified, without any agreement or understanding having taken place before, at the time, or afterward, touching the surrender, cannot deprive the then existing creditors of such debtor of the right to attach such debtor's property therein, and to sell the same, if of value, in conformity to law for the payment of their debts.

But in French v. Sturdivant, 8 Me. 246, it was held that where the owner of land conveyed the premises by absolute deed to another, and at the same time took back a contract signed by the grantee whereby the latter agreed to reconvey the premises if the payments on a contract were made by a certain date, there was no attachable interest in the contract purchaser after default in payment.

The vendor's waiver of performance at the time specified in the contract attaches to it and becomes a part of it, and as such is subject to the attachment. Whitmore v. Woodward, 28 Me. 392, 415.

The attachment of the interest of the obligee in a bond for title does not reach the title to the premises subsequently conveyed directly by the obligor to an assignee of the bond without any conveyance to the attachment debtor, under the Maine statute providing that where the interest which "any person" has by virtue of a bond or contract to a deed of conveyance shall have been attached, and, during the existence of the attachment, and before the same shall have been perfected by proceedings on execution, the obligor or his assignees shall have executed a deed to the "obligee or his assigns," pursuant to such bond or contract, the said attachment shall hold the premises so conveyed as effectually as if the attachment had been originally made after such conveyance, and execution may be levied thereon as in other cases of real estate taken on execution. The statute applies only when the person whose right, title, and interest are attached, and to whom the conveyance is made, is the obligee or assignee of the obligee; the person whose interest is attached and to whom the conveyance is made must be one and the same. Houston v. Jordan, 35 Me. 520.
L.R.A.1915B.

Where land is sold under a verbal contract, the purchaser, upon taking possession, making full payment of the purchase price, and making valuable improvements upon the land, has an interest in land which is subject to an attachment. Neef v. Seely, 49 Mo. 209.

Under the New Hampshire statute providing that by an attachment of real estate all the debtor's interest therein is holden, though such interest be a right to receive a conveyance thereof by contract, it has been held that where a purchaser of land under a parol contract took possession and paid the full purchase price by conveyance of other land, he had an interest which was subject to attachment. Johnson v. Bell, 58 N. H. 395.

But in Dodge v. Beattie, 61 N. H. 101, it was held that one who made a contract with the owner of land to cut and manufacture lumber at a mill to be erected by the former, the owner having the option to sell the land or buy the mill after performance of the contract by cutting and manufacturing the lumber, had no such interest in land as was subject to attachment before the completion of the contract for cutting and manufacturing the lumber and the election of the owner to sell the land, although the land was in fact sold to him after the attachment was made.

Where land was purchased under a contract and bond for title taken in the name of a third person who had no interest in the premises, conditioned upon the payment of a certain sum, and the purchaser entered into possession, and made improvements, such purchaser had an interest which was subject to the lien of an attachment. Woods v. Scott, 14 Vt. 518.

Thus, in Murphy v. Marland, 8 Cush. 575, it was held that the equitable interest of the holder of a bond for deed, who enters into possession of the premises, makes part payment, and builds a house upon the land, is not subject to attachment by his creditors. The terms of the statute are not set out. The court said that "the equitable interest in the land stipulated to be conveyed, as the debtor had no legal interest and no equity of redemption or such other equitable interest as is made attachable by statute, could not be levied on."

And in Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505, it was held that the equitable interest of one holding a bond for title for land purchased under contract is not subject to the lien of an attachment.

A. H. N.

WEST VIRGINIA SUPREME COURT OF APPEALS.

GEORGE A. SANDERS
v.
H. L. WISE et al.

FRANK S. WISE, Exr., etc., of H. L. Wise, Deceased, Plff. in Err.

(— W. Va. —, 83 S. E. 77.)

New trial — disappearance of evidence.

1. In an action on contract for unliquidated damages, commenced in 1904, a verdict for defendant was returned in 1909, whereupon plaintiff promptly moved for a new trial. For reasons not appearing, action on the motion was delayed until 1913, when a special judge, then selected to act thereon (he being the regular judge presiding when the case was tried), awarded a new trial, assigning, as the sole reason therefor, his failure to "find anything in the record as to what the evidence was before the jury." Upon writ of error, nothing appears as to the character, extent, or manner of loss of the evidence, or what effort, if any, was made by either party to preserve or restore it. Held, the ruling on the motion was erroneous.

Judgment — upon verdict.

2. The court should have entered judgment upon the verdict.

Headnotes by LYNCH, J.

(September 29, 1914.)

Note. — Disposition of appeal, or motion for new trial, where without fault of appellant the record is lost or incomplete.

The early cases on this question are presented in note to Bailey v. United States, 25 L.R.A.(N.S.) 860, and the present note is supplementary thereto.

Loss of evidence.

Supplementing note, 25 L.R.A.(N.S.) 861.

In Cuyugan v. Aguas, 19 Philippine, 379, it is held that loss of the trial record, or of documents and evidence that are important for a proper decision of the suit, imposes the necessity of a new trial in order that the litigants may obtain full justice with respect to their controverted rights.

In Elliott v. State, 5 Okla. Crim. Rep. 63, 113 Pac. 213, it is held in the syllabus by the court that "when the record or portions of the record material to appeal are misplaced through no fault of the appellant, the trial court should grant a new trial upon proper showing, in the same manner as the law provides for new trials on the ground of newly discovered evidence."

In O'Donnell v. McCool, — Wash. —, 142 Pac. 1135, it appeared on motion to dismiss the appeal, that certain exhibits introduced in evidence at the trial were not attached to the statement of facts, as ordered by the trial judge and certified to constitute a part of it, for the reason that they were lost or mislaid in the clerk's office without fault of the parties, and that the trial judge refused to substitute copies thereof submitted by appellants or to pass upon their correctness; and it was held that the trial court has inherent power under such circumstances to supply the exhibits if it can be done, and to order a hearing upon notice to all parties concerned, to the end that it may be determined whether the copies offered are in fact copies of the original exhibits or contain their material substance. Accordingly, it was ordered that the papers on file be transmitted to the trial judge for determination as to whether they were true copies of the exhibits, and that he certify the result of his findings to the appellate court.

It has been held that a new trial sought upon the ground that the verdict is against the evidence should not be denied by a judge who did not preside at the trial, upon the ground that he is unable to determine just what evidence was offered at the trial. Cocker v. Cocker, 56 Mo. 180. The court followed the principle announced in Woolfolk v. Tate, 25 Mo. 597, and quoted from the opinion with approval to the effect that a party to a suit "has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action;" that "it is better to allow a new trial where the court for any cause cannot consider the merits of an application for that purpose, than to refuse it; for, by denying the motion without giving the party the benefit of being heard, or of having his reasons considered, irreparable injury may be done, while, on the other hand, the prevailing party in the verdict will only suffer by delay, and will generally secure another verdict if he is entitled to it." These cases are followed in St. Francis Mill Co. v. Sugg, 142 Mo. 364, 44 S. W. 249.

In Ogle v. Potter, 24 Mont. 501, 62 Pac. 920, it was held that the fact that the referee absconded from the state without filing a transcript of the testimony taken before him, as ordered by the court, is not ground for a new trial where judgment had been previously entered by the court upon the findings and conclusions of the referee after argument of counsel.

Loss of papers.

Supplementing note in 25 L.R.A.(N.S.) 861.

On a motion to strike out the transcript on appeal because it was incomplete, it appearing by the certificate of the clerk that the injunction bond filed in the case had been lost, the court in J. M. Radford Grocery Co. v. Owens, — Tex. Civ. App. —, 159 S. W. 453, granted the appellant leave to complete the record by having the bond sub-

ERROR to the Circuit Court for Morgan County to review a judgment setting aside a verdict in defendants' favor and granting a new trial in an action brought to recover a certain amount alleged to be due under a written agreement between plaintiff and defendants for the sale of land. Reversed.

The facts are stated in the opinion.

Messrs. **Faulkner & Walker**, for plaintiff in error:

Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it should not be interfered with by the court, unless manifest wrong and injustice have been done, or unless the verdict is plainly not warranted by the facts proved.

Blosser v. Harshbarger, 21 Gratt. 214; Pryor v. Com. 27 Gratt. 1010; Hilb v. Peyton, 21 Gratt. 386; Smith v. Com. 21 Gratt. 813; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 114; Johnson v. Com. 29 Gratt. 820; Dean v. Com. 32 Gratt. 917; Baccigalupo v. Com. 33 Gratt. 811, 36 Am. Rep. 795; Powell v. Tarry, 77 Va. 260; Priest v. Whitacre, 78 Va. 158; Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384; Nicholas v. Com. 91 Va. 813, 21 S. E. 507; Steptoe v. Flood, 31 Gratt. 342; Gwynn v. Schwartz, 32 W. Va. 494, 9 S. E. 880; Black v. Thomas, 21 W. Va. 713; Robertson v. Com. 2 Va. Dec. 142, 22 S. E. 359; Cash v. Com. 2 Va. Dec. 1, 20 S. E. 893; Campbell v. Lynn, 7 W. Va. 672; Sheff v. Huntington, 16 W. Va. 321; Welch v. County Ct. 29 W. Va. 63, 1 S. E. 341; Jones v. Singer Mfg.

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stituted by a proper proceeding in the lower court.

In Germaine v. Harwell, — Miss. —, 61 So. 659, the court overruled appellant's motion to reverse the judgment on account of his inability to make up the record because of the loss of the original papers, where it did not appear that appellees or their counsel were to blame.

In Territory v. Masagi, 16 Haw. 196, it was held that the loss of papers from the files which were referred to in the bill of exceptions furnished no ground for a new trial.

Loss of charge to jury.

Supplementing note in 25 L.R.A.(N.S.) 864.

The loss of requests for charges which were refused by the court, without the fault or neglect of the party, and which cannot be reviewed on appeal unless incorporated in the bill of exceptions, is not ground for a new trial where no attempt has been made to substitute them. Choate v. Alabama G. S. R. Co. 170 Ala. 590, 54 So. 507, holding the granting of a new trial error. The court, after pointing out that the courts have inherent power to substitute lost records; that the statute provided the proper procedure for substitution, and that an attempt should have been made, said that the plaintiff, who had obtained a judgment in the case, had rights in the premises as well as the defendant, and as he was without fault or neglect as to the loss of the charges, he should at least have been afforded the opportunity of aiding the court and the defendant in the substitution.

Loss of prayers granted at the trial, thereby precluding defendant from securing a complete record of the rulings of the court for review on appeal, furnishes no sufficient ground to strike out the judgment and reinstate the case for trial, where it appeared that defendant did not rely upon the rulings of the court upon the prayers in the bill of exceptions presented to the court before the loss occurred, but solely upon the rulings of the court in the exclusion of certain testimony, and that he took no steps to have the prayers supplied or incorporated in a bill of exception when the court extended the time for the preparation of exceptions upon his refusal to sign the bill tendered. Jones v. State, 118 Md. 67, 83 Atl. 1100.

In Addems v. Suver, 89 Ill. 482, it is held that the loss of the instructions requested in the case, pending decision on the motion for a new trial, affords no ground for a new trial; but that the appellant is entitled to leave to have them restored if he desires to embody the instructions in the record on appeal.

Where the instructions are lost the appellate court will indulge the presumption that no error was committed in giving and refusing instructions. Ibid.

—duty to have lost papers supplied.

Supplementing note in 25 L.R.A.(N.S.) 863.

Conceding, though not deciding, the existence of the power of a court of equity, apart from express constitutional and statutory provisions, to grant a new trial where, without fault of the parties, they have been deprived of the right of appeal by loss or destruction of the record, it was held in Dumbarton Realty Co. v. Erickson, 143 Iowa, 677, 136 Am. St. Rep. 778, 120 N. W. 1025, 21 Ann. Cas. 258, that it should not be exercised where it is possible to substitute the missing record, though it may necessitate the retaking of the testimony.

In the above case it appeared that the notes of testimony never became a part of the record because of failure to have the same certified prior to the death of the reporter, but the court said: "If the testimony taken and considered by the court be lost before the party has reasonable opportunity to have it made of record, we see no good reason for denying to the court the power to direct that it be retaken."

Where a part of the record was lost after the hearing in the lower court, it was held in Roberts v. Calhoun, 149 Ky. 731, 149 S. W. 991, on a motion in the supreme court

Co. 38 W. Va. 149, 18 S. E. 478; Howell v. Com. 26 Gratt. 995; Great Falls Mfg. Co. v. Henry, 32 Gratt. 467; Danville Bank v. Waddill, 31 Gratt. 469; Blair v. Wilson, 28 Gratt. 165; Cluverius v. Com. 81 Va. 787; South West Improv. Co. v. Smith, 85 Va. 306, 17 Am. St. Rep. 59, 7 S. E. 365; Hill v. Com. 88 Va. 633, 29 Am. St. Rep. 744, 14 S. E. 330; Jones v. Rixey, 79 Va. 656; Kimball v. Friend, 95 Va. 125, 27 S. E. 901; Gravely v. Com. 86 Va. 396, 10 S. E. 431; Clark v. Com. 90 Va. 360, 18 S. E. 440; State v. Donohoo, 22 W. Va. 761.

A new trial should not be granted in a doubtful case merely because the judge, if one of the jury, would have found a different verdict.

Mays v. Callison, 6 Leigh, 230; Reed v. Com. 22 Gratt. 924; Vaiden v. Com. 12 Gratt. 717; Burch v. Hylton, 89 Va. 441, 16 S. E. 342; Martin v. Thayer, 37 W. Va. 38, 16 S. E. 489; Thornton v. Com. 24 Gratt. 657; Lawrence v. Com. 30 Gratt. 845; Sigler v. Beebe, 44 W. Va. 587, 30 S. E. 76.

Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court would have given a different verdict.

Grayson v. Com. 6 Gratt. 712; Blosser v. Harshbarger, 21 Gratt. 214; Meredith v. Johns, 1 Hen. & M. 585; Cash v. Com. 2 Va. Dec. 1, 20 S. E. 893; Ross v. Overton, 3 Call. (Va.) 309; Valley Mut. L. Ins. Co. v. Burke, 1 Va. Dec. 508; Brown v. Handley,

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to supply the record, that it could not be supplied by a proceeding in that court, but that the case would be continued and time given for the supplying of the record in the lower court. Citing Gaboury v. Coombs, 28 Ky. L. Rep. 443, 89 S. W. 300, on rehearing in 28 Ky. L. Rep. 761, 90 S. W. 281.

When records are lost they should, in the absence of an agreement, be supplied by a proceeding for that purpose in the lower court, as provided by the statute. Ferrell v. Bauer Cooperage Co. 156 Ky. 749, 161 S. W. 1120; Williams v. Capital Min. Lumber & Oil Co. 152 Ky. 47, 153 S. W. 42.

Bills of exception or statement of facts.

Supplementing note in 25 L.R.A.(N.S.) 866.

One convicted of a criminal offense is entitled to a new trial where he has been deprived of a statement of facts on appeal, through no fault or negligence on his part. Barr v. State, 62 Tex. Crim. Rep. 58, 136 S. W. 454; Burden v. State, — Tex. Crim. Rep. —, 156 S. W. 1196.

As shown in the early note, it has been held that the death of the trial judge, which deprives a party of the benefit of his appeal by being deprived of a bill of exceptions, statement of facts, or case made, is ground for granting a new trial. To the same effect are Gross v. Wood, 117 Md. 362, 83 Atl. 337, Ann. Cas. 1914A, 30; Tegler v. State, 3 Okla. Crim. Rep. 595, 139 Am. St. Rep. 976, 107 Pac. 949; J. W. Ripey & Son v. Art Wall Paper Mill, 27 Okla. 600, 112 Pac. 1119; Duffield v. Ingraham, 35 Okla. 11, 128 Pac. 111.

One against whom judgment has been rendered is entitled to a new trial on the ground of accident or misfortune, where the trial judge was prevented by illness from stating the findings of fact and his rulings thereon, as provided by the statute (N. H. Pub. Stat. 1901, chap. 204, § 10). Bates Street Shirt Co. v. Place, 76 N. H. 569, 78 Atl. 928.

In Gross v. Wood, 117 Md. 362, 83 Atl. 337, Ann. Cas. 1914A, 30, it was held that appellant was entitled to a new trial by reason of the illness and subsequent death of the trial judge, though it appeared that the judge was able to sign the bill of exceptions during a portion of the time allowed for the preparation of the exceptions, but it did not appear that he had reason then to suppose the judge would not be able to sign it later.

In King v. State, 59 Tex. Crim. Rep. 511, 129 S. W. 626, the court, upon an appeal from a conviction of a violation of the local option law, affirmed the judgment because the bills of exception and statement of facts were not approved by the trial judge, but on motion to reinstate the case it appeared that the failure to have the statement of facts and bills of exception approved and properly in the record was no fault of appellant, but a neglect or oversight on part of the trial judge, and the case was accordingly reinstated on the docket, the affirmance set aside, the judgment reversed, and the cause remanded.

But the death of the trial judge subsequently to the trial, and before the statement of facts was made up, does not entitle appellant to a new trial where an agreed statement of facts is filed, and there is no bill of exceptions in the record nor any claim that appellant was deprived of bills of exception by reason of the death of the judge. Ellis v. State, 56 Tex. Crim. Rep. 22, 118 S. W. 543.

In Whitely v. St. Louis, E. R. & W. R. Co. 29 Okla. 63, 116 Pac. 165, it was held that a sufficient showing was made to invoke a court of equity to grant a new trial upon the ground that plaintiffs were deprived of the benefit of their exceptions and right of appeal without their fault, where it appeared that the stenographer lost the notes of the testimony; and that the term of office of the trial judge expired before the expiration of the time fixed by him for signing and settling a case made for appeal, and that he had moved and resided outside of the state.

7 Leigh, 119; Mahon v. Johnston, 7 Leigh, 317; Randolph v. Hill, 7 Leigh, 383; Goode v. Love, 4 Leigh, 635; M'Whirt's Case, 3 Gratt. 594, 46 Am. Dec. 196; Pryor v. Com. 27 Gratt. 1009; McDaniel v. Com. 77 Va. 281, 4 Am. Crim. Rep. 369; Priest v. Whitacre, 78 Va. 151; Russell v. Com. 78 Va. 400; Montague v. Allan, 78 Va. 592, 49 Am. Rep. 384; Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77.

The trial court cannot set aside a verdict merely because it thinks that there is a preponderance of evidence against it, or doubts its correctness, or would itself have found a different verdict.

Morien v. Norfolk & A. Terminal R. Co. 102 Va. 622, 46 S. E. 907.

The verdict of the jury ought not to be interfered with and a new trial awarded by the court, when the evidence is contradictory, if, when most favorably considered in support of the verdict, it does not still appear that the verdict was plainly not warranted by the evidence.

Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880; State v. Sullivan, 55 W. Va. 597, 47 S. E. 267; Grayson v. Com. 6 Gratt. 712; Bell v. Alexander, 21 Gratt. 9; Newlin v. Beard, 6 W. Va. 111; Sheff v. Huntington, 16 W. Va. 324; Jones v. Singer Mfg. Co. 38 W. Va. 148, 18 S. E. 478; Jackson v. Wickham, 112 Va. 131, 70 S. E. 539; Blair v. Wilson, 28 Gratt. 165; Coalmer v. Barrett, 61 W. Va. 237, 56 S. E. 385; Beard v. Indemnity Ins. Co. 65 W. Va. 285, 64 S. E. 119, 21 Am. Neg. Rep. 371.

Mr. **J. Hammond Siler** also for plaintiff in error.

Messrs. **Forrest W. Brown and F. A. Brown**, for defendant in error:

A motion for a new trial is always addressed to the sound discretion of the court, and it takes a stronger case in an appellate court to reverse an order granting than one refusing a new trial.

Varney v. Hutchinson Lumber & Mfg. Co. 64 W. Va. 418, 63 S. E. 203; Soward v. American Car Co. 66 W. Va. 266, 66 S. E. 329.

Lynch, J., delivered the opinion of the court:

On April 8, 1913, a verdict for defendant returned January 9, 1909, was set aside, and a new trial awarded, "because" (as appears from the order) "the court cannot find anything in the record as to what the evidence was before the jury." Defendant having died before entry of the order, the action was revived in the name of his personal representatives; and, the term of the judge who presided at the trial having terminated, he was selected by agreement to rule upon the motion. A fair interpretation of the reason assigned by him for vacating the verdict leads to the conclusion

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Death or default of official stenographer.

Supplementing note in 25 L.R.A.(N.S.) 867.

As shown in the early note, the cases are not in harmony upon the proposition as to whether the loss by the reporter of his stenographic notes of the proceedings at the trial, and consequent inability to furnish a transcript of the evidence, furnish the losing party a ground for a new trial.

As shown in the early note, it has been held that the failure of the official stenographer to make a transcript of the oral proceedings, whereby a party is deprived of his bill of exceptions, is ground for granting a new trial.

This doctrine was recognized in Vincent v. State, 37 Neb. 672, 56 N. W. 320, but it was there held that the application for a new trial must be made to the trial court and its decision on the application may be reviewed, but that the appellate court had no original jurisdiction to vacate a judgment and grant a new trial.

In Bourque v. Record Foundry & Mach. Co. 38 N. B. 239, the court directed a new trial where, on account of the stenographer's failure to file a transcript of the evidence and the judge's instructions, it was unable to pass upon the merits of the motions made by the parties in the case.

And in Elliott v. State, 5 Okla. Crim. Rep. 63, 113 Pac. 213, it was held that the loss of the stenographic report of the testimony taken at the trial, whereby the defendant in a criminal action was deprived of his right to present a complete appeal to the appellate court, through no fault of his, entitled him to a new trial. But see cases cited in next paragraph, which were civil cases.

It has been held that the mere fact that the stenographer who took the testimony at the trial lost his notes, and his consequent inability to furnish a transcript of the evidence, do not entitle the losing party to a new trial. Farmers' & M. Bank v. Welborn, 32 Okla. 1, 121 Pac. 620; Whitely v. St. Louis, E. R. & W. R. Co. 29 Okla. 63, 116 Pac. 165.

Failure to procure a transcript of the evidence on account of the physical condition of the reporter furnishes no ground for a new trial where appellant failed to show sufficient reason for delay in taking the appeal, and further delay in ordering a transcript to be made, until so near the end of the period provided by law that a slight accident or unexpected temporary interference might result in the loss of his appeal. McKinley v. McKinley, 123 Iowa, 574, 99 N. W. 162.

It appeared in the above case that the order for the transcript was not given until about twenty days before the expiration of the time for filing the same, which was during the summer vacation of the courts,

L.R.A.1915B.

that he was unable, after the lapse of four years, to recall the facts on which the jury based its finding.

While the administrators rely for reversal on the rule, frequently announced, that except for misdirection a verdict cannot be disturbed unless manifestly erroneous, defendant in error relies on the counter proposition that the appellate court cannot disturb the finding of the lower court unless its ruling is apparently erroneous. Both propositions find ample support in our decisions. But it is not upon either of them that the decision in this case must rest, under the principles generally announced by the authorities in cases involving the loss or destruction in whole or in part of the evidence introduced on the trial of a cause. Although there is the usual diversity of views upon the question, we think the safe and better rule, and the one sustained by reason and authority when applied to the facts of this case, is that a new trial should not be awarded merely because the evidence or a material part of it has been lost or destroyed without the fault of appellant or plaintiff in error, although there is authority to the contrary,—indeed, it is the usual practice in some courts, under such circumstances, to grant a new trial. Barton v. Burbank, 119 La. 224, 43 So. 1014; State v. McCarver, 113 Mo. 602, 20 S. W. 1058; State v. Huggins, 126 N. C. 1055, 35 S. E. 606. But Golden Terra Min. Co. v. Smith, 2 Dak, 377, 11 N. W. 98, holds that a motion for a new trial, upon the ground of the destruction of the record and evidence before decision, and the difficulty of restoring the evidence and making a case or a bill of exceptions, was, under the circumstances, properly denied; the circumstances being that the stenographer's notes and transcript therefrom were destroyed by fire without appellant's fault, and that sufficient facilities and time were allowed for the preparation of the case and exceptions from memoranda accessible. And in People v. Strollo, 191 N. Y. 42, 83 N. E. 573, the court affirmed a judgment denying a new trial, where a material part of the evidence for the accused had been destroyed without his fault subsequent to the grant of appellate process, and while the record was in course of preparation; the court holding, however, that the record as prepared contained evidence fully warranting the conviction of the accused for first degree murder. In Saxton v. Harrington, 68 Neb. 446, 94 N. W. 605, an equitable proceeding to obtain a new trial, the court held that the mere loss of files in a case, where no effort is made to substitute them and no order obtained for that purpose, the only diligence shown being repeated requests of the clerk for one, "will not sustain a judgment granting a new trial."

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and the reporter, being absent from the state, did not receive the order until his return nine days later, though the transcript would probably have been completed in time for appellant's use but for the failure of the reporter's eyesight.

The inability to procure a translation of the notes of testimony taken at the trial, because of the illness of the stenographer and his subsequent death shortly after the entry of the judgment, thus preventing an appeal, is not an "unavoidable casualty or misfortune preventing the party from prosecuting or defending," within the contemplation of the statute authorizing the granting of a new trial. Dumbarton Realty Co. v. Erickson, 143 Iowa, 677, 136 Am. St. Rep. 778, 120 N. W. 1025, 21 Ann. Cas. 258. The court, in reversing the order granting a new trial, pointed out that the statute refers to casualties which prevented the prosecution or defense at the trial upon which the judgment was rendered, and not to matters occurring after judgment which prevented one from prosecuting or defending his appeal, following Loomis v. McKenzie, 48 Iowa, 416, in which Adams, J., filed a dissenting opinion.

A party who fails to present a record in accordance with the method provided by statute, and is thereby deprived of a hearing upon the merits in the appellate court, is not denied a right under the Constitution, which grants a right of appeal to the supreme court, including a trial *de novo*, upon the evidence offered in the trial court, where the Constitution does not undertake to provide the manner and method in which the appeal shall be taken. Ibid.

In Ross v. Leader, — Iowa, —, 122 N. W. 812, it was held error to grant a new trial because of the death of the official stenographer and the inability of anyone to transcribe his shorthand notes of the testimony, where the objections of the successful party put in issue the claim that the record could not be substituted, alleged that the witnesses could be recalled, and averred that he expressly waived any rights he may have to object to the substituted record if approved by the court.

In Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271, it is held that it is within the discretion of the trial court to refuse a motion for a new trial upon the ground that the stenographer who had taken the testimony lost his notes, and the appellant offered to pay all the costs of a new trial in order to get a correct record.

Inability to secure a copy of the testimony taken at a former trial in time for use at the second trial, to read from it material evidence, furnishes no ground for a new trial, where it appears that the same stenographer took the testimony at both trials and could have read the desired portions of testimony. Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627. A. L. R.

As defendant could rest contented upon the finding in his favor, the duty devolved on plaintiff, whose motion, though promptly made, the court four years later sustained, to preserve the testimony, or to show in what respect the effort, if made, would have been unavailing; and he cannot now complain that plaintiff in error has failed to produce the testimony. Cutting v. Tavares O. & A. R. Co. 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 150.

Although in most of the cases cited the loss or destruction of the whole or a material part of the evidence occurred, as already stated, subsequent to the grant of appellate process, yet by analogy we think the principles announced in the cases cited sustain the contention of plaintiff in error, and lead to the conclusion that the award of a new trial, solely on the ground assigned in the order, is error, for which we should, and do, reverse the judgment of the lower court, and, as it should have done, direct judgment for plaintiff in error upon the verdict returned by the jury.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WILLIAM ROSE, Doing Business as Rose Transfer Company,
v.
PUBLIC SERVICE COMMISSION.

(— W. Va. —, 83 S. E. 85.)

Monopoly — exclusive privilege at railway station.

1. A railway company is not prohibited by §§ 7, 8, and 9, chapter 9, Acts 1913 (Code 1913, chap. 15o [§§ 642–644]), or by any rule or principle of the common law, from granting to a local transfer company, in good faith and for public convenience, the exclusive privilege of occupying a portion of its station platform and ground for the purpose of soliciting patronage in the business of transferring through passengers and baggage arriving on its trains, to the station of another railway company. The rights of a competing transfer company are not thereby violated.

Statute — adoption — construction.

2. When a statute has been adopted from another state or country, the courts usually follow the construction which it had received by the courts of the state or country from which it is taken.

(September 29, 1914.)

PETITION for reversal of an order of the Public Service Commission denying petitioner relief and dismissing his petition filed for the cancelation of a contract between the Union Transfer Company and the Chesapeake & Ohio Railway Company granting exclusive privileges to the former, which were alleged to be in violation of law. Order refused.

The facts are stated in the opinion.

Messrs. **Daugherty & Riggs** for petitioner.

Messrs. **Enslow, Fitzpatrick, Alderson, & Baker** and **George J. McComas**, for respondents:

The public service commission was without jurisdiction.

Norfolk & W. R. Co. v. Old Dominion Baggage & Transfer Co. 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; Judicial Case No. 324, Corporation Commission of Virginia, Cosby v. Richmond Transfer Co.; Kates v. Atlanta Baggage & Cab Co. 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372; Cosby v. Richmond Transfer Co. 23 Inters. Com. Rep. 72.

The railroad, owning its property in fee, has the right to make the contract here involved.

Headnotes by WILLIAMS, J.

Note. — Right to discriminate between hackmen and other solicitors of patronage at depots, wharves, etc.

The earlier cases upon the question considered in this note are gathered in the note accompanying Oregon Short Line R. Co. v. Davidson, 16 L.R.A.(N.S.) 777.

As to right of carrier to grant exclusive train privilege to baggage or passenger transfer companies, see note to Dingman v. Duluth, S. S. & A. R. Co. 32 L.R.A.(N.S.) 1181.

As to remedy by injunction for unlawful discrimination by railroad against hack driver, see note to Cooper v. Deval, 8 L.R.A. (N.S.) 1027.

As to right to exclude undesirable hackmen, draymen, etc., from depot, see note to Chicago, R. I. & P. R. Co. v. Armstrong, 39 L.R.A.(N.S.) 126.

Doctrine permitting discrimination.

In Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co. 190 Fed. 212, a union depot company was held to have the right to make a contract with a single taxicab company, giving the latter the exclusive right to furnish taxicabs and carriages for transporting passengers and baggage, and the right to maintain a booth in the depot and solicit the business of transferring passengers and baggage, and another taxicab company was held not entitled to have an equal privilege under a similar contract. The court said: "It is a matter of general knowledge that it is exceedingly annoying to have a multitude of soliciting agents harassing passengers for transportation. Many of such soliciting agents are rough and uncouth, and become exceedingly offensive in their solicitations. Persons

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202.

Williams, J., delivered the opinion of the court:

William Rose, doing business as the Rose Transfer Company, filed his petition before the public service commission complaining against the Chesapeake & Ohio Railway Company, a corporation, and the Union Transfer & Storage Company, also a corporation, alleging that said railway company had violated the laws of the state by extending to the Union Transfer Company the exclusive privilege of occupying a certain portion of its ground adjacent to its station in the city of Huntington for the purpose of soliciting patronage from persons arriving on said railway company's trains; complainant and said Union Transfer Company being competitors in the business of hauling passengers and baggage from said station to their places of destination in the city, and transferring through passengers and baggage from said station to the station of the Balitmore & Ohio Railroad Company situate in another part of the city. Petitioner avers that the Union Transfer Company enjoys said special and exclusive privilege by virtue of a contract between it and the Chesapeake & Ohio Railway Company, which it alleges is in violation of law, and he prays that the contract be canceled and that he be admitted to equal privileges with the Union Transfer Company in the use and enjoyment of the railway company's station platform and grounds.

The cause was regularly heard upon pleadings, agreed statement of facts, and argument of counsel, and on the 3d day of June, 1914, an order was entered denying petitioner relief and dismissing his petition, and he now petitions this court to review and reverse that order. It appears from the agreed facts that the Chesapeake & Ohio Railway Company owns in fee a square of ground adjoining its station near the point where passengers alight from its trains, which it has paved; that it has given to the Union Transfer Company the exclusive right to occupy this piece of ground with its cabs for the purpose of soliciting passengers and

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who travel but little are so bewildered as not to know what to do. Excessive charges are imposed upon them, and they are subjected to many inconveniences, and sometimes grievous annoyances, and often insults and greater wrongs. The general public has the right to be free from all these things."

And in New York C. & H. R. R. Co. v. Ryan, 71 Misc. 241, 129 N. Y. Supp. 55, relying upon New York C. & H. R. R. Co. v. Flynn; Brown v. New York C. & H. R. R. Co., and New York C. & H. R. R. Co. v. Warren, set out in the note in 16 L.R.A. (N.S.) 779, a railroad company was held to have a right to enter into a contract giving a hackman the exclusive right to solicit business and stand his hacks along a platform on its property.

And it was held in Denton v. Texas & P. R. Co. — Tex. Civ. App. —, 160 S. W. 113, where a railway company had entered into a contract giving a transfer company the exclusive right to solicit business as transfer agents about its station and trains, that the railway was entitled to an injunction against another transfer company restraining them from going upon its premises and soliciting such business.

—effect of statute.

In Depot Carriage & Baggage Co. v. Kansas City Terminal R. Co. supra, a Missouri statute against discrimination was held to have no application in an action by a taxicab company against a railway and union depot company to compel the latter to give the complainant the same right to solicit the business of transferring passengers and baggage which it gave another taxicab company, it appearing that the greater part of the business was interstate business.

Doctrine denying right to discriminate.

The decision in McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15, set out in the note in 16 L.R.A.(N.S.) 781, was followed in Palmer Transfer Co. v. Anderson, 131 Ky. 217, 19 L.R.A.(N.S.) 756, 133 Am. St. Rep. 237, 115 S. W. 182, where it was held that a railroad company could not give to one hackman the right to occupy such a position on its grounds as necessarily resulted in his securing by far the larger share of the business, and that a contract by which it attempted to do so was void. The court said that it could not differentiate the case from the earlier one because in the one at bar there was some space left for other hackmen, where such space was so inconveniently situated as to practically give a monopoly to the preferred hackman.

—designation of stands.

A rule by which a railroad company reserves the right to assign places upon its grounds to different hackmen, and to exclude others from such places, is reasonable, and a hackman has no right to stand his hack at a place assigned to another who has entered into a contract with the railroad to carry the mail and transport its injured employees, although such place is more advantageous for soliciting patronage than that assigned to other hackmen. Hot Springs v. Demby, 90 Ark. 574, 134 Am. St. Rep. 43, 119 S. W. 1126. J. T. W.

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baggage; that petitioner and all other persons have equal right to drive upon this ground for the purpose of delivering passengers and baggage, but that all persons, except the Union Transfer Company, are denied the right of remaining there for the purpose of soliciting patronage; that there are other ways of approach to the station for receiving and delivering passengers and baggage, not so convenient, which all persons are permitted to use. The contract between the Chesapeake & Ohio Railway Company and the Union Transfer Company gives said transfer company the exclusive privilege of transferring through passengers and baggage from the Chesapeake & Ohio Railway Company's station to the Baltimore & Ohio Railroad Company's station, and the "exclusive privilege of soliciting passengers and baggage on the passenger station platform." The railway company agrees to pay the said transfer company 25 cents for each adult through passenger and 12½ cents for each half-fare passenger transferred from its station to the Baltimore & Ohio station, and 15 cents for each piece of through baggage so transferred. Monthly settlements are provided for. The transfer company agrees to maintain suitable conveyances and have them ready to meet all passenger trains, and properly transfer through passengers and baggage to the Baltimore & Ohio station. It also agrees to indemnify the railway company against all claims that may arise on account of any loss, damage, or delay to baggage, or on account of personal injury or death to passengers, while in the possession or under the control of said transfer company. Passenger transfers are to be evidenced by coupons issued by the railway company and collected by the transfer company from the passengers, and baggage transfers by duplicate transfer baggage waybills of the railway company, which shall accompany the baggage upon delivery to the transfer company, and be retained by it until the end of each month, when settlement is to be made. The contract is unlimited in duration, and reserves the right to either party to terminate it upon thirty days' notice. Whether the railway company profits by the arrangement does not appear, nor do we think that point is material.

Petitioner insists that the agreement is an unlawful discrimination against him and in favor of the Union Transfer & Storage Company, and that it violates §§ 7, 8 and 9, chapter 9, Acts 1913 (Code 1913, chap. 15o [§§ 642-644]). A casual reading of sections 8 and 9 will indicate that neither of them apply to the case in hand. Section 8 deals with connecting lines of railroads, and prescribes their duties to each other in respect to mutual service and division of rates. Section 9 is on the subject of changing the rates, fares, and charges of public service corporations, and prescribes what is necessary to be done before such changes can be made. If § 7 does not apply to the case, then there is no statute law of the state on the subject. That section is as follows: "It shall be unlawful for any public service corporation subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular character of traffic or service, in any respect whatsoever, or to subject any particular person, firm, corporation, company, or locality, or any particular character of traffic or service, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

An act in almost the identical language of our statute was passed in Virginia in 1867, and has been in force in that state until the present time. It seems to have been copied by that state from an English act, 17 and 18 Vict. chap. 31, passed in 1854. All courts recognize the rule that, when a state copies a statute from another state or country, it adopts also the construction put upon that statute by the courts of that country. Before the statute was adopted by the legislature of Virginia it had been decided several times by the courts of England, that it did not apply to a case like the one we now have in hand; and the supreme court of Virginia has decided, in the comparatively recent case of Norfolk & W. R. Co. v. Old Dominion Baggage & Transfer Co. 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784, that the statute did not prohibit a railway company from giving to a local transfer company such an exclusive privilege as is here complained of. The facts in that case were almost identical with the facts in this case, and the complaint was the same, except that it was there made to a court of equity on application for an injunction, while here it is made to the public service commission. So we have the construction placed upon the statute by both the courts of England and the highest court of Virginia, before its adoption by this state; and, following the rule above announced respecting the effect to be given those decisions in construing the statute, we are bound to hold that it was not intended to apply to such a case as the one in hand. The English decisions on the point will be found collated in the opinion of Judge Harrison in the Virginia case above cited.

The next question is: Does the common law prohibit a railroad company from granting such exclusive privilege to a local transfer company? We do not think so. We are aware that the courts of some of the states

have held that it does; that the granting of such special privilege is *ultra vires* and creates an unlawful discrimination. Some of the cases so holding are the following: Pennsylvania Co. v. Chicago, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 45 L.R.A. 427, 74 Am. St. Rep. 274, 53 N. E. 937, and Cravens v. Rodgers, 101 Mo. 253, 14 S. W. 106. The better considered cases, however, if not the greater number, hold that a railway company acting in good faith and for the purpose of serving the traveling public may grant to a local transfer company the exclusive privilege of occupying a portion of its station platform or grounds to solicit patronage. Without attempting to collate all the authorities pro and con on the subject, we refer to the case of Kates v. Atlanta Baggage & Cab Co. 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372, as containing a very able and convincing discussion of the subject, and deciding, on principles of the common law, that such exclusive privilege by a railway company to a local transfer company is lawful. The point is also thoroughly and ably discussed in an opinion by Mr. Justice Harlan in Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, in which a similar decision is rendered by a unanimous court. From his opinion we quote the following: "It [the railway company] is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation."

The exclusive privilege here extended by the railway company to the Union Transfer Company does not deny to petitioner any right or privilege which he is entitled to demand of the railway company in respect to any service that it is bound, as a public service corporation, to render to shippers and the traveling public in equal measure. His complaint is not that of a patron of the railway company. He seeks to use the railway company's property to further his own private business, and the railway company owes him no duty in that particular. As between him and it, the railway company's property is strictly private, except in the use he is entitled to make of it in transporting himself and his property, or the persons and property of others in his care (Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517), and no privilege is denied him in respect to those rights. Such agreements as the one in question are not novel; they exist in many places and are intended to benefit the public. In the present case it appears that, when the traveler buys his ticket from the railway company, there is included in the fare the cost of the transfer across the city of himself and baggage, and he knows he will be put to no further expense. He is not subjected to the care and trouble of selecting a conveyance from among the numerous cabmen eager to serve him and clamoring for his patronage when he alights from the train. Those who have traveled will recall how confusing and annoying it was to them the first time they alighted from a train in a strange city and were confronted with numerous cab drivers, all clamoring for patronage.

The order is refused.

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WISCONSIN SUPREME COURT.

JACOB ROSENTHAL et al., Respts.,
v.
INSURANCE COMPANY OF NORTH AMERICA, Appt.

(158 Wis. 550, 149 N. W. 155.)

Insurance — covering property "not elsewhere" — temporary removal — effect.

Liability under a form of insurance policy prescribed by statute upon horses while in a designated building, and not elsewhere, does not attach in case they are destroyed while in another building to which they have been temporarily removed while the building designated in the policy is undergoing repairs.

(October 27, 1914.)

APPEAL by defendant from an order of the Circuit Court for Milwaukee County, overruling a demurrer to the complaint in an action to recover on a fire insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. **Gill & Barry**, for appellant:

The clause in a policy, "while located and contained as described herein and not elsewhere," amounts to a warranty.

1 Cooley, Briefs on Ins. 740, 741; L'Anse

Note. — The general subject of animal insurance is treated in the note to Joplin v. National Live Stock Ins. Asso. 44 L.R.A. (N.S.) 569, the question as affected by the place where the animals are kept being discussed at page 574.

v. Fire Asso. of Philadelphia, 119 Mich. 427, 43 L.R.A. 838, 75 Am. St. Rep. 410, 78 N. W. 465; Bahr v. National F. Ins. Co. 80 Hun, 309, 29 N. Y. Supp. 1031; Haws v. St. Paul F. & M. Ins. Co. 130 Pa. 113, 2 L.R.A. 52, 15 Atl. 915, 18 Atl. 621; Richards, Ins. § 235; Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227; Nichols v. Halliday, 27 Wis. 406; 19 Cyc. 741; Green v. Liverpool & L. & G. Ins. Co. 91 Iowa, 615, 60 N. W. 189; Slinkard v. Manchester Fire Assur. Co. 122 Cal. 595, 55 Pac. 417.

Mr. **Michael Levin**, for respondents:

The policy of insurance should be liberally construed in favor of the insured; particularly when a strict construction would work a forfeiture.

Siemers v. Meeme Mut. Home Protection Ins. Co. 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669; Redman v. Hartford F. Ins. Co. 47 Wis. 89, 32 Am. Rep. 751, 1 N. W. 393; 19 Cyc. 656, 657.

Where the words used in a policy admit of two interpretations, that which will sustain the claim of the insured and cover his loss must, in preference, be adopted.

May, Ins. § 175; Sawyer v. Dodge County Mut. Ins. Co. 37 Wis. 524; Wakefield v. Orient Ins. Co. 50 Wis. 540, 7 N. W. 647; Noyes v. Northwestern Nat. Ins. Co. 64 Wis. 415, 54 Am. Rep. 631, 25 N. W. 419.

Where the horses were temporarily removed, which removal was necessary and incidental to their use, and which was contemplated at the time of the issuance of the policy, the words "contained therein. and not elsewhere," must be held to be not a continuing warranty, but a mere description for the purpose of identification at the time of the issuance of the policy.

Hawkes v. Dodge County Mut. Ins. Co. 11 Wis. 189; Noyes v. Northwestern Nat. Ins. Co. 64 Wis. 415, 54 Am. Rep. 631, 25 N. W. 419; May v. Buckeye Mut. Ins. Co. 25 Wis. 291, 3 Am. Rep. 76; Kircher v. Milwaukee Mechanics' Mut. Ins. Co. 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487; Siemers v. Meeme Mut. Home Protection Ins. Co. 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669; Clute v. Clintonville Mut. F. Ins. Co. 144 Wis. 638, 32 L.R.A. (N.S.) 240, 129 N. W. 661; Lathers v. Mutual F. Ins. Co. 22 L.R.A.(N.S.) 850, and note, 135 Wis. 431, 116 N. W. 1, 15 Ann. Cas. 659; Kinney v. Farmers' Mut. F. & Ins. Soc. — Iowa, —, 141 N. W. 706; Holbrook v. St. Paul F. & M. Ins. Co. 25 Minn. 229; London & L. F. Ins. Co. v. Graves, 12 Ins. L. J. 308; Peterson v. Mississippi Valley Ins. Co. 24 Iowa, 494, 95 Am. Dec. 748; Mills v. Farmers' Ins. Co. 37 Iowa, 400; McCluer v. Girard F. & M. Ins. Co. 43 Iowa, 349, 22 Am. Rep. 249; Everett v. Continental Ins. Co. 21 Minn. 76; Reck v. Hotboro Mut. Live Stock & Protective Ins. Co. 163 Pa. 443, 30 Atl. 205; Ætna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. 934; Haws v. Fire Asso. of Philadelphia, 114 Pa. 431, 7 Atl. 159; American Cent. Ins. Co. v. Haws, 7 Sadler (Pa.) 558, 20 W. N. C. 370, 11 Atl. 107; McKeesport Mach. Co. v. Ben Franklin Ins. Co. 173 Pa. 53, 34 Atl. 16; 16 Am. & Eng. Enc. Law, 930.

Timlin, J., delivered the opinion of the court:

The amended complaint claimed damages on account of the loss by fire of two horses in a building at 924 Walnut street, Milwaukee. The horses were insured, according to the written portion of the policy, "all while contained in the frame brick-front barn situated at rear 425 Fifth street, Milwaukee, Wis." Section 1941—43, Stat., being the statute form of policy authorized in this state, requires such policy to state that the insurer "does insure . . . against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding . . . dollars to the following described property while located and contained as described herein and not elsewhere." The parties are permitted to select their description. The policy in question, in addition to the stipulation first above quoted, contained this latter requirement of the standard form. The complaint then avers that on or about the 9th of March, 1913, it was necessary to remove the horses from the described building in the rear of 425 Fifth street to the building in which they were burned, because the former building was undergoing repairs and interior rearrangement, making it impossible to keep the horses there, and that the horses were taken for the night of March 9th to the Walnut street premises, and there destroyed by fire. The fire risk at the Walnut street premises was less than that at the Fifth street premises. The plaintiffs used the horses in the business of delivering and receiving goods, wares, and merchandise to and from the various parts of the city and county of Milwaukee, and the defendant knew the purposes for which the horses were used, and knew it was customary, usual, and necessary for said horses to be in various parts of the city and county of Milwaukee; that prior to the fire in question the horses had spent a night or two temporarily in other barns, and the defendant knew or ought to have known that it might become necessary to house the said horses temporarily in some other place than that described in the policy, by reason of some contingency or unforeseen event which could not have been

anticipated at the time of the issue of the said policy; and that the repairs at the Fifth street premises were such unforeseen and unanticipated event, and the removal of the horses to the Walnut street barn necessarily incident to the use of said horses by the plaintiff. A demurrer to this complaint was overruled, and the defendant appeals.

It has been ruled many times that policies of insurance are to be liberally construed in favor of the insured, because the insurer has prepared the contract. This reason for such construction would seem to drop out in case of a contract prescribed in its details by statute; at least, so far as the statute covered such details. Temple v. Niagara F. Ins. Co. 109 Wis. 372, 85 N. W. 361; Hewins v. London Assur. Corp. 184 Mass. 177, 68 N. E. 62.

But another and more fundamental rule of construction, applying alike to statutes and contracts, is that the writing must, in case of ambiguity, be considered valid and efficient to work out the ascertained object of the writer; *i. e.*, in favor of indemnity to the insured, rather than useless or nugatory. This is considered with reference to policies of insurance in 1 May on Insurance, 4th ed. § 174, p. 342, and cases there cited; also 1 Phillips, Ins. § 124, p. 76; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 370 et seq. But this does not mean that clear expressions should be distorted, or that language should not be given its ordinary meaning. It is well known that fire risks and fire insurance rates vary greatly in different portions of a large city. And for this reason the fire insurance of chattel property of a kind that is not usually destroyed by fire, except in connection with the burning of a building, while contained in a designated building, is a very important stipulation in the policy. It affects the rates and affects the risk. When to this stipulation is added the words "and not elsewhere," great emphasis and certainty are given to the stipulation, and it is also to be considered that the statute authorizes a policy to be limited to a designated place to insure the property against loss only while at that place, and not elsewhere, leaving it to the parties to insert such written description of the place and the scope of the insurance in this respect as they see fit.

It has been held in Noyes v. Northwestern Nat. Ins. Co. 64 Wis. 415, 54 Am. Rep. 631, 25 N. W. 419, where the policy of insurance was upon a sealskin coat "contained in the two-storied frame dwelling house occupied by the assured, and known as 302 Farwell avenue," and the coat was destroyed by fire while in a downtown store for repair, there existed a liability on the policy. Argument was made by plaintiff's counsel to the effect that where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such use may be presumed to have been in contemplation of the parties when they made the contract of insurance, then and in that case the location of the property is specified in the policy merely to designate the accustomed place of deposit when the property is not absent therefrom in the course of its ordinary use; and that when the property is burned when so absent, the principal place of deposit remaining unchanged, the insurer is liable. This argument was approved in the opinion. Peterson v. Mississippi Valley Ins. Co. 24 Iowa, 494, 95 Am. Dec. 748, relating to horses "situated upon section 22;" Mills v. Farmers' Ins. Co. 37 Iowa, 400, relating to horses "on premises situated in section 7;" McCluer v. Girard F. & M. Ins. Co. 43 Iowa, 349, 22 Am. Rep. 249, relating to the phaeton "contained in the frame barn;" Longueville v. Western Assur. Co. 51 Iowa, 553, 33 Am. Rep. 146, 2 N. W. 394, relating to family wearing apparel "contained in two-story frame dwelling on lot six;" Holbrook v. St. Paul, F. & M. Ins. Co. 25 Minn. 229, relating to mules contained in a certain barn; London & L. F. Ins. Co. v. Graves, 12 Ins. L. J. 308, relating to buggies contained in a certain livery stable,—are cited and approved and selected from other decisions understood by the court to be to the contrary.

It is noticeable that in Noyes v. Northwestern Nat. Ins. Co. supra, and the other cases therein referred to, the language as understood by this court in the Noyes Case was not as restrictive as that in the instant case. In Lathers v. Mutual F. Ins. Co. 135 Wis. 431, 22 L.R.A.(N.S.) 848, 116 N. W. 1, 15 Ann. Cas. 659, it was said, in deciding a like point: "There is left to be determined this question of law: In case of insurance of a farm barn and of live stock customarily kept therein when not in use against loss by fire, the live stock being described as 'therein, on the farm and from lightning at large,' is risk of loss of the stock by fire while, temporarily and according to custom, off the farm, included in the contract, there being no negative thereof expressly or by necessary inference, other than suggested by the words 'therein, on the farm,' etc.? The proposition is ruled in the affirmative, as respondent's counsel contend and the trial court decided, by Noyes v. Northwestern Nat. Ins. Co. supra. . . . The rule involved is one of construction. The idea is that, the dominant purpose of the insurance being pro-

tection against loss from specified causes, it could not be effectuated if the language of the policy restricted liability to loss occurring while the subject of the insurance remained in its customary location when not in use; incidental changes, as matter of common knowledge, being necessary to the enjoyment of the property in the ordinary way. . . . The rule is particularly applicable to horses because of the fact that use thereof for any purpose is commonly outside of a barn, and because, on a farm, even when not in use, they are commonly turned out to pasture."

As observed in the case last cited, policies of insurance written in this state and conforming substantially to the policy in question in Noyes v. Northwestern Nat. Ins. Co. supra, must be considered to have been made with reference to the existing law of this state as there declared, which entered into and became a part of such contract. That case remains unshaken. The instant case, however, presents a different question. When the contract of insurance is so varied that the words describing the location of the insured chattels are prefaced by the word "while," and followed by the words, "and not elsewhere," so as to read "while located and contained as described herein and not elsewhere," does the rule of Noyes v. Northwestern Nat. Ins. Co. supra, obtain? We think not. Express words exclude the implication which controlled in Noyes v. Northwestern Nat. Ins. Co., and it falls within the rule of McKeesport Mach. Co. v. Ben Franklin Ins. Co. 173 Pa. 53, 34 Atl. 16, cited by respondent, and Green v. Liverpool & L. & G. Ins. Co. 91 Iowa, 615, 60 N. W. 189; 19 Cyc. 741, and Haws v. St. Paul, F. & M. Ins. Co. 130 Pa. 113, 2 L.R.A. 52, 15 Atl. 915, 18 Atl. 621, cited by appellant.

Upon this question of construction the implication that the property is covered, although not in the designated place, but elsewhere, arising from the known nature and uses of the property, is negatived by the express words of the policy in the instant case. The law permits a contract of insurance against loss by fire to be limited to loss in a specified building, if the parties so agree; also to be unlimited as to place of loss, if the parties so agree; also to be worded as in Noyes v. Northwestern Nat. Ins. Co. supra. Neither is illegal, harsh, or unusual. It is in all such cases a question of the intention of the parties, and the first and most decisive test of the intention of the parties to a written contract is the language employed. If the words "while contained in the frame brick-front barn situate at the rear of 425 Fifth street and not elsewhere" are not sufficient, what form of expression would be? The statute form of policy employing these words was adopted after the decision in the Noyes Case, supra, and it seems to reject the words there considered, and select a new, more exclusive, and emphatic form of expression, for the purpose of enabling the parties to get away from the rule of the Noyes Case if they wish to do so. To hold that they cannot do so by the form of expression used here, but may do so by some form of expression differing in words, but identical in meaning, would seem to be a sort of decree of outlawry against these useful and expressive words. We cannot think there is alleged anything which would make the policy enforceable by waiver on the part of the insurer. The objection here does not go to the validity of the policy, which might be overcome by the larger evident intention that indemnity was intended, nor to a forfeiture or loss of a right or claim thereunder, but concerns only the scope of the insurance; that is to say, the interpretation of the written contract actually entered into. In cases of ambiguity, this might be affected by extrinsic circumstances; but there is here no ambiguity. The property might be insured generally, or only while it was contained in a specified building, and not elsewhere, and the language employed shows that the parties selected the latter kind of insurance. Section 1941—62 provides how waiver shall be made, *viz.*: Not at all, as to some stipulations of the policy; by writing only, added to the policy, as to others. There might be waiver of a forfeiture, or of a breach of contract; but waiver as a ground for extending the scope of a written contract beyond the usual and ordinary meaning of the language employed would be quite a novelty.

Order reversed, and the cause remanded for further proceedings according to law.

COLORADO SUPREME COURT.

COLORADO MORTGAGE & INVESTMENT COMPANY, Limited, Appt.,
v.
MARGARET GIACOMINI.

(55 Colo. 540, 136 Pac. 1039.)

Landlord and tenant — lease of hotel with defective elevator — liability of landlord.

1. One who lets a hotel with an insuffi-

Note. — Liability of lessor of property to be used for a public purpose, for personal injuries to third persons.

I. Scope, 365.
II. Distinction between public and private purpose, 366.

ciently lighted elevator which creeps when not in use, because of defective machinery, which is not repaired prior to the accident, and is intended for general use of the guests of the hotel in going to and from their rooms, is liable for injury to a paying guest who, in attempting to use the elevator, falls into the well because the car had moved from the place where it was left, on the theory that it is a nuisance in a semipublic place,—especially if he has undertaken to bear a portion of the expenses of repairing it and of insuring against accidents because of it.

Proximate cause — unsafe elevator — failure to guard.

2. The unsafe condition of an elevator, due to the negligence of the owner, which creeps when not in use, is a proximate cause of injury to one who falls down the shaft when attempting to use it, because it had moved away from the open door, although there was also negligence on the part of the lessee in whose possession it was, in not keeping the entrance closed or guarded.

Same — anticipation of injury.

3. That a lessee will sometimes leave a defective elevator open and unguarded, to the injury of one attempting to use it, should be anticipated by the lessor, who lets it in a defective condition, so as to charge him with liability for the injury.

On petition for rehearing.

Appeal — effect of verdict.

4. A verdict founded on evidence to support it is conclusive on appeal.

(June 2, 1913.)

III. Premises defective when leased, 367.
IV. Defects arising subsequent to lease.
a. Where tenant in possession.
1. In general, 369.
2. Where manner of construction and tenant's negligence both contribute to injury, 370.
3. Where defect is obvious, 372.
b. Where lessor retains possession, 373.
V. Effect of agreement by lessee to repair, 374.
VI. Agreement of lessor to repair, 375.
VII. Miscellaneous, 375.

I. Scope.

This note is limited to the question of the liability of the owner of premises leased for a public purpose for injuries to third persons from defects therein. By the term "third persons" is meant all members of the public other than the lessee and those who, by reason of some family or contractual relation, are held to stand to the lessor in the same relation as the lessee.

The liability of the lessor of premises leased for some public use, for personal injuries caused by defects therein, depends upon the character of the person injured, and upon the location of the defect, as to whether or not it was in that portion of the premises intended for use by the public generally. The question of liability as affected by the character of the person injured is not discussed herein, although casually referred to. It is intended to discuss this question in a future note. The question of liability where the injury occurs in a portion of the premises not intended for use by the public generally is discussed in a note to Morong v. Spofford, post. This note is limited to cases involving leases of property for some public or quasi public purpose, or business of a nature impliedly or expressly inviting the general public to make use of the property, where the injury results from a defect in the premises intended for use by the public generally. It does not include leases of property for a use which will necessitate the presence of a large number of people, such as employees at factories, mills, and manufacturing places, nor does it include leases of property to several tenants for private purposes, such as tenements and apartment houses.

And in general it is not intended to include cases involving the liability of the lessor of a place of amusement. Such cases, however, involve the same principle as the cases included herein, and an occasional reference is made to a case of this character where it involves some principle of law which is regarded as particularly applicable to the question under consideration. For a complete reference and consideration of the cases involving the liability of the lessor of a place of amusement for the safety of patrons, see the following notes: 14 L.R.A. (N.S.) 284; 32 L.R.A.(N.S.) 715; and 42 L.R.A.(N.S.) 1073.

The mere fact that a building is leased for a public purpose does not necessarily bring the case within the scope of this note. To be in point it must also appear that the injured person was not a party to the lease, and is within the class of persons properly designated as the general public. While it is not intended to consider the question as to what persons come within this class, it may be said that by the great weight of authority, the class includes members of the public who are impliedly invited to the premises because of the business pursued thereon, where they were let for such purpose. With the exception of the cases immediately following, the cases included herein apparently assume that any person not in privity with the lessor, who is called to the leased premises by reason of the business pursued thereon, is a member of the public within the rule of liability.

It has been held that although the lessor of premises to be used for a barber shop owes a duty to persons going upon the premises to be barbered or to transact business with the barber, he owes no duty except the negative one of not wantonly to injure him, to a person going upon the premises for his own convenience and to gratify his own whim or inclination; for example, to drink from a whisky flask he

APPEAL by defendant from a judgment of the District Court for the City and County of Denver in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Hill, J.:

This action was instituted by the appellee against P. W. Copeland and the appellant to recover damages sustained by her upon June 27, 1908, occasioned by her falling down the elevator shaft in the Columbia Hotel, situate in the city of Denver. It is alleged that the accident was caused by the negligence of the defendants in permitting the elevator and appurtenances thereto to be and remain out of repair. Judgment was in her favor against both defendants in the sum of $10,000. The appellant brings the case here on appeal.

The appellant was the owner of the hotel, its furniture and fixtures. It was being operated under a written lease by its codefendant, P. W. Copeland. This lease was for the term of one year, commencing November 1, 1907. It calls for the Columbia Hotel situate on the corner of Seventeenth and Market streets, East Denver, together with the furniture, fixtures, machinery, cooking utensils, beds, bedding, etc., as enumerated in a schedule, excepting from the lease certain storerooms fronting on Seventeenth street, occupied by others. The lease indicates that the property was rented fully furnished for a hotel. It provided that the

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carried in his pocket, and to give the barber a drink therefrom. Austin v. Baker, — Me. —, L.R.A.1915 —, 91 Atl. 1005.

In Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767, it is held that while customers of the lessee of a building to be used in a retail mercantile business may reasonably expect the exercise of care for their safety from the person who invites them to the premises, they have no right to expect like care from the owner, with whom they are not in privity.

And in Meade v. Montrose, 173 Mo. App. 722, 160 S. W. 11, it is said: "Whether a landlord is liable for an injury to a third person caused by a defect in the demised premises depends sometimes on what the landlord has agreed or undertaken to do in his dealings with his tenant, and sometimes on the status of such third person. If such third person is a stranger to both the landlord and the tenant, for instance, an adjacent or nearby dweller or property owner, or a passer-by on the adjoining highway, then both landlord and tenant may be liable to him for injuries caused by the defective condition of the building. But if the injured person is one who sustains only a private contractual relation with the tenant, and is injured only by being on the premises by reason of that relation, such as a servant, invited guest, licensee, or customer of the tenant, then his right to recover damages is ordinarily limited to the tenant, and only within certain narrow limits can that right extend beyond the tenant to the landlord. In such case the rights possessed by the injured person are not those given him by law as a member of the general public, but are those, and only those, accruing to him by virtue of his contract with the tenant. When this is the case, he has no greater rights against the landlord than the tenant has."

And see Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909, holding that a person injured by falling over a step in an unlighted hall used as an entrance to a building rented for a public purpose, who was there as the guest of a lodge, stands in the same position as members of the lodge, who

are in the position of lessee, and hence cannot complain that the entrance was not a better one, or that it should have been so constructed that it could have been better lighted.

II. Distinction between public and private purpose.

It is not entirely clear to what extent, if at all, the fact that premises are leased for purposes indicative of an intent that they shall be used by the public generally imposes upon the lessor an additional burden to provide against defects rendering the premises dangerous to the public.

As a rule, the cases recognize a distinction between the duties of the lessor of premises to be used by the public generally and the lessor of property to be put to a strictly private use. As to the rule of liability of the lessor of property for private use, see notes in 34 L.R.A. 824; 34 L.R.A. (N.S.) 799; and 48 L.R.A.(N.S.) 917; and also many other notes referred to in Index to L.R.A. Notes, under "Landlord & Tenant," IV. d. By the weight of authority the lessor of real estate, who surrenders possession thereof to the lessee, is regarded as in effect selling a limited estate therein, and to owe no greater duties to the lessee than does the grantor in an absolute conveyance of real estate owe to the grantee therein. And by the weight of authority even a covenant to repair does not render the lessor liable in tort for injuries to the lessee for a breach. See note in 11 L.R.A.(N.S.) 504. As will be hereafter shown, however, a lessor of property to be used for a public purpose is generally held to stand in a different position toward the members of the public who may be lawfully on the premises.

It has been asserted that "where the landlord has created no nuisance, and is guilty of no wilful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a

lessor should not be required to bear any expenses for supplies of any kind, nor for heating, lighting, or repairing, nor for repairs to furniture, fixtures, or utensils, nor for any other purposes except taxes, insurance, and water rent; that the lessee would keep the elevator and all other machinery in good order, and, in addition to the rent, pay to the first party annually, when due, one half the costs of accident insurance policies, covering accidents in connection with the elevator; that the lessor reserved the right at all times to enter and inspect the premises, and if, in its judgment, the premises, furniture, fixtures, machinery, and all other equipments were not being properly cared for, or the business not being managed in a manner satisfactory, it had the right to terminate the lease by giving ten days' notice previous to the end of any calendar month; that the lessee agreed to keep the interior of the hotel in repair and good order, including all articles therein, and in case the articles should wear out, become broken or damaged, to replace them; that all articles placed in the hotel in replacement of any mentioned in the schedule should be the property of the lessor; that if the property became untenantable by reason of fire, or otherwise, the rents should cease until the premises were rebuilt, but nothing should be construed to compel the lessor to build or repair in case of destruction, unless it so desired. Another clause reads: "It is agreed by the parties hereto that all expenses for repairs to boilers, ele-

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demise of dwelling houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may lawfully be upon the premises, using them for the purposes for which they were demised. If one builds a house for public amusments or entertainments, and lets it for those purposes, knowing that it is so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness." Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659.

And see Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391, holding that the fact of leasing a pier to be kept open to the public imposes upon the lessor the duty of taking care, so long as it is kept open, that those having a lawful right to go there may safely do so.

The duty out of which grows the obligation and liability of the owner of premises leased for a public purpose does not spring from the contract of lease, and is not referable to it; but it is one which the law imposes upon owners of property leased for a public purpose.

Thus, where the owner of a store building leased for retail purposes agreed with the lessees to construct the fixtures in a manner safe and proper for the sale of dry-goods and groceries, his failure to perform his contract in this regard is not an element in a customer's right to recover for injuries received from the unsafe condition of the fixtures, since such a person has no interest in the contract or in the breach of it. Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767.

The liability of the owner of premises rented for public amusement, to members of the public injured in making of it the use intended, is attributable to the unfit condition of the premises and rests upon negligence; that is, the omission of the duty to use due care in the erection, construction, or maintenance of the premises. The law holds the lessor responsible not upon any contractual obligation, but because of the *delictum*. Barrett v. Lake Ontario Beach Improv. Co. 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 968, 14 Am. Neg. Rep. 144.

In May v. Ennis, 78 App. Div. 552, 79 N. Y. Supp. 896, it is said that there can be no doubt that a member of the public injured by the defective condition of the premises leased for a public purpose cannot maintain an action to recover for the injuries either upon the contract or for its breach, but his action must be an action for negligence for the failure to perform a duty imposed by law.

III. Premises defective when leased.

It is generally recognized that the lessor of property for a public purpose, at least, as to latent defects, owes to the public the duty of exercising ordinary care to provide against defects in the premises which render them unsafe for the use intended. This includes defects in construction, defects caused by the property being in a state of disrepair at the time of the lease, or a condition which, in the nature of things, must ultimately result in the property being dangerous when put to the use intended. A breach of this duty which results in an injury to a person not in privity with the lessor, and who is lawfully upon the premises, renders the lessor liable for the damage thereby occasioned:

—Colorado Mortg. & Invest. Co. v. Giacomini holding that where property was leased for public or semipublic purposes (hotel), and at the time it was not safe for the purpose intended, or when there was a dangerous condition on the premises constituting a nuisance, and the owner knew, or, by the exercise of reasonable diligence, ought to have known, of such condition, the

vators, or pumps shall be borne equally by both." It is shown that at the time of the accident the appellant had a $5,000 insurance policy in force, protecting it against accidents caused by this elevator.

The hotel fronts upon Seventeenth street, one of the main thoroughfares of the city between the Union Depot and the main portion of the business district, being about three blocks from the depot. It has four stories and a basement, and contains about 100 sleeping rooms. The elevator is situate in the main office or lobby, about 30 feet from the front entrance. It is back of the business office. There is a porch in front of this room. The light in the daytime comes from the front of this room, and that which reflects down from the fourth story of the building through a skylight in the top of the elevator shaft. The elevator cage has a top or tight roof. Upon account of these facts the light in that portion of this room is not good, and is always poor in the elevator shaft at this floor. One former employee testified: "To be able to see around and see what you are doing the lights have to be lit in the office in the afternoon. . . . If it was not a bright day and the lights were not lit it was almost impossible at that time of day to read a name on a package while in the elevator at that floor." Another witness says: "Never light enough in the elevator to read a newspaper." There were no lights lit at the time of the accident. According to the evidence of the plaintiff's witnesses the elevator was out of

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owner is liable to a third person (guest) injured by reason thereof.

—Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800, holding the owner of premises used as a retail store liable to a customer of the lessee, who was injured by falling into a hole between a platform in front of the store and the store proper, and extending to the basement, where the defect existed at the time of the lease, since it constituted a nuisance.

—Reichenbacher v. Pahmeyer, 8 Ill. App. 217, holding the owner of a hotel liable to an employee of the lessee thereof for injuries caused by a chandelier defectively hung, to the knowledge of the owner, and of which the employee had no knowledge, the defect being a latent one.

—Copley v. Balle, 9 Kan. App. 465, 60 Pac. 656, 7 Am. Neg. Rep. 437, holding that the owner of property leased to another for use as a hotel and restaurant is liable for injuries sustained by a third person lawfully thereon, by reason of a dangerous excavation left by the owner at the time of making the lease.

—Smith v. State, 92 Md. 518, 51 L.R.A. 772, 48 Atl. 92, 9 Am. Neg. Rep. 286, stating the rule that where property is leased for a public purpose, where people in large numbers are likely to gather, if the lessor knows or may, by the exercise of reasonable diligence, ascertain that it is unsafe, by renting same in an unsafe condition he renders himself responsible to a third person injured by the defective condition.

—State use of Bashe v. Boyce, 73 Md. 469, 21 Atl. 322, holding that for a third person to recover for personal injury received from the defective condition of a wharf, it is essential that it appear that the owner, when he leased the wharf, knew that it was in an unsafe condition, or, by the exercise of reasonable care and diligence, might have known that fact.

—Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697, holding the owner of a wharf leased to another for a public purpose liable for injuries to a third person, caused by a defect therein, where, at the time he rented it, he knew, or, by the exercise of reasonable diligence, might have known, of the defect.

—Connors v. Newton, 77 N. J. L. 125, 71 Atl. 36, the court, acting as a jury, holding as a matter of law and fact that the owner of premises leased for a retail store was not liable for an injury received by a third person from a defect in the platform in front of the store, but not a part of the sidewalk, where the defect did not exist at the time of the leasing, and was unknown to the owner.

—Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed without opinion in 163 N. Y. 559, 57 N. E. 1109, holding that a grand stand erected for public exhibitions must be constructed in a manner to withstand any strain which naturally may be placed upon it, and the owner will be held responsible for the highest degree of care in such construction; and where the structure is unsafe for the purpose for which it was created, and dangerous, the owner is liable notwithstanding he has leased the property to another, who was in possession at the time of the accident complained of.

—Barrett v. Lake Ontario Beach Improv. Co. 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 968, 14 Am. Neg. Rep. 144, holding that a lessee of a structure designed for the use of the general public as a place of amusement, which is either structurally defective or does not afford proper and adequate protection to persons using it, is responsible for injuries to such persons, caused by these defects, and asserting the general doctrine that where premises are rented for public use for which the owner knows they are unfit and dangerous, he is guilty of negligence, and may become responsible to persons suffering injury while rightfully using them.

—Ahern v. Steele, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193, holding that a trustee, by leasing a pier while in such a dangerous condition as to constitute a nuisance, is guilty of a misfeasance, and during the existence of his estate he is responsible for any damages caused by the nuisance.

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repair at the time of the execution of the lease, and thus continued up to the time of the accident. The printed abstract of the record is so meager that it is nearly impossible to get an intelligent idea of the condition of the elevator therefrom; but, as we understand it, the substance of these defects was in its machinery, which caused leaking of the cups in the main valves, or the packing in the piston leaking, or a wearing of the cups or the valves, some of which created a rumbling noise, and that upon account of these defects the elevator cage, after being properly stopped, when left alone, would creep (that is, move slowly), upon account of its leaky condition, in order to counteract the leaking in the cups, valves, or piston. The ceiling of the elevator cage had originally been fitted for an electric light, but prior to the execution of this lease it had been dismantled or disconnected, so that there was no wire connecting it with the light plant. It was impossible, without having this condition repaired, to have an electric light within the cage. There was evidence to show that all these conditions were in existence at the time of the execution of this lease, and were known, or, in the exercise of reasonable care, ought to have been known, to the lessor, and to the lessee at that time or soon thereafter, but regardless of this they were allowed to thus continue up to the time of the accident.

Upon June 26, 1908, the appellee (who lives at Sterling, Colorado) came to Denver with her mother. They stopped at this

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—Friedman v. Richman, 85 Misc. 376, 147 N. Y. Supp. 461, holding the general lessee of a building in which there was an auditorium not responsible to a person injured while attending a festival in the auditorium, conducted by a lessee of the general lessee, where it did not appear either that the auditorium was defective when leased, or that the general lessee retained possession and control over it during the festival; the plaintiff basing her right of action entirely upon the fall of a balcony, which caused the accident.

—May v. Ennis, 78 App. Div. 552, 79 N. Y. Supp. 896, holding that the owner of property to be leased for a hotel, in erecting a sidewalk to be used as an approach thereto, has imposed upon him the duty of so constructing the walk in the first instance, and of afterwards maintaining it, that it shall be reasonably safe for the use of those impliedly invited to use it.

—Black v. Maitland, 11 App. Div. 188, 42 N. Y. Supp. 653, holding the owner of a building rented for a retail store not liable for an injury received by a customer, caused by the defective condition of the covering to a vault used as a part of the entrance, but not a part of the public street, where it was not shown that the defective condition existed at the time the lease was executed, or that the owner had knowledge thereof prior to the accident.

—Kane v. Lauer, 52 Pa. Super. Ct. 467, affirmed in 244 Pa. 605, 91 Atl. 218, holding that where an owner leases premises which are a nuisance, whether in or out of possession, he is liable to a third person for injuries due to the nuisance if he knew, or, by the exercise of reasonable diligence, might have known, of the defect which constituted the nuisance (grand stand). (The owner is responsible for his gross neglect in constructing and renting a building insecure for the purpose for which it was rented. Godley v. Haggerty, 20 Pa. 387, 59 Am. Dec. 731 [warehouse]. To the same effect see Carson v. Godley, 26 Pa. 111, 67 Am. Dec. 404.)

—Joyce v. Martin, 15 R. I. 558, 10 Atl. 620, holding the owner of a wharf, who leases same with knowledge of a defect therein, liable to a third person properly using the wharf, for an injury caused by such defect.

—Stenberg v. Willcox, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917, holding that the owner of premises, who rents them as a boarding house, is liable to a boarder injured through the defective condition of the premises, if the unsafe condition was known to the owner, or, with the exercise of reasonable diligence and care, might have been known by him at the time of the letting. In this state, however, the same rule also applies to leases of property to be used for a private purpose.

In Fellows v. Gilhuber, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307, the rule is stated that a landlord who lets a house in a dangerous state is not liable to a tenant's customer or a guest for accidents; at least, where there is no agreement upon his part to repair.

IV. Defects arising subsequent to lease.

a. Where tenant in possession.

1. In general.

When the defective condition is due solely to the negligence of the tenant, and no defect in construction contributes to the dangerous condition, the lessor of property to be used by the public generally is not liable to a member of the public injured by such condition while properly on the premises:

—Moore v. Oceanic Steam Nav. Co. 24 Fed. 237, holding the lessor of a wharf and slip, not in bad order at the time of the lease, not liable for an injury caused by a subsequent obstruction of which he had no notice, where the exclusive possession was transferred to the lessee, who covenanted to keep the property in repair.

—Manning v. Sherman, 110 Me. 332, 46 L.R.A.(N.S.) 126, 86 Atl. 245, holding the lessor of a block leased to different tenants for business purposes not liable to a third person undertaking to enter from the street

hotel, where she was assigned to a room upon the second floor. Between 4 and 5 o'clock upon the afternoon of June 27th the elevator boy came to the second floor and informed her that she was wanted at the telephone, which was situate upon the ground floor. She went to the elevator, and was taken, by the boy who carried the message, to the first floor, where, upon leaving the elevator, she immediately went to the telephone booth and conducted a very short conversation with her brother, who was holding the line. She immediately went back to the elevator to be taken to the second floor. Finding the door open, and it being, as she says, "quite shadowy there," she assumed that the elevator was as she had left it but a moment or two before, and walked into what proved to be a vacant space, falling to the cement basement about 12 feet below, and receiving serious and permanent injuries, for which the damages were awarded.

The young man in charge of the elevator testified that before bringing the plaintiff down he had received a call for drinks to be secured at the bar; that after stopping the elevator at the first floor, when the plaintiff got out, he heard a bell ring, and, presuming it was a second call for the drinks, he followed her out of the elevator, going to the bar to get the drinks, intending to return at once, which he did; that he thinks he left the door of the elevator open; that the drinks were immediately furnished him, but just as he came out of the bar

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one of the business places, where he mistakenly used an unlocked cellar door, and was injured by falling to the cellar bottom, it appearing that the lessor had constructed a proper door to this open area and securely locked it, and had taken the key into his possession, and deposited it in a place of safekeeping, from which it was taken by the unauthorized act of a servant, at the request of one of the tenants.

—Towne v. Thompson, 68 N. H. 317, 46 L.R.A. 748, 44 Atl. 492, holding the owner of premises used as a boarding house not liable to a boarder for injuries occasioned the latter by the defective and unhealthy condition of the premises, although the lessor knew that the house was to be used as a boarding house when he leased it. It is said that when the boarder went to live on the defendant's property under a contract with the latter's tenant, he accepted the contractual rights acquired by the tenant, and those rights did not include the right to have the premises kept in a condition suitable for a residence.

—Ahern v. Steele, 115 N. Y. 23, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193, holding that, in the absence of a covenant to repair, the owner of premises leased for a public purpose is not responsible for damage caused by a nuisance created thereon during the term of the lease.

—Clancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391, holding that where property leased for a public purpose, such as a pier, is safe at the time of the lease, in the absence of any special agreement between the parties to the lease, the fact that subsequently it gets out of repair imposes upon the lessor no liability for injuries occasioned thereby.

—Heath v. Metropolitan Exhibition Co. 33 N. Y. S. R. 828, 11 N. Y. Supp. 357, holding that, in the absence of evidence showing that a glass door which leaned against the side of the building near a sidewalk was there at the time the owner leased the building, which was used as an athletic club house, a person properly using the building, who was injured by slipping on the walk and falling against the door, could not recover from the owner.

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—Kane v. Lauer, 52 Pa. Super Ct. 467, affirmed in 244 Pa. 605, 91 Atl. 218, holding that if the defective condition of a grand stand, causing the injury complained of, did not exist at the time the stand was leased, but came into existence thereafter, the owner was not liable to answer for the injury.

—Spoar v. Spokane Turn-Verein, 64 Wash. 208, 116 Pac. 627, holding the owner of premises leased for public amusement purposes, who surrenders control to the lessee, not liable for personal injuries received by a person attending an exhibition, who was injured by slipping upon ice which the lessee had permitted to accumulate upon a stairway leading to part of the building, where the hotel and stairway, when leased, were in safe condition.

—Oerter v. Ziegler, 59 Wash. 421, 109 Pac. 1058, holding the owner of a business block leased to different tenants not liable for injuries to a third person, caused by his slipping upon the stairway leading to one of the places of business in the block, which, at the time, was covered with ice and snow, and this is true even if the owner would have been liable had the stairway been defective from some cause referable to the duties of the owner.

—Glass v. Colman, 14 Wash. 635, 45 Pac. 310, holding a lessor of property used as a hotel not responsible to a guest for injuries received from defective improvements placed by the lessee upon the premises after taking possession under his lease.

2. Where manner of construction and tenant's negligence both contribute to injury.

The cases are not in harmony upon the question of the liability of the lessor of premises to be used by the public generally, for an injury to a member of the public properly on the premises, where the injury was caused by the manner of the construction of the premises or by defects therein, rendering the premises dangerous only by reason of the negligence of the tenant with reference thereto, as where he fails to use

into the main office where the elevator was situate, he observed the plaintiff entering the door, and saw her fall. She also testified that her eyesight was not perfect, although reasonably good for all ordinary purposes; that she was then twenty-eight years old; that when she returned to the elevator she found the door open, looked in, and thought that the elevator was standing there, and that the pilot was inside, but did not make an investigation to establish this latter fact before entering. At the time she entered the door, according to the testimony of her witnesses, the elevator cage, upon account of its defective condition, had crept upwards and the bottom of the cage was then some 6 or 7 feet higher than this floor. She was between 5 feet 2 inches and 5 feet 5 inches in height, and did not come in contact with the cage when she entered the door. The elevator boy testified that the duties allotted to him by Mr. Copeland were not limited to running the elevator, but he was required to answer bell calls, carry water to the rooms, drinks, etc., and otherwise to wait upon the guests; that these latter duties were not usually required of elevator boys in hotels where he had formerly worked; that there was a lock to the door of the elevator shaft upon this floor, but he did not have a key to it; that he usually left the elevator doors open when answering calls; that in case he closed this door it became fastened, and it was then necessary to get a knife, blotter, or some other narrow instrument and slip it

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the means provided by the lessor to protect the public against such latent danger or defect.

Thus, it has been held, where the proximate cause of the injury to a person injured in attempting to enter a store building was the negligence of the tenant thereof in repairing and replacing portions of a vault, the landlord cannot be held liable for the injury. Mayer v. Schrumpf, 111 Mo. App. 54, 85 S. W. 915.

Compare with Folsom v. Lewis, 85 Ga. 146, 11 S. E. 606, holding the proprietor of a restaurant liable for personal injuries received by a third person from an opening in the sidewalk in front of the premises, although the defendant had sublet this portion for use as a stand, and it was the negligence of this lessee in allowing the opening that caused the injury. The court said that, under the circumstances, the negligence of the sublessee was chargeable to the original lessee.

In Wheeler v. Pullman Palace Car Co. 131 Ill. App. 262, appeal dismissed in 228 Ill. 28, 81 N. E. 789, the court said that if an accident to a customer of a retail store, by falling from the steps leading thereto, which were not protected by a railing, was due to the absence of sufficient light, it was not a failure of the landlord, for it was the tenant's business to furnish light enough to make the entrance to or exit from the premises safe for his customers.

And see Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695, holding that where a dwelling house was used by the tenant for a dwelling house and also a market, the lessor was not responsible to a customer injured while walking at night on a sidewalk leading from the house to a public street, the injury being occasioned by falling down an unprotected embankment near the walk. It is pointed out that there was no defect in the walk itself, but the danger was due to a failure to protect the embankment by a railing, or to the absence of a light or some other warning. The court said that there was nothing to show that the lessor retained any control over the building, or any right to direct the purposes for which the premises might be used; and hence, he did not guarantee that they would be safe for all the purposes to which the tenant might put them, and if the latter used them so as impliedly to invite people to visit them at night, it was his duty to make them safe by a railing or by a light or other warning.

In Texas Loan Agency v. Fleming, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214, the owner of a hotel is held not liable for the negligence of his tenant in failing to use the means provided to make openings safe and secure, and hence is not liable to a person injured by stepping through an unlocked door opening into space, where the door was provided with bolts and locks to keep it safe.

To same effect is De Graffenried v. Wallace, 2 Ind. Terr. 657, 53 S. W. 452, holding the lessors of a building leased for a Federal courthouse not liable for injury caused by the failure of the lessee to keep locked or bolted a door opening into space; and for a somewhat similar case as to the facts, see Manning v. Sherman, 110 Me. 332, 46 L.R.A.(N.S.) 126, 86 Atl. 245.

And see McCane v. Majestic Bldg. Co. 120 La. 306, 45 So. 258, analyzed in a note to Morong v. Spofford, post, 387, a case involving very similar facts, although disposed of on slightly different grounds.

Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659, holds, where a gallery of a building leased for public amusement fell when the lessee put it to a use different from that intended by the owner, which placed upon it a much greater strain than it ever was intended to withstand, that its fall did not show negligence on the part of the owner, rendering him liable to a person injured thereby, there being no other evidence of negligence except the fact that the gallery fell.

And see, also, Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127, holding that where a person injured by stepping into an unguarded elevator well used in a hotel had been the guest of the hotel for two years, and the elevator was operated by the

through the crack and raise the latch, and the door could then be pushed open from the outside. Mr. Copeland testified that the duties required of his elevator pilots were not limited to running the elevator, but that they were required to perform certain other services usually belonging to bellboys.

Mr. **William J. Miles**, for appellant:

No action lies against the lessor for injuries from a defect existing in the premises at the time of the demise.

Lane v. Cox [1897] 1 Q. B. 415, 76 L. T. N. S. 135, 66 L. J. Q. B. N. S. 193, 45 Week. Rep. 261; Robbins v. Jones, 15 C. B. N. S. 221, 9 L. T. N. S. 523, 10 Jur. N. S. 239, 33 L. J. C. P. N. S. 1, 12 Week. Rep. 248; Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695.

Accordingly there is no implied covenant on the part of a lessor that the premises are safe or fit for a lessee's intended purpose.

Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652; Thum Bros. v. Rhodes, 12 Colo. App. 245, 55 Pac. 264; Howard v. Doolittle, 3 Duer, 464.

In the absence of an express agreement to the contrary on the part of the lessor, the lessee takes the premises as he finds them, "for better or for worse."

Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652; Franklin v. Brown, 118 N. Y. 110, 6 L.R.A. 770, 16 Am. St. Rep. 744, 23 N. E. 126; Clifton v.

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guests themselves, and the injured person was familiar with its location and use, he cannot maintain an action against the owners of the building to recover for the injury occasioned either by the darkness of the hall way in which the elevator was located at the time he attempted to use it, or by the general plan of construction.

Compare with COLORADO MORTG. & INVEST. CO. v. GIACOMINI, holding the owner of a hotel leased to third persons liable to a guest for injuries caused by stepping into an elevator well, the door of which had been left open by a servant of the tenant, where the guest, finding the door open, it being, as she said, "quite shadowy there," assumed that the elevator was in place, and, without further investigation, stepped into the well. The owner of the hotel was held liable on the ground that at the time he leased the property, the elevator was defective in that it could not be depended upon to stay as it was left, but would "creep" up or down; and in this instance, when the door was left open the elevator was in place, but at the time of the accident it had "crept" up. The court denied the contention of the owner that, inasmuch as he had provided the entrance to the elevator with a door which it was the duty of the tenant to shut and lock when the pilot was absent, he could not be held to have assumed the risk of the tenant's negligence in this regard.

3. Where defect is obvious.

It has been held that no recovery may be had by a member of the public lawfully using premises leased for a public purpose for any injury occasioned by an obvious defect in the premises, and such person, if he uses the premises, assumes the risk of injury from such a defect:

—Ten Broeck v. Wells, F. & Co. 47 Fed. 690, holding the owner of a hotel not liable for an injury to a guest, caused by falling from steps used as a means of entrance, the fall being occasioned by failure to have the steps protected by any outside railing or any other protection. The court said that the fact that there was no railing or other protection might be a good reason for declining to become a guest at the house, for inasmuch as the defect or omission was apparent to every guest, it necessarily followed that each guest must have voluntarily assumed the risks incident to the plan of the house in this respect.

—Wheeler v. Pullman Palace Car Co. 131 Ill. App. 262, appeal dismissed in 228 Ill. 28, 81 N. E. 789, holding the owner of property used as a retail store not liable for injury caused a customer by falling at night from the steps used as an entrance, due to a failure to protect the steps by a railing. The court said that the absence of a railing was obvious, and anyone using ordinary care to look before stepping could not make the mistake in the daytime, such as was made by the plaintiff at night. And if there was any evidence tending to show that the accident occurred because of the absence of sufficient light, it was not the failure of the landlord, but it was the occupant's business to furnish light enough to make the entrance or exit to the premises safe for his customers.

—Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127, holding that where a person injured by stepping into an unguarded elevator well used in a hotel had been the guest of the hotel for two years, and the elevator was operated by the guests themselves, and the injured person was familiar with its location and use, he cannot maintain an action against the owners of the building to recover for the injury occasioned by the darkness of the hall way in which the elevator was located at the time he attempted to use it, or by the general plan of construction.

—Henson v. Beckwith, 20 R. I. 165, 38 L.R.A. 716, 78 Am. St. Rep. 847, 37 Atl. 702, 3 Am. Neg. Rep. 95, holding the owner of a block in which there was a freight elevator operated and controlled by the tenant, not responsible to a third person on the premises at the invitation of the tenant, for injuries due to the defective construction of the elevator, the defect being obvious.

—Meade v. Montrose, 173 Mo. App. 722,

Montague, 40 W. Va. 207, 33 L.R.A. 449, 52 Am. St. Rep. 872, 21 S. E. 858; Whitmore v. Orono Pulp & Paper Co. 91 Me. 297, 40 L.R.A. 377, 64 Am. St. Rep. 229, 39 Atl. 1032.

And this, though the lessor knows of the defect or danger, and does not inform the intending lessee, if the latter, by ordinary care, could have known thereof.

Keates v. Cadogan, 10 C. B. 591, 20 L. J. C. P. N. S. 76, 15 Jur. 428; Coulson v. Whiting, 14 Abb. N. C. 60; Doyle v. Union P. R. Co. 147 U. S. 413, 37 L. ed. 223, 13 Sup. Ct. Rep. 333.

Being under no legal duty to exercise any care to discover latent dangers in the premises, for the benefit of intending lessees, a lessor cannot be negligent in respect thereto.

Ahern v. Steele, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193; Ocean S. S. Co. v. Hamilton, 112 Ga. 901, 38 S. E. 204, 9 Am. Neg. Rep. 471; Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113; Simons v. Gregory, 120 Ky. 116, 85 S. W. 751; Stelz v. Van Dusen, 93 App. Div. 358, 87 N. Y. Supp. 716; Holzhauer v. Sheeny, 127 Ky. 28, 104 S. W. 1034.

The lessor is liable for bad faith, but not for negligence: for misfeasance, but not for mere nonfeasance.

Franklin v. Tracy, 117 Ky. 267, 63 L.R.A. 649, 77 S. W. 1113; Hamilton v. Feary, 8 Ind. App. 615, 52 Am. St. Rep. 485, 35 N.

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160 S. W. 11, holding that where the supports for a roof could be seen by anyone entering the building, so that, if they were insufficient to support the roof, either in size or number, such fact was open to inspection, and it was also open to observation that but one spout was provided to carry off the water on the roof, which was flat, these defects in the construction of the roof were obvious, and a third person could not recover for an injury to his property by the falling of the roof, caused in part, at least, by the weakness of the supports and the weight of water from rain which the one spout did not carry away.

But it has been asserted that although a risk from the use of premises intended and leased for public amusement may be apparent to the persons using it, yet these persons have the right to assume that by the making of the premises the use intended, they incur no risk which may have been reasonably expected by the proprietors thereof. They have the right to believe that every reasonable care has been taken for their safety. Barrett v. Lake Ontario Beach Improv. Co. 174 N. Y. 310, 61 L.R.A. 829, 66 N. E. 968, 14 Am. Neg. Rep. 144.

b. Where lessor retains possession.

The lessor of premises leased for a public purpose, who retains possession, is liable to members of the public properly upon the premises for injuries occasioned by any dangerous defects in the premises:

—Springer v. Ford, 189 Ill. 430, 52 L.R.A. 930, 82 Am. St. Rep. 464, 59 N. E. 953, holding the owner of premises leased for a public purpose liable to an employee of a tenant for injuries caused in the operation of a freight elevator by the owner, for the benefit of the tenants, and it is said that the measure of liability is the same as that of a common carrier.

—Stratton v. Staples, 59 Me. 94, holding the owner of a block of stores who leases same, but retains general possession, liable for injuries to a third person who fell into an unprotected excavation.

— Gordon v. Cummings, 152 Mass. 513, 9 L.R.A. 640, 23 Am. St. Rep. 846, 25 N. L.R.A.1915B.

E. 978, holding the owner of a block leased to different tenants liable for injury to a third person, caused by his falling down an unguarded elevator well over which the owner had control.

—Readman v. Conway, 126 Mass. 374, holding that if a platform extending in front of several stores leased to different tenants was not leased to the several tenants, but was controlled by the owner for the common use of all the occupants of the store and the public, the owner is liable to a third person injured by reason of a defect therein.

—Larue v. Farren Hotel Co. 116 Mass. 67, holding that if an excavation near a retail store is dangerous to persons going in and out of the store while in the exercise of due care, it is the duty of the owner to take all proper precautions by means of bars or grates to make the passageway reasonably safe; and if he does not do so, and a third person is injured in leaving the store, he is liable for such injury. (Owner retained possession of premises for purpose of making repairs.)

—Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336, holding the owner of an office building liable for an injury to an employee of a tenant where the injury was caused by a defective elevator operated by the owner for the benefit of the tenants and those having business with them.

—Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282, holding that the lessor of a hall to be used for a public entertainment holds it out to the public as safe; hence he is bound to exercise care to provide safe arrangements for the entrance and departure of the public; and where a person is injured by walking through an unlocked door upon an awning not protected by a railing, from which he falls, the owner is liable if he was negligent in not keeping this door locked, and his negligence under the circumstances is a question for the jury, although he locked the door before the accident, but it was evidently unlocked later.

—Cannavan v. Conklin, 1 Daly, 509, holding the lessor of a pier, who retains possession thereof, liable for an injury to

E. 48; Davis v. Smith, 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832; Holzhauer v. Sheeny, 127 Ky. 28, 104 S. W. 1034.

If the declaration or complaint does not charge the landlord with fraud or deceit, no cause of action is stated.

Angevine v. Knox-Goodrich, 3 Cal. Unrep. 648, 18 L.R.A. 264, 31 Pac. 529.

The rights of the lessee's employee or guest against the lessor are the same as the lessee's would be under the same circumstances, but no greater.

24 Cyc. 1119; 1 Thomp. Neg. §§ 1133, 1171; 2 Shearm. & Redf. Neg. § 711; 1 Taylor, Land. & T. 9th ed. § 175a; 1 Pingrey, Real Prop. § 592; McAdam, Land. & T. 3d ed. 1234; Robbins v. Jones, 15 C. B. N. S. 221, 33 L. J. C. P. N. S. 1, 9 L. T. N. S. 523, 10 Jur. N. S. 239, 12 Week. Rep. 248; Lane v. Cox [1897] 1 Q. B. 415, 76 L. T. N. S. 135, 66 L. J. Q. B. N. S. 193, 45 Week. Rep. 261; McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469; Perez v. Rabaud, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438; Ryan v. Wilson, 87 N. Y. 471, 41 Am. Rep. 384; Kushes v. Ginsberg, 99 App. Div. 417, 91 N. Y. Supp. 216; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; Bowe v. Hunking, 135 Mass. 380, 46 Am. Rep. 471; Phelan v. Fitzpatrick, 188 Mass. 237, 108 Am. St. Rep. 469, 74 N. E. 326; Dalton v. Gibson, 192 Mass. 1, 116 Am. St. Rep. 218, 77 N. E. 191; Henson v. Beckwith, 20 R. I. 165, 38 L.R.A. 716, 78 Am. St. Rep. 847, 37 Atl. 702, 3 Am. Neg. Rep. 95; Eyre v. Jordan, 111 Mo. 424, 33 Am. St. Rep. 543, 19 S. W. 1095; Johnson v. Tacoma Cedar Lumber Co. 3 Wash. 722, 29 Pac. 451.

A guest or employee of a tenant is not, as to the lessor, in law a stranger or third person.

Mehr v. McNab, 24 Ont. Rep. 653; Griffin v. Jackson Light & P. Co. 92 Am. St. Rep. 508, note, 3; Taylor, Land. & T. §§ 175, 175a; 2 Shearm. & Redf. Neg. §§ 709, 709a; Perez v. Rabaud, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177; McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469; Brady v. Klein, 133 Mich. 422, 62 L.R.A. 909, 103 Am. St. Rep. 455, 95 N. W. 557, 2 Ann. Cas. 464, 14 Am. Neg. Rep. 351; Towne v. Thompson, 68 N. H. 317, 46 L.R.A. 748, 44 Atl. 492; McConnell v. Lemley, 48 La. Ann. 1433, 34 L.R.A. 609, 55 Am. St. Rep. 319, 20 So. 887.

Where negligence is sought to be estab-

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a third person, caused by the defective condition of the pier.

Friedman v. Richman, 85 Misc. 376, 147 N. Y. Supp. 461, holding the general lessee of a building in which there was an auditorium not responsible to a person injured while attending a festival in the auditorium, conducted by a lessee of the general lessee, where it did not appear either that the auditorium was defective when leased, or that the general lessee retained possession and control over it during the festival; the plaintiff basing her right of action entirely upon the fall of a balcony which caused the accident.

—Bogendoerfer v. Jacobs, 97 App. Div. 355, 89 N. Y. Supp. 1051, holding that one who leases a building to various tenants, and who furnishes and maintains a freight elevator therein for their common use, owes to a third person, using the elevator in the lawful business of one of the lessees, the duty of exercising reasonable care to see that it is safe; and he is responsible for a personal injury to such person by reason of his failure in this regard. To the same effect, see Grifhahn v. Kreizer, 62 App. Div. 413, 70 N. Y. Supp. 973.

Ordinarily the lessor of a building leased for a lodge room is not liable to lessees or others lawfully on the premises, for its condition, in the absence of actual or constructive concealment or of any agreement. Where, however, the lessor remains in control of the premises, and repairs are made under his supervision, he is liable for an injury occasioned a third person thereby, as where the unsafe condition of an elevator used in the building is due to repairs thereto, and by statute it is unlawful for any person to erect or cause to be erected any structure, room, or place where persons are invited, expected, or permitted to assemble, which in construction, arrangement, or means of egress, is dangerous. Stackhouse v. Close, 83 Ohio St. 339, 94 N. E. 746.

The mere fact that a third person agrees to keep in good condition the premises of another in part used by him does not release the owner, who is in control of the premises, from liability for an injury caused by the unsafe condition of the premises. Wichita Falls Traction Co. v. Adams. — Tex. Civ. App. —, 146 S. W. 271 (pavilion.)

V. Effect of agreement by lessee to repair.

Where a defect in the premises at the time of leasing the same constitutes a nuisance, and is known or might, by reasonable diligence, have been known, to the owner, he cannot evade responsibility to a third person who was injured by reason thereof by an agreement with the tenant that the latter shall make all necessary repairs. Kane v. Lauer, 52 Pa. Super. Ct. 467 (grand stand); affirmed in 244 Pa. 605, 91 Atl. 218.

And see Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, holding the owner of a pier liable for injuries received thereon by a third person lawfully using the same, where he rented it in a defective and insecure condition, although the lessee covenanted to keep it in good repair, and asserting the

lished by circumstantial evidence, it must be by proof of such circumstances as preclude all other probabilities or probable causes of the accident.

Murray v. Denver & R. G. Co. 11 Colo. 124, 17 Pac. 484; Murphy v. Hays, 68 Hun, 450, 23 N. Y. Supp. 70; Stratton v. Union P. R. Co. 7 Colo. App. 126, 42 Pac. 602; Atchison, T. & S. F. R. Co. v. Adcock, 38 Colo. 369, 88 Pac. 180; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Geoghegan v. Atlas S. S. Co. 3 Misc. 224, 22 N. Y. Supp. 749.

The proximate cause of the accident was the negligence of the lessee in failing to keep the elevator entrance closed or guarded during the absence of the pilot in charge.

Taylor v. Loring, 201 Mass. 283, 87 N. E. 469; Texas Loan Agency v. Fleming, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214; Malloy v. New York Real Estate Asso. 156 N. Y. 205, 41 L.R.A. 487, 50 N. E. 853, 4 Am. Neg. Rep. 335; Goodlander Mill. Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Miner v. McNamara, 81 Conn. 690, 21 L.R.A.(N.S.) 477, 72 Atl. 138; Rider v. Syracuse Rapid Transit R. Co. 171 N. Y. 139, 58 L.R.A. 125, 63 N. E. 836; Brubaker v. Kansas City Electric Light Co. 130 Mo. App. 439, 110 S. W. 12; Andrews & Co. v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300; Teis v. Smuggler Min. Co. 15 L.R.A.(N.S.) 893, 85 C. C. A. 478, 158 Fed. 260; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Schroeck v. Reiss, 46 App. Div. 502, 61 N. Y. Supp. 1054; Consolidated Hand-Method Lasting Mach. Co. v. Bradley, 171 Mass. 127, 68 Am. St. Rep. 409, 50 N. E. 464; Cass v. Sanger, 77 N. J. L. 412, 71 Atl. 1126.

The lessor was under no legal duty to assume that the lessee would run the elevator in a negligent manner.

Taylor v. Loring, 201 Mass. 283, 87 N. E. 469; Daniel v. Metropolitan R. Co. L. R. 3 C. P. 216; DeCamp v. Sioux City, 74 Iowa, 392, 37 N. W. 971; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Texas Loan Agency v. Fleming, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214.

The rule of *caveat emptor* announced in Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652, is uniformly enforced where the property is demised to be used for business and semipublic purposes.

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rule that the owner of premises who leases them when they are already a nuisance, or must become so from user, is liable for injury to a stranger by reason thereof, whether or not he is in possession of the property.

Also Trego v. Rubovits, 178 Ill. App. 127, asserting that where the owner of premises, a portion of which is leased for a business purpose, stipulates in the lease of such portion that the lessee shall keep the elevator used generally by the different tenants of the building in good condition, he is thereby relieved of the duty of keeping the elevator in good condition as to such lessee, but this stipulation does not affect his duty to the other tenants.

Compare with Fellows v. Gilhuber, 82 Wis. 630, 17 L.R.A. 577, 52 N. W. 307, holding the owner of a hotel not liable to a guest for an injury occasioned by the fall of a wooden awning, due to rotten posts, where, at the time of the accident, the hotel was in the possession of the lessee, under an agreement to keep the buildings in order at his own expense.

VI. Agreement of lessor to repair.

In May v. Ennis, 78 App. Div. 552, 79 N. Y. Supp. 896, it is said that the responsibility of the owner of property leased for a public purpose attaches because of his ownership; and conceding that he may be relieved from liability if he leases to a tenant who, under the law, or by the contract, would be charged with the duty of repair, he is not relieved from the legal duty when in the lease he expressly agrees to make the repairs. "The obligation as to third persons is not under the contract, but under the law. The action is maintainable not to enforce the contractual obligation, but to enforce the prior legal one, which the contract by its terms has served to keep in force, by not relieving the defendant from its operation."

Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503, holds that the owner of premises leased for a public purpose is not exonerated in consequence of his neglect to make and keep the access thereto reasonably safe because the property is in the possession of a tenant, and this is especially true where, by express stipulation, the owner is to make all necessary repairs (wharf).

VII. Miscellaneous.

The successors to a trust estate in a pier, who become full owners during the term of a lease thereof and subject thereto, are not responsible to a person injured by a nuisance created thereon during the existence of the precedent estate, where they have no notice thereof. Ahern v. Steele, 115 N. Y. 203, 5 L.R.A. 449, 12 Am. St. Rep. 778, 22 N. E. 193.

It has been held that the lessor of a warehouse is not liable for injuries to a third person, caused by the floors falling because the building was insufficient, unsafe, and insecure for this purpose, where the lessee, at the time of the lease, knew of this defect. Schwalbach v. Shinkle, 97 Fed. 483,

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Dyer v. Robinson, 110 Fed. 101; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; Texas Loan Agency v. Fleming, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214; Towne v. Thompson, 68 N. H. 317, 46 L.R.A. 748, 44 Atl. 492; Fellows v. Gilhuber, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307; Oriental Invest. Co. v. Sline, 17 Tex. Civ. App. 692, 41 S. W. 130; Texas & P. R. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617; Hutchinson v. Cummings, 156 Mass. 330, 31 N. E. 127; Glass v. Colman, 14 Wash. 635, 45 Pac. 310; Ten Broeck v. Wells, F. & Co. 47 Fed. 690; Curran v. Flammer, 49 App. Div. 293, 62 N. Y. Supp. 1061; Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304; Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695; Capen v. Hall, 21 R. I. 364, 43 Atl. 847, 6 Am. Neg. Rep. 397; Taylor v. Loring, 201 Mass. 283, 87 N. E. 469; Dustin v. Curtis, 74 N. H. 266, 11 L.R.A.(N.S.) 504, 67 Atl. 220, 13 Ann. Cas. 169; Jordan v. Sullivan, 181 Mass. 348, 63 N. E. 909; McCain v. Majestic Bldg. Co. 120 La. 306, 45 So. 358.

Messrs. Allen & Webster, for appellee:

Where a place is leased by the lessor in a condition which is dangerous to the persons resorting thereto, who come there on a general invitation to the public, it will not do for the owner, knowing its condition, or, in the exercise of reasonable care, having the means of knowing it, to rent it out and and receive rent indirectly derived from the visiting public who resort thereto, and escape all liability when injuries occur from the unsafe and dangerous condition.

Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Nugent v. Boston, C. & M. R. Corp. 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797, 15 Am. Neg. Cas. 315; Patterson v. Jos. Schlitz Brewing Co. 16 S. D. 33, 91 N. W. 336; Schwalbach v. Shinkle, W. & K. Co. 97 Fed. 483; Copley v. Balle, 9 Kan. App. 465, 60 Pac. 656, 7 Am. Neg. Rep. 437; Burner v. Higman & S. Co. 127 Iowa, 580, 103 N. W. 802; Stenberg v. Willcox, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917.

It was the province of the jury to pass upon the question as to what constituted the proximate cause of the injury, if the evidence was applied correctly by the jury, as directed in the instructions.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Colorado Mortg. & Invest. Co. v. Rees, 21 Colo. 435, 42 Pac. 42; Clifford v. Denver, S. P. & P. R. Co. 9 Colo. 333, 12 Pac. 219; 21 Am. & Eng. Enc. Law, 2d ed. pp. 485–491; Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600, 22 Mor. Min. Rep. 213; Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621; Denver & R. G. R. Co. v. Bedell, 11 Colo. App. 139, 54 Pac. 280.

Hill, J., delivered the opinion of the court:

The assignments of error present two questions: First, whether, under the facts disclosed, the appellant can in any event be held liable for the damages to the plaintiff, occasioned in whole or in part by the defective condition of the elevator; and, second, if so, was its defective condition the proximate cause of the injury?

We have been furnished with many citations of authorities upon the first question. The conflict among some of them cannot be reconciled. The great mass of the cases appears to recognize certain well-defined legal principles. The first is that, as between the landlord and tenant, when there is no fraud, or false representations, or deceit, and in the absence of an express warranty or covenant to repair, there is no implied contract that the premises are suitable or fit for habitation, or for the particular use intended, or that they are safe for use, or that they shall continue fit for the purposes for which they were demised. These general rules have been recognized and followed in this jurisdiction. Davidson v. Fischer, 11 Colo. 583, 7 Am. St. Rep. 267, 19 Pac. 652; Thum Bros. v. Rhodes, 12 Colo. App. 245, 55 Pac. 264.

There are certain exceptions, however, to the rules exempting the owner from liability for injuries to third persons caused by defective conditions in leased premises. The cases recognizing these exceptions hold that where the property is leased for public or semipublic purposes, and at the time is not safe for the purposes intended, or when there is a dangerous condition on the premises which is in the nature of a nuisance, and the owner knew, or by the exercise of reasonable diligence ought to have known, of such conditions, he cannot evade liability to a third person for damages resulting from such conditions, but it is his duty to make such property reasonably safe for the purposes intended, or to discontinue the conditions which are in the nature of a nuisance, as the case may be.

In Stenberg v. Willcox, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917, it was held: "Where unsafe premises are leased, to be used as a boarding house, the lessor, if he knew the unsafe condition of the premises, or could have known it by the exercise of reasonable care and diligence, is liable to the lessee's guest or boarder who has sustained personal injuries as the result of such unsafe conditions of the premises." The injury was occasioned by the falling of

a defective back porch. It appears that the lessee knew the condition of the porch at the time he rented the premises, and claimed that the lessor promised to put it in good repair. However, the case was disposed of upon the theory that where the landlord leased premises in a dangerous and unsafe condition, when he knew, or by the exercise of reasonable diligence and care might have known, of such unsafe condition, and the boarder did not know of such unsafe condition and could not have known of it by the exercise of reasonable diligence and care, the landlord was liable, and not upon any contract relations between the landlord and tenant, of which the boarder may have known nothing, and to which she was not a party. The contention was made that the tenant alone should be held liable; that if the plaintiff was a guest or boarder of the tenant, then the tenant, and not the owner, must be held liable for such injuries, even though the defect existed when the lease was made, on the theory that such person would never have suffered injury from the defects if she had not entered the premises, and such entry was not made at either the request or invitation of the owner, but upon the invitation of the tenant, who held himself out to the public as the keeper of a boarding or lodging house. In response to this argument the writer of the opinion, at page 165 of 96 Tenn., says: "The language is substantially the same as in Shearman & Redfield on Negligence, vol. 2, § 711; but the same author says in the same section: 'If the landlord lets the premises for a purpose which he knows, or ought to know, it to be unfit for, knowing that strangers will be invited there, it has been held that he is liable to them.' And the same author says (§ 709): 'Even the entire surrender of control by the landlord does not relieve him from liability to third persons for defects which existed in the premises when he parted with the control, not even if the tenant had agreed to make repairs,' etc. It clearly appears by the proof in this case that the defendant knew the premises were to be used as a boarding house, recommended it for this purpose, and urged its location near the Union Depot as a desirable feature for this purpose." This matter was again gone over by the supreme court of Tennessee in Willcox v. Hines, 100 Tenn. 524, 66 Am. St. Rep. 761, 45 S. W. 781, 4 Am. Neg. Rep. 226, where this same doctrine was again approved, and many cases cited in support of their former position.

In Copley v. Balle, 9 Kan. App. 465, 60 Pac. 656, 7 Am. Neg. Rep. 437, it was held that the owner of property having a dangerous excavation thereon, known to him when he leased it to another to be run as a hotel and restaurant, without making reasonable provision for the protection of its patrons from falling into said excavation, is liable for the damages resulting therefrom. At page 467 of 9 Kan. App., the court said: "The evidence in this case warranted the jury in finding that the plaintiff in error was negligent in leasing the property to be used for a public purpose without providing for the protection of patrons from the danger of injuries by reason of the excavation thereon." As authority for this statement the court cites Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659, which is a leading case upon this subject, in which, after announcing the doctrine heretofore recognized, the court said: "Therefore, if any responsiblity in this case attaches to the defendant, it cannot be based upon any contract obligation, but must rest entirely upon its *delictum*. If a landlord lets premises and agrees to keep them in repair, and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. If he demises premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which will, in many cases, impose responsibility upon him. If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance as the creator thereof, and his tenant is also liable for the continuance of the same nuisance. But where the landlord has created no nuisance, and is guilty of no wilful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise; and there is no distinction stated in any authority between cases of a demise of dwelling houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him. If he lets a building for a warehouse, knowing that it is so weak and imperfectly constructed that the floors will break down from the weight necessarily to be placed upon them, his negligence imposes liability upon him for injury to the person or property of anyone who may lawfully be upon the premises, using them for the purposes for which they were demised. If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is

so imperfectly and carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness. And this rule of responsibility goes far enough for the protection of lessees and of the public generally. . . . It imposes liability upon the landlord for his *delictum*, and the tenant is also liable, not only for his negligence, but also upon the authority of the case of Francis v. Cockrell, L. R. 5 Q. B. 501, 10 Best & S. 850, 39 L. J. Q. B. N. S. 291, 23 L. T. N. S. 466, 18 Week. Rep. 1205, by virtue of an implied contract which he makes with all the persons whom, for a compensation, he invites or induces to enter his building to witness public entertainments given therein by him or under his supervision." In this case the building was leased for public exhibitions; held, that the lessee had changed the conditions under which it was expected by the lessor that it would be managed, for which reason he was not liable; but, had it been used for the purposes and in the manner contemplated under the terms of the contract, and it was then demonstrated that it was unfit for these purposes, he would have been held for the damages sustained. Four members of the court were of the opinion that he should be held under conditions as disclosed.

In Reichenbacher v. Pahmeyer, 8 Ill. App. 217, it was held that when a landlord rents premises in a ruinous and dangerous condition, and an injury results therefrom to a third person, the landlord is liable; that suffering premises to be constructed or to become in a dangerous and unsafe condition is a nuisance, and if the landlord demises the premises in that condition, he is liable for injuries resulting therefrom to third persons lawfully upon the premises. In this case the owner leased a building for a hotel in which was a public barroom. The chandelier in the barroom was in a defective and dangerous condition, known to the landlord at the time of the execution of the lease, but was not apparent to an observer. The plaintiff, an employee of the lessee, was injured by the falling of this chandelier. The court, at page 218 of 8 Ill. App., said: "A nuisance is anything that unlawfully worketh hurt, inconvenience, or damage (3 Bl. Com. 216), and it may result from nonfeasance or negligence as well as from misfeasance or malfeasance (Wood, Nuisances, chap. 1). It is said in Shearman & Redfield on Negligence, vol. 2, § 56: 'The rule seems to be that if the injury results from the negligence of the owner either in constructing or upholding the property, he is responsible; but that he is not in general responsible for the negligence of the tenant in the use of the house.' Wharton, Neg. § 727a, and Wood, Nuisances, § 141. It is also, no doubt, true that in the leasing of premises there is no implied warranty that they are fit for a particular use, and that liability, if any, in this class of cases, does not spring from contract, but must be predicated upon the negligent act or omission of the landlord, the same being the proximate cause of the injury, in reference to a matter where it was his duty to use ordinary care out of respect to the rights of others liable to be thereby directly involved, and for an injury thus arising a recovery may be had where there is no such contributory negligence on the part of the plaintiff as would bar the remedy in other actions for negligence."

In Godley v. Hagerty, 20 Pa. 387, 59 Am. Dec. 731, the owner of a building erected for rent had constructed it so imperfectly that it was incapable of supporting the burden imposed upon it by the business for which it was intended; it suddenly fell, injuring a laborer employed by the lessee, through no carelessness of his. The owner was held for the damages sustained.

In Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, the owner of a pier leased it while in an unsafe condition. During the continuance of the lease the plaintiff's intestate, who, by reason of his occupation, was lawfully using the pier, was injured by the pier giving way upon account of its defective construction. The owner was held liable. After an exhaustive review of the authorities it was said that suffering the pier to be in such a state as to become dangerous to those lawfully using it was the creation of a nuisance, and the lessor was liable if he created the nuisance and demised the premises in that condition, and was receiving a benefit therefrom in the way of rent, or otherwise, at the time of the injury.

In Todd v. Flight, 9 C. B. 377, it was held that if the landlord rented premises in a ruinous and dangerous condition, resulting in an injury to a third person, he must respond. After examining and analyzing a number of cases, the court said: "These cases are authorities for saying that, if the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases."

In Nugent v. Boston, C. & M. R. Corp. 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797, 15 Am. Neg. Cas. 315, damages were awarded to a railroad brakeman, an employee of the lessee, for personal injuries occasioned by reason of the negligent construction of the lessor's station house, which was then in

the possession of the lessee. The owner attempted there, as here, to defend upon account of its lease. The plea was held not well taken. The opinion states that the common law imposed upon the lessor a duty to the public, independent of contract and coextensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition. It is also said that the action was *ex delicto* for an injury caused by a neglect of duty created by law, and that privity is not essential to the maintenance of an action of tort therefor. At page 77 of 80 Me., the court said: "We are also of opinion that the defendant is liable, under the rule which governs the responsibility of a lessor of demised premises for their condition. For it is settled law, that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity, to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a nonfeasance." Numerous cases are cited to support this position when applied to a private nuisance or a semipublic place.

In Joyce v. Martin, 15 R. I. 558, 10 Atl. 620, defendant was the owner of a defective wharf, which was used in connection with a place of public resort. He leased both, knowing the defect, to his codefendant, who was then ignorant of it, but who continued to use both after learning about it. In an action for damages to the plaintiff, who had been injured by the defect, it was held that the lessor and lessee were jointly liable. This case likewise cites many authorities to support its conclusion.

In Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697, the action was by a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in possession of the defendant's tenant. The instruction complained of was "that if they found that the defendant was the owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover." The instruction was held good. The court cited Owings v. Jones, 9 Md. 108, where the following rule was approved: "Where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such nuisance." Continuing, on page 337 of 66 Md., the court said: "A wharf, furnishing the only mode of ingress and egress to a summer resort, where crowds were invited to come, if in an unsafe and dangerous condition, is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having by the exercise of any reasonable care the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors."

In Patterson v. Jos. Schlitz Brewing Co. 16 S. D. 33, 91 N. W. 336, it was held that "the owner of a building, who negligently allows it to become a nuisance before he leases it, is liable for injury to an employee of the tenant from its fall after he leases it, though he does not covenant in the lease to repair," and in such case "it is immaterial whether it was leased for a dwelling or otherwise." With reference to the liability of the owner for injuries to persons caused by defective and unsafe buildings, at page 45 of 16 S. D., the court said: "The following rule may be regarded as settled: If when let, the premises are in a condition dangerous to the public, or with a nuisance thereon, the owner may be liable to strangers for the injuries resulting from such condition or nuisance if he had notice of the dangerous condition of the building, or could, by the exercise of ordinary care and diligence, have ascertained its dangerous condition. By renting the premises and receiving rent therefor he is to be regarded as authorizing the continuance of the nuisance."

This principle is recognized and stated in Metzger v. Schultz, 16 Ind. App. 454, 59 Am. St. Rep. 323, 43 N. E. 886, 45 N. E. 619, where it is said: "It is also the general rule that the occupier of lands is prima facie responsible for any nuisance maintained thereon, and not the owner. But to this rule there are several well-defined exceptions. The owner is responsible if he creates a nuisance and maintains it. He is responsible if he creates a nuisance and then demises the premises with the nuisance thereon, although he is out of possession. He is liable if a nuisance was erected on the land by a prior owner or by a stranger, and he knowingly maintains or continues it. He is liable if he demised the premises and covenanted to keep them in repair, and omits to repair, thereby creating

a nuisance. He is liable if he demise the premises to be used as a nuisance, or to be used in any way so that a nuisance will necessarily be created. . . . If a landlord demise his property, the law requires him to know its condition at the time he accepts a tenant. The rights of others are frequently involved by the condition in which the premises are maintained. Any person who conducts upon his premises any dangerous business, or has thereon any dangerous machinery or substance, not in themselves unlawful, is in duty bound to exercise reasonable care and vigilance to see that no harm comes to others in consequence thereof. But the landlord is not an insurer. There are many businesses, machinery, and appliances not nuisances *per se* that are attended with danger. When the landlord has exercised reasonable care in respect thereto, he is exonerated from liability."

The same rule is recognized in Burner v. Higman & S. Co. 127 Iowa, 580, at page 588, 103 N. W. 802, which involved liability in the operation of a freight elevator. At page 588 the court said: "As this was a freight elevator, they were not bound to the highest degree of care, but were required to use ordinary and reasonable care in protecting and lighting this elevator well or shaft, so that persons rightfully upon the premises might not be injured thereby. Had they retained no control over the elevator, there would have been no liability, in the absence of a showing that at the time they leased the premises there was a nuisance, of which they had knowledge, and which it was their duty to abate. But as landlords they had the right to lease their premises in their then condition, and there was no covenant, either express or implied, to repair, or to keep the premises free from danger, except to the public in general. They could not, of course, by leasing the premises, absolve themselves from any duty they owed to the public; but, as to private individuals who came upon the property by invitation of the tenants, they were under no duty, save as they retained control over the elevator shaft or well." Then follow citations of authorities, after which the court said: "The cases are not harmonious on these propositions, but, in most of those holding to a contrary view, the premises were devoted to a public or semipublic purpose, of which the lessor had notice, and were not put to merely private uses, as was the building in this case. Most of the authorities may be harmonized when this distinction is kept in mind. If the premises are devoted to public or semipublic purposes, or if there be a duty owing to the public in general, the landlord cannot absolve himself from liability by leasing them to a tenant, for he is under an affirmative duty, which he cannot so delegate to another as that failure of that other to repair makes him, and him alone, responsible for the injury."

The latest case we have found upon the subject is that of Bailey v. Kelly, 86 Kan. 911, 39 L.R.A.(N.S.) 378, 122 Pac. 1027. A girl sixteen years of age was drowned in a cistern; she was a servant of the tenant. The defective condition of the cistern was known by both landlord and tenant, although unknown to the servant. It was held that where a nuisance dangerous to life is created by the owner on his premises, or through his negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to a person who is rightfully upon the premises, and who, without fault, is injured by reason of such nuisance; that this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault, or neglect, or knowledge of the danger, could not have maintained an action against the owner for an injury suffered by himself. The opinion discloses a very careful research of the authorities pro and con upon the subject, and particularly the phase of the case by which the landlord sought to escape liability because the deceased was a servant of the tenant, under the general rule announced in 24 Cyc. p. 1119, which is that the right to recover against the landlord by a subtenant, guest, or servant of the tenant is the same as the tenant's right would be had the accident happened to him; but he can have no greater claim against the landlord than the tenant himself would have under like circumstances. After a review of the cases upon this subject, the Kansas court was of opinion that the action was *ex delicto*, and the conclusion reached was that the doctrine of *caveat emptor* was not applicable to the servant of the tenant.

Other cases which adhere to the principle announced in the foregoing concerning leased premises for public or semipublic purposes are: Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Wendell v. Baxter, 12 Gray, 494; Fox v. Buffalo Park, 21 App. Div. 321, 47 N. Y. Supp. 788.

By citing and quoting from the above authorities we do not wish to be understood as approving all the declarations announced therein; we have referred to them for the purpose of disclosing the recognition of certain well-defined legal principles concerning this class of cases, and, when applied to modern conditions, to, in part, make our de-

ductions therefrom and apply them to the facts of this case.

A four-story hotel containing an office and lobby, a dining room, about 100 sleeping rooms, passenger elevator, and other modern facilities, furnished, and doing a general hotel business, situate upon one of the principal streets between the Union Depot and the main business district of a city like Denver, when leased for hotel purposes, is unquestionably a semipublic place. We cannot concede that this question is debatable. It is unquestionably as much a public place as is a private pier. This was fully recognized in Swords v. Edgar, 59 N. Y. wherein, at page 31, it is said: "We think it is clear that the intestate was lawfully upon the south half of the pier. It may be that it was not a public place or highway in the fullest sense of those terms. It was, indeed, private property to a certain degree. . . . Though private property, it was held as such for public objects. There is an implied license to vessels upon navigable waters to enter and occupy piers built into or lying adjacent to such waters, in the manner and for the purposes contemplated by their erection. The keeping of such a pier is likened to the keeping of an inn; and a general license is given to all persons to occupy it for lawful and accustomed purposes." See also Wendell v. Baxter, 12 Gray, 494.

We are of opinion, that this hotel comes under the rules announced in the authorities as applicable to semipublic places, and the rules applicable to patrons or guests of such semipublic places are likewise applicable to the paid guests of this hotel, and the rule announced in 24 Cyc. 1119, and the cases cited by the appellant which limit the right of the subtenant, guest, or servant of the tenant, as against the landlord, to no greater claim than the tenant would have under like circumstances, is not applicable to the paid guest of this hotel. It being a semipublic place is a potent reason for one of the exceptions to the general rule, and places the guest more in the category of a stranger, rather than in the shoes of the tenant, who is operating the hotel under a lease. It does not appeal to reason to say that one who comes into a strange city during his travels, and enters a public hotel, without any knowledge of its ownership, its leases, or conditions governing its control, and is there injured by reason of a dangerous condition existing therein at the time it was leased, should be deprived of recovery because, perhaps, the day before, the owner had leased the hotel to an insolvent person. What reason can there be for holding that such a stranger should occupy the same position as the lessee and be bound by the same limitations? He does not know the lessee, nor even know there is a lessee, much less does he know anything about the arrangements between the lessor and the lessee, and the duties devolved upon each under the terms of the lease. The owner of the building (as in this case) has maintained it as a hotel, rents it as a hotel, in this case fully furnished for such purpose. He knows that the place is to hold out an invitation to the public to enter therein. More than that, when he leases for that purpose he leases for a purpose which gives a general license to all persons to enter the same for lawful and accustomed purposes. His profit is indirectly derived from the custom derived from the traveling public. If it were a crime to hold out an invitation to the public to enter it as a hotel, or otherwise, directly or indirectly, solicit or secure guests therefor as a hotel, the appellant would unquestionably be guilty of aiding and abetting the commission of the crime, if not in fact be a party thereto. It follows that if, when let, the elevator was in a defective condition which was dangerous to the guests when used for the purposes intended, and this fact was known, or, in the exercise of reasonable diligence, ought to have been known by the appellant, it is liable to the paid guests of the hotel, when in the exercise of ordinary care, for injuries resulting to them upon account of such defective condition.

Under the circumstances as disclosed by the terms of this lease, if material, it might be proper to assume that the appellant was of this view itself until this accident happened. Its lease provides that the lessee shall keep the elevator in good condition and also pay one half the cost of accident insurance covering accidents in connection with the elevator. The lessor agreed to pay one half the cost of keeping it in repair, and reserved the right to enter and inspect the premises, and, if not satisfactory, to terminate the lease. It kept a $5,000 accident policy in force for its protection, but, regardless of these facts concerning its intentions and the steps it took for its protection, which are probably immaterial, as its liability to this appellee is limited to what the law imposes, such liability cannot be escaped by its contract with the lessee to keep the property in repair. Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Nugent v. Boston, C. & M. R. Corp. 80 Me. 62, 6 Am. St. Rep. 151, 12 Atl. 797, 15 Am. Neg. Cas. 315; Burner v. Higman & S. Co. 127 Iowa, 580, 103 N. W. 802; Albert v. State, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697.

In order not to be misunderstood concerning the liability which attaches to this land-

lord, upon account of the defective condition of the property at the time of the accident, we call attention to the fact that we are only considering the defective conditions which were in existence at the time of the execution of the lease, and thereafter continued up to the time of the accident. By instruction No. 5 the jury were told, if, at any time between November 1, 1907 (which was the date of the lease) and the date of the accident, the elevator was put in a condition of proper repair for ever so short a time, that no verdict could properly be rendered against this appellant, although they should further believe from the evidence that the elevator was out of repair at the time of the accident to plaintiff, and that such accident was caused by such lack of repair. By this instruction it will be observed that no liability was placed upon the landlord for conditions which might come into existence after the giving of the lease, but limited its liability to injuries caused by defective conditions in existence at the time it turned the property over to the tenant.

We are not impressed with the appellant's contention that the elevator was in no respect dangerous, and that under no circumstances could it, or any acts pertaining to it, become in the nature of a private nuisance, for the reason, though out of repair and dangerous when being operated, that when let alone and kept closed it was harmless and could injure no one, and that it was possible to operate it in its then condition without causing an accident. At the time of the execution of this lease it was understood by the landlord that it was to be used as a passenger elevator. It was the only practical means for the transportation of the guests to their rooms on the three upper floors. Under such circumstances, the negligence of the appellant in omitting to place it in repair is in the nature of a nuisance. 21 Am. & Eng. Enc. Law, 2d ed. 701; 29 Cyc. 1188; Wood, Nuisances, 3d ed. § 127. See also Hill v. Taulatin Academy, 61 Or. 190, 121 Pac. 901, and cases therein cited.

As we understand the rule pertaining to liability when applied to articles of this kind, it is: Whether it was dangerous and unsafe when used for the purposes and in the ordinary manner intended, and not whether it was safe and harmless when let alone, or possible to operate it without an accident. 29 Cyc. 1152; Wood, Nuisances, 3d ed. chap. 1; Owings v. Jones, 9 Md. 108; Rich v. Basterfield, 4 C. B. 784, 2 Car. & K. 257, 16 L. J. C. P. N. S. 273, 11 Jur. 696; Anderson v. Hayes, 101 Wis. 538, 70 Am. St. Rep. 930, 77 N. W. 891, 5 Am. Neg. Rep. 504; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Burner v. Higman & S. Co. 127 Iowa, 580, 103 N. W. 802.

It is claimed that the proximate cause of the accident was the negligence of the lessee in failing to keep the elevator entrance closed or guarded during the absence of the pilot, and not the defective condition of the elevator. We think it was both. This question has been settled in this jurisdiction. In Colorado Mortg. & Invest. Co. v. Rees, 21 Colo. 435, it was held that where an injury is the result of the combined negligence of the defendant and the negligent or wrongful act of a third person, for which neither plaintiff nor defendant is responsible, the defendant is liable when the injury would not have occurred except for his negligence. This principle is applicable here. The negligence of the landlord was the cause of the defective condition of the elevator, it being out of repair in having no lighting system, although such was necessary upon account of its location, and also the defective condition of its machinery, which caused it to creep when left alone. The negligence of the lessee, Mr. Copeland, through his servant, was in leaving the door open; neither the appellant nor the appellee was responsible for this act. The injury was the result of the combined negligence of both the lessor and the lessee. This is apparent for the reason that had the lessee, through his agent, closed and fastened the door upon leaving the elevator, the accident would not have occurred. Upon the other hand, had the elevator been in proper repair so that it would have remained at the entrance where the pilot left it, and had not crept upward as it did, on account of its defective condition, the accident could not have happened, and had the cage's lighting system been in repair and a light been turned on, it is quite probable that the accident would not have occurred. We are thus confronted with the fact that the accident had to be the result of these combined acts of negligence of both the landlord and tenant, for without either the accident would not have happened. The case last cited was for damages upon account of injuries occasioned by stepping into an elevator shaft when the door was open and the cage not there. The lock to the door was out of repair, so that it could be opened from the outside. The defendant sought to show that the door had not been left open by the elevator pilot, but had been opened by a boy by the name of Thorne, who had no connection with the property. It was held that such an act on his part would not constitute an efficient intervening cause that would relieve the defendant from liability; that if the boy had opened the door, his act, coupled with de-

fendant's negligence, constituted the combined and concurrent causes of the injury. Upon this theory the court approved an instruction to the jury which reads as follows: "The jury are instructed that if they find from the evidence that the defendant negligently failed to provide and maintain proper and secure fastenings to its elevator door, and by reason thereof the door was open at the time of the alleged accident, and that while so open and while the elevator was in the upper part of the building, the plaintiff, while in the exercise of ordinary care, fell into the elevator shaft and was injured, and if such accident was reasonably to have been apprehended from the condition of the elevator door and its fastenings, and of insufficient and inadequate light, then the plaintiff will be entitled to recover a verdict at your hands for such damages as he may have sustained. And under such circumstances it is wholly immaterial whether such door was opened by some third person or not, provided that such accident could not have happened but for the negligence of the defendant in keeping and maintaining the fastening to its elevator door." To support this position the court quotes from Shearman & Redfield on Negligence, vol. 1, § 10, as follows: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." The appellant makes no complaint concerning instructions, but seeks to distinguish this case from the former one, by reason of the fact that here a lessee was in possession. It is claimed that it was his duty to keep the door shut when the pilot was absent from the cage, and that the landlord had the right to assume he would perform the ordinary duties required of him in this respect. This line of argument pertaining to the duty of others was considered in the former case in which the suggestion presented itself, that the landlord had a right to assume that trespassers, boys, or bystanders, in the performance of their proper duties, would let the elevator door alone, and not open it when the cage was not at that floor. The court held that this was not a defense, but that it was incumbent upon the landlord to have the door in such a condition so that such an accident could not happen in this manner. In commenting upon this question, at page 444, the court said: "It was the duty of defendant, in operating the elevator in question, to exercise the utmost care and diligence, and to provide and maintain proper and secure fastenings to the doors opening into the elevatorway that could not be opened or controlled from the outside. Therefore the court was correct in saying that it was 'wholly immaterial whether such door was opened by some third person or not, provided that such accident could not have happened but for the negligence of the defendant in keeping and maintaining the fastenings to its elevator door,' for, had it performed its duty in the premises, such interference by a third party would have been impossible; hence its negligence necessarily concurred in and constituted an essential factor in causing the injury." We think the latter part of this declaration specially applicable here. Had this landlord performed its duty in placing the elevator in repair, the negligent act of the pilot in leaving the door open, if, as a matter of law, it was negligence, could not have occasioned the injury; hence, the landlord's negligence necessarily concurred in and constituted an essential factor in causing the injury.

The rule announced in Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600, 22 Mor. Min. Rep. 213, concerning the actions of a tenant in this respect, is in point. The company had leased the different levels of its mines. The lessees delivered their ore to the company at the shaft, who hoisted it to the surface. A person working for the company at the bottom of the shaft was injured by an ore car escaping from an employee of a lessee in one of the levels and falling down the shaft. The tracks on which the ore cars ran were laid with too much grade, and no barrier was placed at the shaft to stop the cars and prevent them from running into the shaft. It was shown they were in the same condition when turned over to the lessee as when the injury occurred. It was held that the company was responsible for the condition of the level, and was liable for injuries caused by its negligence in maintaining the track with an excessive grade, and in not providing a sufficient barrier to stop the cars at the shaft. The same contention was made there as here that, assuming the company to have been negligent in causing these conditions, it was not the proximate cause of the injury; that the act which caused the injury was that of the independent contractor or lessee; but the court held otherwise, and at page 522 of 29 Colo., said: "The most ordinary foresight and prudence, it would

seem to us, would have dictated some suitable protection at the mouth of the level. The most cautious man might lose control of a loaded car in a level such as the fourth level of this mine, and there was a breach of the positive duty of the company in not guarding against such an occurrence." The car had escaped from the employee of the lessee, and while it is true the jury found that he was unable to prevent its escape by the exercise of ordinary care, the court, in holding that the escape of the car was not the proximate cause of the injury, cites with approval Colorado Mortg. & Invest. Co. v. Rees, 21 Colo. 435, 42 Pac. 42, and also Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, which we think support our conclusion concerning the proximate cause of the injury.

This question was again under consideration in Tanner v. Harper, 32 Colo. 156, 75 Pac. 404, where it was alleged that the injury was caused by defendants' negligence in the manner of operating their mine and the defective condition of its appliances. It was shown that the injury was occasioned by the negligent act of a coemployee, coupled with a defective condition of certain appliances, concerning which question, at page 163 of 32 Colo., the court says: "The jury having necessarily determined that the defendants were negligent, and that plaintiff was not guilty of contributory negligence, the question of the negligence of the trammer is practically eliminated. In the order of events the injury was caused by the grossly culpable negligence of the trammer, but if the defendants had taken the proper precautions to keep the truck from falling into the shaft in the circumstances it did, the injury would not have happened; so that the sole cause of the plaintiff's injury was not the negligence of the trammer in handling the car, but the result of the concurrent negligence of the defendants in failing to exercise a reasonable degree of care to prevent the car from being precipitated into the shaft when left standing upon the track. When the injury of an employee by a coemployee would not have happened except for the negligence of the common employer, the latter is responsible for the injury. Cone v. Delaware, L. & W. R. Co. 81 N. Y. 206, 37 Am. Rep. 491; Sherman v. Menominee River Lumber Co. 72 Wis. 122, 1 L.R.A. 173, 39 N. W. 365; Denver & R. G. R. Co. v. Sipes, 26 Colo. 17, 55 Pac. 1093, 5 Am. Neg. Rep. 305; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Shearm. & Redf. Neg. § 10; quoted with approval in Colorado Mortg. & Invest Co. v. Rees, 21 Colo. 435, 42 Pac. 42."

Our court of appeals has had occasion to consider this question. In Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621, it was held, as stated in the syllabus: "Where several concurring acts or conditions of things —one of them, the wrongful act or omission of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission."

It is claimed that, assuming the elevator was out of repair, and that the accident would not have happened except for such conditions, that was not such an accident as reasonably might have been foreseen or anticipated; that though the cage did creep when left alone after being properly stopped, and that no arrangements were made for lighting it, the landlord was not bound to anticipate that the tenant would not keep a pilot in it when being used, but that it had the right to assume that he would, for which reason it cannot be held. In commenting upon this question in the Rees Case, at page 445 of 21 Colo., the court quotes with approval the following: "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

In Lane v. Atlantic Works, 11 Mass. 136, from which the foregoing quotation is taken, it is also said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind. the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen."

In 13 Cyc. at page 25, in note 54, with many authorities cited to support it, it is said: "Where the effect could reasonably have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences."

In 21 Am. & Eng. Enc. Law, 2d ed. at page 491, it is said: "An act or omission

may yet be negligent and of a nature to charge a defendant with liability, although no injuries would have been sustained but for some intervening cause, if the occurrence of the latter might have been anticipated."

By these declarations we do not understand it is meant that the particular accident should have been anticipated or foreseen, or that it should be anticipated that an accident should occur in this particular manner, but when applied to the facts of this case the rule is that, if it was to be expected, or could reasonably have been foreseen by a person of ordinary foresight and prudence that, in the operation of a passenger elevator in the condition which the plaintiff's witnesses say this one was, it would be the cause of an accident, the liability is then established so far as this phase of the matter is concerned. As said by this court in Clifford v. Denver, S. P. & P. R. Co. 9 Colo. at page 338, 12 Pac. 221: "The principle above stated does not declare that the damage or injury must have resulted, or even that it must have been anticipated, in the particular case under consideration. On the contrary, it has been well said 'that the consequences of negligence are almost invariably surprises.' The expression 'reasonable expectation,' frequently used in this connection, is said to mean 'an expectation that some such disaster as that under investigation will occur on the long run from a series of such negligences as those with which the defendant is charged.' Whart. Neg. §§ 77, 78, and cases cited." This language is applicable here. This particular accident was unquestionably a surprise. Most accidents usually are. We do not think the appellant had the right to turn this elevator over in such a defective condition, as disclosed by the plaintiff's witnesses, under the assumption that in its then condition it would be managed in such a manner as to prevent all accidents. 'Tis true, it could have been kept closed and not used at all. This would have avoided the probability of any accident, but it was understood it would be used as a passenger elevator for the hotel. Under such circumstances it is beyond the limits of common understanding to believe that the door where the cage is then stationed will, at all times, be closed when the elevator pilot is not standing within the cage, but the contrary ought to have been foreseen and anticipated by any person of ordinary foresight and prudence. Such a condition is certainly not beyond reasonable expectations. It was unquestionably not a circumstance of an extraordinary nature, but was one which reasonably ought to have been foreseen and anticipated.

It is claimed that the evidence did not exclude the possibility of the car being out of place from causes other than the one alleged; also that the evidence discloses that there were causes which might have caused the elevator to creep other than its being out of repair. The appellant was given full opportunity to present this line of testimony to the jury. They made their findings under instructions concerning which no complaint has been made. There is evidence to support them; under such circumstances it is not the province of this court to disturb the verdict of the jury.

Perceiving no prejudicial error, the judgment is affirmed.

Musser, Ch. J., and **Gabbert**, J., concur.

A petition for rehearing having been filed, the following response was handed down on December 1, 1913:

Counsel earnestly contend that there is absolutely no evidence to sustain the contention that the elevator was out of repair and in an unsafe condition at the time of the execution of the lease; that the jury, the trial judge, and this court are all wrong in assuming that there is an iota of testimony to thus show. For this reason we have re-read the evidence in order to ascertain if there is an entire lack of competent testimony upon this subject. The lease was for the term of one year, commencing November 1, 1907. The accident occurred June 27, 1908. The trial was in November, 1909. The witness Frank A. Linton testified, in substance, that he had been a resident of Denver for about eight years; that he worked in this hotel about six years; that he worked there during the years 1907 and 1908, and had occasion to observe the action of this elevator; that during this period it would creep up and down just according to the way you would pull on the cable; that the air would get out; that it would move one way or the other without anybody being there; that it did this in 1907 and 1908; that he could not give the exact dates, but that it never worked properly at all times the whole time he was there; that sometimes it would stand right on the level of the floor, and then again it would creep up; that when he worked at the desk he had occasion to see it creeping, sometimes once or twice through the day; that the elevator was out of order while he worked there at different times off and on; that during all of the year 1907 it was in the condition above described; that they packed it once, but the packing did not fit right, and it got out of order; that he did not know the exact date it was packed, but it was after this accident,

possibly three or four weeks; that the elevator was back about 30 feet from the front of the building and back of the office; that there was a wire mesh or netting on the outside of the elevator; that there was a wooden porch in front of the building, on account of which, at about 4 o'clock in the afternoon and thereafter, it was so dark you could not read a paper in the elevator; that there was no provision for connection of the electric light in the elevator cage.

Olaf Nelson testified, in substance, that he had been an employee in this hotel since September, 1894; that he was still there at the time of the trial, and was there during 1907 and 1908; that during this period he was familiar with this elevator; that he ran it sometimes; that it had crept more or less since he came to the hotel; that he noticed it more in the last four or five years; that when he pulled it to a stop and went away it would creep quite often; that two or three times a day when the boy left the elevator he had seen it up even with the floor, sometimes 6 inches or a foot more, sometimes up to his head, and that he had seen it up to the second floor; that he did not know of any particular change during the period he was there; that he came near having an accident with it; that when he pulled it (the elevator) to a stop and went away it would creep, but if he stood there and balanced it and saw that it stood still it would not creep very much; that he could not swear that it would not creep, but that he could swear that it did creep; that there was no light in the elevator.

Dan Dougherty testified that he was an experienced elevator operator; that he was the elevator pilot when the accident occurred; that it was an old hydraulic elevator; that at the time of the accident it was so dark he could not read the address on a letter or package on the inside of the cage; that the elevator could not be depended upon; that it was in such a condition that he never knew at any time when he left it whether it was going to stand without creeping or not; that when he set it in the way it would be supposed to stand to stop, it would hold it in place as he went away; that lots of times he would go back and the elevator would be halfway up to the other floor; that he would set it, and it would probably stand for a few minutes; that sometimes it would stop after it had crept a few feet; that it was never the same; that you could not tell by the place in which you put the cable in advance whether it was going to move or not; that when he adjusted the cable to the very best of his experience it would creep; that just before the accident, before leaving the elevator, he fixed it so that it was standing for the time being; that when he then left he did not touch the ropes; that when he returned, which was in a minute or a minute and a half, the bottom of the elevator was near the second floor.

Jesse C. Brockway, a witness upon behalf of the defendant, testified that he was the engineer in charge of the engines in this building, and likewise had supervision over the elevator; that he was there on the 1st of November, 1907, and continued up to and after the 27th day of June, 1908. In cross-examination he testified that the last time it was packed was in January, 1908; that he thought that it had not been packed before that for something in the neighborhood of three years, and then it was packed by Nock and Garside, the manufacturers of the elevator; that he, the witness, had not packed it since the time Nock and Garside packed it in the first place.

G. S. Tears, an engineer with eleven years' experience in the handling of elevators, testified that if the cups on the valve leaked or were worn out the water would pass and cause the car to creep; that the piston in a cylinder proper is packed with square hydraulic or flat packing; if that is leaking the car will creep, but that if both the conditions above referred to are perfect in the piston and the valve, a cage will not creep; that the more the valve is out of repair or the piston out of repair it will accelerate the quickness with which a car will creep; that when the machinery is out of repair, if the pilot will drop down below and work up a little, sometimes he will get it stationed so that puts it in the reverse, as you might say; that it will then balance on the leaking, but that this cannot be depended upon; but that if the piston and the valve are in perfect condition and not leaking, if a car is brought to a standstill so that it is perfectly motionless, it will not start of its own volition.

Martin H. Collin, another experienced engineer, gave similar testimony.

It is not the province of this court to supersede the functions of the jury. From the foregoing synopsis of the testimony of these witnesses it is self-evident that there is competent testimony upon which the jury might be justified in finding, as they did, that this elevator was out of repair at the time of the execution of the lease upon November 1, 1907, and at that time was unsafe for use for the purposes intended. Whether these witnesses are to be believed was for the jury to determine.

The petition for rehearing is denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

DANIEL MORONG
v.
ELLEN A. SPOFFORD.

LYDIA E. MORONG
v.
SAME.

(218 Mass. 50, 105 N. E. 454.)

Landlord and tenant — stairway from tenant's landing — duty to protect.

A landlord who retains control of an unlighted back stairway leading from a second-story landing which furnishes access to portions of the building rented to tenants is not bound to keep the door leading thereto locked to avoid liability for injury to one who, using the landing for the purpose of transacting business with the tenant, opens the door and falls down the stairway.

(May 22, 1914.)

REPORT by the Superior Court for Essex County for the opinion of the Supreme Judicial Court of actions brought to recover damages for injuries to the female plaintiff by falling down a stairway in defendant's building and for the recovery of consequential damages on account of the injuries sustained by her which resulted in verdicts for plaintiffs. Judgment for defendant.

The facts are stated in the opinion.

Mr. T. S. Herlihy for plaintiffs.

Messrs. Dickson & Knowles, for defendant:

Plaintiff was not in the exercise of due care.

Gaffney v. Brown, 150 Mass. 479, 23 N.

Note. — Liability of lessor for personal injuries received from a defect in premises leased for public use, where the defect was in a portion of the premises intended only for private use.

As to the liability of an owner of premises leased for some public use such as a hotel, store, wharf, pier, etc., for injuries occasioned third persons from defects therein, there is a distinction between injuries caused by defects in that portion of the premises used and intended to be used by the public generally and other portions of the premises intended for private use. The question as to the liability of the lessor of premises of this character for injuries caused third persons by defects in that portion of the premises intended for the use of the public generally is discussed in a note to Colorado Mortg. & Invest. Co. v. Giacomini, ante, 364. This note is limited to the question as to the liability of the lessor of premises of this character for injuries occasioned third persons from defects in the premises not intended for the use of the public generally.

A question somewhat similar to that under consideration is raised in Edwards v. New York & H. R. Co. 98 N. Y. 245, 50 Am. Rep. 659, holding that if a tenant puts property intended for a certain public use, to an entirely different use, and it is structurally weak for the use to which it is thus put, members of the public injured by reason of this weakness cannot hold the owner liable for the damages thereby occasioned them. In this case the lessee of a building put the gallery therein to a use different from that intended by the owner, thereby placing upon it a much greater strain than it ever was intended to withstand, and it fell.

Reverting to the question of liability for personal injuries from defects in that portion of premises, leased for a public purpose, not intended for use by the public generally, it may be said that the same duty is not imposed upon the owner of premises leased for use by the public, as to portions thereof which the public are not expressly or impliedly invited to make use of, as it is to that part intended for public use generally. Thus, while there is an implied invitation to customers to use the front stairway and landing, leading to a store, and the owner owes the customer the duty of exercising reasonable care to provide safe and reasonable approaches thereto, where there is no evidence which would warrant a finding that there is an invitation to open or pass through a door leading down a rear stairway, the owner owes a customer no duty to keep the door leading down such stairway locked; and the customer has no right to assume that, as the door was not locked, it was intended that customers might use it as a means of ingress to or egress from the premises. MORONG v. SPOFFORD.

To the same effect is Bender v. Webber, 250 Mo. 551, 46 L.R.A.(N.S.) 1211, 157 S. W. 570, holding the owner of property the lower floor and basement of which was occupied for a retail store not liable to a customer for injuries occasioned by falling from an unguarded stairway in the rear of the building, not intended to be used as an entrance or exit by customers.

And a person entering the hall way of a business block to transact business with a tenant in an upper story, who finds a broad, well-lighted stairway leading to the floor above, and there is nothing to indicate the existence of another stairway or of an elevator, cannot hold the lessor liable for injuries received by going to the back part of a dimly lighted hallway, and through a partly opened door opening into an elevator shaft, down which he fell, since the lessor owed to the injured person no other duty than that afforded by the open stairway as a plain and safe access to the

E. 233; McCarvell v. Sawyer, 173 Mass. 540, 73 Am. St. Rep. 318, 54 N. E. 259; Cowen v. Kirby, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; Piper v. New York C. & H. R. R. Co. 156 N. Y. 224, 41 L.R.A. 724, 50 N. E. 851, 4 Am. Neg. Rep. 331; Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146, 27 L. J. C. P. N. S. 39, 6 Week. Rep. 44; Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385, 13 Am. Neg. Rep. 95; Campbell v. Abbott, 176 Mass. 246, 57 N. E. 462.

The construction of the premises was usual, or, if unusual, not to such an extent that the defendant would be negligent in maintaining the premises as they were.

Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320, 7 Am. Neg. Rep. 53.

Crosby, J., delivered the opinion of the court:

The female plaintiff, whom we shall refer to as the plaintiff, brings this action to recover damages for injuries received by falling down a flight of stairs in a building owned by the defendant. The action brought by Daniel Morong, husband of the first-named plaintiff, is to recover for consequential damages on account of injuries sustained by her. These cases are before us upon the report of the presiding judge of the superior court, after a verdict for each plaintiff.

The undisputed evidence shows that the plaintiff, on November 11, 1909, at about 8:30 o'clock in the evening, ascended a flight of stairs to visit the store of one Gilchrist, a milliner, which was on the second floor of the defendant's building; that there was a hallway or landing on the second floor, with two doors leading into the Gilchrist store, and a third door leading from this landing down to the rear of the first floor. There was no lock on this door, which was at the top of the back stairway. The landing is about 8 feet square and was lighted. The rear stairway was not lighted, and there were no means of lighting it. The tenant Gilchrist occupied the whole of the second floor of the building, and "the plaintiff was familiar with the premises, and had visited the store of said Gilchrist on the second floor on a number of occasions and had been there earlier that day. She had, however, never been on any portion of the premises except the premises of said Gilchrist, and the front stairs and landing at the top of

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upper floors. Rohrbacher v. Gillig, 203 N. Y. 413, 96 N. E. 733.

Where the owner of a building leased for use as a public theater did not intend a door leading into space should be held out to the public as a safe means of exit, the fact that the door was marked "exit" and the lessee placed a red light over it to denote that it was an exit does not render the owner liable to a patron injured while attempting to leave the theater by means of this door; the owner not being in possession of the premises, and it being through no fault or neglect of his that the door was unlocked. McCain v. Majestic Bldg. Co. 120 La. 306, 45 So. 258. For other cases passing upon the question of liability of the lessor of a building intended for public use to a person injured while attempting to use, as an exit, a door opening into space, see following cases analyzed in the note to Colorado Mortg. & Invest Co. v. Giacomini, ante, 364; Manning v. Sherman, 110 Me. 332, 46 L.R.A.(N.S.) 126, 86 Atl. 245; Texas Loan Agency v. Fleming, 92 Tex. 458, 44 L.R.A. 279, 49 S. W. 1039, 6 Am. Neg. Rep. 214; De Graffenried v. Wallace, 2 Ind. Terr. 657, 53 S. W. 452.

In Mistler v. O'Grady, 132 Mass. 139, it is held that the owner of two houses leased to different tenants, one of whom operated in his house a boot and shoe repair shop, is not liable to a third person injured while attempting to reach this repair shop to have some repairing done, where the shop was located in the house in the rear of the other house, the injury being caused by the injured person falling into a ditch recently dug by the owner, but which was a distance of about 17 feet from the passageway by which the rear house was reached. The court said that this ditch, so far from the passageway intended by the owner to be used, did not render the passageway unsafe.

Where a penthouse connected with a hotel was not designated and did not purport to be for the use of guests or persons lawfully on the premises, and it was not in a dangerous condition when the premises were let, an employee of a contractor with the lessee to make some repairs, who falls down an elevator shaft in the penthouse while working on the premises, cannot recover from the lessor for the injuries received. Dickie v. Davis, 217 Mass. 25, 104 N. E. 567.

On the same ground it has been held that an employee of a tenant occupying a portion of an upper floor of a block leased for business purposes to different tenants cannot recover for injuries received from a defect in the cellar while dumping refuse therein, where it was not shown that any of the tenants were using the cellar as of right, as appurtenant to their respective leaseholds, or that such use in any way inured to the benefit of the lessor. The latter's mere active acquiescence in the use of the cellar by the different tenants involved no liability on his part, but merely relieved the users of liability as trespassers, and the owner was under no obligation to them except to abstain from acts wilfully injurious. Saunders v. Smith Realty Co. 84 N. J. L. 276, 86 Atl. 404. A. G. S.

L.R.A.1915B.

said stairs leading to the apartments of said Gilchrist." The defendant retained possession of the back stairway. It appeared that the plaintiff had visited the store in the afternoon of the day of the accident, and was told by Mrs. Gilchrist that the latter would see her (the plaintiff) that evening in her (Gilchrist's) kitchen, as the store would not be open. The plaintiff testified that when she reached the landing she tried Mrs. Gilchrist's door and found it was locked, "and then I turned round and there was a door that went opposite to the door where you go down onto the street and I opened it. I said, 'I guess this is the door,' opened it and it swung over the stairs. . . . I made a step forward. . . . There was not any landing on the other side, and I went head first down the stairs. . . ."

While there was an implied invitation from the defendant as the owner of the premises to the plaintiff to use the front stairway and landing leading to the Gilchrist store, and the defendant owed her the duty of exercising reasonable care to provide safe and suitable approaches thereto, we are of opinion that there is no evidence which would warrant a finding that there was any invitation from the defendant to the plaintiff to open or pass through the door leading down the rear stairway, and that the defendant owed her no duty to keep the door locked. It could not be found that she had a right to assume, as the door was not locked, that it was intended that she might use it as a means of ingress to or egress from the premises. Accordingly we are of opinion that there is no evidence of negligence of the defendant. It follows that, in accordance with the terms of the report, judgment should be entered for the defendant in each case.

So ordered.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA
v.
J. F. CUNNINGHAM et al., Appts.

(130 La. 749, 58 So. 558.)

Appeal — evidence — conduct in other cases.

1. A conviction and sentence in a criminal prosecution by a judge sitting without a jury will not be set aside, because, in order to relieve the state of the imputation of negligence, the prosecuting officer is permitted to show that witnesses had been brought in other cases from the home in another state of the principal witness for the state in order to sustain his general reputation in the community in which he lived for veracity; no effort having been made to show what such witnesses would have testified to if they had been held for the case on trial and put on the stand, and there being nothing to warrant the belief that the trial judge indulged in any assumptions in that respect.

Witness — veracity — neighbors.

2. Though ordinarily one who lives in the same community with another may be in a better position to know the general reputation for veracity of such other in such community, it does not follow that one not living in such community may not be better informed than many of those who live there. The qualification of the witness depends not upon his place of residence, but upon the means and extent of his information.

Intoxicating liquor — sale to dealer in dry territory — character.

3. Where a person assuming to do business as a wholesale liquor dealer in a prohibition parish sells to another who assumes to be doing a retail liquor business in such parish, the transaction is a sale at retail, and subjects the wholesaler to the penalty for selling at retail without having previously obtained a license; there being no such thing, within the meaning of the law, as a dealer for resale in a parish where the sale of liquor at retail is prohibited.

Statute — form — validity.

4. Act No. 51 of 1906 is not obnoxious to article 31 of the Constitution as having two objects or as failing to express its object in its title, nor is it obnoxious to article 32 of the Constitution as attempting to amend and re-enact laws and ordinances without re-enacting and publishing them at length. It is a piece of independent legislation which repeals all prior legislation with which it conflicts.

(Breaux, Ch. J., and Provosty, J., dissent.)

(April 22, 1912.)

APPEAL by defendants from a judgment of the Judicial District Court for the Parish of Caddo convicting them of unlawfully selling intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. **Alexander & Wilkinson** for appellants.

Headnotes by MONROE, J.

Note. — Intoxicating liquors; what amounts to retail sale as distinguished from wholesale.

The earlier cases upon this question are treated in the note to Re Metz Bros. Brewing Co. 32 L.R.A.(N.S.) 622, wherein a discussion of the various rules will be found.

The few cases that have passed upon the question since the compilation of that note follow.

STATE v. CUNNINGHAM, following and re-

L.R.A.1915B.

Mr. G. A. Gondran, with Messrs. **Walter Guion**, Attorney General, and **J. M. Foster** for the State.

Monroe, J., delivered the opinion of the court:

It was charged against the defendants, J. F. Cunningham and E. Bitters, that on August 9, 1911, they "unlawfully did keep a grog and tippling shop, and did retail spirituous and intoxicating liquors, to wit, beer and whisky, without previously obtaining a license from the police jury of Caddo parish or the municipal authorities of the city of Shreveport." And, a similar offense having been charged in a separate proceeding as committed on August 15, 1911, the two prosecutions, involving as they do the same issues of fact and law, were consolidated. After issue joined and trial, defendants were convicted and sentenced for the one offense to pay each a fine of $350 and to serve ninety days on the public roads, and ninety days additional in default of payment of the fines and for the other offense to pay each a fine of $100 and costs, and in default of payment of the fines to serve thirty days on the public roads. From the sentence first mentioned, they prosecute this appeal and present their case by means of certain bills of exception which will be considered, seriatim, to wit:

Bill No. 1. That after defendants had examined several witnesses introduced for the purpose of impeaching the character for veracity of Warren, the principal witness for the state, the state called Daniels, a policeman, and S. C. Fullilove, commissioner of public safety, who were allowed to testify: "That the state had had several witnesses summoned and brought from the former home of said witness Warren for the purpose of sustaining his reputation for truth and veracity, and had kept said witnesses here for several days for said purpose, to which evidence counsel for the defendants objected on the ground that it was irrelevant, and that it was not permissible to sustain the character for truth and veracity of said witness Warren by such species of evidence. . . . And, further, the witness Daniels, who testified that he had not lived in the neighborhood where said witness Warren resided for over ten years, but had heard the character and reputation of said Warren discussed by persons from said neighborhood, was permitted . . . to testify that the character of said Warren for truth and veracity was good in said neighborhood"—to which

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affirming State v. Spence, 127 La. 336, 53 So. 596, which is set out in the earlier note, adopts a modified "original package" rule by holding that a wholesale dealer who sells intoxicating liquors, even though in what is by statute declared to be wholesale quantities, is a retailer provided the sale is made to one who has no right to resell, the decision being based on the provision in the statute that no persons shall be deemed to be wholesalers unless they sell to dealers for resale. The decision in the Spence Case was also reaffirmed in State v. Pomeranky, 130 La. 339, 57 So. 994, wherein the Louisiana statute and the proper construction to be accorded it are discussed at length. It is of interest to note, however, that two members of the court (Breaux, Chief Justice, and Provosty, J.) dissented in the Pomeranky Case, and that one of these (Provosty, J.) said that upon further consideration he had become convinced that the Spence Case was erroneously decided. In this connection he said: "The decision is founded upon the first proviso of § 6 of the general license law (act 171, p. 387, of 1898), reading: 'Provided, That no person or persons shall be deemed wholesale dealers unless he or they sell by the original or unbroken package or barrel only; and provided, further, That no person or persons shall be deemed wholesale dealers unless he or they sell . . . to dealers for resale. If they sell in less quantities than original or unbroken packages or barrels, they shall be considered retail dealers, and pay licenses as such. . . .' The court took the view that under this proviso the wholesaler was he who sold only by the original and unbroken package, and only to dealers for resale, and that all other dealers were retailers. According to this decision, sales of original and unbroken packages, barrels, casks, boxes, sacks, hogsheads, and bales, even in boat load or cargo lots, would be at retail, if for individual use, not for resale. This is not in accord with the generally accepted notion of what is meant by selling at retail. It adopts as a criterion for determining whether a mercantile transaction is at wholesale or at retail, not the quantity of the goods sold, but the character of the purchaser, or the use to which the goods are to be put. The legislature can hardly have intended to express that idea, and that it did not so intend appears from the second sentence of the said proviso, reading: 'If they sell in less quantities than the original and unbroken packages or barrels, they shall be considered retail dealers, and pay licenses as such,'—showing clearly that the criterion intended to be adopted was the usual one of the quantity of the merchandise sold. If the wholesaler can only sell to dealers for resale, who is to sell by the original, unbroken package to the ordinary person buying for his own use? Certainly not the retailer, for the statute expressly restricts him to selling in less quantities than the original and unbroken package. The said proviso does not say that the wholesaler is not to be deemed such unless he sells only to dealers for resale. It does say that he is not to

L.R.A.1915B.

ruling defendants objected and reserved their bill.

The statement *per curiam* is: "That the testimony of Daniels and Fullilove, to the effect that the state had witnesses present at one time for the purpose of sustaining the credibility of state's witness Warren, was admitted, for what it was worth, to negative the effect that no effort was made to counteract the testimony of the witness, introduced by the defendant, to impeach the testimony of the witness Warren, and that the objection of the defendant went simply to the effect of the testimony objected to, and not to its admissibility, and that the testimony of the witness Daniels as to his knowledge of the witness Warren and his reputation for truth and veracity went to the worth of the testimony, and not to its admissibility."

But it does not appear that Daniels or Fullilove offered or were asked to say what testimony the witnesses whom the state had brought from Warren's home would have given if they had been held and put on the stand, and we can discover no prejudice to any rights of the defendants in the making known to the judge, sitting without a jury and admitting the testimony only for that purpose, the fact that the state had secured the presence of such witnesses, but for reasons which may or may not have been given had allowed them to return to their homes. Such knowledge may have served to acquit the state of laches, but it could have had no effect in determining the question of the credibility of Warren, in support of whose general reputation in that respect the witnesses were said to have been summoned. As to the testimony of Daniels upon that subject, his qualification as a witness depended not upon his residence in the community in which Warren lived, but upon his knowledge of Warren's general reputation for truth and veracity in that community, and though such knowledge is ordinarily more likely to be acquired by one who himself lives in the community, nevertheless one not so living may keep himself better informed than many of the residents. We therefore find no reversible error in the ruling complained of.

Bill No. 2. That Warren, to whom the beer in question is said to have been sold, was authorized by the authorities of the city of Shreveport to open and conduct a retail liquor shop for the purpose of obtaining evidence of the sale of liquor by others, and, having obtained an internal

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be deemed such unless he sells only in original and unbroken packages, but does not say that he is not to be deemed such unless he sells only to dealers for resale. The word 'only' is not in the latter clause, which is merely to the effect that the wholesaler is not such unless he sells to dealers for resale; that is to say, make it his principal business to sell to them, not that he must confine his sales to them. To require him to do so would impose upon him the impractical, not to say absurd, necessity of investigating the character of his customers, even those offering to buy for cash; in fact, it would drive him out of business, for no business concern thus hampered in the choice of its customers could long subsist. The court has added the adverb 'only' to the statute. This cannot be done. The statute must be read as written. The word 'only' must have been left out advisedly, since it was evidently added advisedly to the clause requiring the sales to be by the original unbroken package only, and therefore can hardly have been left out accidentally from this clause as to selling to dealers for resale, which immediately follows the other clause in the same sentence and in the case grammatical construction." The above-noted decision in State v. Pomeranky was subsequently adhered to in the case of State v. Monsour, 130 La. 450, 58 So. 144, the court being again divided as in the earlier case. And see also State v. Cunningham, 130 La. 760, 58 So. 563, which is a companion case to and follows STATE v. CUNNINGHAM, the same point being raised in both cases.

In the English case of Hales v. Buckley, 104 L. T. N. S. 34, 75 J. P. 214, [1911] W. N. 32, the "quantity sold" rule was adhered to. In that case a wholesaler licensed to sell beer in casks containing not less than 4½ gallons or not less than 2 dozen quart bottles to be consumed off the premises sold 18 bottles of stout, which were paid for but were stored by the wholesaler and delivered after removal from the bottles in small quantities as ordered by the purchaser, and the wholesaler was indicted for retailing without a license; but the court held that the sale was a wholesale, and not a retail, transaction, as the sale of all the stout must be regarded as having been made at one time, notwithstanding the several deliveries, and that selling at retail meant selling in less than a certain quantity.

And see Rowan v. State, 178 Ind. 663, 100 N. E. 9, wherein it was held that one who sold whisky in quantities of pints and half pints and beer in bottles was, at least as to such sales, a retailer, and not a wholesaler.

And see Boos v. Scudder, 163 Mich. 678, 127 N. W. 1040, for a statute which expressly defines a wholesaler as follows: "Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for sale such liquors and beverages at wholesale in original trade packages and in bulk and by measure not to be drunk on the premises." G. J. C.

revenue license from the United States, was a retail dealer within the intendment of the law; that a sale to him of beer by the manufacturer in the original unbroken package of more than 5 gallons was therefore a sale at wholesale, and not at retail; the wholesale dealer in such case not being concerned with the inquiry whether the purchaser buys for resale or not, and not being considered a retail dealer because such purchaser may not have obtained a retailer's license. "That, as to the defendant Cunningham, the indictment and bill of particulars having charged that the sale alleged to have been made by him was so made by him in person, he cannot be convicted on proof that it was made by another as his or his company's employee or agent, . . . and evidence that he made a sale by or through another as agent or employee is not admissible, under the charge against him, except as disproving that he made the sale as alleged in person."

It appears from the statement *per curiam* that Caddo is a parish in which, as a result of a vote of the people, the sale of intoxicating liquor is prohibited agreeably to the provisions of act No. 221 of 1902, amending and re-enacting §§ 1211 and 2778 of the Revised Statutes, and authorizing the police juries and municipal authorities "to make such rules and regulations for the sale or the prohibition of the sale of intoxicating liquors as they may deem advisable, and to grant or withhold licenses from drinking houses and shops . . . as a majority of the legal voters may determine by ballot."

This act is supplemented by act 66 of 1902, p. 93, amending and re-enacting § 910, Rev. Stat. and providing that "whoever shall keep a grog or tippling shop, or retail spirituous or intoxicating liquors without previously obtaining a license, . . . on conviction shall be fined not less than $100 nor more than $500, and, in default of payment of fine and costs, shall be imprisoned for a term within the discretion of the court, or shall suffer fine and imprisonment as the court may deem proper. . . . "

And the legislation thus referred to is further supplemented by act No. 46 of 1906, p. 61, which provides "that it shall be unlawful for any person, within the limits of any village, town, city, ward, or parish of this state, in which the retailing of spirituous or intoxicating liquors is prohibited, to seek, solicit, or receive orders from anyone for the purchase of spirituous or intoxicating liquors." And there is a penalty of fine or imprisonment, or both, imposed for violation of the prohibition.

And finally we have act No. 176 of 1908, p. 236 (known as the "Gay-Shattuck law"), which is, "An Act to Regulate and License the Business of Conducting a Barroom, Cabaret, Coffee House, Café, Beer Saloon, Liquor Exchange, Drinking Saloon, Grog Shop, Beer House, Beer Garden, or Other Place Where Alcoholic, Spirituous, Vinous, and Malt Liquors, or Intoxicating Beverages, Bitters, or Medicinal Preparations, of Any Kind, Are Sold, Directly or Indirectly, in Quantities of Less than 5 Gallons, and to Provide Penalties for Violations of This Act; to Limit the Effect and Operation of This Act to Cities, Towns, Villages, and Parishes . . . Where the Sale of Liquors is Permitted; to Prevent This Act from Affecting, Modifying, Amending, or Repealing Any Local Option Laws; or from Interfering with or Preventing the Exercise of Local Option on the Liquor Traffic," etc. (the balance of the title being omitted).

The first section of the act (last above mentioned) provides that, for every business of conducting a barroom, cabaret, etc. (following the title), in which intoxicating liquors are sold in less quantities than 5 gallons, the license shall be based on the annual gross receipts, and the business is then divided into classes and the license fixed upon each class in proportion to the receipts; the maximum license being $1,600, and the minimum $200, to which is added a proviso which need not be here quoted. Section 2 provides that the police juries and municipal authorities shall require licenses in such cases of not less than $500. Section 3 prohibits the conducting of the businesses mentioned under penalty of a fine of not less than $100 nor more than $500, or imprisonment in the parish jail or parish prison for a term not exceeding two years, or both such fine and imprisonment.

Section 14 provides "that this act shall only apply to cities, towns, villages, and parishes where the sale of liquors is permitted, and nothing in this act shall be construed to affect, modify, amend, or repeal any local option laws or to interfere with or prevent the exercise of local option on the liquor traffic, and that nothing in this act shall be construed, in any way or manner, as affecting, amending, modifying, or repealing any existing special or local act or acts prohibiting or restricting the sale of liquor from or within any locality or localities in this state."

Section 15 provides "that, subject to the limitations contained in § 14 of this act, all laws and parts of laws contrary to, or inconsistent with, this act be and the same are hereby repealed."

It is quite evident from the excerpts thus given from the title and context of act 176 of 1908 that its purpose is to authorize the

licensing and provide for the regulation of the business of selling intoxicating liquors in less quantities than 5 gallons in places where such sales are not prohibited under the local option laws, and it is equally evident that the lawmakers did not deem it advisable to complicate a statute enacted for the regulation of the sale of intoxicating liquors with the existing laws providing for the prohibition of such sales in particular communities. How such prohibition is to be enforced is therefore to be ascertained from other legislation.

The act of 1902 (No. 66, p. 93), as we have seen, imposes a penalty for the retailing of spirituous or intoxicating liquors without previously obtaining a license. Act No. 221 of 1902, p. 451, as we have seen, authorizes police juries and municipal governments to "grant or withhold all licenses for the sales of intoxicating liquors within their parishes as a majority of the legal voters may determine by ballot."

There is no law which specifically prohibits the sale of intoxicating liquors at wholesale even in a prohibition parish, but the result is the same, since under the general license law (act 171 of 1898, § 6, p. 394) it is "provided, that no person or persons shall be deemed wholesale dealers, unless he or they sell by the original or unbroken package or barrel only, and provided, further, that no person or persons shall be deemed wholesale dealers unless he or they sell to dealers for resale. If they sell in less quantities than original and unbroken packages or barrels, they shall be considered retail dealers and pay licenses as such. . . . " Page 395. "Provided, that if any distilled, vinous, malt, or other kind of mixed liquors be sold in connection with the business of retail merchant, grocer, oyster house, confectionery, or *in less quantities than 5 gallons*, the license for such additional business shall be as hereinafter provided in § 13 of this act," etc. (italics ours).

The licenses for wholesale dealers having been fixed by § 6, and the proviso first above quoted from that section having furnished definitions of wholesale and retail dealers, the effect of the proviso last quoted is to add to the class of retail dealers those who sell "in less quantities than 5 gallons," whether they sell in original or unbroken packages or barrels or otherwise, and § 910, Rev. Stat. (as amended and re-enacted by act 66 of 1902), applies to all persons who retail intoxicating liquors without previously obtaining licenses, whether the sales be made in prohibition territory or elsewhere. Act 46 of 1906, p. 61, applies in terms to places where the sale of intoxicating liquors at retail is prohibited, but it is confined in its application to the seeking, soliciting, or receiving of orders for such liquors, and is probably intended to reach the case of the liquor dealer in prohibition territory whose agent or traveling salesmen seek and receive such orders elsewhere and transmit them to him for execution. The act may therefore be given its own effect without interfering with the operation of § 910 of the Revised Statutes as amended. In the instant case, it is undisputed that the defendants made the sale charged as an offense in a quantity exceeding 5 gallons and in the original or unbroken package, but, in order to escape the penalty for selling at retail without a license, they must have made such sale to a dealer for resale, and that they did not do, for the person to whom they sold was an illicit vender, engaged in retailing intoxicating liquor in Caddo parish in violation of a prohibitory law, and hence was not, within the intendment of the law, a "dealer for resale." The transaction therefore falls within the rulings heretofore made by this court to the effect that "under the general license act (No. 171 of 1898, p. 387), no person is deemed a wholesale dealer unless he sells to dealers for resale. Hence a dealer in intoxicating liquors who sells to individuals for consumption is a retailer and may be properly convicted as such in a prohibition parish." State v. Spence, 127 La. 336, 53 So. 596.

"As there can be no lawful retailers of intoxicating liquors in a prohibition parish, local sales by a wholesaler to illicit venders of liquor will be treated as unlawful sales to individuals." State v. Pomeranky, 130 La. 339, 57 So. 994. See also State v. Foster, 130 La. 219, 57 So. 895; State v. Mansour, 130 La. 450, 58 So. 144.

The trial judge has found as fact that the sales charged against defendants were made by them in person.

Bill No. 3 was reserved to the overruling of a motion for new trial, in which the matters presented by the two bills just considered were relied on.

Bill No. 4 was reserved to the sentence condemning defendants, in addition to the payment of fines, to work on the public roads; the ground of objection being that said sentence is based on act No. 51 of 1906, and that said act contravenes article 31 of the Constitution in that "it contains two distinct objects, and that its object is not expressed in its title," and that it contravenes article 32 of the Constitution in "that it attempts to amend all the criminal statutes of the state, and all the municipal ordinances of the various municipalities of the state, without re-enacting and publish-

ing at length the said statutes or ordinances intended to be amended."

Defendants are prosecuted under act No. 66 of 1902, which amends and re-enacts § 910, Rev. Stat., denounces the offense with which they are charged, and imposes as the penalty therefor a fine of not less than $100 nor more than $500, and imprisonment in default of payment of the fine within the discretion of the court (elsewhere limited to two years), or fine and imprisonment, as the court may deem proper. Act No. 46 of 1902 provides that (save in the parish of Orleans) any person sentenced to imprisonment in the parish jail, or to fine and imprisonment, or to imprisonment in default of payment of fine, may, at the discretion of the court, be set to work on the roads, levees, or other public works of the parish, or may be hired out or leased for work in the parish, during the term for which he may be sentenced to imprisonment: "Provided, That convicts sentenced to imprisonment alone, or to imprisonment and fine, shall not be hired out except for the fine, but, for the term of their imprisonment, shall be worked on public works only under public officials; and further provided that no convict shall ever be hired out for a less sum than the aggregate of their fine, costs of court, and fees of officers."

Act No. 51, of 1906, p. 85, is entitled and reads as follows:

"An Act to Provide That in All Criminal Prosecutions, Sentences to Imprisonment, to Imprisonment without Qualification, and All Sentences for the Violations of Ordinances, Shall Mean Imprisonment with Labor; Regulate the Employment of Such Prisoners; and to Repeal All Laws in Conflict Herewith."

"Section 1. . . . That, in all criminal prosecution where any person is sentenced to imprisonment, or to imprisonment in default of the payment of the fine imposed, whether in the parish jail or without qualification as to the nature of such imprisonment, or where any person is sentenced to imprisonment in default of the payment of the fine imposed, for the violation of any valid ordinance of any of the political subdivisions of the state, such imprisonment shall mean imprisonment with labor; and every person so sentenced, if not put to work under the provisions of act No. 29 of 1894, as amended by act No. 46 of 1902, shall be required to work on the public roads, streets, or levees of the parish or municipality responsible for the costs of the prosecution of such person or within the walls of the jail, under such rules and regulations as shall be prescribed by the police jury or city council of such parish or municipality.

"Section 2. . . . That all law or parts of laws in conflict herewith be and the same are repealed: Provided, That this act shall not apply to persons committing offenses prior to the adoption hereof, but all such persons shall be sentenced in accordance with existing laws."

The single object of the act as expressed in the title is to provide that all sentences to imprisonment, whether with fine or in default of payment of fine, and whether under state law or municipal or parish ordinance, unless otherwise qualified (as, for instance, by the addition of the words "at hard labor," which would mean in the penitentiary), shall mean imprisonment with labor, and the additional language of the title ("regulate the employment of such prisoners, and to repeal all laws in conflict herewith") merely indicates the purpose to prescribe the manner in which that object is to be accomplished, and to remove obstacles in the way of conflicting laws. And nothing more is attempted in the body of the act. The title and text are therefore within the rule that "whatever is germane or incidental to the purpose expressed is embraced within it: hence an act has not more than one object by reason of its containing provisions for the carrying out of that object, nor is it necessary to set out in the title the means by which the purpose of the act is to be accomplished." Marr's Cr. Jur. § 3, p. 7.

The act does not purport to revive or amend any statute, but is a piece of independent legislation which in terms and according to the accepted canons of construction repeals all prior legislation with which it conflicts. Dehon v. Lafourche Basin Levee Board, 110 La. 767, 34 So. 770; State v. De Hart, 109 La. 574, 575, 33 So. 605; 36 Cyc. 1071, 1073, 1081.

There are some other matters discussed in the brief filed on behalf of defendants, but they are not covered by the bills of exception, do not appear to have been presented in the trial court, and need not be here considered.

Finding no reversible error therein, the convictions and sentences appealed from are affirmed.

Breaux, Ch. J., dissents.

Provosty, J., dissenting:

The two accused, J. F. Cunningham and E. Bitters, are prosecuted under § 910, Rev. Stat. as amended by act 66, p. 93, of 1902, which makes it a crime to retail intoxicating liquors without having first obtained a license from the proper authorities. There were two sales, each of one cask of beer, and they were made by the the Shreve-

port Ice & Brewing Company. One of the accused (Cunningham) is the secretary and treasurer of the company, and the other accused (Bitters) is another of its employees; in what capacity, the record does not show. In the city of Shreveport, where the said company is located and carries on its business, prohibition prevails; liquors cannot be sold at retail; and licenses for selling liquors at retail do not issue. But the selling of liquors at wholesale does not fall under the prohibition, because liquors at wholesale are classed as ordinary merchandise. But this court decided in the case of State v. Spence, 127 La. 336, 53 So. 596, that a sale could not be deemed to be at wholesale unless made to a dealer for resale; hence the present prosecution. The commissioner of public safety of the city of Shreveport, South Carolina, Fullilove, suspecting that the prohibition laws were being violated, procured a young man named Warren to open a saloon and sell beer openly, and Warren made the purchase in question for the purpose of his said business. The statement of counsel in the bill of exceptions is that the accused Cunningham did not take part in the selling of the beer, but that when applied to by Warren he referred him to Bitters. The statement of the trial judge is that Warren personally sold the beer. Whether by this the learned trial judge meant to say that the sale was made by Warren personally in point of fact is not entirely certain.

Warren had come from Texas some months before, and had been employed as a detective to procure evidence of the violation of the prohibition laws. On the trial, he was the principal state witness. His character was impeached by several witnesses, and the prosecution sought to support it by the testimony of said commissioner of public safety, S. C. Fullilove, to the effect that several witnesses who had been brought from the neighborhood of Warren's home in Texas for the purpose of testifying in this and other liquor cases to his veracity had been suffered to go home, after the other cases had all been tried, without any attempt at impeachment having been made, and also by the testimony of a policeman of Shreveport who had not lived in the neighborhood with Warren for over ten years, but had since heard his character discussed. Defendant objected to the said testimony of Fullilove on the ground that it was hearsay, and to that of the policeman on the ground that he had not qualified as a character witness.

The said testimony of the witness Fullilove as to what these witnesses from Texas would have testified to if they had been sworn in the case was in my opinion hearsay and inadmissible. And the case is not met by the statement that Fullilove did not undertake to testify to what these witnesses would have testified. His statement that other witnesses had been called by the state to testify to the good character of Warren was tantamount to giving their testimony. It was practically to say that these witnesses if examined would have testified to the good character of Warren.

The said testimony of the policeman was also in my opinion inadmissible. Before a witness to character can be heard, he must qualify. State v. Rester, 116 La. 985, 41 So. 231. The bill of exceptions does not inform us whether this policeman had been acquainted with the character of Warren when they lived in the same neighborhood ten years back, nor whether the discussions of Warren's character which he had heard were recent; but, conceding for argument both of these points, still his testimony was inadmissible, because the character of Warren was being inquired into, not as of ten years back, but as to the time of the trial. In State v. Fontenot, 48 La. Ann. 305, 19 So. 111, where the intervening space of time had been seven years, this court declared the testimony inadmissible. For instances from other jurisdictions, see 16 Cyc. 1276, note 19; 30 Am. & Eng. Enc. Law, 1080, note 5. The fact that the witness had recently heard the character of Warren discussed did not help the situation, because the thing to be proved by a character witness is, not what he has heard any particular person say concerning the person whose character is at issue, but the sum, or general result, of all that he has heard, or not heard, touching the character of such person while living among his associates.

"The admissible reputation is that which is built up in the neighborhood of a man's domicil or in the circle where his livelihood is followed, and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently its tenor can be adequately learned only by a residence in the place, not by a mere visit of inquiry or by a casual sojourn, or by a conversation with a resident who reports the reputation." Wigmore, Ev. § 692. See also 30 Am. & Eng. Enc. Law, 1077 et seq.; 16 Cyc. 1277.

Usually much discretion is left to the trial judge on the point of the qualification of a character witness, and his decision will not easily be set aside because of any real or supposed error in that regard, but in the present instance the case seems to have turned upon the reliability of Warren as a witness; he being the sole witness for the prosecution, and hence the qualification

of this policeman to testify to Warren's veracity assumed unusual importance.

On the foregoing grounds, and also on the other point involved in the case, I dissent from the majority opinion. For the reasons of my dissent on this other point, see State v. Pomeranky, 130 La. 339, 57 So. 994. I therefore respectfully dissent.

Petition for rehearing denied May 20, 1912.

Writ of error dismissed by the Supreme Court of the United States, March 12, 1914, 232 U. S. 734, 58 L. ed. 819, 34 Sup. Ct. Rep. 605.

LOUISIANA SUPREME COURT.

RE SUCCESSION OF CATHERINE HOUSKNECHT.

EDWARD BOYLE et al., Appts.

(— La. —, 66 So. 233.)

Appeal — two proceedings — single bond.

1. Where two proceedings in the same succession, between the same parties, involving a common issue, were consolidated by consent of counsel, and submitted together for decision in chambers, and a judgment was rendered in each proceeding and an appeal was taken from the "judgment" disposing of the issues in both proceedings, and but one bond was given, held that the appeal will not be dismissed on the ground that two appeals should have been taken and two appeal bonds furnished.

Gift — permission to draw bank account.

2. A document reading: "To the Commercial-Germania Trust & Savings Bank, . . . I hereby authorize Mrs. Josephine Connell to withdraw any money she may wish from my account in the Commercial-Germania Trust & Savings Bank at any and all times. Account Mrs. Meyers,"—is merely an authorization to Mrs. Connell to draw money from the account of Mrs. Meyers, and is not evidence of a manual gift of the money which was formerly in the bank and withdrawn by Mrs. Connell.

Same — intention — proof.

3. Where a daughter alleges that money drawn from the account of her mother was intended as a manual gift, it must be made to appear by convincing evidence that at the time the money was withdrawn the money was intended by the mother to be a donation to her daughter, as nothing will be left to intendment and construction to support the allegation of the daughter that the money was intended as a manual donation.

On Rehearing.

Same — bank account — formal requisites.

4. The donation *inter vivos* of an account in a savings bank is the gift of a right or credit, which must be evidenced by an act passed before a notary public and two witnesses, under the pain of nullity.

(December 15, 1913.)

(Provosty, J., dissents in part.)

Headnotes by LAND, J.

Note. — Effect of delivery of order for savings account without the book to complete a gift of the account.

This note is a continuation of one on the same subject appended to Candee v. Connecticut Sav. Bank, 22 L.R.A.(N.S.) 568.

As to the delivery necessary to complete gift of a savings-bank account when the book is already in the possession of the donee, see note to Goodrich v. Rutland Sav. Bank, 17 L.R.A.(N.S.) 181.

In Foley v. New York Sav. Bank, 79 Misc. 220, 139 N. Y. Supp. 915, it is held that the delivery of an order for the amount of a savings account is not a sufficient delivery to support a gift *causa mortis*, where it is not shown that the bank book was also delivered to the donee by the depositor personally. This decision was reversed on appeal in 157 App. Div. 868, 142 N. Y. Supp. 822, on the ground that evidence of an employee of the bank who called on the depositor and drew the order at his request established so clear an intent to give that, taken with the fact that the donee had possession of the bank book, "evidence that the donee received actual delivery of the gift from the hands of the donor is unnecessary." L.R.A.1915B.

Where a depositor, intending to make a gift *causa mortis*, wrote a direction to the savings bank to pay her father and mother the amount of her account on a printed draft furnished by the bank and customarily presented with the pass book when money was drawn, which contained the printed words, "No payment made without the deposit book," the failure to deliver to her father and mother the deposit book made the delivery incomplete, inasmuch as the contemplated donees received nothing which gave them control of the deposit. Pfeifer v. Badenhog, — N. J. L. —, 92 Atl. 273.

See also HOUSKNECHT'S SUCCESSION in this connection.

And in Gordon v. Toler, — N. J. Eq. —, 89 Atl. 1020, where a depositor signed and delivered to a bank an order directing the addition of her sister's name to the account, and making the funds payable either to herself or to her sister or to the survivor, but where she retained the pass book, there was no completed gift *inter vivos*.

The preceding case, however, is not strictly within the scope of the note, inasmuch as the delivery was to the bank, and not to the donee. E. L. D.

APPEAL by opponents from judgments of the Civil District Court for the Parish of Orleans dismissing their opposition to the appointment of applicant Mrs. Connell as administratrix of the succession of Catherine Housknecht, and dismissing their rule to turn over moneys to the succession. Affirmed as to dismissal of opposition. Reversed as to dismissal of the rule.

The facts are stated in the opinion.

Mr. J. J. Prowell, for appellants:

The judge should be guided to some extent in making his appointment for the administration of the succession by the preference of the other heirs and creditors.

Chaler's Succession, 39 La. Ann. 308, 1 So. 820; Gaines's Succession, 42 La. Ann. 700, 7 So. 788.

When an agent receives moneys collected for his principal, the moneys belong to the principal.

Fitzpatrick v. Letten, 123 La. 748, 49 So. 494, 17 Ann. Cas. 197.

The presumption of ownership resulting from possession is not applicable to factors, brokers, and other avowed agents, with respect to money or property intrusted to them for the special purpose of their vocation.

Boisblanc's Succession, 32 La. Ann. 109.

Delivery by the maker to a particular person, even though accompanied by words indicative of a gift or donation of the same, does not stand in lieu of, is not a substitute for, nor is it equivalent to an indorsement. The situation does not correspond at all with that of delivery by the holder of a note to whose order it was made payable to a third person, accompanied by words of assignment. Such an instrument cannot be made available as a note, neither is it enforceable as a gift or donation.

Rabasse's Succession, 49 La. Ann. 1406, 22 So. 767.

Incorporeal moveables or rights are not subjects of manual gifts.

Donations *inter vivos* will not be valid unless an act be passed of same by a notary and two witnesses.

The desires and intention of deceased will be recognized and respected by the courts.

Cole v. Cole, 39 La. Ann. 879, 2 So. 794.

If a father or mother desires to prefer one child to another in the disposition of his property, he is bound to state his designs expressly by declaring that the gift or legacy is intended as an advantage or extra portion, or using other equivalent terms.

Clark v. Hedden, 109 La. 147, 33 So. 116.

Mr. Arthur B. Leopold, for appellee:

Applicant, the oldest beneficiary heir present in the state, is entitled by law to administer, and it makes no difference that she is a married woman, for her husband acts conjointly with her.

Gusman's Succession, 36 La. Ann. 300; Boudreaux's Succession, 42 La. Ann. 296, 7 So. 453.

Applicant is entitled to the manual gift.

Stauffer v. Morgan, 39 La. Ann. 632, 2 So. 98; DePouilly's Succession, 22 La. Ann. 97; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Sinnot v. Hibernia Nat. Bank, 105 La. 711, 30 So. 233; Hale's Succession, 26 La. Ann. 195.

Land, J., delivered the opinion of the court (on motion to dismiss December 15, 1913):

Mrs. Josephine Boyle, wife of James D. Connell (hereinafter called Mrs. Connell), applied to be appointed administratrix of the succession of her deceased mother, Catherine Housknecht, widow by first marriage of Edward Boyle, deceased, and widow by second marriage of Gotlieb Meyer.

This application was opposed by Edward Boyle, a son of the deceased, and by John W. Boyle, Corinne Boyle, and William Boyle, children of a son of decedent's first marriage.

The opponents recommended the appointment of John W. Boyle, as administrator, in preference to Mrs. Connell, a married woman, alleged to be without business qualifications or experience.

The opponents alleged that Mrs. Connell was indebted to the estate in a large sum, which she had failed and refused to include in the inventory, and that Mrs. Connell, as agent and attorney in fact of her aged mother, had withdrawn from bank several hundred dollars, and deposited the same to her individual credit. Later John W. Boyle ruled Mrs. Connell to show cause why she should not have placed on the inventory the sum of $1,535.38 collected by her, under the said power of attorney, from a certain bank in the city of New Orleans. Mrs. Connell answered the rule, and averred that said sum was received by her as a manual gift from her mother.

After the rule was taken up and evidence adduced, the parties proceeded to try the opposition to the appointment of Mrs. Connell, as administratrix, under the following agreement, to wit: "It is agreed by counsel representing applicant and counsel representing opponent that this cause shall be consolidated with the matter of the rule to turn over funds, and that the evidence taken in said rule shall be used in this cause, as far as applicable, reserving to either party the right to offer such additional evidence as may be deemed proper and necessary."

The case was submitted to the court un-

der the following agreement of counsel: "It is agreed that in this case, both as to the opposition of appointment of administrator and rule taken against Mrs. James D. Connell, to return to the succession certain money, enumerated in said rule, be read, rendered, and signed by the judge hereof, during vacation and out of term time, and that an appeal may be taken from said decision, by motion, during vacation, the same as though this cause had been decided in term time and an appeal regularly taken therefrom."

It is apparent that the word "judgment" has been omitted in the first line of the agreement.

On October 8, 1913, the judge in open court, rendered a judgment dismissing the opposition and appointing Mrs. Connell as administratrix. On the same day the judge in open court rendered a judgment discharging the rule to place the sum of $1,535.38 on the inventory. Both judgments were read and signed in open court on October 14, 1913.

Opponents took an appeal from the "judgment" dismissing their opposition to the appointment of administrator and dismissing their rule to turn over moneys to the succession. The judge fixed the amount of the appeal bond in the sum of $100. The appellants executed a single bond for said sum, and the bond recites that the appellants have filed a motion of appeal "from a final judgment rendered against . . . in the suit of Succession of Mrs. G. Meyer, No. 103,350, of the civil district court for the parish of Orleans, on the 8th day of October, 1913, and signed on the 14th day of October, 1913."

The appellee has moved to dismiss the appeal on the grounds:

That the judgments below were distinct and separate, and two appeal bonds should have been furnished; that the appeal bond is insufficient to identify it with the motion and order granting the appeal, or with either judgment.

The two proceedings involved the same question of the alleged failure and refusal of Mrs. Connell to account for and produce funds belonging to the succession. The two proceedings were consolidated by consent of counsel, and the agreement to submit both cases for decision in chambers clearly implies the rendition of one judgment. In the motion for an appeal, and in the order granting the appeal and fixing the amount of the bond, the two judgments are treated as one.

This case is much stronger than that of the Clark's Succession, 30 La. Ann. 801, where three separate judgments were rendered,—one vacating an order appointing a provisional administrator, another maintaining an opposition to the appointment of any administrator, and a third ordering a partition by licitation. An appeal from the three judgments on one bond was maintained. The court said: "All the questions passed upon in these three judgments arose in one case, the succession of John Clark; and they all tend to one result, the settlement of the succession of John Clark, whether by an administration, or by partition among the heirs, which puts an end to the succession."

In Clairteaux's Succession, 35 La. Ann. 1178, there were two suits in each succession on distinct and separate matters, and only one bond was given. The court said that "the oppositions were not consolidated below, to be tried together and determined by one . . . judgment."

The motion to dismiss is therefore overruled.

(On the Merits March 16, 1914.)

The forced heirs of the late Catherine Meyer, *née* Housknecht, widow by first marriage of Edward Boyle, by second marriage of G. Meyer, opposed the application of Josephine Boyle, wife of James D. Connell, daughter of Catherine Meyer, on the ground that she did not have the business qualifications or experience necessary to administer the estate of her late mother; that she, Josephine Connell, is indebted to the estate of her late mother in a large sum which she failed to include in the inventory; that Mrs. Catherine Meyer, the deceased, was over seventy years of age at the date of her death, and that prior thereto her daughter, Mrs. Josephine Connell, exerted an influence over the mother to the extent that she obtained a full power of attorney from her to sign and execute checks and to do other acts in the name of the mother, who had an amount deposited in the Commercial-Germania Trust & Savings Bank.

As to the manual gift claimed by Mrs. Connell to her by her mother:

The order is inserted here in full for the reason that it is of some importance in deciding the point, that relating to the alleged manual gift. It reads as follows:

To the Commercial-Germania Trust & Savings Bank, New Orleans. No. 7823, Dec. 21st, 1912.

I hereby authorize Mrs. Josephine Connell to withdraw any money she may wish from my account in the Commercial-Germania Trust & Savings Bank at any and all times. Account of Mrs. Meyers.

Two witnesses signed this order.

The bank on this power of attorney de-

livered to Mrs. Connell the amount in bank to the credit of Mrs. Meyer, which amounted to $1,535.38, balance on deposit.

As to this order, Mrs. Connell testified that the amount thereunder was a manual gift of her mother; she testified:

"I don't know exactly how much money she had in the bank until Mr. Blaffer gave me the check to draw, put it in my name; that my mother said to me, 'Josephine, take this letter to Mr. Blaffer, let him give you this money to put it in your own name, because I want you to have it for yourself.'"

The witness also stated, contradicting the foregoing, that she had never used the power of attorney; that she had never drawn a cent from the bank other than "those hundred dollars which I just mentioned, which I drew before Christmas."

Mrs. Connell was appointed administratrix on the 8th day of October, 1913.

Opponents ask at this time that she be dismissed as administratrix.

We decline to grant that prayer. In few words we hold that the settlement of the succession is near the end. It would serve no useful purpose to dismiss the administratrix at this time. It would only delay the settlement and add to the costs.

Now as to the manual gift:

On January 10, 1910, the late Mrs. Meyer wrote to the cashier of the Commercial-Germania Trust & Savings Bank to transfer her account to her daughter, Mrs. Connell, to use as she sees fit.

The evidence shows that Mrs. Meyer, the decujus, was exceedingly anxious to avoid court costs, apprehensive that the end was near, and seemed concerned about the devolution of her property after her death.

Judgment on the motion to compel Mrs. Connell to place the amount of $1,535.38 on the inventory was rendered on the 8th day of October, 1913. The rule applied for in this motion was denied.

In the motion to have this amount deposited, the heirs, other than Mrs. Connell, alleged that she had an amount of $1,535.38 in her possession which belonged to the succession, the sum having been transferred to Mrs. Connell by the Commercial-Germania Trust & Savings Bank.

The transfer was made, as before stated, on the power of attorney to Mrs. Connell by the late Mrs. Meyer, her mother.

There were premium bonds for an amount over $4,000 and a small tract of land also belonging to the succession. The bonds are deposited in the depository of the court.

Edward Boyle, one of the heirs, testified that Mrs. Meyer supported Mrs. Connell for a number of years. On the other hand, Mrs. Connell testified that she supported her mother, for which the mother was grateful, and frequently said that her daughter should have some compensation for her services, and for that reason the manual gift was made.

The power of attorney which Mrs. Connell held was not an act of donation, nor does it prove in itself an intention on the part of the asserted donor, Mrs. Meyer, to donate the amount. The testimony upon the subject is direct enough, but it does not prove that the donor did actually hand over the amount to the donee. She authorized her to withdraw any money which she may wish for my account. That does not have the appearance of an actual gift as intended by the law upon the subject. In other words, the donation was not complete.

In the case reported in Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98, there was a complete donation of the check.

We do not attach the greatest importance to this decision, although we state that from the point of view of the appellee it was a complete assignment of the definite amount from the moment of the assignment.

The French authorities, construing the corresponding articles of our Code, hold that the manual gift can have for object only corporeal movables. This is the view expressed by Laurent, § 274.

In Huc, vol. 6, p. 242, it is stated more broadly that incorporeal things can be the subject of a donation. A title to a holder, for instance, is treated as a corporeal movable.

In the present case, there was no title to an incorporeal thing; only a power of attorney which directed the agent under the power of attorney to withdraw any money she might wish from the account at any and all times. It does not authorize Mrs. Connell to do as she pleases with the amount she withdraws. It is a power of attorney only, and the agent, it is presumed, must account to the principal. It is not to be presumed for an instant that one who is appointed agent by inference has the right to retain an amount that comes into his hands.

The right recognizing manual gifts is an important one. Movable property is easily given; very little or no formality is required. From that point of view, it should be made to appear without the least doubt that the intention was to give the property. Proof of that intention must be made to appear by the manual gift itself, and not by statement of conversations held with the donee before or after the gift.

This article of the Code was adopted before movable property had the great value it has at this time. It was deemed that it could be disposed of without all the for-

malities required when realty is donated. For that reason, the manual gift of movable property must be considered at the present time to be as important in many instances as the donation of immovable property.

Moreover, under our system of laws, in the interest of the family, it is said an owner cannot dispose always of all his property without regard to the laws relating to the disposable portion.

If a manual gift can be made by a mere power of attorney without its being certain that the principal intended a donation, it would be easy at times to dispose of property without regard to others than the principal who also are interested in the disposition of property made, let us say, by the head of the family.

We have to reverse the decision of the district court and direct the donee to return the amount of $1,535.38, before mentioned, to the succession to be divided among the heirs.

It is therefore ordered, adjudged, and decreed, as relates to the administratrix, that the judgment appealed from be affirmed, and she be permitted under the provisions of law to settle finally the succession of Mrs. Catherine Housknecht. To that extent the judgment appealed from is affirmed. It is further ordered, adjudged, and decreed that Mrs. Connell shall return to the succession the sum of $1,535.38, to be divided as before mentioned. It is further ordered, adjudged, and decreed that the appellee pay the costs of appeal and of the district court. The costs in so far as relates to the rule taken on March 13, 1913, to compel Mrs. James Connell to place the amount on the inventory, to be paid by appellee also. The costs of the district court in matter of the opposition to the appointment of Mrs. Connell as administratrix to be paid by the opponents.

A petition for rehearing having been granted, the following additional opinion was handed down on October 19, 1914.

On January 10, 1913, Mrs. Meyer wrote to Mr. Blaffer as follows:

"Will you please see that my account is transferred to my daughter, Mrs. Josephine Boyle Connell, to use as she sees fit."

On the same day the savings bank delivered the balance at Mrs. Meyer's credit to Mrs. Connell on a receipt signed, "Mrs. G. Meyer by Mrs. Josephine Boyle Connell." The evidence shows that Mrs. Connell held a power of attorney from her mother, to withdraw money from the savings bank. As a matter of fact the account was not transferred to Mrs. Connell. It follows that Mrs. Connell received the money as agent of her mother, and not as her assignee or transferee.

Considering said written request to Mr. Blaffer as a transfer of the account, the transaction was null and void as a donation *inter vivos*, because not passed before a notary public and two witnesses, as required by article 1536 of the Civil Code in case of every donation of "incorporeal things, such as rents, credits, rights, or actions."

A deposit in a savings bank is not subject to check, and is a mere chose in action. Zane, Banks & Bkg. pp. 630–639. "The pass book is not a document which is negotiable." Id. 643.

The claim of Mrs. Meyer against the savings bank fell squarely within the purview of Civ. Code, art. 1536, and the alleged gift by parol, or private writing, of the right or credit, was a nullity for want of form.

According to the text of the law the manual gift is the giving of "corporeal movable effects, accompanied by a real delivery." Civ. Code, art. 1539.

It has been held that indorsed checks, and bonds payable to bearer, may be subjects of the manual gift. See notes under Civ. Code, arts. 1536, 1539; Merrick's Rev. Civ. Code, 2d ed.

Such checks and bonds are exceptions to article 1536, which requires donations *inter vivos* of credits, rights, or actions to be evidenced by act passed before a notary and two witnesses.

In the case at bar, it is not shown by the required authentic evidence that Mrs. Meyer donated or gave to her daughter the balance due her by the savings bank. The alleged donation being a nullity for want of legal form, the delivery of the money to Mrs. Connell produced no legal effect.

For these additional reasons, our former decree herein is reinstated and made the final judgment of the court.

Povosty, J., dissenting in part:

Mrs. Josephine Connell applied to be appointed administratrix of the succession of the decedent, her mother, and asked that an inventory be made. This inventory having been made, and it not including a sum of $1,535.38, which the other heirs of the decedent knew had been to the credit of the decedent in bank shortly before her death and been withdrawn by Mrs. Connell under a power of attorney given to her by the decedent, and which she claimed had been made a present of to her by her mother, these heirs filed an opposition to Mrs. Connell's application, and moved that she be ordered to show cause why the said sum of money should not be inventoried as belonging to the succession. The trial judge

overruled the opposition, and denied the motion, and confirmed the applicant as administratrix. The grounds of the opposition are that Mrs. Connell is an unfit person for the position, that she is a debtor of the estate in the said sum of $1,535.38, and that the other heirs prefer that someone else should be appointed.

Mrs. Connell's mother, a very old person, had lived with her the last three years of her life, and up to her death, and whatever she had left was in her charge, and yet when her brother and coheir arriving from Texas, where he lived, inquired of her concerning the estate, she told him that their mother had not left enough to bury her, and when her nephew and coheir asked her concerning the money in bank, the only satisfaction she gave him was that it was none of his business. As a matter of fact, there were bonds to the amount of $4,700, and some real estate. We find also that her coheirs, with one exception, prefer that one of the other heirs or some bank should have charge of the estate. We think it would have been better not to have given her the administration; but inasmuch as the estate is small and uncomplicated, so that the question of who administers it is of little importance, and a new appointment would merely mean that much unnecessary expense, we have concluded to let her appointment stand.

Her mother, ten days before her death, expressed the desire that the money in bank should be hers, not merely at her death but presently, and for carrying out that wish dictated and signed the following letter:

New Orleans, La., January 10, 1913.
Dear Mr. Blaffer:—
Will you please see that my account is transferred to my daughter, Mrs. Josephine Boyle Connell, to use as she sees fit, and oblige, Yours sincerely,
[Signed] Mrs. G. Meyer.

Mr. Blaffer was the president of the bank in which the money was deposited. Mrs. Connell on the same day drew out the money. But the payment of it to her was not by authority of this letter, which, it will be noticed, is not an order on the bank, but by authority of the power of attorney which she held, as is shown by the receipt which the bank exacted of her, which reads as follows:

New Orleans, January 10, 1913.
Received of Commercial-Germania Trust and Savings Bank $1,535.38, as per pass book No. 7283 for $1,535.38.
Mrs. G. Meyer,
By Mrs. Josephine Boyle Connell.

Upon this state of facts, the coheirs of Mrs. Connell deny that there was a manual gift of the fund. The Code provides:

"Art. 1538. A donation *inter vivos*, even of movable effects, will not be valid, unless an act be passed of the same, as is before prescribed.

"Such an act ought to contain a detailed estimate of the effects given.

"Art. 1539. The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality."

Thus it is seen that a donation of movables cannot be effected by the mere volition of the would-be donor, but that there must be "a real delivery." Was there, then, "a real delivery" in this case? We think there was. Although Mrs. Connell received the fund as the agent of her mother as between herself and the bank, she received it for herself as between herself and her mother. "Tradition or delivery of movable effects takes place," says article 2478 of the Code, "when the purchaser had them already in his possession under another title." If this fund had been in Mrs. Connell's actual possession at the time her mother expressed the desire that it should presently be hers, there would have been no need, for the perfection of a manual gift, that the ceremony should be gone through of her turning the money over to her mother and of her mother at once returning it to her. The law takes no account of empty formality; indeed, expressly declares in said article 1539 that the manual gift "is not subject to any formality." For the perfection of the manual gift it suffices that the will to give and the actual possession of the donee should synchronize. The volition of the decedent to make the gift was still in full operation at the moment Mrs. Connell actually received the money from the bank. Zacharie's Succession, 119 La. 154, 43 So. 988.

I, therefore dissent on the question of the validity of the manual gift.

MINNESOTA SUPREME COURT.

JAMES A. FARRELL, Appt.
v.
W. A. HICKEN, Respt.,

SAME, Appt.,
v.
RODERICK MURCHISON, Respt.

(125 Minn. 407, 147 N. W. 815.)

Elections — required vote for all candidates — validity.

1. The charter of the city of Duluth,

Headnotes by HALLAM, J.

adopted by the electors December 3, 1912, provides for a preferential ballot, with the right of the voter to indicate first, second, and additional choices. It contains the provision that no vote shall be counted on the election of commissioners unless the voter marks as many first choices as there are commissioners to be elected. This provision is not in conflict with the section of the state Constitution which gives to every male person belonging to certain classes the right to vote "for all officers that now are or hereafter may be elective by the people."

Same — charter provisions — general law.

2. The Duluth charter does not abrogate the provision of the general election law, which confers upon the voter the right to vote for persons other than the regularly nominated candidates whose names are printed thereon.

(Brown, Ch. J., and Philip E. Brown, J., dissent.)

(May 15, 1914.)

APPEAL by contestant from a judgment of the District Court for St. Louis County in defendants' favor in consolidated actions for the contest of an election. Affirmed.

The facts are stated in the opinion.

Messrs. **Baldwin & Baldwin**, for appellant:

The legislature cannot add to, take from, or in any way modify the qualifications of an elector, and prescribe conditions upon which he may vote, which are different from those prescribed by the Constitution.

McCrary, Elections, § 59; 10 Am. & Eng. Enc. Law, 573; State ex rel. Knappen v. Clough, 23 Minn. 17; State ex rel. McCarthy v. Fitzgerald, 37 Minn. 26, 32 N. W. 788; State ex rel. Childs v. Holman, 58 Minn. 219, 59 N. W. 1006; State ex rel. Brady v. Bates, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105; State ex rel. Nordin v. Erickson, 119 Minn. 152, 137 N. W. 385.

The law which presents a form of ballot for the election of public officers without providing a blank space in which the voter may write the name of the person of his choice is unconstitutional.

State ex rel. Gulden v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; State ex rel. McCarthy v. Moore, 87 Minn. 308, 59 L.R.A. 447, 94 Am. St. Rep. 702, 92 N. W. 4; State ex rel. Nordin v. Erickson, 119 Minn. 152, 137 N. W. 385.

Even if a name had been written on the ballot and voted for by an elector, the person whose name was so written would not have been a candidate within the meaning of the charter, and the whole vote would have been rejected as void.

Leonard v. Com. 112 Pa. 607, 4 Atl. 220; Morris v. Burdett, 2 Maule & S. 212, 14 Revised Rep. 639; State ex rel. Brady v. Bates, 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105.

Messrs. **Crassweller, Crassweller, & Blu**, for respondent Hicken:

The legislature may establish such regulations as will enable all persons entitled to the privilege to exercise it freely and securely, and exclude all who are not entitled from improper participation therein.

Cooley, Const. Lim. 6th ed. 756; State

Note. — Constitutionality of statute requiring voter to vote for all officers.

While the question has arisen in a few cases as to the constitutionality of statutes restricting the vote of an elector to less than all where several officers are to be chosen for the same office (see note on this question to Com. ex rel. McCormick v. Reeder, 33 L.R.A. 141), research has disclosed no case other than FARRELL v. HICKEN, passing upon the constitutionality of a statute requiring the voter to vote for all officers. However, in Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, cited in FARRELL v. HICKEN, an analogous question was involved, as to the constitutionality of a provision of the primary election law making it mandatory upon the voter to vote for both first and second choice if there were more than twice as many candidates as offices. It was held that the statute did not violate a constitutional provision that "no power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage." The court took the position that the statute did not abridge the freedom of the voter, or interfere with his right of suffrage, but was a reasonable exercise of the power of the legislature. However, the constitutional provision in question was regarded as having reference to the attendance of civil and military officers at the poles and as prohibiting interference by them with the free and lawful exercise of the right of suffrage.

See also State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728, upholding the constitutionality of the second-choice provision of the Washington primary election law, and denying the contention that it interfered with the freedom of election guaranteed by the Constitution, and compelled the elector to vote for a person other than the candidate of his choice.

In general, as to regulations of the right to vote, see note to State ex rel. Allison v. Blake, 25 L.R.A. 480, on the question how far the right to vote is absolute.

And generally as to constitutionality of primary election laws, see notes to State ex rel. Phillips v. Strassheim, 22 L.R.A. (N.S.) 1136 and State ex rel. Miller v. Flaherty, 41 L.R.A.(N.S.) 132.

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ex rel. Nordin v. Erickson, 119 Minn. 152, 137 N. W. 385.

An act of the state legislature should not be declared unconstitutional unless it so clearly infringes upon some provision of the Constitution that men of reasonable minds would practically unanimously agree as to its unconstitutionality.

Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; Northern Securities Co. v. United States, 193 U. S. 350, 48 L. ed. 705, 24 Sup. Ct. Rep. 436; Ames v. Lake Superior & M. R. Co. 21 Minn. 241; Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450; State ex rel. Simpson v. Mankato, 117 Minn. 458, 41 L.R.A.(N.S.) 111, 136 N. W. 264; Pennington v. Hare, 60 Minn. 146, 62 N. W. 116; Elwell v. Comstock, 99 Minn. 261, 7 L.R.A.(N.S.) 621, 109 N. W. 113, 698, 9 Am. Cas. 270; State ex rel. McCarthy v. Moore, 87 Minn. 308, 59 L.R.A. 447, 94 Am. St. Rep. 702, 92 N. W. 4; State ex rel. Thompson v. Scott, 99 Minn. 145, 108 N. W. 828.

The voter may write the name of the person for whom he desires to vote, and whose name is not printed.

Snortun v. Homme, 106 Minn. 464, 119 N. W. 59; Erickson v. Paulson, 111 Minn. 336, 126 N. W. 1097; McCrary, Elections, § 543; State ex rel. Blodgett v. Eagan, 115 Wis. 417, 91 N. W. 984; Quinn v. Markoe, 37 Minn. 439, 35 N. W. 263; State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224.

Mr. **James A. Hanks** for respondent Murchison.

Hallam, J., delivered the opinion of the court:

At an election in Duluth on April 1, 1913, contestees Hicken and Murchison were each declared elected to the office of commissioner for the term of two years. Contestant Farrell instituted this contest. The trial court decided against him, and he appealed.

This election was the first under the "commission" charter adopted December 3, 1912. Under this charter the legislative and executive authority of the city is vested in a mayor and four commissioners. The term of office of each commissioner is four years, except that at the first election two of the commissioners were to be elected for two years, the other two for four years. All elections are nonpartisan. There is no primary election. Nominations are made by petition of at least 50 electors. The names of candidates so nominated are all placed upon the official ballot at the election. On the ballot used at this election the candidates for commissioners for the long term and those for the short term were separately classified and separately voted for, the instruction being in each case to "vote two." Where candidates are as numerous as they were in this case, three columns are placed upon the ballot, in which the voter is to indicate his choice as follows:

First Choice.	Second Choice.	Additional Choices.

The right of the voter is to cast as many first choice votes as there are offices to be filled, a like number of second choice votes, and third choice votes without limit as to number. First choice votes are counted first. If any candidate receives a majority of these, he is elected. If not, then the second choice votes are counted. Then if a candidate receives a majority of first and second choice votes, taken together, he is elected. If not, then first, second, and additional choice votes are all counted together, all having equal value, and the highest vote elects. In this case no candidate received a majority of first choice votes or of first and second choice votes together. It accordingly became necessary to count the additional choice votes.

The charter contains these provisions:

"No vote shall be counted on the election of commissioners unless the voters mark as many first choices as there are commissioners to be elected. . . . " Section 41.

"All ballots shall be void which do not contain first choice votes for as many candidates for commissioner as there are commissioners to be elected. . . . " Section 44.

A number of voters did not comply with these provisions, but, on the contrary, cast only single first choice votes for commissioners. The canvassing board and the trial court in counting the votes for commissioners followed the charter and rejected all such ballots. Had they counted the votes so rejected, contestant Farrell would have been elected, and contestee Hicken would have been defeated.

1. The contention of the contestant is that the provision of the charter which requires that the voter must mark as many first choice votes for commissioner as there are commissioners to be elected, in order to have his vote counted, is in conflict with article 7, § 1, of the state Constitution, and is unconstitutional and void. This section of the Constitution reads as follows: "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who has

resided in this state six months next preceding any election, shall be entitled to vote at such election in the election district of which he shall at the time have been for thirty days a resident, for all officers that now are, or hereafter may be, elective by the people."

The claim is that the charter provision restricts or hampers the elector in his constitutional right to vote for all officers that are to be elected. We cannot so hold. At the outset we may observe that the canvassing board and the trial court rejected votes properly marked for commissioners for the short term, on the ground that the voter failed to mark two first choice votes for commissioner for the long term. It may be questionable whether the charter provisions quoted authorized this. But the votes that were rejected on this ground would not affect the result of the election. The result is not affected, unless it be held that the canvassing board and the trial court improperly rejected votes for commissioners for the short term which were marked with only one first choice for the short term, and the one question we decide is that the charter provision, in so far as it requires this, is not unconstitutional.

It is undoubtedly true that neither the state legislature nor any other legislative authority can either restrict or extend the right of suffrage, or impose conditions which shall in any substantial manner impede its exercise. State ex rel. Nordin v. Erickson, 119 Minn. 152, 137 N. W. 385. It is equally true, however, that the exercise of the right of suffrage may be regulated by legislation. It has for years been regulated in many ways. Men do not have the right to vote in what manner they please. The legislature may prescribe the day and hours of election, and may deny any voter the right to vote unless he be present at such time. It may require the voter to register in advance of the election, and deny him the right to vote unless he do so. It may prescribe the character of the ballot used and the manner in which the voter shall indicate his choice. It may require him to vote by means of a voting machine, and deny him the right to vote in any other manner. It may render his ballot void if he vote for too many candidates, though he vote for one and against the other of the two regular or highest candidates.

Regulations not dissimilar in principle to the one here involved have been applied for years, both by the Constitution and the statutes of this state. Under our state Constitution, when constitutional amendments are submitted to a vote at any general election, they must receive the votes of a majority of all the electors voting at such election. If the elector does not register his vote upon this proposition by marking his ballot, his vote nevertheless counts in the negative. The result is that every elector must, in effect, vote either for or against every constitutional amendment or refrain from voting at all. The Constitution applies the same principle when any law to increase the gross earnings tax upon railroads is to be voted upon at a general election (Const. art. 4, § 32a); also when, in cities, a proposed city charter or an amendment to a charter is to be voted on at a general election (Const. art. 4, § 36); also in counties when a proposition to change a county seat is to be voted on at a general election (Const. art. 11, § 1).

The legislature applies the same principle where the question of license or no license in villages (State ex rel. Peacock v. Osakis, 112 Minn. 365, 128 N. W. 295), or of the issuance of school bonds by school districts (State ex rel. Board of Education v. Brown, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477, is to be voted upon at a general election. The voter must have his vote cast in the scale on these questions or not vote at all. The validity of laws of this character has never been questioned.

In Bott v. Secretary of State, 62 N. J. L. 107, 40 Atl. 740, it was held by the supreme court of New Jersey that, where several constitutional amendments were to be voted upon, a form of ballot which required a voter to vote one way or the other on all the amendments did not contravene the requirement of the Constitution that such amendments should be "submitted in such manner and form that the people may vote for or against each amendment separately and distinctly." The court [at page 126] said: "The constitutional provision in itself gave no consideration for the qualified voter who, for any reason, was indifferent or noncommittal." This case was affirmed on other grounds in 63 N. J. L. 289, 45 L.R.A. 251, 43 Atl. 744, 881.

Of course these precedents are not decisive of the questions here involved. But they bear witness to the fact that forms of regulation quite as restrictive as the regulations here found are of common acceptation. The particular plan adopted by the Duluth charter is new. But its novelty alone should not condemn it. In view of past experience in the government of American cities, the people of Duluth may be pardoned for attempting something new. It is a matter of common knowledge that under the system generally prevailing, where two or more persons are to be elected to any office, some voters may and do seek to give an advantage to the candidate of their choice by casting a vote for him and none

other. The practice redounds to the benefit of the individual candidate rather than to the public good. The theory of the nonpartisan system is that, under its operation, the voter will cast his vote uninfluenced by the partisan considerations which in local affairs have too often militated against good government. It may well be that, if the practice is permitted of casting a single vote for a single candidate for an office to which two or more are to be elected, combinations of voters, actuated by partisan, selfish, or other improper motives, may in this manner gain a certain advantage. The people of the city of Duluth, pursuant to the authority granted to them by the Constitution and laws of the state, adopted this charter for their own local government at a popular election, by a vote of at least four sevenths of the electors voting. They saw fit to make a rule, which in their local elections should prohibit this practice, doubtless in the expectation that, if every elector who votes for any candidate for an office, where more than one is to be elected, is compelled to cast as many votes as there are officers to be elected, a better composite expression of the judgment of the electorate will be attained. With the wisdom of these charter provisions we have no concern. They emanate from an authority having power to legislate generally as to such matters. They are the law, unless they run contrary to some higher law. The state Constitution is such a higher law. But we must bear in mind that, as far as power of legislation is concerned, the state Constitution is an instrument of limitation, not of grant. We need not search in it for authority for this legislation. We need look in it only for prohibitions. No constitutional authority to legislate upon this subject is required. The power of the legislative authority to legislate is plenary, unless the Constitution has deprived it of that power. Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 207, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; State ex rel. Simpson v. Mankato, 117 Minn. 458, 41 L.R.A.(N.S.) 111, 136 N. W. 264.

Legislative enactments are not to be lightly put aside by the courts. In Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606, the Supreme Court of the United States, speaking through Washington, J., said: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." This rule has always obtained in this state. Curryer v. Merrill, 25 Minn. 1, 4, 33 Am. Rep. 450; L.R.A.1915B, Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 208, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53.

The Constitution was adopted in 1857. This is not a long time ago, and yet political and social conditions have materially changed. The Constitution contemplated changing conditions. Necessarily new devices that are in conflict with the Constitution are forbidden, but the Constitution must not be narrowly construed. It must be broadly construed with a view to adapt it to the changed and changing conditions, which its framers knew must arise, and, in order that it may accomplish the purpose for which it was adopted, to furnish a working rule of legislative conduct for generations yet to come.

Approaching this question in the light of these principles, we cannot hold that this charter provision abridges the right of the elector "to vote . . . for all officers . . . elective by the people." The charter does not command the elector not to vote. It enjoins him to vote. No clause in the Constitution guarantees him the right not to vote. It is his duty as a citizen to exercise his franchise to the full. No citizen has any constitutional right to perform half his public duty by voting for only half the number of candidates to be elected to any office, and a law that requires him to perform his full public duty and vote for all he may as a condition to voting for any is not an unwarranted restriction of his right to vote "for all officers" to be elected. The decision in Adams v. Lansdon, 18 Idaho, 483, 110 Pac. 280, while not directly in point, tends to sustain these views.

2. It is contended that this charter provision is an unwarranted limitation upon the right of the voter to vote for whom he pleases, because, it is urged, he cannot vote for one whose name is not printed on the ballot, and there may not be two candidates for commissioner for whom he can consistently vote, and that as a result he may be put to the alternative of voting against his conscience, or not at all. In our opinion, the voter is not, under this charter provision, so limited. The general election law (Gen. Stat. 1913, § 460) definitely confers upon the voter the power to write upon the ballot, and to vote for, persons other than the regularly nominated candidates whose names are printed thereon, and § 327 provides for a blank line for such purpose. The Duluth charter (§ 47) adopts the general election laws of the state, "except as otherwise provided in this charter." We have examined the charter with care, and we find in it nothing which abrogates the above

provisions of the general law, and we hold these provisions still in force in the city of Duluth. See State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224; Park v. Rives, 40 Utah, 47, 119 Pac. 1034.

Judgment affirmed.

Brown, Ch. J., dissenting:

I am unable to concur in the views of the court in this case, and therefore respectfully dissent. The question involved is of far greater and more serious importance than whether the contestant or contestee shall hold and discharge the duties of the office of commissioner of public safety of the city of Duluth. The constitutional right of the electors of the state freely and without restraint to cast their ballots for candidates of their choice, and to have them counted as cast, is the fundamental issue presented, is of far-reaching importance for future guidance of legislation along the line of the Duluth charter, and entirely overshadows all other considerations.

The facts are fully stated in the opinion, and need not be repeated. That the provisions of the Duluth charter violate the constitutional rights of the electors of that city seems clear and beyond serious discussion. The Constitution (§ 1, art. 7) provides that every citizen meeting the requirements there prescribed "shall be entitled to vote . . . for all officers that now are, or hereafter may be, elective by the people." This is an express guaranty of a right or privilege which cannot be denied, or substantially impaired or abridged by legislation. It is a civil privilege protected by the fundamental law, to be exercised by the elector, or not, at his option, and in no sense a legal duty imposed by law. It is a duty in the sense that it is a personal obligation the citizen owes to the state and to society, but it has never been declared by court or legislature an imposed legal duty which the elector must perform either in whole or in part. And it may safely be said that prior to the adoption of the Duluth charter no legislative authority has ever attempted to declare that an elector must cast his ballot for a particular number of candidates or not vote at all. Under the Constitution, the right of franchise must be free and untrammeled, to the end that the elector may freely cast his ballot for such candidates as he deems worthy of election, and that he is here deprived of that right is clear. If the decision in this case affirming the validity of this requirement is followed and applied in the future, there is no limit to which the legislature may not go in restricting and substantially embarrassing the right of franchise. It may say, as does the Duluth charter, that, if the elector casts his ballot for a less number of candidates than are to be elected to a particular office, the ballot shall be void. It may command the elector to vote the entire ballot, or be deprived of the right to vote for any of the candidates appearing thereon; and, if he fails to do so, that the ballot cast by him for some of the candidates shall be void. The legislature may also say and declare that if several constitutional amendments are to be voted upon, each elector shall cast his ballot upon all, one way or the other, or not at all. In my opinion, the legislature has no such power, and any statute so providing would be a nullity. As I understand the facts in Bott v. Secretary of State, 62 N. J. L. 107, 40 Atl. 740, cited in the opinion of the court, the decision there rendered does not uphold any such legislative power. In the case at bar two commissioners were to be elected. There were eight or ten candidates whose names appeared upon the official ballot. Several ballots were cast for contestant only, and by force of the Duluth charter, the validity of which is affirmed by this court, the ballots so cast are thrown out, resulting in a declaration that a candidate who received the minority vote at the election is declared elected to the office. If this does not deny the right of the elector to vote for candidates of his choice, ignoring those to whom he is opposed, it is difficult to imagine a statute that would have that effect. While it is true, as remarked in the opinion of the court, that statutes are not to be lightly set aside, it is equally true that the right of franchise, standing, as it does, at the foundation of our free institutions, is just as sacred as the right of the legislature to enact laws. Its protection is safeguarded by the Constitution, and is beyond legislative impairment. The suggestion in the opinion that one of the purposes of this provision of the Duluth charter was to prevent combinations of voters in favor of one candidate is without force. If combinations of this kind are formed, the purposes thereof can readily be carried out by voting for the preferred candidate alone, and then writing into the ballot the name of some person, not a candidate at all, and marking the cross opposite his name, thus wholly circumventing the intention of the charter, by the exercise of a right the opinion concedes to each elector. The result intended to be guarded against may be accomplished by this idle ceremony.

In my opinion, the charter of Duluth upon this subject arbitrarily violates the rights of the electors, and should be declared void.

Mr. Justice **Philip E. Brown** concurs in this dissent.

NEW MEXICO SUPREME COURT.

A. L. MORGAN et al., Appts.,
v.
NATHAN SALMON.

(— N. M. —, 135 Pac. 553.)

Principal and surety — building contract — failure to retain funds — effect.

A surety on a bond for the faithful performance by the contractor of a building contract is absolutely discharged from liability when the obligee fails to retain not less than 15 per cent of the value of all work performed and material furnished in the performance of said contract in accordance with the terms of said bond; said surety not having consented to such alteration.

Headnote by LEIB, District Judge.

(June 30, 1913.)

APPEAL by defendants from a judgment of the District Court for Santa Fé County in plaintiff's favor in an action on a bond for the faithful performance of a building contract. Reversed.

Statement by **Leib**, District Judge:

This is an action brought by the appellee, Nathan Salmon, against A. L. Morgan, as principal, and the American Surety Company, as surety, on a bond for the faithful performance of a building contract by the terms of which the said Morgan was to

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Note. — Release of surety on building contractor's bond by making payments not authorized by contract.

This note supplements the earlier note to First Nat. Bank v. Fidelity & D. Co. 5 L.R.A.(N.S.) 418. It does not include cases in which the surety was held liable upon the ground that he had ratified improper payments, or upon the ground that the payments were authorized.

It was said in St. John's College v. Ætna Indemnity Co. 201 N. Y. 335, 94 N. E. 994, that if money is given to a contractor or for his benefit by an owner in advance of his payment becoming due upon a contract, the amount thereof and the circumstances of the payment should be considered in connection with the obligation of the surety; and that, while an advance payment is an act which may be so antagonistic to the interests of the surety and the obligation assumed by him as to relieve him from further obligation to the owner upon his contract of suretyship, the rule of strict construction is liable at times to work a practical injustice, and it ought not to be extended beyond the reason for the rule, particularly when the surety is engaged in the business of becoming a surety for pay and presumably for profit. Accordingly, it was held in that case that where an advance payment without the architect's certificate, as required, is made to enable the contractor to pay laborers and to avoid giving up his contract, the same not amounting to more than the stipulated percentage of the work already done, and, after default by the contractor, another undue payment is made to pay off laborers, not as a part of the contract, but to prevent future labor troubles,—the sureties are not absolutely discharged. It was, however, held that to the extent of the unauthorized payments, the surety was not liable.

So, the case of Y. M. C. A. v. Fidelity & G. Co. 90 Kan. 332, L.R.A.1915, —, 133 Pac. 894, declares that a corporation engaged in the surety or guaranty insurance business stands in a less favorable position than the ordinary surety on a contractor's bond; and that failure to retain the amount required by the principal contract might not discharge the corporation where it would discharge an ordinary surety. But it holds that where the contract authorizes monthly payments of a certain percentage of the work done, and the bond provides that the surety shall not be liable if the owner makes final payment without the surety's consent, the surety is discharged to the extent of the premature payment. In reaching its conclusion the court cited with particular approval not only the note in 5 L.R.A. (N.S.) 418, but also the note to George A. Hormel & Co. v. American Bonding Co. 33 L.R.A.(N.S.) 513, on the character of, and rules governing, contracts by corporations engaged for profit in the business of guarantying the fidelity or the contracts of other persons. As to paid sureties, see also Brown v. Title Guaranty & S. Co. 38 L.R.A. (N.S.) 698; and Costello v. Bridges, L.R.A. 1915A, 853. And see also cases cited at page 295 of note in 47 L.R.A.(N.S.) 290, on the question whether entering into contracts of suretyship for a consideration amounts to insurance.

Failure to retain percentage of price as required.

See also note in 5 L.R.A.(N.S.) 418. And see also, infra, cases under the heading, "Overestimates or falsified bills or receipts."

This division excludes cases of loans and advancements, which are discussed separately below.

But few decisions are found to emphasize, as is done in the preceding cases, the difference between the ordinary surety's obligation and that of a paid surety company. More often the courts declare broadly that the owner's failure to retain, until completion of the building, the percentage of the price of labor and material, as required by the contract, discharges the surety. Lawhon v. Toors, 73 Ark. 473, 84 S. W. 636; National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745; Fels & Co. v. Massachusetts Bonding & Ins. Co. 48 Pa. Super. Ct. 27;

erect a building for said Salmon in the city of Santa Fé. The bond sued upon is conditioned as follows:

Now, therefore, the condition of this obligation is such that, if said principal shall faithfully perform said contract on his part, according to the terms, covenants, and conditions thereof (except as hereinafter provided), then this obligation shall be void; otherwise, to remain in full force and effect: Provided, however, and upon the following further express conditions:

First. That, in the event of any default on the part of the principal in the performance of any of the terms, covenants, or conditions of said contract, written notice thereof, with a verified statement of the particular facts showing such default, and the date thereof, shall, within fifteen (15) days after such default, be delivered to the surety at its office in the city of Santa Fé, New Mexico, and that in case of such default all moneys which, but for such default, would be due, or would thereafter become due, to the principal, shall be held by the obligee and by him applied for the indemnification of the surety.

Second. That the liability of the surety hereunder is and shall be strictly construed as one of suretyship only; and that no suit, action, or proceeding upon or by reason of any such default shall be brought or instituted against the principal or surety after the 24th day of July, 1906, and that actual service of writ or process commencing such suit, action, or proceeding be made on or before such date.

Jersey City Water Supply Co. v. Metropolitan Constr. Co. 76 N. J. L. 419, 69 Atl. 1088 (at least, where such percentage, if retained, would have been sufficient to complete the contract after the contractor's abandonment of it). Note in this connection, Y. M. C. A. v. Fidelity & G. Co. supra.

This rule is recognized in Guttenberg v. Vassel, 74 N. J. L. 553, 65 Atl. 994, holding that the surety's liability, however, continues where the bond provides that it should not be void by reason of any payment made to the contractor contrary to the terms of the contract.

The purpose of a stipulation for progress payments for materials furnished or labor performed, upon certificates of the architect is to guard against the consequences of a default in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive for the contractor to finish his work; and when the provision is not observed, and advances or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as a matter of law. Fidelity & D. Co. v. Agnew, 82 C. C. A. 103, 152 Fed. 955.

The owner's failure to comply with a provision of the principal contract for retained percentages discharges a surety whose bond subrogates him, in case of default, to the rights of the contractor to all the deferred payments and retained percentages. It was so held in O'Neill v. Title Guaranty & T. Co. 113 C. C. A. 211, 191 Fed. 570, holding that a provision that payments were to be made on the first day of each month, a certain percentage of value of the work and labor being paid, and the rest retained until final completion, has reference to the contract price, and not to the amount of materials and labor furnished, and that where the owner does not retain the required percentage of the contract price, the surety is discharged, although he paid only the permitted percentage of the value of the materials and labor furnished, which exceeded the contract price.

A surety for the performance of a contract giving the owner the right to retain the last payment to meet lienable claims is not liable for a claim which could thus have been met, where the last payment was made to the contractor without a certificate from the architect that it was due as required by the contract. Harris v. Taylor, 150 Mo. App. 291, 129 S. W. 995.

Where, instead of retaining the stipulated percentage, the owner pays the contractor in full, and the contractor abandons the contract at a time when completion in itself would yield no profit, the surety on the contractor's bond is discharged. Long v. American Surety Co. 23 N. D. 492, 137 N. W. 41.

And although the contract provides no time for payment, the surety is discharged by payment in full before the work is commenced, where the bond provides that the owner shall retain the last payment and the reserve due until complete performance and until the expiration of the time when liens may be filed, and that the surety shall be notified in writing before the last payment shall be made or the reserve paid. Leiendecker v. Etna Indemnity Co. 52 Wash. 609, 101 Pac. 219.

A decision like that in MORGAN v. SALMON is reached in Lyons v. Kitchell, — N. M. —, 134 Pac. 213, declaring that the deviation from the terms of the contract, and not the injury or damage done by such deviation, is what operates to release the surety; and that the breach of the contract *ipso facto* nullifies it as to the surety.

An overpayment of $2,000 on a $19,000 job, three months before completion, and without the required architect's certificate, was held in Kunz v. Boll, 140 Wis. 69, 121 N. W. 601, to be such a material variation from the contract as absolutely to discharge the surety.

The case of Bessemer Coke Co. v. Gleason, 223 Pa. 84, 72 Atl. 257, goes no further than to hold that an owner who fails to retain the required percentage cannot re-

Third. That the principal shall not, nor shall the surety, be liable for any damage resulting from an act of God, or from a mob, riot, civil commotion, or a public enemy, or from employees leaving the work being done in the performance of said contract, or so-called "strikes" or labor difficulties, or from fire, lightning, tornado, or cyclone, or from injury to person or adjacent property resulting from accident or negligence in the performance of such contract; and that the principal shall not, nor shall the surety, be liable for the reconstruction or repair of any work or materials damaged or destroyed by said causes, or any of them.

Fourth. That the obligee shall retain not less than fifteen (15%) per centum of the value of all work performed and materials furnished in the performance of said contract, until the complete performance by said principal of all the terms, covenants, and conditions thereof, on said principal's part to be performed, and that the obligee shall faithfully perform all the terms, covenants, and conditions of said contract on the part of said obligee to be performed.

Signed and sealed this 27th day of November, 1905.

[Signed] A. L. Morgan.

[Signed]

American Surety Company of New York,
By Robert C. Gortner,
Resident Vice President.

Attest: Hanna & Spencer, Resident Assistant Secretary.

In the latter part of December, 1905, while the building was in process of erec-

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cover the amount of such overpayments from the surety.

But where the contractor abandons the work long before completion, and the owner finishes the same himself, the surety's liability to the owner for the excess expended by him above the contract price is not affected by the fact that the owner did not reserve the stipulated percentage of the contract price, such provision being predicated upon the contractor's performance of the contract. Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 126 Am. St. Rep. 1088, 110 S. W. 1042.

And where the principal contract provides that the contractor shall pay for all labor and materials promptly so as to prevent the filing of liens, the owner may, although the contract also gives him the right to protect himself against such liens by reserving certain payments to the contractor, or parts thereof, rely upon such obligation of the contractor, which has become a part of his bond, and the surety upon the bond is therefore not released by failure to reserve such payments, although the owner knew that the labor was being performed and the materials furnished. Rawson v. Grant, 138 Iowa, 127, 115 N. W. 909.

Where the contract provides for the retention of 20 per cent until the work is finished, and the bond provides for a retention of 15 per cent, a retention of 15 per cent is sufficient to preserve the liability of the surety. American Surety Co. v. Scott, 18 Okla. 264, 90 Pac. 7.

Architects' estimates and bills or receipts for labor and materials—failure to obtain as required.

See also note in 5 L.R.A.(N.S.) 418. And see cases under the heading, "Overestimates or falsified bills or receipts."

As to loans and advancements, see cases under second heading below.

A provision in a building contract that the contractor shall be paid as the work progresses according to the amount of materials furnished or work performed, upon L.R.A.1915B,

estimates to be made by the supervising architect or engineer, inures to the benefit of a surety on the contractor's bond, and payment in disregard of it is such a departure from the contract as to release the surety. Fidelity & D. Co. v. Agnew, 82 C. C. A. 103, 152 Fed. 955.

And where the provision is for payment at certain stages of construction, it has been held that a payment before the corresponding stage of construction was completed released the surety notwithstanding at the time a succeeding stage of construction was under way to such an extent that the total amount of work done exceeded the amount of the payment. Blackburn v. Morel, 13 Ga. App. 516, 79 S. E. 492, declaring that the liability of the surety is *stricti juris*, and is released by any act which tends to increase the risk.

Ordinarily, under a building contract authorizing variations and changes from specifications, such changes may be made without discharging the sureties; but where the provision is that money shall be paid only on architect's certificates as the work progresses, and on the basis of a certain percentage of its value, subject to additions and reductions as may thereinafter be provided, the original stipulations cannot be changed without the surety's consent, where the contract contains no further provisions with respect to changes. Reissaus v. Whites, 128 Mo. App. 135, 106 S. W. 603.

Failure of a contractor to exercise his option to pay directly persons furnishing labor and materials to the subcontractor, or to exact receipts which the subcontractor agreed to obtain and deliver to the contractor, discharges the surety on the subcontractor's bond, at least from liability for the difference between the unpaid claims for labor and materials and the unpaid portion of the contract price. Pauly Jail Bldg. & Mfg. Co. v. Collins, 138 Wis. 494, 120 N. W. 225.

And the gist of Hubbard v. Reilly, 51 Ind. App. 19, 98 N. E. 886, seems to be that where the contract provides that the payments are to be made to the contractor

tion, the contract was terminated by the obligee discharging the contractor because of alleged defects in the work so far done, and on January 5, 1906, he entered into a new contract with another contractor, under which the building was completed January 15, 1907. At the time Morgan was discharged, all work performed and materials furnished in the construction of said building was paid for in full by the obligee.

After the completion of the building the appellee brought suit for damages against the appellants on said bond, and, a jury having been waived, the cause was tried by the court, and judgment rendered against appellants, from which judgment this appeal is prosecuted; the following among other errors being assigned:

"2. The court erred in holding and finding that the obligee complied with the requirements of the bond in the matter of the reservation by him of fifteen per centum (15%) of the amount due in accordance with the terms of the bond and contract."

Messrs. **Wilson, Bowman, & Dunlavy**, for appellants:

The surety was released by the failure of the obligee to retain 15 per cent of the value of the work performed and materials furnished.

First Nat. Bank v. Fidelity & D. Co. 5 L.R.A.(N.S.) 418, note; Glenn County v. Jones, 2 Ann. Cas. 766, note; Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210; Welch v. Hubschmitt Bldg. & Woodworking Co. 61 N. J. L. 57, 38 Atl. 824; Taylor v. Jeter, 23 Mo. 244; St. Mary's

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through the surety, the failure of the owner to do so releases the surety; and that the owner cannot be heard to say that when payments were due he sought the surety but could not find him, where it appears that he afterward made numerous payments without any further effort to locate the surety or to pay through him.

And where the owner has failed to comply with the requirement that payment be made only upon affidavits of the contractor, the fact that an affidavit was taken when the last payment was made is immaterial for the purpose of preserving the surety's liability. Blackburn v. Morel, supra.

And in Zang v. Hubbard Bldg. & Realty Co. — Tex. Civ. App. —, 125 S. W. 85, the court seemed to think that, but for a provision in the bond that the sureties should not be discharged by any change in the method or amounts of payment, the sureties would have been discharged by a secret understanding that the president of the contractor company would make the first payment to the company and get credit therefor upon an indebtedness due from him to the owner.

But payment without the required architect's certificate does not affect the surety's liability so long as not more than the stipulated percentage is paid. Martin v. Whites, 128 Mo. App. 117, 106 S. W. 608; Brandrup v. Empire State Surety Co. 111 Minn. 376, 127 N. W. 424.

And where the contract provides that the payment shall be made on the 15th of each month, upon architect's certificates delivered to the owner on or before the 5th of each month, mere variation from these requirements as to dates does not affect the liability of the surety, in the absence of unwarranted anticipation of payments or unfair dealing. New Haven v. National Steam Economizer Co. 79 Conn. 482, 65 Atl. 959.

Payment to the contractor without his production of receipted bills, as required by a provision in the bond, does not release the surety where the provision declares that if the contractor fails to produce

the receipts, the owner must immediately notify the surety, and "upon demand pay to the company [surety] all money which would have been due and payable to the principal had the principal produced such receipted bills," and it does not appear that the surety ever made any demand for such moneys although so modified.

In Kunz v. Boll, 140 Wis. 69, 121 N. W. 601, the court expressed doubt whether failure to exact the architect's certificate would affect the liability of the surety so long as the payments at no time exceeded the respective amounts due under the contract.

Where money is due a contractor, its payment to his creditors with his consent, instead of to the contractor himself, does not affect the liability of his surety. Wolf v. Ætna Indemnity Co. 163 Cal. 597, 126 Pac. 470.

In People use of Reynolds v. Banhagel, 151 Mich. 40, 114 N. W. 669, the court said that undoubtedly a surety for the performance of a contract providing for payments at specified times or upon proportional performance of the contract would be discharged by material advances made by the owner to the principal without the surety's consent; but it was held that there was no such advancement where the contract provided for payment upon estimates made about each thirty days, and one payment was made upon an estimate about a week before the customary period, where such estimate was for work actually performed.

And in Litchgi v. Gottlieb, 134 Mo. App. 237, 113 S. W. 1134, the court recited the principle that any material variations from the contract method of payment will release the surety, but held under the facts of the case that the surety was not discharged inasmuch as the contract was silent as to the time of payment; and that although in such circumstances the contractor could not have recovered payment until completion of the work, no such limitation would be read into the contract for the purpose of discharging the surety from lia-

College v. Meagher, 11 Ky. L. Rep. 112, 11 S. W. 608; McNally v. Mercantile Trust Co. 204 Pa. 596, 54 Atl. 360; Wehrung v. Denham, 42 Or. 386, 71 Pac. 133; Cowdery v. Hahn, 105 Wis. 455, 76 Am. St. Rep. 921, 81 N. W. 882; Gato v. Warrington, 37 Fla. 542, 19 So. 883; United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; California Sav. Bank v. American Surety Co. 87 Fed. 118, 82 Fed. 866; Foster v. Fidelity & C. Co. 99 Wis. 447, 40 L.R.A. 833, 75 N. W. 69; Starr v. Millikin, 180 Ill. 458, 54 N. E. 328; Electric Appliance Co. v. United States Fidelity & G. Co. 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 648; Fidelity & C. Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167; Insurance Co. of N. A. v. Brim, 11 Ind. 281, 12 N. E. 315; Swift & Co. v. Jones, 135 Fed. 437; Sullivan v. Fraternal Societies' Co-op. Indemnity Union, 36 Misc. 578, 73 N. Y. Supp. 1094; Guarantee Co. of N. A. Mechanics' Sav. Bank & T. Co. 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. Rep. 124; Knight & J. Co. v. Castle, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976.

The limitation of time in the bond within which suit must be brought was not complied with, and there was no waiver of time.

Marshalltown Stone Co. v. Louis Drach Constr. Co. 123 Fed. 747; Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; Holtby v. Zane, 220 Pa. 178, 69 Atl. 675; Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 466; East Liverpool China Co. v. Illinois Surety Co. 152 Ill. App. 89; Granite Bldg. Co. v. Saville, 101 Va.

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bility for the contractor's abandonment of the work, merely because payments were made before such abandonment.

—overestimates of falsified bills or receipts.

See also note in 5 L.R.A.(N.S.) 418.

A provision in the bond that failure of the owner to retain the required percentage until completion of the contract shall discharge the surety does not have such effect unless the owner overpays the contractor knowingly; and where the principal contract authorizes the payment of the authorized percentage at certain intervals upon certificates of the architect, overestimates in such certificates, whether from mistake of the architect or through collusion between him and the contractor, excuse the overpayments thereunder so long as the owner acts in the bona fide belief in their correctness. McKenzie v. Barrett, 43 Tex. Civ. App. 451, 98 S. W. 229.

The case of New Haven v. National Steam Economizer Co. 79 Conn. 482, 65 Atl. 959, holds that the surety is not discharged where the architect in making the certificates, and the owner in paying them, acted in good faith, notwithstanding, upon the termination of the contract by the owner for cause, from 33 to 50 per cent of the work had been done, while 65 per cent of the contract price had been paid, and under the contract only 85 per cent was to be paid before completion of the work.

And the surety is not discharged where the owner in good faith pays estimates which are too high, made by the superintendent, who, under the contract, is the agent of all parties in making the estimates, although he was lax in preparing them. Y. M. C. A. v. Gibson, 58 Wash. 308, 108 Pac. 766.

A fortiori, where the engineer in making his estimate makes an honest mistake and overestimates the amount of work done, and payment is made accordingly, but deductions are made in subsequent months, it is held that there was no overpayment such as would release the surety. Wakefield v. L.R.A.1915B.

American Surety Co. 209 Mass. 173, 95 N. E. 350.

The case of Chicago v. Agnew, 264 Ill 288, 106 N. E. 252, states that from an early date it has been held that a surety is discharged by the payment to the contractor of money which the contract required to be reserved; but the case is disposed of upon the ground that the surety's liability is not affected by payment pursuant to overestimates, where no more than the specified per cent of the estimates was ever paid, and the specified part of the contract price was always held in reserve.

Payment upon receipts forged by the contractor, but believed by the owner to be genuine, does not affect the surety's liability in a bond conditioned for the true and faithful performance of the contract, where the contract required the contractor to produce receipts from the laborers and materialmen before obtaining payments from the owner as the work progressed. Allen v. Eneroth, 118 Minn. 476, 137 N. W. 16.

And a surety upon the bond of one constructing a county bridge under a contract providing that the county shall pay 75 per cent of the cost of the materials from time to time as delivered, the same not to exceed 75 per cent of the contract price, and the balance on completion, is not discharged by payment for inferior materials furnished under falisfied bills showing them to be according to specifications, where, although the amount paid was more than 75 per cent of the actual value of the materials furnished, it was not more than 75 per cent of the billed price. Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24. In reaching its conclusion the court said that it would be a reproach to the law to permit a surety to escape liability because the obligee had been guilty of a technical breach of contract, where that breach was due to the principal's failure to comply with the contract against which the surety's bond was conditioned, as in this case, by furnishing inferior materials and billing them at the contract price.

217, 43 S. E. 351; Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 Pac. 742; James Reilly Repair & Supply Co. v. Smith, 100 C. C. A. 630, 177 Fed. 168; De Farconnet v. Western Assur. Co. 58 C. C. A. 612, 122 Fed. 448, affirming 110 Fed. 405; Taber v. Royal Ins. Co. 124 Ala. 681, 26 So. 252; Metropolitan Acci. Asso. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766.

The alterations made in the Morgan contract released the surety.

Lonergan v. San Antonio Loan & T. Co. 101 Tex. 63, 22 L.R.A.(N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061, 106 S. W. 876, reversing — Tex. Civ. App. —, 98 S. W. 387; Beers v. Wolf, 116 Mo. 179, 22 S. W. 620; Killoren v. Meehan, 55 Mo. App. 427; Eldridge v. Fuhr, 59 Mo. App. 44; Fullerton Lumber Co. v. Gates, 89 Mo. App. 201; Chapman v. Eneberg, 95 Mo. App. 128, 68 S. W. 974; Burnes v. Fidelity & D. Co. 96 Mo. App. 467, 70 S. W. 518; Truckee Lodge No. 14, I. O. O. F. v. Wood, 14 Nev. 293; Northern Light Lodge No. 1, I. O. O. F. v. Kennedy, 7 N. D. 146, 73 N. W. 524.

Failure to give notice fifteen days after the default, in compliance with the terms of the bond, is fatal to the cause of action.

Knight & J. Co. v. Castle, 172 Ind. 97, 27 L.R.A.(N.S.) 573, 87 N. E. 976; Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 Pac. 742; National Surety Co. v. Long, 60 C. C. A. 623, 125 Fed. 887.

Mr. **A. B. Renehan**, for appellee:

Failure to withhold 15 per cent does not release the so-called surety.

United States Fidelity & G. Co. v. Omaha Bldg. & Constr. Co. 53 C. C. A. 465, 116 Fed. 145; Leghorn v. Nydell, 39 Wash. 17, 80 Pac. 833; American Surety Co. v. Waseca County, 77 Minn. 92, 79 N. W. 649; Madison v. American Sanitary Engineering Co. 118 Wis. 480, 95 N. W. 1097; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859.

The alterations in the contract were unavailing, because not pleaded.

American Surety Co. v. San Antonio Loan & T. Co. — Tex. Civ. App. —, 98 S. W. 403; Filbert v. Philadelphia, 181 Pa. 530, 37 Atl.

Loans and advancements.

The surety is not discharged by a loan made by the owner to the contractor where it is a bona fide loan, and not a payment on account. Meyer v. Bichow, 133 La. 975, 63 So. 487.

Virtually, loans are held not to be unauthorized payments, and, of course, cases so holding are not strictly within the title of this note, being decided not upon the ground that unauthorized payments do not release the surety, but upon the ground that there were no unauthorized payments. For instance, in addition to the preceding case, see Museum of Fine Arts v. American Bonding Co. 211 Mass. 124, 97 N. E. 633, holding that no payment which will release the surety occurs when the owner loans money on the contractor's note to enable the latter to pay for labor or materials, and the contractor executes a paper giving the owner authority to apply instalments on the contract price as they came due, upon the loan, it appearing that it was not intended as an advance payment, but as a loan pure and simple. After coming to this conclusion, the court said that, this being the case, it is therefore unnecessary to determine the question whether an advance payment releases the surety.

But where, before any work is done, a subcontractor informs the contractor that he is unable to proceed with the work, and the contractor advances money to him not only in excess of the stipulated percentage, but in excess of the contract price, the surety upon the subcontractor's bond, which is payable to the contractor, is discharged, and the fact that the excessive payments were necessary to enable the subcontractor to complete the work does not affect the L.R.A.1915B.

situation, especially where that contingency is met in the contract by a provision that the contractor should have the election to take charge of the work and charge the expense of completing it to the subcontractor. McKnight v. Lange Mfg. Co. — Tex. Civ. App. —, 155 S. W. 977.

Where a subcontractor is to be paid upon architect's certificates for materials incorporated into the building, his surety is discharged by an advancement of one fifth of the amount of his contract without any certificate or notice to the surety, and before any work has been done on the building, to enable the subcontractor to pay workmen's wages in getting out the materials during a delay in the building operations caused by the principal contractor, who was obligee in the bond. James Black Masonry & Constr. Co. v. National Surety Co. 61 Wash. 471, 112 Pac. 517, emphasizing the fact that the surety was a compensated indemnity company. The court also recognized the fact that mere technical breaches of the principal contract will not release the surety. It was stated that in this case the contractor was prejudiced because the advanced payment removed a considerable part of the incentive of the subcontractor to complete the work.

There occurs, not an accommodation loan, but an advance of money on a contract between a contractor and a materialman, in violation of a provision thereof requiring payments for material as the work progresses, to be made upon estimates of the supervising architect, where the contractor, after refusing to loan the materialman money, indorses his note, which is discounted at a bank and afterward paid by the owner accounting to the bank for the value of material received, such transaction, after

546; Cowles v. United States Fidelity & G. Co. 32 Wash. 120, 98 Am. St. Rep. 838, 72 Pac. 1033.

Leib, District Judge, delivered the opinion of the court:

A number of questions are raised by appellants in their assignment of errors, but the findings of fact of the lower court upon conflicting evidence are probably binding upon us as to all these.

The court concluded that the surety was not released by the failure of the obligee to retain 15 per cent of the value of the work performed and material furnished, as required by the bond. Nowhere has the appellee shown that he has complied with this condition, and it was necessary for him to do so before he could recover. On the contrary, he admits in his evidence that payments had been made in full. This question can therefore be considered by us, and, as it goes to the very heart of the matter, it will be unnecessary for us to consider any other.

The bond sued upon was given to guarantee the faithful performance of the contract to erect the building for the appellee. This was to be construed in accordance with the terms of said contract, except as the same is limited and varied by the provisions of the bond set out in the statement of the case. The contract, amended by the bond, then, is what we are to consider. Where the two conflict, the terms of the latter control. In other words, the terms of the bond which change or qualify the terms of the contract are the limits of the surety's obligation, and, so far as the surety is concerned, take the place of such provisions upon the same subject as are contained in the contract and the specifications. "If the main contract is broader in its scope than the limits fixed in the bond, a reference to the contract will only incorporate so much of the same as is within the limits of the terms of the bond." Stearns, Suretyship, § 143; Ausplund v. Ætna Indemnity Co. 47 Or. 10, 81 Pac. 579, 82 Pac. 12.

The surety had the right to specify the conditions under which it would be held lia-

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completion, being succeeded by others handled in the same way. Fidelity & D. Co. v. Agnew, 82 C. C. A. 103, 152 Fed. 955, holding the surety on the materialman's bond therefore discharged.

But overpayments early in the work in small amounts, made directly to the contractor, whether regarded as loans or advancements, do not affect the liability of the surety where they aggregate less than a credit subsequently given for extra work. Manhattan Co. v. United States Fidelity & G. Co. 77 Wash. 405, 137 Pac. 1003.

And where payments were to be made in instalments of certain amounts at respective stages of the work, as shown by the architect's certificates, loans and advancements to the contractor shortly before the work had progressed to the respective payment stages were held not to affect the surety's liability, where the advancements were deducted from the respective instalments when they became due and were paid. Monro v. National Surety Co. 47 Wash. 488, 92 Pac. 280.

And excessive payments made directly to laborers and materialmen of the contractor, which are necessary to prevent the filing of liens upon the premises, against which the contractor's bond is conditioned, do not affect the liability of the surety thereon. Manhattan Co. v. United States Fidelity & G. Co. supra.

So, where, between the contractual dates of the progress payments, the owner makes advancements to enable the contractor to pay for labor, materials, and freight, making the checks payable directly to the holder of the obligation, and not to the contractor, and such advancements are deducted from the next payment shown to be due by the architect's certificate, there is no violation of the contract for payment at certain dates and upon the architect's certificates, which will discharge the surety. American Surety Co. v. Scott, 18 Okla. 264, 90 Pac. 7. The court pointed out that the advancements were made to enable the contractor to proceed with the work, and that the checks were made out in the name of the claimant for labor, materials, and freight as a precautionary measure, and thus made the contract one which inured to the benefit of the surety.

Effect on rights of laborers or materialmen.

See also note in 5 L.R.A.(N.S.) 418.

For other questions in relation to rights of laborers and materialmen under contractor's bonds, see Index to L.R.A. Notes, under title, "Bonds," II.

Where the bond provides not merely for performance of the contract, but also for payment of materialmen and laborers, their rights cannot be affected by violations of the contract by the owner; and as to them the surety is not released by the owner's violation of a provision in the contract for retained percentages. United States Fidelity & G. Co. v. American Blower Co. 41 Ind. App. 620, 84 N. E. 555, holding this especially true where the contract is for public work on which there can be no lien.

So, the liability of a surety upon a bond conditioned for the payment of materialmen furnishing materials to one contracting with a city is not discharged, as against the materialmen by premature payments after the claims of the materialmen accrue. Empire State Surety Co. v. Des Moines, 152 Iowa, 531, 131 N. W. 870, 132 N. W. 837.

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ble. The obligee was not compelled to accept these conditions; but, having done so, he is bound by them. The provisions of the bond that 15 per cent of the amount due for labor performed and material furnished be retained was obviously for the benefit of the surety, and without it therein the bond, no doubt, would never have been written. Had it been complied with by the obligee, not only would there have been a sum remaining in his hands for the protection of the surety, but there would also have been an additional incentive for the contractor to carry out the terms of his contract and go on and complete the building. By payment in full, the temptation for dishonesty was increased, and the hope of reward for further labor decreased. It made a different obligation that subjected the surety to risks for which it had not contracted. We can but conclude, therefore, that the failure of the obligee to retain 15 per cent of the value of the labor performed and material furnished in the construction of the building was a material variation of the bond.

Having reached this conclusion, it logically follows that the surety is released. There are but few rules of law better settled than the one that the surety has the right to stand upon the exact terms of his bond. If, without his assent, the obligee departs therefrom in a material matter, it operates as a discharge. As said in Ryan v. Morton, 65 Tex. 258: "The liability of a surety cannot be extended beyond the terms of the contract out of which his obligation arises. If the contract be altered without his consent, whether he sustain injury or the contract be to his advantage, it ceases to be his contract, and with that ceases his obligation."

This is squarely in line with the overwhelming weight of authority. From the leading case of Calvert v. London Dock Co. 2 Keen, 639, 7 L. J. Ch. N. S. 90, 2 Jur. 62, down to the present time, there is a long line of authorities holding in substance, the doctrine just enunciated. See Glenn County v. Jones, 146 Cal. 518, 80 Pac. 695, and the extensive note thereto in 2 Ann. Cas. at page 766, where a large number of authorities are collected. In that case it is said: "The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. He has a right to stand on its very terms."

Additional authorities sustaining the same doctrine are Shelton v. American Surety Co. 66 C. C. A. 94, 131 Fed. 210; St. Mary's College v. Meagher, 11 Ky. L. Rep. 112, 11 S. W. 608; Evans v. Graden, 125 Mo. 72, 28 S. W. 439; McNally v. Mercantile Trust Co. 204 Pa. 596, 54 Atl. 360; Gato v. Warrington, 37 Fla. 542, 19 So. 883; United States v. American Bonding & T. Co. 32 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925, and Prairie State Nat. Bank v. United States, 164 U. S. 233, 41 L. ed. 417, 17 Sup. Ct. Rep. 142. In Miller v. Stewart, 9 Wheat. 680, 6 L. ed. 189, the court said: "It is not sufficient that he [the surety] may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

We are not unmindful of the fact that there are some authorities holding that a variation, such as we find in this case, operates only *pro tanto* to discharge the surety. This, however, as we have seen, is contrary to authority, and cannot be sustained by reason. Who can tell, in any given case of this character, to what extent the surety is injured? It may be that, had the stipulated sums been withheld, there would have been no default. It may be that it would have made no difference. Between these two extremes of conjecture there is a wide field for what would be, at best, very uncertain computation. Where is the court that can approximate the damages, even after weighing, as best it can, all the complex forces that influence each individual and are transmuted into action? Would not such an attempt lead the courts to adopt as many different rules of construction as there are contractors involved? Should not the courts enforce the contracts made by the parties, and not other and different ones? And what right have the courts to extend by implication contracts that in terms are fixed and definite? These questions answer themselves.

We think it the better rule to hold in such cases as the one before us that the surety is entirely released. For the reasons above stated, the decision of the lower court is reversed, and this cause is remanded, with instructions that the same be dismissed as to the appellant the American Surety Company; and it is so ordered.

Roberts, Ch. J., and **Parker**, J., concur. **Hanna**, J., having been of counsel in the court below, did not participate in this decision.

Petition for rehearing denied October 1, 1913.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

JAMES J. CUMMINGS, Plff. in Err.,
v.
JAMES LOBSITZ et al.

(— Okla. —, 142 Pac. 993.)

Municipal corporation — power to abate nuisance.

1. At common law a municipal corporation has the power to cause the abatement of public nuisances, and, if it cannot otherwise be abated, to destroy the thing which constitutes the nuisance.

Same — destruction of building.

2. Not only has a municipal corporation the power, under the common law, to abate a public nuisance, but chapter 7, Comp. Laws 1909, gives the municipal corporation full power to abate public nuisances, and when it becomes necessary, it may remove or destroy the building which constitutes the nuisance, even though the nuisance consists in the building being in such a condition that it endangers the public safety or the safety of adjacent property.

Evidence — sufficiency.

3. Evidence examined, and held to be sufficient to establish that the building was in fact a nuisance.

Municipal corporation — unconstitutional act — liability.

4. No liability is created against a municipal corporation by acts of its officers, done under an unconstitutional or void resolution enacted in the exercise of governmental powers, and the fact that the council passed, and the street commissioner enforced, such void resolution, does not make the city liable.

Municipal corporation — act of officer — liability.

5. Where a street commissioner of a city of the first class removes a frame building which constitutes a public nuisance, he does not do so as the agent or representative of the municipality, but the acts of such officer is in the interest of the public generally and for public purposes in the enforcement of the police regulations, and the abatement and removal of the frame building in the instant case by such street commissioner was an act which was essentially governmental in its character, and the municipality is immune from liability for the act of such officer in abating such nuisance.

Appeal — general exception — availability.

6. A general exception to a charge of the court, containing a great many distinct instructions, some of which are unobjectionable, is not available as error.

(August 25, 1914.)

ERROR to the District Court for Noble County to review a judgment in defendants' favor in an action to recover damages for the alleged wilful, unlawful, and malicious removal of plaintiff's building. Affirmed.

Statement by **Rittenhouse, C.**:

In the year 1909 James J. Cummings, plaintiff in error, who was plaintiff below, owned a frame building on lot 11 in block B, in the city of Perry, Oklahoma, and during the same year the city of Perry, a municipal corporation, removed said building. On February 16, 1910, the plaintiff instituted suit against the city of Perry, a municipal corporation, and James Lobsitz, to recover $550 damages for the wilful, unlawful, and malicious removal of said building. James Lobsitz answered by general denial, and the city of Perry answered by general denial, and further alleged that the said building was located upon one of the principal business streets of the city of Perry, and that it was in an unsafe and dangerous condition, and by reason of such condition it was a public nuisance, and further answered that prior to the removal of said building the mayor and city council, after having fully investigated the condition of said building, passed a resolution declaring said building to be in an unsafe and dangerous condition, and provided in said resolution that if the owners, agents, or occupants of said building did not remove the same within fifteen days of the service of such notice, the street commissioner would remove the same. Issues were joined, the court instructed the jury to return a verdict in favor of James Lobsitz, one of the defendants, and gave general in-

Headnotes by RITTENHOUSE, C.,

Note. — The power of municipal corporations to define, prevent, and abate nuisances is treated generally in the note to Grossman v. Oakland, 36 L.R.A. 593, and the question with respect to nuisances affecting highways is specifically treated in the note to Hagerstown v. Witmer, 39 L.R.A. 649; see page 662 of that note for cases in relation to buildings. Other phases of the general subject of the power of municipalities over nuisances are treated in notes which may be found by consulting the Index to L.R.A. Notes, under the title "Municipal Corporations," subheading, "As to Nuisances."

The subject of the liability of a municipality in tort for acts beyond the scope of its powers is treated in the note to Scott v. Tampa, 42 L.R.A.(N.S.) 908.

Various phases of the distinction between the governmental and private functions of a municipal corporation as affecting its liability for tort are treated in notes referred to in the Index to L.R.A. Notes, under the title "Municipal Corporations," subheading, "Liability for Damages."

structions as between Cummings and the city of Perry. A general exception was saved to these instructions. The evidence was overwhelming that the building was in an unsafe and dangerous condition, and the jury found according to such evidence.

Mr. **H. A. Johnson**, for plaintiff in error:

If defendant Lobsitz directed the building to be torn down, the burden of proof shifted to him to show that he was justifiable in doing so, and that was a question of fact for the jury, and should have been submitted to them under proper instructions.

Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Des Plaines v. Poyer, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677; Tissot v. Great Southern Teleg. & Teleph. Co. 39 La. Ann. 996, 4 Am. St. Rep. 248, 3 So. 261.

The damage for the destruction of a house on the premises is the cost of replacing it, and its value while that is being done.

Marks v. Culmer, 6 Utah, 419, 24 Pac. 528.

The city of Perry had no legal authority to pass the ordinance declaring the building of the plaintiff to be a nuisance, and said ordinance was void as matter of law. Re Gribben, 5 Okla. 379, 47 Pac. 1074; Evansville v. Miller, 146 Ind. 613, 38 L.R.A. 161, 45 N. E. 1054; Wood, Nuisances, 740.

Messrs. **Charles R. Bostick** and **H. E. St. Clair**, for defendants in error:

An executive officer of the city is not liable for his acts as such officer, within the scope of his authority, in carrying out the provisions of an ordinance duly passed.

1 Beach, Pub. Corp. §§ 207–209.

At common law, municipal corporations have power to abate nuisances within their territorial limits.

Joyce, Nuisances, § 345, p. 498, § 347, note, 73, § 349; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421; Miller v. Sergeant, — Ind. App. —, 37 N. E. 418; Waggoner v. South Gorin, 88 Mo. App. 25; Montgomery v. Hutchinson, 13 Ala. 573; Ferguson v. Selma, 43 Ala. 398; 2 Beach, Pub. Corp. § 1022; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.

Rittenhouse, C., filed the following opinion:

It is the duty of a municipal corporation to abate public nuisances, and it is well settled that a municiual corporation has, at common law, the power to cause the abatement of such nuisances, and, if it cannot otherwise be abated, to destroy the thing which constitutes the nuisance. This authority has been given to municipal corporations from the earliest days of the common law down to the present time. Beach, Pub. Corp. § 1022; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830, and cases cited. Not only can municipal corporations summarily remove public nuisances under the common law, but chapter 7, Comp. Laws 1909 (construed in Re Jones, 4 Okla. Crim. Rep. 74, 31 L.R.A.(N.S.) 548, 140 Am. St. Rep. 655, 109 Pac. 570), enumerates what shall constitute a public nuisance, and provides that a nuisance shall consist in unlawfully doing an act or in omitting to perform a duty which either annoys, injures, or endangers the comfort, health, repose, and safety of the citizens, or unlawfully interferes with or tends to obstruct, or in any way renders unsafe and insecure, other persons in life or in the use of their property, and makes such nuisance public when it affects an entire community or any considerable number of persons, and provides that such nuisance may be abated by any public body or officer authorized by law or by individuals, and giving them the right to abate such nuisance by removal of the nuisance, or, if necessary, to destroy the thing which constitutes the nuisance. As has been said, under the common law, and also under chapter 7, supra, a municipal corporation has full power to abate public nuisances, and when it becomes necessary it may remove or destroy the building which constitutes the nuisance, even though the nuisance consists in the building being in such condition that it endangers the public safety or the safety of adjacent property. First Nat. Bank v. Sarlls, 129 Ind. 209, 13 L.R.A. 481, 28 Am. St. Rep. 185, 28 N. E. 434; Harvey v. De Woody, 18 Ark. 252; Joyce, Nuisances, §§ 349, 352.

The question as to whether the frame structure was in fact a nuisance was submitted to the jury, not upon the theory that the finding of the city council was a final adjudication of the fact that the building was a nuisance, but upon the broad question as to whether the building was in fact a nuisance. The testimony shows that the frame building had been in bad condition for more than two years prior to the time it was removed; that it had caught fire several times just prior to the date of its removal; that the building was on one of the principal business streets, and was leaning about 18 inches over the sidewalk; that the glass windows were out, and the doors were standing open; the front door twisted in such a manner that it could not be shut and the back door was off its hinges; that the floor was uneven and that the boards in the upper part of the building

were decaying and in bad shape; and that the side wall against the adjoining building had decayed from dampness. These facts were testified to by several witnesses, and were not denied; and the jury found, we think correctly, that the building was in fact a nuisance, and the city was justified in summarily removing the same.

The next contention is that the introduction of the resolution in evidence was prejudicial to the plaintiff in that said resolution was void. Assuming but not deciding, that the resolution was void, as contended by the plaintiff, the act of the commissioner in removing the building while in the exercise of his governmental functions under a void resolution would not render the city liable for his acts under such unconstitutional or void resolution. It is said in McQuillin, Municipal Corporations, vol. 6, 4th ed. § 2640: "No liability is created against a municipal corporation by acts of its officers done under an unconstitutional or void ordinance enacted in the exercise of governmental powers." Worley v. Columbia, 88 Mo. 106; Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Bond v. Royston, 18 L.R.A.(N.S.) 409, and note (130 Ga. 646, 61 S. E. 491); Bartlett v. Columbus, 101 Ga. 300, 44 L.R.A. 795, 28 S. E. 599; Easterly v. Irwin, 99 Iowa, 694, 68 N. W. 919; Simpson v. Whatcom, 33 Wash. 392, 63 L.R.A. 815, 99 Am. St. Rep. 951, 74 Pac. 577; Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949; Taylor v. Owensboro, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; Masters v. Bowling Green (C. C.) 101 Fed. 101; Trescott v. Waterloo (C. C.) 26 Fed. 592.

Independent of the questions hereinbefore decided, the street commissioner, in abating and removing the frame building which constituted the nuisance, was not acting as the agent or representative of the municipality in its corporate capacity, but was acting in the interest of the public generally, and for public purposes, in the enforcement of the police regulations. The abatement and removal of the frame building in the instant case by such street commissioner was an act which was essentially governmental in its character (6 McQuillin, Mun. Corp. 4th ed. § 2641), and as no liability is expressly declared by statute for such an act, the municipality would be immune from liability while its officers were exercising their governmental functions in the abatement of such nuisance. It was said in Lawton v. Harkins, 34 Okla. 545, 42 L.R.A.(N.S.) 69, 126 Pac. 727: "The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is therefore not liable for the acts of its officers in attempting to enforce such regulations, and, further, because police officers can in no sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render the cities and towns liable for their assaults, trespasses, or negligent acts."

A distinction is made between the liability of a municipal corporation for the acts of its officers in the exercise of powers which it possesses for public purposes and which it holds as agent of the state, and those powers which embrace private or corporate duties and are exercised for the advantage of the municipality and its inhabitants. When the acts of its officers come within the powers which it has as agent of the state, it is exempt from liability for its own acts and the acts of its officers; if the acts of the officer or agent of the city are for the special benefit of the corporation in its private or corporate interest, such officer is deemed the agent or servant of the city, but where the act is not in relation to a private or corporate interest of the municipality, but for the benefit of the public at large, such acts by the agents and servants are deemed to be acts by public or state officers, and for the public benefit. Flannagan v. Bloomington, 156 Ill. App. 162; Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649; Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702; Franks v. Holly Grove, 93 Ark. 250, 137 Am. St. Rep. 86, 124 S. W. 514; Laurel v. Blue, 1 Ind. App. 128, 27 N. E. 301; Clark v. Atlantic City (C. C.) 180 Fed. 598.

It is next contended that the court improperly instructed the jury; but upon an examination of the record, we find that the court gave eleven instructions to the jury, and as plaintiff excepted generally to such instructions and some of those given were undoubtedly correct, the exception saved is not sufficient to present to this court the error complained of. Glaser v. Glaser, 13 Okla. 389, 74 Pac. 944; A. B. Farquhar Co. v. Sherman, 22 Okla. 17, 97 Pac. 565; Huff v. Territory, 15 Okla. 376, 85 Pac. 241; Standard Life & Acci. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856.

The cause should therefore be affirmed.

Per Curiam:
Adopted in whole.

TENNESSEE SUPREME COURT.

CLINCHFIELD FUEL COMPANY, Appt.,
v.
W. M. LUNDY et al.

(— Tenn. —, 169 S. W. 563.)

Partnership — retirement of partner — notice — liability on contract.

Liability of a partner on a contract for supplies to be delivered in monthly instalments for a year is not affected by written notice during the term that he has withdrawn from the firm, and that the remaining partner will carry on the business, pay the debts, and collect the bills.

(September 23, 1914.)

APPEAL by plaintiff from a decree of the Chancery Court for Washington County in favor of one of the defendants in a suit to recover the balance due for coal purchased by the defendant partnership and undelivered when the partnership was dissolved. Reversed.

The facts are stated in the opinion.

Mr. **Thad A. Cox** for appellant.

Mr. **Haskiel H. Dyer** for appellees.

Buchanan, J., delivered the opinion of the court:

This was a suit by the fuel company against W. M. and Terry H. Lundy, as partners trading under the firm name and style of W. M. Lundy & Son. The chancellor granted a decree against W. M. Lundy for $2,100.86 principal, and certain interest, which, added to the principal, amounted to the sum of $2,307.36, and one half of the costs of the cause, and a decree against complainant for the other one half of the costs. There was no appeal by W. M. Lundy from the above portion of the decree, and no appeal by complainant from the part of the decree taxing it with one-half of the costs. The chancellor dismissed the cross bill filed by W. M. and Terry H. Lundy, and from this part of the decree the cross complainants prayed, and there was granted to them, an appeal, which they failed to prosecute by the execution of an appeal bond, so that this part of the decree is not in question here. The decree denied complainant a recovery against Terry Lundy for the amount of the principal and interest for which he was sued as a member of the partnership, and from this much of the decree the complainant appealed and has assigned error.

The material facts are as follows: On March 17, 1911, the partnership, W. M. Lundy & Son, entered into two contracts with the fuel company, by one of which contracts the partnership bought from the fuel company 3,000 tons of lump Clinchfield coal, at the price of $1.50 per ton of 2,000 pounds, free on board cars at the mines, shipments to be made in equal instalments monthly. By the other of such contracts the partnership bought of the fuel company 1,000 tons of run of mine coal, at the price of 90 cents per ton, to the date October 1, 1911, and of $1 per ton for the remainder of the term of the contract, each ton to be 2,000 pounds in weight, the grade of the coal to be No. 1, and shipments to be made monthly in equal instalments.

Each of these contracts was to become effective on May 1, 1911, and to continue in effect until April 30, 1912. The principal sum for which the decree was rendered in the cause was the balance shown to be due the fuel company for coal shipped under these two contracts during this term for which they were to be effective, and the correctness of that balance is not in question.

In due course of mail after it was written, the fuel company received the following communication, dated December 8, 1911:

Clinchfield Fuel Company, Spartansburg, South Carolina.

Gentlemen:—

This is to give notice that, on November 30, 1911, the partnership of W. M. Lundy & Son was dissolved, Terry H. Lundy, withdrawing from the firm, W. M. Lundy will carry on the business as heretofore, will pay all debts, and collect all accounts of the partnership.

Yours truly, W. M. Lundy,
Terry H. Lundy.

The general manager of the fuel company, on cross examination by counsel for the Lundys, was asked if the company had received the above notice, and replied: "Clinchfield Fuel Company received notice of the dissolution of the partnership of W. M. Lundy & Son. However, the Clinchfield Fuel Company did not release W. M. Lundy's son from the contract, and the contract stands W. M. Lundy & Son. The notice of dissolution was not accepted as indicating a desire by Mr. Lundy to cancel the contract. On the contrary, he continued to order coal thereunder at prices named therein, and paid therefor down to January. At the time of dissolution, the price named in the contract to Mr. Lundy was under the price

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Note. — For assumption of debts on dissolution of partnership, including the effect on the liability of the retiring or indemnified partner, see notes to Dean v. Collins, 9 L.R.A.(N.S.) 49, and Johnson v. Jones, 48 L.R.A.(N.S.) 547.

obtained for shipments in the open market known as 'spot sales.' Had Mr. Lundy requested cancelation of the contract, succeeding shipments would have been made at the open market price, which was $1.75 or more per ton. We recognized Mr. W. M. Lundy as the head of W. M. Lundy & Son, his personal checks were sent in payment for all coal shipped prior to dissolution notice, and all shipments made therefor down to the time he withheld payment in January."

It further appears that the balance on the account sued for was for coal shipped during the months of January, February, and March of the year 1912, and that payment had been made for all prior shipments, and that after receipt of the notice of dissolution all coal shipped by the fuel company was billed to W. M. Lundy, with the exception of a bill of date March 20, 1912, amounting to $72, unintentionally billed to the firm. After stating which the general manager further states: "But the invoice price per ton of the coal was the same as named in the contract, because the contract was assumed by Mr. Lundy. Mr. Lundy was aware that the cancelation of his contract and the purchase of coal on the open market would have entailed an extra cost per ton."

Under the facts disclosed, we cannot agree to the conclusion reached by the chancellor as to the nonliability of Terry H. Lundy. The contracts on which he was sued were made during the life of a general partnership of which he was a member, and he thereby became bound to make payment for the coal delivered under the contracts at the prices fixed by the terms of the contracts. By the dissolution agreement between him and his copartner, all of his partnership assets passed to his copartner, and the latter assumed the payment of all of the partnership debts. Along with the other assets which so passed to his copartner were the two contracts here in suit. The notice of dissolution served on the fuel company was proper authority from the retiring partner to that company to deliver the balance of the coal to the copartner, who had taken over the assets and assumed the liabilities of the firm. That notice was also effective to advise the fuel company that the retiring partner would not be bound for new credits extended to the firm or the partner who had assumed the debts and taken over the assets thereof, but the notice was not effective to destroy the liability of Terry H. Lundy, the retiring partner, to pay the fuel company the contract price on delivery of the coal which remained undelivered when he retired from the firm; and this for the good reasons: (1) He became liable so to pay when the two contracts were signed. (2) He reaffirmed this original liability when, by the dissolution notice, he said in substance to the fuel company: Execute your contract, but instead of delivering the balance of the coal to the old firm, now extinct, made the delivery of it to W. M. Lundy, my former partner, who has taken over the assets and assumed the debts of the defunct partnership.

In carrying out this agreement between the parties to whom it was bound under the two contracts to make delivery of the coal at the prices named (which by the way the fuel company did to its own hurt, coal having increased in value), that company did not waive its rights acquired as stated, to look to the retiring partner for pay when it fulfilled its contracts, modified, as those contracts were, in respect of the person to whom delivery should be made. The fuel company was not bound to see the ulterior and sinister purpose, if such there was, working in the mind of the retiring partner to escape liability by means of the notice. It was well within its rights to act on the notice as it did, seeing in it only such significance as the law gives it, and consequently the fuel company waived no right when it acceded to the wish of the two partners, expressed by their act of dissolution, that delivery be made to one of them instead of to the firm.

It is true that, as between themselves, upon the dissolution, the partner who assumed payment of the debts of the firm and took over its assets became the principal debtor, and the retiring partner a surety only; but they both remained liable as principal debtors to the creditors of the firm. Bryan v. Henderson, 88 Tenn. 23, 12 S. W. 338; Croone v. Bivens, 2 Head, 339; Hollis v. Staley, 3 Baxt. 168, 27 Am. Rep. 759.

The doctrine of our cases above cited is supported by a well-reasoned opinion of the North Dakota supreme court in Dean v. Collins, 15 N. D. 535, reported in 9 L.R.A. (N.S.) p. 49, where an elaborate note reviewing the authorities may be found. That portion of this note which deals with the question we are considering begins on page 76 of 9 L.R.A.(N.S.) where a large collation of authority sustaining the doctrine of our cases appears.

It is true, as stated in Dean v. Collins, supra, that by some courts it is held that where there is a dissolution of a partnership, and an agreement among the partners by which one takes over the assets and assumes the debts of the firm, and the other retires, and a creditor has notice thereof, but is in no way a party to it, the creditor after receiving such notice, must treat the

retiring partner, not as a joint debtor, but as a surety. But it is explained in Dean v. Collins that the doctrine of the courts which so hold is founded on a misunderstanding of the facts of the case of Oakeley v. Pasheller, 4 Clark & F. 207, 10 Bligh, N. R. 548, where it appeared that the creditor had consented to the dissolution agreement between the partners, and was therefore held bound to treat the retiring partner as a surety only. However this may be, we think the view best supported by reason and authority is the one held by our cases supra, and to that we adhere.

There was in the present case no waiver or abandonment, by the fuel company of the liability to it of Terry H. Lundy. "To constitute an abandonment or waiver, there must be a clear, unequivocal, and decisive act of the party, showing a determination not to have the benefit in question, with a full knowledge of his rights in the premises." Prewitt v. Bunch, 101 Tenn. 742, 50 S. W. 748, and cases cited.

From the views above expressed, it results that so much of the decree of the Chancellor as denied the joint and several liability of Terry H. Lundy to pay the principal and interest of the debt sued for in this cause will be reversed, and decree here will go against him therefor, and also for all the costs of the cause. The costs of the Chancery Court will be paid as decreed by that court.

INDIANA SUPREME COURT.

HARRY C. BOOTH, Appt.,
v.
STATE OF INDIANA.

(179 Ind. 405, 100 N. E. 563.)

Statute — title — sufficiency.

1. A title, "An Act Requiring the Owners or Operators of Coal Mines" to maintain washhouses, is broad enough to cover a requirement that such houses shall be maintained by mine superintendents, under penalty for neglect.

Constitutional law — maintenance of washhouses — equal protection.

2. A statute requiring coal miners to maintain washhouses for their employees does not deprive them of their property without due process of law or of the equal protection of the laws.

Indictment — failure to erect buildings — provide.

3. Charging failure to provide a washhouse in violation of a statute requiring its erection and maintenance is sufficient.

Constitutional law — maintenance of washhouses — compensation.

4. Coal miners may, without compensation, be required to maintain washhouses for their employees.

Legislature — delegation of power — petition for protection of statute.

5. A provision in a statute for the maintenance of washhouses by coal miners, only upon petition of their employees, is not an unconstitutional delegation of legislative power.

Mine — provision of washhouse — right of complaint.

6. A coal-mine operator who delays for more than a year to comply with a petition to provide a washhouse for employees as required by statute cannot complain if the statute does not provide as to when he must comply with it.

(January 28, 1913.)

APPEAL by defendant from a judgment of the Circuit Court for Sullivan County convicting him of failing in violation of statute to provide a wash room for the employees in a coal mine, after demand. Affirmed.

The facts are stated in the opinion.

Messrs. **John T. Hays, Will H. Hays, and McNutt, Wallace, & Sanders**, for appellant:

The act is unconstitutional in so far as it applies to a superintendent of a coal mine, for the reason that the title embraces only owners or operators of mines and other employers of labor.

Indianapolis Northern Traction Co. v. Brennan, 174 Ind. 1, 30 L.R.A.(N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; Cleveland, C. C. & St. L. R. Co. v. DeFrees, 173 Ind. 717, 87 N. E. 722; Fleming v. Greener, 173 Ind. 260, 140 Am. St. Rep. 254, 87 N. E. 719, 90 N. E. 72, 21 Ann. Cas. 959; Korbly v. Loomis, 172 Ind. 352, 139 Am. St. Rep. 379, 88 N. E. 698, 19 Ann.

Note. — Constitutionality and construction of statute requiring mine owner or operator to furnish wash rooms or similar conveniences for employees.

Very little authority has been found on this question. A similar statute was before the Illinois supreme court in Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61, wherein the court held unconstitutional a statute requiring wash rooms to be maintained at the top of every coal mine. The court said that the statute could not be justified as an exercise of the police power, as it imposed burdens on mine proprietors which were not borne by other employers, *e. g.*, foundry and steel-mill proprietors, whose business was such as to render such a measure no less desirable; and that therefore the statute applied to only a few of the people suffering from the evil at which the act was aimed. It was

Cas. 904; State v. Dorsey, 167 Ind. 199, 78 N. E. 843; State ex rel. Western Constr. Co. v. Clinton County, 166 Ind. 162, 76 N. E. 986; Mewherter v. Price, 11 Ind. 199.

The title of the act is "An Act Requiring the Owners or Operators of Coal Mines . . . to Erect and Maintain," and does not justify the provision in the body of the act penalizing the refusal to "provide" a washhouse. To "provide" is not covered either by "erect" or "maintain."

Louisville, N. A. & C. R. Co. v. Godman, 104 Ind. 490, 4 N. E. 163; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Barber Asphalt Paving Co. v. Hezel, 155 Mo. 391, 48 L.R.A. 285, 56 S. W. 449; Indianapolis Northern Traction Co. v. Brennan, 174 Ind. 1, 30 L.R.A.(N.S.) 85, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503; Cleveland, C. C. & St. L. R. Co. v. DeFrees, 173 Ind. 717, 87 N. E. 722; Fleming v. Greener, 173 Ind. 260, 140 Am. St. Rep. 254, 87 N. E. 719, 90 N. E. 72, 21 Ann. Cas. 959; Korbly v. Loomis, 172 Ind. 352, 139 Am. St. Rep. 379, 88 N. E. 698, 19 Ann. Cas. 904; State v. Dorsey, 167 Ind. 199, 78 N. E. 843; State ex rel. Western Constr. Co. v. Clinton County, 166 Ind. 162, 76 N. E. 986; Mewherter v. Price, 11 Ind. 199.

The act deprives the owner or operator of property without compensation, hence it is unconstitutional unless its provisions can be justified as a valid exercise of the police power of the state.

U. S. Const. 14th Amendment; Ind. Const. art. 1, § 21; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

The operation of the statute is not made dependent upon the use of the washhouse, nor upon an agreement to use it, nor upon any conditions necessitating its erection and maintenance. This brands the act as not in the exercise of the police power, but as an arbitrary interference with rights of property.

Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61; Re Morgan, 26 Colo. 415, 47 L.R.A. 452, 77 Am. St. Rep. 269, 58 Pac. 1071; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Dobbins v. Los Angeles, 195 U. S. 223, 47 L. ed. 169, 25 Sup. Ct. Rep. 18; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431, 438; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Austin v. Murray, 16 Pick. 121; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; State v. Redmon, 134 Wis. 89, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Cooley, Const. Law, 5th ed. 393; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L.R.A.(N.S.) 102, 32 Sup. Ct. Rep. 493.

The law applies to the operators of coal mines alone, and is invalid as class legislation.

State v. Arnold, 140 Ind. 628, 38 N. E. 820; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; 23 Am. & Eng. Enc. Law, 240; State v. Hackett, 5 La. Ann. 91; Cooley, Const. Law, 5th ed. 176, 393; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Starne v. People, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61; Richardson v. Board of Education, 72 Kan. 629, 84 Pac. 538; Tiedeman, Pol. Power, § 1, p. 4; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431, 438; Cotting v. Kansas City Stock Yard Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; Sellers v. Hayes, 163 Ind. 422, 72 N. E. 119.

The act in its operation is discriminative for the reason that it gives the employees the right to require the washhouse at their own caprice, which may make the act apply to one mine, and not to another which is surrounded by similar conditions.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Re Quong Woo, 13 Fed. 229; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; St. Louis v. Howard, 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; Bennett v. Gulf, C.

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further held that the act could not be justified under a provision of the Illinois Constitution making it the legislature's duty to pass laws for the protection of operative miners, by providing for ventilation, when the same be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, —since such provision was designed to promote safety as distinguished from the health and convenience of the miners.

L.R.A.1915B.

The statute involved in BOOTH v. STATE was before the court in Hewitt v. State, 171 Ind. 283, 86 N. E. 63, where an affidavit alleging that the defendant was superintendent, but did not allege that he was in charge of the mine, was held not to satisfy the language of the statute imposing the duty as to wash rooms upon the owner, operator, lessee, superintendent, or other person in charge of every coal mine.

L. A. W.

& S. F. R. Co. — Tex. Civ. App. —, 146 S. W. 353; Gulf, C. & S. F. R. Co. v. Ellis, 70 Tex. 307, 7 S. W. 722; Rhine v. McKinney, 53 Tex. 354.

The legislature merely provides that in case a certain number of miners decide that a washhouse is needed it must be provided. The legislature cannot delegate police power to private individuals, nor make the operation of a statute contingent upon the arbitrary decision of one or more private individuals.

Rouse v. Thompson, 228 Ill. 522, 81 N. E. 1109; Bennett v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 146 S. W. 353; Gulf, C. & S. F. R. Co. v. Ellis, 70 Tex. 307, 7 S. W. 722; Rhine v. McKinney, 53 Tex. 354; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State ex rel. Omaha Gas Co. v. Withnell, 78 Neb. 33, 8 L.R.A.(N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680; Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; Little Chute v. Van Camp, 136 Wis. 526, 128 Am. St. Rep. 1100, 117 N. W. 1012; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; Smiley v. McDonald, 42 Neb. 13, 27 L.R.A. 540, 47 Am. St. Rep. 684, 60 N. W. 355; State v. Tennant, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; State v. Kuntz, 47 La. Ann. 106, 16 So. 651; Sioux Falls v. Kirby, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; State v. Mahner, 43 La. Ann. 496, 9 So. 480; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; State v. Dubarry, 44 La. Ann. 1117, 11 So. 718; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Bills v. Goshen, 117 Ind. 221, 3 L.R.A. 261, 20 N. E. 115.

It is unreasonable to require a superintendent of a coal mine to erect and maintain a washhouse at the risk of a heavy penalty involving fine and imprisonment in a county jail, when the owner of the property might be unwilling to do so, thus punishing the superintendent for not doing an impossible thing.

Durkin v. Kingston Coal Co. 171 Pa. 193, 29 L.R.A. 808, 50 Am. St. Rep. 801, 33 Atl. 237; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312.

The statute requires the erection and maintenance of a washhouse upon demand of certain employees, without specifying any time within which this demand must be complied with. This defect in the law renders it clearly unconstitutional.

Missouri, K. & T. R. Co. v. State, 100 Tex. 420, 100 S. W. 766; Sutherland, Stat. Constr. § 324; Potter's Dwarr. Stat. 246–251, 652; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; United States v. Sharp, Pet. C. C. 122, Fed. Cas. No. 16,264; The Enterprise, 1 Paine, 34, Fed. Cas. No. 4,499; Bishop, Statutory Crimes, § 41; Lieb. Herm. 156; Ex parte Jackson, 45 Ark. 158; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; Chicago, I. & L. R. Co. v. Salem, 166 Ind. 71, 76 N. E. 631; Buckles v. State, 5 Okla. Crim. Rep. 109, 113 Pac. 244; State v. Taylor, 7 S. D. 533, 64 N. W. 548; Savage v. Wallace, 165 Ala. 572, 51 So. 605; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785.

The operation of the statute is uncertain because the washhouse is to be provided only in the event of a written demand by a certain portion of the employees, and the number of employees at any particular time might not be capable of definite ascertainment.

State ex rel. Crow v. West Side Street R. Co. 146 Mo. 155, 47 S. W. 959; State v. Texas & N. O. R. Co. — Tex. Civ. App. —, 103 S. W. 653; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; Security Trust Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

Messrs. **Thomas H. Branaman, Edwin Corr,** and **James E. McCullough,** with Mr. **Thomas N. Honan,** Attorney General, for the State:

The act is an exercise of the police power of the state, and not in violation of the 14th Amendment of the Constitution of the United States.

State v. Richcreek, 167 Ind. 217, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899.

The title of the act, requiring owners and operators to "erect and maintain," embraces the provision in the body of the act "to provide."

Swartz v. Lake County, 158 Ind. 141, 63 N. E. 31; State ex rel. Duensing v. Roby, 142 Ind. 168, 33 L.R.A. 213, 51 Am. St. Rep. 174, 41 N. E. 145; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340.

A law to protect the health, safety, or

lives of the people is within the police power of the state.

Pittsburgh, C. & St. L. R. Co. v. Brown, 67 Ind. 45, 33 Am. Rep. 73; State v. Richcreek, supra; State v. Barrett, 172 Ind. 169, 87 N. E. 7; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229.

A law which provides that it may be called into exercise by petition does not violate article 1, § 25, of the Constitution of Indiana.

State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469; Isenhour v. State, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153; McPherson v. State, 174 Ind. 60, 31 L.R.A.(N.S.) 188, 90 N. E. 610.

A provision that washhouses must be provided at every coal mine renders the act free from objection as class legislation.

State v. Indiana & I. S. R. Co. 133 Ind. 69, 18 L.R.A. 502, 32 N. E. 817; Davis Coal Co. v. Polland, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492; Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153; State v. Barrett, 172 Ind. 169, 87 N. E. 7; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229; Smith v. Hamilton County, 173 Ind. 364, 90 N. E. 881; Cummins v. Pence, 174 Ind. 115, 91 N. E. 529.

Even though it be conceded that the phrase, "other employers of labor," is insufficient to bring other persons within the act, yet as it applies to all coal mines it will be presumed that all have been included that are known to exist.

State v. Barrett, 172 Ind. 169, 87 N. E. 7.

It is not class legislation, because it is required to be provided upon petition of twenty men in one case and one third of persons employed in another case. Such matters are largely within the discretion of the legislature.

Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153.

The question of the act being unreasonable or imposing a hardship is one for the legislature, and not the courts.

Townsend v. State, 147 Ind. 624, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Parks v. State, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; State v. Richcreek, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cas. 899; State v. Barrett, 172 Ind. 169, 87 N. E. 7; State ex rel. Smith v. McClelland, 138 Ind. 395, 37 N. E. 799; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; Gillett, Crim. Law, § 2.

Defendant cannot raise the question of the reasonableness of compliance with this statute.

Chicago, I. & L. R. Co. v. Crawfordsville, 164 Ind. 70, 72 N. E. 1025; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340.

The requirements of the statute are certain and definite.

State v. Louisville & N. R. Co. supra.

Erwin, J., delivered the opinion of the court:

This was a prosecution by the state of Indiana against Harry C. Booth upon an affidavit charging that appellant was a superintendent of a coal mine in the county of Sullivan, and that, after written demand of more than twenty employees of said mine, he had failed to provide a wash room for the employees of said mine, in violation of an act of the general assembly approved March 8, 1907. Acts 1907, p. 193, Burns Anno. Stat. 1908, § 8623.

The affidavit in said cause, omitting the caption, reads as follows: "Harry Ritchie, being duly sworn, says on his oath that on the 7th day of March, A. D. 1911, at and in the county of Sullivan and state of Indiana, Harry C. Booth did then and there unlawfully being then and there, and from the said day continuously up to the time of the filing of this affidavit, and being now superintendent of mine No. 25 in Sullivan county, Indiana, belonging to the Consolidated Indiana Coal Company, that at the time and place named mine No. 25 belonging to the Consolidated Indiana Coal Company was a coal mine then and there situated, in which persons were then and continuously since have been and now are employed, and that said Harry C. Booth was then and there superintendent and in charge of said mine; that twenty of the employees of said mine then and there in writing requested the said Harry C. Booth, while superintendent and in charge of said mine, to provide a wash room or washhouse for the use of persons employed in said mine; that said request was made to Harry C. Booth, and directed to him under and in the name of H. C. Booth as such superintendent, but that this defendant Harry C. Booth and H. C. Booth is one and the same person; that said Harry C. Booth, being superintendent and in charge of said mine, as aforesaid, and having been requested, as aforesaid, did then and there unlawfully fail and refuse to provide a suitable wash room or washhouse or any wash room or washhouse whatever for the use of persons employed in said mine, and that ever since said day up to the present time he has unlawfully refused, neglected, and wholly failed to provide any wash room or washhouse for the use of persons employed in said mine, contrary to the form of the statute in such cases made and provided, and against the peace and

dignity of the state of Indiana." The appellant in due time moved to quash the affidavit. His motion was, in substance, that the law under which the prosecution was brought contravenes § 19 of article 4 of the Constitution of the state of Indiana, and is in violation of the 14th Amendment to the Constitution of the United States, also is violative of § 1, art. 1, and § 21, art. 1, also § 23, art. 1, also § 25, art. 1, and § 26, art. 1, of the Constitution of the state of Indiana. The motion to quash the affidavit was overruled by the court, to which ruling of the court appellant excepted. Appellant entered a plea of not guilty, and the cause was submitted to the court for trial without the intervention of a jury, which said trial resulted in the finding of appellant guilty as charged in the affidavit. A motion in arrest of judgment was seasonably made, which motion was overruled by the court, and judgment entered, fixing the penalty at a fine of $1 and costs of the prosecution, from which judgment appellant appeals to this court. The assignment of errors in this court questions the constitutionality of the act under which the prosecution was brought.

The contention of appellant is that the title of the act limits the liability to owners and operators of coal mines, and does not include superintendents. The affidavit avers that appellant is the superintendent of a coal mine. Section 19, article 4, of the Constitution of this state, provides: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The title of the act in question reads as follows: "An Act Requiring the Owners or Operators of Coal Mines and Other Employers of Labor to Erect and Maintain Washhouses at Certain Places where Laborers are Employed for the Protection of the Health of the Employees and Providing a Penalty for its Violation." [Acts 1907, chap. 121]. The question is whether the title of the act is broad enough to include superintendents. Words and phrases shall be taken in their plain or ordinary and usual sense. Subdivision 1, § 240, Burns's Anno. Stat. 1908, Rev. Stat. 1881, § 240. The Standard Dictionary defines "operate," "to put in action and supervise the working of; to conduct or manage the affairs of; superintend; as to operate a mining business or a railroad." "Superintend" is defined by the same authority "to have the charge and direction of; especially of some work or movement; regulate the conduct and progress of; be responsible for; manage; supervise."

The words of a statute will be construed in their plain, ordinary, and usual sense, unless such construction will defeat the manifest intent of the legislature. White v. Furgeson, 29 Ind. App. 144–154, 64 N. E. 49; Coffinberry v. Madden, 30 Ind. App. 360, 363, 96 Am. St. Rep. 349, 66 N. E. 64. It is contended by appellant that the act in question, being a criminal statute, should be strictly construed. This contention is true to a limited extent. In Lewis's Sutherland Statutory Construction, vol. 2, on page 962, the author uses the following language: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is the modification of the ancient maxim, and amounts to this: That, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation, or in that sense in which the legislature has obviously used them would comprehend. The intention of the legislature is to be collected from the words they employ." The same author, on page 981, has this to say further on the same subject: "A penal statute should receive a reasonable and common-sense construction, and its force should not be frittered away by niceties and refinements at war with the practical administration of justice." To the same effect, see State v. Louisville & N. R. Co. 177 Ind. 353, 96 N. E. 340–342 and cases cited. The legislature, while not using the word "superintendent," evidently intended in the title of the act that it should apply to those having the supervision, the conduct or management, or the charge and direction of, and who should be responsible for and regulate the conduct and progress of the work of employees. We are of the opinion that the title of the act is comprehensive enough to include superintendents of mines.

Appellant presents the further question that the act in question is in contravention

of the 14th Amendment of the Constitution of the United States, in that the act denies to coal companies the equal protection of the law, and discriminates between coal mining and other classes of business; that it discriminates between the different classes of persons engaged in coal mining; deprives the defendant of his property without due process of law. The 14th Amendment does not impair the police power of the state, nor does it prohibit one class of business being regulated by special provisions. State v. Richcreek, 167 Ind. 217, 224, 228, 5 L.R.A. (N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899, and cases cited; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703–709, 28 L. ed. 1145–1147, 5 Sup. Ct. Rep. 730.

It is further insisted that the act in question is too indefinite and uncertain in its terms. It certainly cannot be said that this act is indefinite as to its terms and requirements. It could not be made more certain without setting out plans and specifications for each building required at each mine.

The appellant contends that, as the affidavit charges that he failed and refused to provide a suitable wash room, he cannot be amenable under the statute. The word "provide" means to make, procure, or furnish for future use, prepare. Standard Dictionary; Swartz v. Lake County, 158 Ind. 141–149, 63 N. E. 31.

Appellant raises the further question that the act, in requiring the defendant to furnish the washhouse, deprives the owner or operator of property without compensation, and in that respect contravenes the 14th Amendment to the Constitution of the United States. A law which protects the lives, health, safety, and comfort of employees is within the police power of the state. Pittsburgh, C. C. & St. L. R. Co. v. Brown, 67 Ind. 45–48, 33 Am. Rep. 73; State v. Richcreek, 167 Ind. 217–222, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; State v. Barrett, 172 Ind. 169–179, 87 N. E. 7; Inland Steel Co. v. Yedinak, 172 Ind. 423–433, 139 Am. St. Rep. 389, 87 N. E. 229, and cases cited; Barrett v. State, 175 Ind. 112, 93 N. E. 543.

It rests solely with the legislative discretion, inside the limits fixed by the Constitution, to determine when public safety or welfare requires the exercise of the police power. Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the Constitution. With wisdom, policy, or necessity of such an enactment they have nothing to do. 18 Am. & Eng. Enc. Law, 746; Walker v. Jameson, 140 Ind. 591–597, 28 L.R.A. 679, L.R.A.1915B. 683, 49 Am. St. Rep. 222, 37 N. E. 402, 39 N. E. 869.

Appellant insists that the act is invalid for the reason that it is for the benefit of individuals employed in a particular mine, and that its operation is left entirely to the dictation of certain persons. That a certain law may be called into exercise by petition does not violate § 25, article 1, of the Constitution. State v. Gerhardt, 145 Ind. 439, 470–472, 33 L.R.A. 313, 44 N. E. 469; Isenhour v. State, 157 Ind. 517, 521, 523, 87 Am. St. Rep. 228, 62 N. E. 40; Bowlin v. Cochran, 161 Ind. 486–489, 69 N. E. 153; McPherson v. State, 174 Ind. 60, 70–76, 31 L.R.A.(N.S.) 188, 90 N. E. 610, and cases cited. This act is not open to the infirmities suggested by appellant, in that it only applies to coal mines, and not other classes of business. This same question was raised in the case of Soon Hing v. Crowley, supra, and decided adversely to the contention of appellant. Justice Field uses the following language in the later case: "The specific regulations for one kind of business which may be necessary for the protection of the public can never be the just ground of complaint, because like restrictions are not imposed upon other business of a different kind." The same doctrine was declared in Barbier v. Connolly, supra. It will not be doing violence to any of the authorites cited by the learned counsel for the appellant to say that the question of whether the act is reasonable is one for the legislature, provided it shall operate alike on all persons of a particular class. To the same effect, see Townsend v. State, 147 Ind. 624–633, 37 L.R.A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Parks v. State, 159 Ind. 211–223, 59 L.R.A. 190, 64 N. E. 862; State v. Richcreek, 167 Ind. 217–222, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; State v. Barrett, 172 Ind. 169, 179–182, 87 N. E. 7; State ex rel. Smith v. McClelland, 138 Ind. 395–398, 37 N. E. 799; State ex rel. Terre Haute v. Kolsem, 130 Ind. 434–443, 14 L.R.A. 566, 29 N. E. 595; Gillett, Crim. Law, § 2.

If appellant had made an honest effort to comply with the law, and had proceeded within a reasonable time, after being petitioned as alleged in the affidavit to erect the washhouse, he might with good grace present the argument that the statute makes no provision as to when he must comply with the act. The affidavit alleges that he was petitioned on March 7, 1911, and that he had failed to comply with the request for more than a year, or until March 11, 1912. Chicago, I. & L. R. Co. v. Crawfordsville, 164 Ind. 70–74, 72 N. E. 1025; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340–344. The provision of

the law is a salutary one, and is no more unreasonable than the provision of the law which requires that mines shall be guarded, lighted, and ventilated. This act has to do with the comfort, health, and care of the employees of mines, and is within the legislative discretion. State v. Barrett, 172 Ind. 169–179, 87 N. E. 7. The true test of a criminal law as to its effect is that it shall state the crime with such certainty that the person upon whom it operates may, with reasonable certainty, ascertain what the statute requires to be done. In the case of Tozer v. United States (C. C.) 4 Inters. Com. Rep. 245, 52 Fed. 917, Chief Justice Brewer uses the following language: "But, in order to constitute a crime, the act must be one which the party is able to know in advance, whether it is criminal or note." The act in question has this provision as to the washhouse: "To provide a suitable wash room or washhouse for the use of persons employed, so that they may change their clothing before beginning work, and wash themselves and change their clothing after working. That said building or room shall be a separate building or room from the engine or boiler room, and shall be maintained in good order, be properly lighted and heated, and be supplied with clean, cold and warm water, and shall be provided with all necessary facilities for persons to wash, and also provided with suitable lockers for the safe-keeping of clothing." All these provisions of the statute are so definite and certain in their terms that no one who makes an honest effort to comply therewith need err. Each of the questions presented by appellant in his assignment of errors, except the single one as to whether this act contravenes § 19, article 4, of the Constitution, has already been decided by this court in State v. Barrett, 172 Ind. 169, 87 N. E. 7; State v. Louisville & N. R. Co. 177 Ind. 553, 96 N. E. 340; Barrett v. State, 175 Ind. 112, 93 N. E. 543; Hirth-Krause Co. v. Cohen, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914C, 708. These opinions are able and exhaustive discussions of the constitutional questions presented by appellant in this cause, and were decided adversely to the contention of appellant. To extend this opinion would be to reiterate what has already been decided in the cases last above cited.

We are of the opinion that the title of the act is comprehensive enough to include superintendents, and that the act does not contravene any of the provisions of the Constitution of the United States, or of this state, as claimed by appellant.

Judgment affirmed.

Petition for rehearing denied, April 15, 1913.

L.R.A.1915B.

UTAH SUPREME COURT.

JOE FURKOVICH, Respt.,
v.
BINGHAM COAL & LUMBER COMPANY, Appt.

(— Utah, —, 143 Pac. 121.)

Negligence — unloading coal near decline.

1. One who shovels coal from a wagon to the ground, near the unprotected edge of a steep decline at the bottom of which are dwelling houses, without exercising any care to prevent it from going over the edge, is liable for injury to a person while at work near a house, by a piece of coal which goes over the edge and rolls down the decline.

Evidence — injury by rolling coal — inference.

2. That a person unloading coal from a wagon near the top of a decline placed a piece where it could roll down the decline may be inferred from the fact that it did so roll down to the injury of a person at the foot of the decline, where no other cause was apparent.

Appeal — instruction — duty as to reasonable care.

3. Failure to give to the jury an instruction that one charged with negligently injuring another was bound to exercise only reasonable or ordinary care, with nothing to show the relation of such terms to the facts of the case, is not error.

Proximate cause — foreseen injury.

4. To render one who permits coal to roll down a mountain side to the injury of one dwelling at the foot, liable for the injury, it is not necessary that he should have foreseen that such injury would happen, if the injury was the natural and probable consequence of his act.

(August 14, 1914.)

Note. — Negligence; permitting articles to roll down hillside or decline.

Cases between master and servant will be found in the note as to duty of master to protect servant from material rolling down hillside, attached to Paulsen v. Feroglio, 46 L.R.A.(N.S.) 629, and so have not been included here.

The decision in FURKOVICH v. BINGHAM COAL & LUMBER CO., that one is liable for the natural and probable consequences of a failure, in placing an object at the top of a decline, to exercise care to prevent its rolling down, finds support in Howe v. West Seattle Land & Improv. Co. 21 Wash. 594, 59 Pac. 495, where one placing a log on the side of a hill with knowledge that landslides occur frequently at such place was held liable when, as a result of a landslide the log was dislodged, rolled down the hill, and, striking a child at the bottom, killed it.

The facts in this case were that a tree growing upon the land of said company

APPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Dan B. Shields and Snyder & Snyder, for appellant:

The injury to plaintiff was one of those unfortunate accidents which would not have been foreseen or anticipated by the exercise of ordinary care, and therefore one for which defendant is not liable.

Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 135, 22 So. 675; Mayhew v. Yakima Power Co. 72 Wash. 431, 130 Pac. 486.

The jury should have been told that they must look at the entire situation as it appeared and was disclosed by all the evidence, and then make up their verdict without indulging any presumption of negligence on the part of defendant.

Christensen v. Oregon Short Line R. Co. 35 Utah, 142, 20 L.R.A.(N.S.) 255, 99 Pac. 676, 18 Ann. Cas. 1159, 1 N. C. C. A. 232; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336.

It was incumbent upon plaintiff "to give some evidence establishing, or tending to

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was cut down to prevent endangering the lives of passers-by. Shortly after, a slide occurred on the hillside, bringing down the stump from which the tree was cut, and a large amount of dirt, filling up the road to a considerable depth and carrying the tree on to the sidewalk. The deputy road supervisor, together with two men sent by the improvement company for the purpose of clearing out the road, cut the tree up into a log. This log was, by the three men, placed parallel with the road and about 10 feet distant therefrom, on the side of the hill, against small standing trees. The log remained in that position for several days when another slide occurred, bringing down a large amount of dirt from the hillside above, a portion of it sweeping over the road and upon the log, dislodging it, and it was driven to the bottom of the hill, where it struck the child. It was contended that the work was under the supervision of the road supervisor whose duty it was to remove the obstruction, and so the company was not liable; but the court said that it appears from the undisputed testimony that the company was the original cause of the log being in the street, and so it was the company's duty, having obstructed a public highway, to remove such obstruction. That the testimony did not show who specially superintended the moving of the log from the road, but it simply shows that the agents of the county and the agents of the company removed it: that the log was not left in the road, but was placed parallel with the road, some 10 feet therefrom, not for the purpose of mending the road, but solely for the purpose of disposing of the log, so if it be true that the log was placed there by the agents of the company, although assisted by the agents of the county, in such a negligent manner that it worked injury to anyone, the company cannot escape responsibility. It will be seen, also, that the decision turns in great part upon the fact that the company ought to have anticipated that landslides would have occurred at this point, and that there was great likelihood that if any object touched the log, it would be dislodged from the position where it was placed. L.R.A.1915B.

So, also failure to exercise care in the piling alongside the public highway of a large amount of slack dirt, small coal, and other refuse from a mine was the proximate cause of an injury, so as to make the mine owner liable where a horse, being driven past this material, was frightened at the burning and sliding down of the material, ran away, and the driver was injured, the evidence showing that the mining company knew that it was the nature of such material to take fire and burn at and near the bottom and along the sides, and, after so burning, large portions would slide down the sides, making a loud noise and emitting smoke. Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38.

Also one who gives an assurance of safety is liable. Thus a railroad construction company is liable to an indepedent contractor engaged upon such work for injuries sustained by a rock sliding down from a ledge above where he was working in reliance upon the construction company's foreman that there was no danger from the falling of rocks. Gibson v. Chicago, M. & P. S. R. Co. 61 Wash. 639, 112 Pac. 919.

In Salina Mill & Elevator Co. v. Hoyne, 10 Kan. App. 579, 63 Pac. 660, where there was implied assurance of safety the milling company was held liable for injuries sustained by one getting feed at the mill, occasioned by his being struck by bags of feed which were delivered to him with great force through a chute, the evidence showing that the milling company's employee who delivered the feed to the plaintiff directed him to drive his wagon under the chute to receive the feed, without apprising him that the chute was so constructed that the bags of feed, when they came down the chute, would come with sufficient velocity to knock the plaintiff out of his wagon, and there was nothing apparent to warn the plaintiff of his danger; the court stating that, being directed to drive under the chute and receive his load without intimation of danger, he might, without negligence being attributed to him by reason thereof, assume that it was safe to do so.

Nor was it material that the chute in use was the kind in general use by others,

establish, negligence on the part of the defendant, and it was not sufficient for his case to merely prove the accident."

Duhme v. Hamburg-American Packet Co. 184 N. Y. 404, 112 Am. St. Rep. 615, 77 N. E. 386, 20 Am. Neg. Rep. 161; Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 1 L.R.A.(N.S.) 298, 52 S. E. 121.

Defendant owed no duty to plaintiff, or anyone similarly situated, except to use ordinary care commensurate with the entire situation and surroundings.

McKeon v. Louis Weber Bldg. Co. 84 N. Y. Supp. 913; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 134, 22 So. 675; Heffernan v. Arnold, 48 App. Div. 419, 63 N. Y. Supp. 261; Wilkinson v. Oregon Short Line R. Co. 35 Utah, 115, 99 Pac. 466.

Defendant had the right to have its theory of the case submitted to the jury.

Downey v. Gemini Min. Co. 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414; McKinney v. Carson, 35 Utah, 180, 99 Pac. 660; Jones v. Caldwell, 20 Idaho, 5, 48 L.R.A.(N.S.) 119, 116 Pac. 113; West v. Shaw, 61 Wash. 227, 112 Pac. 243; Tigerman v. Butte, 44 Mont. 138, 119 Pac. 477; Chicago Union Traction Co. v. Hansen, 125 Ill. App. 153; San Antonio Mach. & Supply Co. v. Campbell, — Tex. Civ. App. —, 110 S. W. 770.

The fact that the accident could have been avoided by the adoption of some other means of protection raises no presumption of negligence, and the standard of due care is that of the average prudent man.

Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. Supp. 670; Kilbride v. Carbon Dioxide & Magnesia Co. 88 Am. St. Rep. 829, note.

Mr. **Willard Hanson**, for respondent:

The rolling of the coal down the mountain side raised a presumption of negligence on the part of the defendant.

Shearm. & Redf. Neg. 6th ed. § 59; Scott v. London Dock Co. 3 Hurlst. & C. 596, 34 L. J. Exch. N. S. 220, 11 Jur. N. S. 204, 13 L. T. N. S. 148, 13 Week. Rep. 410; Sheridan v. Foley, 58 N. J. L. 230, 33 Atl.

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as this was an action between the milling company and a stranger to it, and not one between employer and employee. Ibid.

Liability of railroad company for injury to passenger caused by rocks rolling down hillside.

A railroad company is not liable for injuries to a passenger by a bowlder rolling down a mountain side, if it is not shown to have come from the company's right of way, and no negligence is shown on the part of the company. LeDeau v. Northern P. R. Co. 19 Idaho, 711, 34 L.R.A.(N.S.) 725, 115 Pac. 502, Ann. Cas. 1912C, 438, 3 N. C. C. A. 505.

A railroad company will not be held liable for an injury inflicted on a passenger by reason of a stone rolling down the mountain side and striking the passenger, unless it is shown that the company had either actual notice of the danger, or that the place or immediate locality from which the rock fell was so obviously dangerous as to impute notice of the danger to the railroad company and charge it with negligence in failing to take reasonable precautions to prevent an injury from such cause. Ibid.

No presumption of negligence arises, but it is incumbent on the party seeking relief to prove negligence in case of injury to a passenger by a bowlder rolling down a mountain side, where the evidence clearly discloses that the injury was not caused by any defect in the machinery or appliances used by the company in the operation of its road, or by any defect in the operation of its road, or by any defect in the construction of the road, and was not caused by any act of the employees of the company or of any person in charge of the train.

And no presumption of negligence on the part of a railroad company arises from injury to a passenger by the fall upon a train of a rock which became detached from its natural hillside more than 300 feet from the top of the cut through which the railroad ran. Fleming v. Pittsburgh, C. C. & St. L. R. Co. 158 Pa. 130, 22 L.R.A. 351, 38 Am. St. Rep. 835, 27 Atl. 858.

The court distinguished this case from cases where the cause of the accident was connected with the means and appliances of transportation and the construction of the road.

But in Goller v. Fonda, J. & G. R. Co 110 App. Div. 620, 96 N. Y. Supp. 483, where a passenger was injured by a stone which fell or rolled from a rock cut through which the car was passing, the decision, reversing judgment in favor of plaintiff, was based on the improbability of plaintiff's version as to how he was injured; it being evident that had the injury occurred as he stated, the railroad company would have been held liable. This case is distinguishable from the LeDeau and Fleming Cases, as, if it may be presumed that there would have been liability in case the plaintiff's version of the accident was accepted, the liability would probably be based upon the fact that there was evidence that stones had recently fallen or rolled from the rock cut, and that watchmen had at times been stationed at that place.

It will be noted that the decisions in the Fleming and LeDeau Cases were predicated, in part at least, on the fact that the object occasioning the injury had come from without the railway company's right of way; whether or not the stone occasioning the injury in the Goller Case came from without the company's right of way is not disclosed by the evidence.

484; Bahr v. Lombard, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167, 16 Am. Neg. Cas. 689; Byrne v. Boadle, 2 Hurlst. & C. 722, 33 L. J. Exch. N. S. 13, 9 L. T. N. S. 450, 12 Week. Rep. 279; Kearney v. London, B. & S. C. R. Co. L. R. 5 Q. B. 411; Clare v. National City Bank, 1 Sweeny, 539; Volkmar v. Manhattan R. Co. 26 Jones & S. 125, 9 N. Y. Supp. 708; Maher v. Manhattan R. Co. 53 Hun, 506, 6 N. Y. Supp. 309; Morsemann v. Manhattan R. Co. 16 Daly, 249, 32 N. Y. S. R. 61, 10 N. Y. Supp. 105; Cahalin v. Cochran, 1 N. Y. S. R. 583; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Briggs v. Oliver, 35 L. J. Exch. N. S. 163, 4 Hurlst. & C. 403, 14 L. T. N. S. 412, 14 Week. Rep. 658; Lyons v. Rosenthal, 11 Hun, 46; Kaples v. Orth, 61 Wis. 531, 21 N. W. 633; Cummings v. National Furnace Co. 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Thomas v. Western U. Teleg. Co. 100 Mass. 156; Howser v. Cumberland & P. R. Co. 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906; The Joseph B. Thomas, 46 L.R.A. 58, 30 C. C. A. 333, 56 U. S. App. 619, 86 Fed. 658, 4 Am. Neg. Rep. 105; Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379, 6 L.R.A.(N.S.) 800, 113 Am. St. Rep. 980, 78 N. E. 529, 20 Am. Neg. Rep. 186.

If all other dealers had been negligent that would not excuse defendant's negligence.

Jenkins v. Hooper Irrig. Co. 13 Utah, 100, 44 Pac. 829; Koester v. Ottumwa, 34 Iowa, 41; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356; Hill v. Winsor, 118 Mass. 251; Blanchette v. Holyoke Street R. Co. 175 Mass. 51, 55 N. E. 481, 7 Am. Neg. Rep. 64; Miller v. Pendleton, 8 Gray, 547; Pulsifer v. Berry, 87 Me. 405, 32 Atl. 986; Kelley v. Parker-Washington Co. 107 Mo. App. 490, 81 S. W. 631; Metzgar v. Chicago, M. & St. P. R. Co. 76 Iowa, 387, 14 Am. St. Rep. 224, 41 N. W. 49; Bailey v. New Haven & N. R. Co. 107 Mass. 496.

Frick, J., delivered the opinion of the court:

This was an action in tort to recover

Generally as to presumption of negligence from occurrence of an accident, see Index to L.R.A. Notes, "Evidence," III.

Where during the process of excavation on land adjoining a highway a great mass of rock and earth is suddenly and without warning loosened, and falls with a tremendous noise accompanied by a great quantity of dust, and a fragment of rock strikes a traveler on the highway, there arises a presumption of negligence in the absence of proof to the contrary. Scott v. Hough, 47 Hun, 634, 14 N. Y. S. R. 401.

But the maxim, *res ipsa loquitur*, is not applicable to an accident caused by the breaking of a rope used by a lumber company to draw lumber up a skid on to a car, causing the lumber to roll down the skid and injure a lumber inspector in the employ of the railway company. Nebraska Bridge Supply & Lumber Co. v. Jeffery, 95 C. C. A. 137, 169 Fed. 609.

The evidence offered in this case did not explain the cause of the parting of the rope, but it did show that the rope had been recently purchased, and had only been used on one occasion prior to this time, and then for the purpose of securing a raft of logs in the river; that it was a manila rope, and at the time it was purchased was carefully inspected, and was of the usual size for the purpose for which it was then used, and was apparently in good condition.

The court stated that, conceding that the maxim, *res ipsa loquitur*, is not and should not be confined to cases of contractual relations, still the plaintiff's case was not aided, for that doctrine is based upon the general consideration that, where the management and control of the instrumentality which occasioned the injury are in the defendant, it is within the defendant's power to produce evidence of the actual cause of the accident, which the plaintiff may be unable to produce.

And even though the doctrine, *res ipsa loquitur*, were applicable to such an accident, where sufficient evidence is offered on behalf of defendant tending to rebut any presumption of negligence on his part, the submission of that question to the jury is not warranted. Ibid.

So, also, in Groarke v. Laemmle, 56 App. Div. 61, 67 N. Y. Supp. 409, where a heavy milk wagon which had been left in a sloping courtyard, with the shafts resting on the top of the fence on which hooks on the underside of the shafts could catch, the evidence being conflicting as to whether the wagon was held by a small piece of brick less than half under one wheel as testified by plaintiff, or whether it was secured by wooden chocks or blocks under the front wheel and by a brick under each hind wheel, the wagon standing there without further fastening from 11 A. M. until about 7 o'clock in the evening, when, without warning, it ran backwards across the yard and struck a boy who was returning home across the court yard;—it was held that the doctrine of *res ipsa loquitur* did not apply, but that it was incumbent upon the plaintiff to show that the chocks which the defendant used to hold the wagon in place were insufficient for that purpose, or that the bricks which held it were crushed or pushed out of place by the weight which came upon it; that he bore the burden of showing some circumstance or circumstances from which the jury would be authorized to infer the cause of the accident, and that such cause was one for which the defendant was responsible. J. H. B.

damages for personal injuries. The plaintiff, respondent in this court, after alleging the necessary matters of inducement in his complaint, in substance, alleged, that on September 12, 1912, the defendant, appellant here, negligently and carelessly unloaded a wagon of coal on a "steep mountain side," and carelessly and negligently failed and omitted to place any safeguards or barriers to prevent said coal from "rolling down said steep mountain side," and carelessly and negligently omitted taking any other precautions to keep said coal from rolling down said mountain side; that in unloading said coal it was so carelessly and negligently done that a piece thereof "rolled and bounded down said mountain side," struck the plaintiff, who lived down the mountain side and in the vicinity where the coal was being unloaded, severely injuring him. The appellant in its answer admitted "that it was engaged in unloading coal at the time and place stated in the complaint, and that the plaintiff lived in the vicinity where said coal was being unloaded." It was also admitted in the answer "that the hillside below where said coal was unloaded is steep, but [appellant] alleges that the place where said coal was unloaded is a flat place, due to a widening of the grade of the wagon road at said point, and the unloading of coal at said point in the way it was being done was not obviously or inherently dangerous." It was further admitted that said coal was "unloaded by shoveling the same out of the wagon in which it was contained" onto the ground. Appellant denied all acts of negligence, and pleaded contributory negligence on the part of respondent. Upon these issues a trial to a jury resulted in a verdict and judgment in favor of respondent. The appellant has preserved all the evidence adduced at the trial in a proper bill of exceptions, and, among other things, now insists that the evidence is not sufficient to sustain the verdict and judgment.

The evidence produced on behalf of respondent at the trial is, substantially, as follows: That on September 12, 1912, respondent lived with his wife in a small house in what is called a gulch in Bingham canyon, about 200 feet distant, and down a steep incline from the point where the load of coal mentioned in the pleadings was being unloaded by one Davis, an employee of the appellant; that the coal was being unloaded at a place where appellant and others had frequently before unloaded coal for the use of those who lived in the gulch aforesaid, of whom there were quite a number of families who lived there in small houses; that the coal and other things were unloaded at the place aforesaid, for the reason that there was no way to reach the small houses by team and wagon, and hence said coal and other things were usually unloaded, that is, delivered, on top of the mountain as aforesaid, and those who purchased coal would get it there and take it down the mountain to their homes. On September 12, 1912, the exact time of day is not disclosed, the respondent and one Sabine were digging a small cellar in the rear of respondent's house. When they were about through, and just after Sabine had left the cellar, he noticed a large piece of coal rolling down the steep incline of the mountain, which incline was shown to be from 36 to 40 degrees. The coal was coming fast in the direction of respondent, and Sabine shouted to him to get out of the way. Respondent dodged to get out of the way of the lump of coal, but it struck him, grazing his head and striking him on the arm, breaking it. Respondent became unconscious from the blow, and was immediately taken into the house by his wife and Sabine. Sabine and respondent's wife immediately (within five minutes they state) went up the trail to the top of the mountain where the coal was being unloaded, and they found Davis in the wagon, in which there still was some coal left. There was what they called a "big pile" unloaded on the ground. Respondent's wife testified that the edge of the pile of coal was about 2 feet from the margin of the highway or flat place where the coal was being unloaded, that is about 2 feet from the brink of the steep incline of the mountain. Both Sabine and respondent's wife testified that there was no barrier or protection of any kind placed around the edge of the road where the coal was thrown from the wagon, to prevent any pieces from rolling down the mountain side towards the houses in which the people were living in the gulch below. The lump of coal which rolled down the mountain side was produced in court and exhibited to the jury, but its size or shape is not disclosed. The only other evidence produced by the respondent related to the character and extent of his injuries and the damages sustained by him. When respondent rested, appellant interposed a motion for a nonsuit upon the ground, among others, that respondent had failed to establish negligence on its part. The motion was overruled, after which appellant produced some evidence to the effect that the flat place where the coal was unloaded was larger in extent or area than testified to by respondent's witnesses, and that the coal was further away from the edge or margin of the mountain brink. No explanation was offered respecting the unloading of the coal, or how it

happened that the piece in question passed beyond the margin of the highway and rolled down the mountain side.

Appellant contends that the court erred in overruling its motion for nonsuit. In considering that question it must be remembered that appellant admitted the unloading of the coal in question. While the admission is not couched in that particular form, yet the admission is that it unloaded coal "at the time and place" stated in the complaint, and the evidence is clear that no one else unloaded or handled coal at the time and place mentioned; hence the admission is to the effect that appellant unloaded the coal in question. It is admitted, therefore, that appellant unloaded the coal by shoveling it from the wagon onto the ground near the margin of the steep mountain side, and at a place in the vicinity of which there lived a number of families in small houses, which were some 200 feet down the mountain side, and the evidence is not disputed that the incline or slope of the mountain at that point was from 36 to 40 degrees. If, therefore, any object, such as a stone or a piece of coal of any considerable size, the shape or form of which was round, or nearly so, were thrown to or near the margin, or where it would bound and land so near the margin of the highway on the mountain that by reason of its high specific gravity the force of gravitation would cause it to roll down the incline of the mountain, it in all probability would become a source of danger to anyone who might be in its pathway. Every sane person is charged with knowledge respecting the properties of matter and the natural laws of nature. Every person who is handling objects which are affected by the law or force of gravity is charged with the knowledge that if he permits such objects to fall or to be where the force of gravity will cause them to move downward, anyone who may be in the pathway of such an object, while in motion, may be injured. If, therefore, a person, where he has a right to be, is injured by such a moving object, he is not required to prove any particular act of negligence on the part of the person in whose care and under whose control the object in question was before the injury occurred, but, under such circumstances, it is sufficient that the injured person prove the facts from which negligence may be inferred. In the case at bar the respondent proved that appellant was handling a substance of high specific gravity; that it was thrown from a wagon onto the ground near the margin of a steep incline, and where if it moved or rolled beyond the margin, the immutable laws of nature would cause it to continue to roll or move with accelerated speed and force down the mountain side, and thus might, and probably would, inflict injury upon any living being in its pathway. Then again, all men, the jury included, are bound to know that it is a universal and unchangeable law of nature that if any substance of any considerable size and specific gravity is placed at rest it will so continue until it is started in motion by some physical force or power. The inference, therefore, that Davis, who was unloading the coal, caused the piece in question to be precipitated over the edge of the margin of the mountain is not only natural and logical, but it is one of great probative force. The jury, therefore, were not only justified in inferring or presuming that Davis, in unloading the coal, placed it where by the forces of nature it would roll down the mountain side, but it seems to the writer they could not well have arrived at any other logical conclusion. Being charged with knowledge that if so placed the coal would, nay, must, roll down the mountain side to a place where people were living, the jury had a right to infer that it was through the negligence of Davis that it was so placed. Where a person is working on a building, wall, or scaffold which extends any considerable height above the surface, and has in his possession and under his control tools, or other objects, which he permits to fall from the building, wall, or scaffold, by reason of which injury is inflicted on another, negligence may be inferred or presumed from the mere fact of the falling of the objects aforesaid. See Sheridan v. Foley, 58 N. J. L. 230, 33 Atl. 484; Armbright v. Zion, 108 Iowa, 338, 79 N. W. 72; Melvin v. Pennsylvania Steel Co. 180 Mass. 196, 62 N. E. 379, 11 Am. Neg. Rep. 1. See also note to Barnowski v. Helson, 15 L.R.A. 33, where a large number of cases are collated. There is no difference in principle between objects handled on a building, wall, or scaffold and those that are thrown or placed near a precipitous or steep incline. Whatever difference there is in that regard is one of degree, and not of kind. The foregoing cases, therefore, are strictly in point here.

In this case there is, however, another fact or circumstance which the jury were authorized to consider in determining whether appellant was negligent or not in the premises. The fact is uncontroverted that no effort whatever was made to prevent any stray piece of coal that might bound away from the other coal, or in some other way get near the brink of the steep incline, from going beyond it and down the mountain side. That some barrier or protection could have been placed along the

edge of the road to prevent pieces of coal from going down the mountain side, and that such could have been done without practically any effort or expense, is so palpable that merely to mention the fact is sufficient. Where a dangerous condition is easily obviated or rendered harmless, a failure to do one or the other may be considered in determining the question of negligence. See Swan v. Salt Lake & O. R. Co. 41 Utah, 518, 127 Pac. 267, where the principle is applied, and where the cases on the point are referred to. We are clearly of the opinion that the evidence was sufficient to justify a finding of negligence upon the part of appellant, and that under the circumstances the duty was cast upon it to offer some explanation of how the coal came to pass beyond the margin of the highway and down the mountain side. While, as we have pointed out, appellant offered some evidence with regard to the size or area of the place where the coal was being unloaded, it offered none whatever to explain the accident.

In view of the foregoing the court charged the jury as follows: "You are instructed that if you should find from a preponderance of the evidence that the piece of coal which rolled down the mountain side and struck the plaintiff was a part of the coal being unloaded by the defendant at the time and place alleged in plaintiff's complaint, the rolling of such piece of coal down the steep mountain side raises a presumption of negligence on the part of the defendant, and unless you should find from all the evidence in the case that such presumption is overcome, you should find for the plaintiff."

Appellant excepted to the foregoing instruction, and now insists that the court erred in so charging the jury. If what we have said respecting the inference or presumption of negligence is correct, then it follows that the court did not err in giving the charge excepted to. What we have already said, therefore, respecting the principle involved in the charge disposes of this contention.

It is also insisted that the court erred in refusing a number of requests to charge offered by appellant. It offered 13 requests, all of which the court refused. We have carefully examined all of them, and each one contains some fault. In view of the great length of the requests just referred to we shall not set them forth here; nor would it serve any useful purpose to do so. It must suffice to say that because of the inherent defects contained in each request the court was fully justified in refusing to give any of them.

It is, however, urged that the court erred because it did not in its charge define the duty or care the law imposed upon appellant in unloading the coal at the time and place in question. Upon an examination of the court's charge we find that the contention is well founded. It is urged as error, therefore, that the court refused to give the following request: "The defendant was only charged with the exercise of ordinary care, and where reasonable care is employed in doing a thing not itself liable or inherently likely to produce damage to others, there is no liability, although damage in fact ensues. Reasonable care does not require such protection as will absolutely prevent or render accidents impossible, nor is the doing of an act necessarily negligent because there may have been a safer method of performing it."

We do not think the court erred in refusing this request. Merely to tell the jury that one is only required to "exercise ordinary care" or "reasonable care" in "doing a thing" imparts no information to the jury. Such a charge in no way helps them in arriving at a correct result. In charging a jury it should always be kept in mind that what may be ordinary care, or reasonable care, under certain facts or conditions may not be such under other facts or conditions. "Ordinary care" is a relative term, and whether certain acts or omissions constitute ordinary care must be determined from all the facts and circumstances. Ordinary care must always measure up to the particular danger that is present and which is to be met or avoided by the exercise of care. The question to be met is, What is the standard of duty that the law imposes in view of the particular facts and circumstances? The standard is ordinarily expressed by the phrase, "ordinary care," or "reasonable care," but the care, whatever it is termed, must always respond to and be commensurate with the degree of danger that is to be avoided. While the request, therefor, states an abstract legal principle, it is not at all adapted to the particular facts and circumstances of the case at bar. A charge should be adapted to the facts and circumstances of the case on trial, and not merely embody a correct abstract legal principle. In this case the jury should have been told that it was the duty of appellant to exercise ordinary care, through its employee Davis, in unloading the coal, so as to prevent any large piece thereof from rolling down the mountain side; and if the jury, from a preponderance of the evidence, found the fact to be that appellant did not exercise ordinary care, that is, such care as men of ordinary prudence usually exercise under like or similar circumstances, either in unload-

ing the coal or in omitting to do some act by which the coal would have been prevented from rolling down the mountain side, then the jury would be justified in finding appellant guilty of negligence. In view that the request referred to imparted no practical information to the jury we do not see how the appellant could have been prejudiced by the court's refusal to charge as requested. While it is the duty of the courts to inform the jury respecting the legal duty imposed by law upon the respective parties, yet a party who may offer a request upon a subject which is refused cannot predicate error upon the refusal, unless the request is in all respects a proper one to be given, and is applicable to the facts of the case on trial.

But it is also asserted that the verdict and judgment are erroneous because Davis was not required to foresee the consequences which resulted from the piece of coal rolling down the mountain side. Counsel in that connection contend that, in order to fasten responsibility upon the party charged with negligence "it must appear that the result must have reasonably been foreseen by a person of reasonable care and prudence, to be the probable consequences of doing the particular thing in the particular way it was done."

We have had occasion to pass upon the ordinary test of liability respecting consequences flowing from a particular act. In Stone v. Union P. R. Co. 32 Utah, 205, 89 Pac. 722, Mr. Justice Straup states the rule thus: "But the test of liability is not whether, by the exercise of ordinary prudence, the defendant could or could not have foreseen the precise form in which the injury actually resulted, but he must be held for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act. If the act is one which the party, in the exercise of ordinary care, could have anticipated as likely to result in injury, then he is liable for any injury actually resulting from it, although he could not have anticipated the particular injury which did occur."

A number of cases are there cited and reviewed in support of the doctrine. If we apply the test outlined above, how can appellant escape liability? It would seem that the most ordinary intelligence must have foreseen that if a stone or a large piece of coal should be permitted to roll down a steep mountain side, at the foot of which there are a number of dwellings with people living therein, injury would probably happen to someone.

The judgment is affirmed, with costs to respondent.

McCarty, Ch. J., and **Straup**, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

JOHN NOONEY, Plff. in Err.,
v.
PACIFIC EXPRESS COMPANY.

(125 C. C. A. 474, 208 Fed. 274.)

Master and servant — duty to furnish servant with safe horse.

1. An express company is not relieved from liability for injury to a delivery man by the kick of a horse furnished him for use in the business, by the fact that it did not know of the propensities of the horse to kick, if it brought the horse without training from the country to the terrifying environment of the city; but liability is governed by its duty to use reasonable care to furnish the servant with a reasonably safe instrumentality with which to perform his work.

Evidence — negligence — unsafe horse.

2. An express company may be found to be negligent in directing a delivery man who drives single a country horse which has not been broken to city streets, after using it a couple of days as part of a team, during all of which time it behaved badly.

Master and servant — assumption of risk — unbroken horse.

3. The driver of an express wagon does not assume the risk of injury in obeying the direction of his employer to drive a country horse which has not been broken to city streets a second day, after reporting its bad behavior on the first day of trial.

(October 1, 1913.)

Note. — Duty and liability of master to servants in respect to animals owned or used by master.

As to master's liability for injury by horse when used by servant for his own business or pleasure, see note to Hayes v. Wilkins, 9 L.R.A.(N.S.) 1033.

As to liability of master to servant for personal injuries by wild animal, or animal kept for exhibition purposes, see the note to Gooding v. Chutes Co. 23 L.R.A. (N.S.) 1071.

A master who knowingly and without warning furnishes a vicious horse to a servant who does not know of its disposition is liable to the servant for injuries thereby caused. Berenson v. Butcher, 209 Mass. 208, 95 N. E. 220. There is an assumption to the same effect in Scanlon v. Cavanaugh, 210 Mass. 291, 96 N. E. 526, holding that the evidence was sufficient to warrant a finding that a horse furnished by the mas-

ERROR to the District Court of the United States for the Eastern Division of the Eastern District of Missouri to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Hook and Smith, Circuit Judges, and Amidon, District Judge.

Messrs. **W. B. Thompson and Ford W. Thompson**, for plaintiff in error:

As soon as the owner knows, or has good reason to believe that the animal is likely to do mischief, he must take care of it. The only restriction is that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of.

Cockerham v. Nixon, 33 N. C. (11 Ired. L.) 269; Ingham, Animals, p. 398; Jenkins v. Turner, 1 Ld. Raym. 109; Blackman v. Simmons, 3 Car. & P. 138; Hartley v. Harriman, 1 Barn. & Ald. 620, Holt, 617, 2 Starkie, 212.

Messrs. **J. L. Minnis and Moses N. Sale**, for defendant in error:

If domestic animals are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such injury, unless he knows that the animal is accustomed to be vicious; and such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal

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ter had the habit of running away and that the master knew thereof; and also in Leonard v. Donohoe, 142 N. Y. Supp. 1079, involving an action by a servant for injuries caused by the kick of a horse, and holding the evidence sufficient to show that the horse was vicious and that the master had knowledge of that fact.

It is the master's duty to exercise ordinary care to furnish his servant with a reasonably gentle and safe animal, suitable for the performance of the service required; and it is negligence for the master knowingly to furnish the servant for use in the course of his employment a mule which is dangerous and vicious, if the servant is ignorant of its character, and the defendant fails to inform him. Stutzke v. Consumers' Ice & Fuel Co. 156 Mo. App. 1, 136 S. W. 243.

It is as much the duty of a master who uses mules in his work to furnish safe mules as it his duty to furnish safe tools; and where a servant is ordered to use a mule, by a person in authority who either knows it to be unsafe, or makes no effort to ascertain whether it is safe or not, the servant may recover for injuries resulting from the dangerous character of the mule. Sloss-Sheffield Steel & I. Co. v. Long, 169 Ala. 337, 53 So. 910, Ann. Cas. 1912B, 564.

Where a servant is required to use a horse which both the master and the servant know to be vicious, the master is bound to furnish a suitable harness to make the use of such an animal reasonably safe; and the servant may recover for injuries resulting from the use of a harness which he did not know, but the master knew, to be defective. Cooper v. Portner Brewing Co. 112 Ga. 894, 38 S. E. 91, 9 Am. Neg. Rep. 457.

A declaration alleging that the servant was injured by a vicious mule furnished by the master is sufficient after verdict, although it shows that plaintiff gained knowledge of its viciousness, where it appears that his injury had occurred while obeying a command of the master. Buck v. Citizens' Coal Min. Co. 163 Ill. App. 637, affirmed in 254 Ill. 198, 98 N. E. 228. L.R.A.1915B.

The liability of the master for injuries inflicted by a mule which the master, with knowledge that it was vicious, ordered a servant to use, cannot be made to depend upon the question whether its propensity was the result of a desire to injure human beings as distinguished from mere ill-temper. Manufacturers' Fuel Co. v. White, 228 Ill. 187, 81 N. E. 841.

A right of action for negligence at common law is stated by a complaint alleging that the master knowingly furnished a horse which was dangerous and unfit to be used by reason of a large sore upon its breast, which was irritated and made worse by the rubbing of a collar upon it, thus making the horse restless, nervous, vicious, and liable to kick. Finley v. Conlan, 152 App. Div. 202, 136 N. Y. Supp. 565. In this case the court said that if "it was to be reasonably anticipated that a horse might kick if one attempted to drive it when the harness pressed upon and irritated a sore upon his breast, the existence of which was known to defendant, and if under such circumstances defendant required plaintiff to make use of the horse, then he might be found to be negligent."

Attention is also directed to Thornton v. Layle, 33 Ky. L. Rep. 382, 17 L.R.A.(N.S.) 1233, 111 S. W. 279, holding that the owner of a cow, who, knowing it to be vicious toward strangers, employs a stranger to milk it, assuring him that it is gentle, is liable for injuries inflicted upon him by it when he makes the attempt to do so.

In order to recover for injuries caused by the kick of a horse, a servant must show that the horse had a vicious nature, and had previously manifested a tendency to kick, and this tendency was known, or should have been known, to the master. McGovern v. Fitzpatrick, 148 App. Div. 34, 131 N. Y. Supp. 1048.

Though a mule be vicious, the master is not liable for setting a servant to work with it, unless the master knew, or by the exercise of reasonable care should have known, of its vicious character; and he is not liable where several witnesses testify that the mule was in fact not vicious, and

after the knowledge of its vicious propensities.

Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487, 1 Am. Neg. Cas. 375; Cooper v. Cashman, 190 Mass. 75, 3 L.R.A.(N.S.) 209, 76 N. E. 461, 19 Am. Neg. Rep. 300; Eastman v. Scott, 182 Mass. 192, 64 N. E. 968; Johnston v. Mack Mfg. Co. 65 W. Va. 544, 24 L.R.A.(N.S.) 1189, 131 Am. St. Rep. 979, 64 S. E. 841, 21 Am. Neg. Rep. 359; Knickerbocker Ice Co. v. Finn, 25 C. C. A. 579, 51 U. S. App. 256, 80 Fed. 483, 1 Am. Neg. Rep. 742; Stutzke v. Consumers' Ice & Fuel Co. 156 Mo. App. 1, 136 S. W. 243; Ingham, Animals, § 94; 2 Cooley, Torts, 3d ed. 693; Reed v. Southern Exp. Co. 95 Ga. 108, 51 Am. St. Rep. 62, 22 S. E. 133; Conn v. Hunsberger, 224 Pa. 154, 25 L.R.A.(N.S.) 372, 132 Am. St. Rep. 770, 73 Atl. 324, 16 Ann. Cas. 504.

Where the risk attendant upon the work at which a servant is placed is as well known and obvious to the servant as to the master, the risk is assumed by the servant.

Jones v. Pioneer Cooperage Co. 134 Mo. App. 324, 114 S. W. 94; Smith v. Kansas City, 125 Mo. App. 150, 101 S. W. 1118; Green & C. Street Pass. R. Co. v. Bresmer, 97 Pa. 103; Cooper v. Cashman, 190 Mass. 75, 3 L.R.A.(N.S.) 209, 76 N. E. 461, 19 Am. Neg. Rep. 300; Eastman v. Scott, 182 Mass. 192, 64 N. E. 968.

Plaintiff was guilty of contributory neg-

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the only one to testify to facts from which it may be inferred that it was vicious is not shown to have been the keeper of the mule, or to have occupied such a position that his knowledge was the knowledge of the master. Arkansas Smokeless Coal Co. v. Pippins, 92 Ark. 138, 122 S. W. 113, 19 Ann. Cas. 861.

A master is not liable for injuries to a servant caused by the kick of a mare, where it appears that the mare had been owned by the master for three years, and had not been known to kick but once, and then at another horse; and that the kick that caused the injury was not a vicious kick at a man, but a kick at a horse that was led close behind her when she was tied in the stable yard, and that the tendency to kick under like circumstances was common to all mares. Keenan v. William M. Lloyd Co. 236 Pa. 246, 84 Atl. 694.

In Lynch v. North Yakima, 37 Wash. 657, 12 L.R.A.(N.S.) 261, 80 Pac. 79, holding that a city is not liable to an employee of the fire department for the negligence of those in charge of that department in failing to have proper apparatus for the training of horses, and in furnishing vicious horses for the use of the employees without notice to them, by reason of which an employee is injured by a kick from a horse which he is engaged in training for the service, the decision was upon the ground that the matter pertained to the public function of the municipality, so that the doctrine *respondeat superior* did not apply.

In McFadden v. Standard Oil Co. 148 N. Y. Supp. 957, involving a teamster's action for injuries caused by the running away of a team, it was held that, although it appeared that the team was green and that the plaintiff did not know it, there could be no recovery where it did not appear that the horses were vicious, fractious, or untrained, or that they had run away before, especially where it appeared that the teamster was experienced.

Duty to warn.

For earlier cases on this point, see the note to Cooper v. Cashman, 3 L.R.A.(N.S.) 209.

It was said in Johnson v. Wasson Coal Co. 173 Ill. App. 414, that if the mule was a kicking mule, and the master knew that fact when he employed the servant to use the same, he should have so advised him; or if the master knew that the mule had the habit of looking back before he kicked, he should have advised him of that also.

Of course, after the servant, by driving the mule, has learned of its vicious propensities, the previous failure of the master to inform him would not render the master liable for damages caused by a kick of the mule. Douglas v. Scambia Coal Co. — Iowa, —, 141 N. W. 960.

See also Stutzke v. Consumers' Ice & Fuel Co. 156 Mo. App. 1, 136 S. W. 243, and Berenson v. Butcher, 209 Mass. 208, 95 N. E. 220, supra.

Servant's assumption of risk or contributory negligence.

For earlier cases on this phase, see the note to Milby & D. Coal & Min. Co. v. Balla, 18 L.R.A.(N.S.) 695.

Ordinarily, a servant employed to drive or handle a horse, who is aware that it has a tendency to kick, will be regarded as having assumed the risk if he continues to drive or handle it, and there is no promise on the part of the master to take such precautions as may be possible to counteract or minimize the risk. McGovern v. Fitzpatrick, 148 App. Div. 34, 131 N. Y. Supp. 1048.

A servant does not assume the risk in using an unusually vicious mule furnished by the master without warning as to its viciousness, even though mules as a class are dangerous. Stutzke v. Consumers' Ice & Fuel Co. supra.

While one undertaking to drive a mule in a mine assumes the dangers ordinarily incident to such an occupation, the doctrine of assumption of risk cannot be said to apply if the owner of the mine knowingly furnishes him with a vicious mule unsafe for use, and the servant does not know of the

ligence. Knowing better than anyone that the horse was afraid of street cars, his conduct in driving and holding the horse in the car tracks in closest proximity to a rapidly moving car making a frightful noise was the sole proximate cause of his injury.

Wooster v. Bliss, 90 Hun, 79, 35 N. Y. Supp. 514; Mahan v. Clee, 87 Mich. 161, 49 N. W. 556; Manufacturers' Fuel Co. v. White, 122 Ill. App. 527; Bessemer Land & Improv. Co. v. Dubose, 125 Ala. 442, 28 So. 380; Milby & D. Coal & Min. Co. v. Balla, 18 L.R.A.(N.S.) 695, and note, 7 Ind. Terr. 629, 104 S. W. 860.

Amidon, District Judge, delivered the opinion of the court:

The plaintiff was the driver of one of defendant's express wagons in the city of St. Louis. The defendant purchased a horse in the country, six years of age, 16 hands high, weighing about 1,250 pounds. The horse had never been city broke. It was brought to St. Louis in a car, and taken to defendant's barn. On the way to the barn it showed great fear of street cars and automobiles. In accordance with defendant's practice, this horse was first hitched up with an experienced horse, to a double express wagon weighing about 3,300 pounds. It was driven in this way for two days. Then plaintiff was directed by the foreman of the stable to hitch the horse to a single wagon, and use it in the distribution of express matter. As a safeguard the superintendent directed an experienced driver to accompany the plaintiff. On the first day the horse behaved badly, plunging and rearing, sometimes leaping upon the curbing, and at one time nearly leaping into another carriage. Owing to the terror of the horse, whenever possible the plaintiff drove along alleys, where street cars and automobiles would not be encountered. Upon returning to the stable about noon of the first day, plaintiff was asked by the superintendent how the horse behaved, and explained to him its behavior. The superintendent then directed the plaintiff to try the horse for another day in company with the same driver. On this day the horse continued to behave badly. When all the

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viciousness of the animal. Gatliff Coal Co. v. Wright, 157 Ky. 682, 163 S. W. 1110. In this case the court said: "It is insisted for appellant that a mule is inherently an unreliable and dangerous animal, and that one who drives him must be regarded as assuming any and all risks attending such work. It will be conceded that the reputation of the mule for gentleness and reliability is not as good as that of the horse; but it is likewise true that all mules are not vicious. But without regard to the popular estimate of the animal, we know of no rule of law that will exempt the owner of a mule from responsibility to his employee injured by it while in his service, where the latter, being unacquainted with the vicious propensities of the animal, is injured because induced, by the owner's assurance of its gentle and reliable qualities, to omit, in his use of it, some precaution for his safety that, as a person of ordinary prudence, he would otherwise have taken." It appears that there was evidence tending to show that the mule had been represented to the servant as gentle and reliable.

And whatever may be the effect of the servant's knowledge of the horse's inclination to kick, a charge is too broad which states that he cannot recover if he had an opportunity to observe and know the horse and its habits and traits, and did so observe and know them. Morgan v. Hendrick, 80 Vt. 284, 67 Atl. 702.

But a servant who is an experienced horseman assumes the risk in handling a pair of green horses which are nervous and high spirited, although not vicious, where he has been warned as to their character and disposition, and understood the warning. Armington v. Providence Ice Co. 33 R. I. 484, 82 Atl. 263.

And unless a master knowingly furnishes a vicious mule, the servant assumes the risk of the mule being frightened by ordinary objects which may lie in or near the pass way. Green River Coal & Coke Co. v. Phaup, 137 Ky. 34, 121 S. W. 651.

So a servant who, having been instructed to use a certain horse in his work, and having objected that the horse was not broken to that work, nevertheless uses it in the work, assumes the risks attending the efforts to break it. Smith v. Potlatch Lumber Co. 22 Idaho, 783, 128 Pac. 546.

A servant's momentary relaxation of vigilance in unharnessing a mule which he did not know to be vicious is not contributory negligence precluding recovery for injuries from the master, who furnished the mule without warning as to its vicious nature. Stutzke v. Consumers' Ice & Fuel Co. supra.

In Lynch v. North Yakima, 37 Wash. 657, 12 L.R.A.(N.S.) 261, 80 Pac. 79, supra, it was said that even if the city could otherwise be held as an ordinary employer, a member of a fire department of a city, who for seven weeks is engaged in handling and training a team of horses without the necessary apparatus, cannot hold the city liable for injuries from a kick alleged to be due to the vicious nature of one of the horses and the absence of necessary apparatus, since he was as chargeable as the city with knowledge of the character of the horses, and, knowing their nature, placed himself in a position of danger, and was guilty of contributory negligence.

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parcels had been delivered but the last, the journey led along Laclede avenue, upon which a double street car track is laid. A car was approaching from the opposite direction in which the plaintiff was driving. At the point where he was about to meet the car, there was another horse and wagon standing next to the curbing, so the plaintiff was obliged to swerve out towards the track upon which the car was approaching. The horse was greatly frightened by the car, reared on its hind legs, so that it nearly fell over backward, and when it come down it kicked with its hind feet, striking plaintiff's foot and ankle, producing the injury for which the action was brought. This was the first time that the horse had kicked. The horse was used by the defendant for one more day in a double rig, and then returned to the country. At the conclusion of plaintiff's case showing these facts, the court directed a verdict in favor of defendant, and plaintiff brings error.

Defendant contends that this case falls within the ancient rule of the common law, that in order to make a master liable for injury caused by the vicious conduct of a domestic animal, the master must have known of the vicious character of the animal,—that every horse is entitled to one kick, the same as every dog is entitled to one bite. The rule had its origin in an agricultural community long before domestic animals were subjected to the contrasts between the quietness of the country and the terrors of a modern city street. It has not for years been looked upon with favor, and we do not think that it should be applied in any field outside of that which is covered by authority. If it were necessary to apply the rule in this case we think there was sufficient evidence to show *scienter*. The cause of injury was not that the horse was "possessed of an evil propensity and accustomed to attack and injure mankind," according to the formula of the old common law. On the contrary, the conduct of the horse was due to the fact that it had been taken from the quietness of the country and plunged into the terrifying environment of a great city, without proper training, and of the effect of this change upon the horse defendant had abundant knowledge. The case, however, properly falls within a more recent, as well as a more just, rule. The master is required to furnish his servant with reasonably safe instrumentalities with which to perform his service. Here the horse was such an instrumentality, in precisely the same sense as the wagon. The duty of the master was to exercise reasonable care to furnish the plaintiff with a reasonably safe horse for the performance of his service; and the whole question is, Was there evidence which made a case that ought to have been sent to the jury to decide whether or not what the defendant did with respect to this horse constituted the exercise of reasonable care? The evidence showed that the horse was a green, country animal, wholly inexperienced in regard to the city. The defendant was bound to know the effect of exposing such a horse to the cars and automobiles of city streets. If such a horse had been given to the plaintiff without any previous testing of its behavior in the city, all would agree that such conduct would have been negligent. The defendant did not do this, but it did place him in charge of a horse which had not been properly broken for single driving; at least, the evidence was sufficient to carry that question to the jury. It was not necessary that defendant should have known that the horse would be guilty of the particular misconduct which resulted in plaintiff's injury. Defendant was bound to know that a green horse, under such circumstances, was likely to do some act which would cause injury to the driver, and among the acts which it had reasonable cause to anticipate was that such a horse, if sufficiently maddened with fright, would kick. We think the jury would have been justified in finding, under the evidence, that the horse had not been properly tried out and broken to city life in the two days' experience with the double wagon, and that the master was not in the exercise of reasonable care when it turned the horse over to the plaintiff for use upon a single wagon. The court, therefore, erred when it disposed of the issue as a question of law.

We do not think the plaintiff assumed the risk of injury from using the horse on the second day, because of his knowledge of its behavior on the first day. He made a full statement of the conduct of the horse to the superintendent, and was directed to try him for one more day. This was tantamount to a complaint with a promise to repair in the case of an ordinary instrumentality. Plaintiff was not employed as a horse trainer, but as an ordinary driver, and we think the direction of the superintendent, under the circumstances disclosed by the evidence, exonerated plaintiff from assuming the risk of injury from the continued use of the horse.

The judgment is reversed, with directions to grant a new trial.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE HARRY B. HOLLINS et al., as Members of the Firm of H. B. Hollins & Company, Bankrupts.

A. LEO EVERETT, Receiver, Petitioner.

(— C. C. A. —, 215 Fed. 41.)

Bankruptcy — right of purchaser of draft against deposit.

One purchasing a draft by a domestic upon a foreign banker, with knowledge of a custom that such drafts were against deposits and securities, and upon assurance tha the drafts were drawn pursuant to an agreement with the foreign banker that collateral should be deposited for their payment, which was to be at the exclusive disposal of the drawee, has a lien upon the collateral as against the drawer's receiver in bankruptcy, upon refusal of the drawee to pay the draft because of such bankruptcy.

(June 20, 1914.)

PETITION by the receiver in bankruptcy for a revision of an order of the District Court confirming the report of a special master in favor of John L. Hogeboom, assignee of the purchaser of a draft, establishing a lien in certain securities which had been deposited with a trust company in favor of the drawee of the draft, by the bankrupt drawers. Affirmed.

The facts are stated in the opinion.

Argued before Coxe and Rogers, Circuit Judges, and Mayer, District Judge.

Messrs. **George M. Mackellar** and **Martin A. Schenck**, with Messrs. **Lexow, Mackellar, & Wells**, for the receiver:

The transaction between bankrupts and claimant's assignor did not result in an equitable assignment of the securities.

Pom. Eq. Jur. § 1284; Bowker v. Haight & F. Co. 146 Fed. 257; Whitney v. Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316; 2 Am. & Eng. Enc. Law, 2d ed. 1063; Wright v. Ellison, 1 Wall. 16, 22, 17 L. ed. 555, 557; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 644, 41 L. ed. 855, 861, 17 Sup. Ct. Rep. 439; Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Muller v. Kling, 209 N. Y. 239, 103 N. E. 138.

There is no evidence that the drawer in-

Note. — Right of purchaser of a draft from a bank to lien or preference to collateral in hands of drawee upon insolvency of the drawer.

The general question of the right to preference for money paid an insolvent bank for a draft is discussed in the notes to Whitcomb v. Carpenter, 10 L.R.A.(N.S.) 928, and Widman v. Kellogg, 39 L.R.A. (N.S.) 563. Those notes, as suggested by their title, considered the question only from the point of view of the right to a preference because of the payment of money to the bank after it became insolvent; and do not consider the subject from the point of view of the right by reason of the funds or property of the insolvent bank which was in the hands of the drawee.

See note to Clark v. Toronto Bank, 2 L.R.A.(N.S.) 83, for a brief discussion of the question as to the respective rights of the holder of a draft and the receiver of the drawer to funds against which the same was drawn.

Adhering to the rule that a check operates as an absolute assignment of the amount called for therein as between the maker and the payee, and that it transfers to the payee the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof provided the party drawing the check has funds to that amount on deposit subject to check at the time the same is presented, the court in Wyman v. Ft. Dearborn Nat. Bank, 181 Ill. 279, 48 L.R.A. 565, 72 Am. St. Rep. L.R.A.1915B. 259, 54 N. E. 946, holds that the holder of a check by one bank upon another is entitled to be subrogated to collateral securities held by the drawee bank, where, upon notice of the placing of the drawer bank in the hands of the receiver, the drawee bank applied money held by it to the cancelation of its debt against the insolvent bank.

The payee of a draft who purchases the same not upon the general credit of the drawer, but upon the security afforded by a collateral draft of the drawer upon his debtor in favor of the drawee, is, after the dishonor of his draft, because of a general assignment of the drawer, entitled to a preference in the amount which is paid by the debtor of the drawer, upon whom the collateral draft is drawn. Muller v. Kling, 209 N. Y. 240, 103 N. E. 138. In this case the collateral draft had been drawn and sent to the payee thereof (the drawee of the draft in question). It is stated by the court that the plaintiff did not purchase the draft upon the general credit of the drawer, but upon the security afforded by the collateral draft, and that he understood that a debt or part of an indebtedness owing by the debtor of the drawer was to be transferred and ultimately paid to the drawee as a fund to cover the payment of the draft upon him.

Some cases of interest in this connection follow although not involving collateral, but the note does not purport to have exhausted the citation of this class of cases.

A bank which has purchased the draft of another, after the drawer of the draft has stated that it has funds in the hands of the drawee sufficient to meet the draft when

tended to create a trust in the security for the benefit of the buyer of the drafts.

39 Cyc. 84; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Watts v. Shipman, 21 Hun, 598.

There is no proof of an agreement between the drawer and the buyer of the drafts, that the buyer should have the benefit of the collateral.

Ernst v. Mechanics' & M. Nat. Bank, 120 C. C. A. 92, 201 Fed. 664; Marine & F. Ins. Bank v. Jauncey, 3 Sandf. 257.

Messrs. **Charles C. Deming** and **W. W. Lancaster**, with Messrs. **Alexander & Green**, for petitioner Hogeboom:

Claimant's assignor did not purchase the series of drafts drawn by H. B. Hollins & Company upon A. Ruffer & Sons, upon the general credit of said H. B. Hollins & Company, but in reliance upon the securities deposited by them in the Equitable Trust Company to secure the said drafts.

Muller v. Kling, 209 N. Y. 240, 103 N. E. 138, 149 App. Div. 176, 133 N. Y. Supp. 614; Watts v. Shipman, 21 Hun, 598; Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Dan. Neg. Inst. 6th ed. § 552; Rankin v. City Nat. Bank, 208 U. S. 541, 546, 52 L. ed. 610, 613, 28 Sup. Ct. Rep. 346; Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259; Re Chase, 59 C. C. A. 629, 124 Fed. 753; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 132, 53 L. ed. 729, 733, 29 Sup. Ct. Rep. 466; Marine & F. Ins. Bank v. Jauncey, 3 Sandf. 257.

The facts show a trust in the securities in favor of the holder of the drafts.

Sexton v. Kessler & Co. 225 U. S. 90, 97, 56 L. ed. 995, 1000, 32 Sup. Ct. Rep. 657; Muller v. Kling, 209 N. Y. 239, 103 N. E. 138; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446.

Rogers, Circuit Judge, delivered the opinion of the court:

A petition was filed against a receiver in bankruptcy to establish an equitable lien in certain securities. The issues involved were referred to a special master, who reported in favor of the petitioner. This report was confirmed by the district judge, who held that the petitioner, John L. Hogeboom, was entitled to a lien on certain

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presented, is entitled to a preference to such fund, which afterward came into the hands of the voluntary assignee of the drawer. Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439. The rule is laid down in this case that, while an equitable assignment or lien will not arise against the deposit account solely by reason of a draft drawn against the same, yet if, in the transaction connected with the delivery thereof, it is the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the draft, mere volunteers, and parties charged with notice.

In Seligman v. Wells, 17 Blatchf. 410, 1 Fed. 302, the holder of a draft was held entitled to recover from the trustees in bankruptcy, a sum of money which had been paid to the drawee of the draft by the drawer expressly to provide for the draft, the court stating that this sum had been set apart and appropriated by the bankrupt before bankruptcy for the holders of the draft, and was in the hands of the drawee for that purpose, and was claimed by the holders of the draft while it was there for that purpose, and while they had the right to it, and before bankruptcy proceedings were commenced.

But a bank which has cashed checks issued by the depositors in another bank upon their accounts, and which, upon presentation to the bank upon which they are drawn, has accepted drafts drawn by such bank upon a correspondent bank, is not entitled, upon the insolvency of the bank drawing the drafts, to a preference, although at the time the checks were presented there were sufficient funds on hand with which to pay them in full, and it could have had the money instead of the drafts had it so desired; and this is true even though the bank issuing the drafts was insolvent at the time of the issuance thereof. Lamro State Bank v. Farmers' State Bank, — S. D. —, 148 N. W. 851.

So a depositor who, about the time of the assignment of the bank, accepts in part payment of his deposit a draft containing on its face notice of the assignment, is not entitled to a preference where the payment of the draft has been stopped by the assignee and the draft returned unpaid, especially where the draft has not been presented to the drawee for acceptance. Meldrum v. Henderson, 7 Colo. App. 256, 43 Pac. 148. The court, after referring to the notice contained in the draft of the assignment, states that with that introduction the bill did not purport to be drawn against any fund, and therefore could not operate as an assignment of anything.

The purchaser of a draft under circumstances which do not constitute an assignment of a particular fund or part of a particular fund is not entitled to the amount of the debt for which the draft is drawn, which is remitted to the drawer of the draft in another manner. Whitney v. Eliot Nat. Bank, 137 Mass. 351, 50 Am. Rep. 316. W. A. E.

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securities in the hands of the Equitable Trust Company of New York City, which securities had been deposited with the trust company by H. B. Hollins & Company, now bankrupts, under an agreement with A. Ruffer & Sons, of London, England, that such securities should be deposited with the trust company for the account of A. Ruffer & Sons, that H. B. Hollins & Company might draw drafts or bills of exchange upon the said A. Ruffer & Sons against the said securities. It appears that H. B. Hollins & Company, having deposited the securities as agreed upon, drew certain drafts on A. Ruffer & Sons, which drafts aggregated $75,000. These drafts H. B. Hollins & Company offered for sale to the International Banking Corporation, a corporation organized under the laws of Connecticut. At the time the drafts were thus offered, H. B. Hollins & Company represented to the International Banking Corporation that they had been drawn pursuant to agreement existing between themselves and A. Ruffer & Sons. Thereupon the International Banking Corporation purchased the drafts. At the time of the purchase the buyer knew that it was a custom of H. B. Hollins & Company in their dealings with foreign bankers to draw drafts against collateral deposited for security, and, in purchasing, relied on this custom. When the drafts were presented acceptance was refused, because of the filing, in the meantime, of a petition in bankruptcy against H. B. Hollins & Company as a firm, and against the persons who composed it as individuals. Thereafter the International Banking Corporation assigned the drafts to Hogeboom, the petitioner.

The receiver in bankruptcy claims that the securities which the bankrupts deposited with the trust company are a part of the estate of the bankrupts for the benefit of their personal creditors. The assignee claims that as his assignor did not purchase the drafts upon the general credit of the drawers, but in reliance upon the securities deposited in the Equitable Trust Company, he has a claim upon those securities superior to any claim of the general creditors. The trust company refuses to surrender the securities except with the consent of the receiver.

The deposit of the securities was made "to the account of A. Ruffer & Sons," and was prior in time to the drawing of the drafts assigned to Hogeboom. The securities were deposited with the trust company in pursuance of the agreement made by H. B. Hollins & Company with A. Ruffer & Sons. The agreement stated that the securities were to be at the exclusive disposal of A. Ruffer & Sons, and that they were pledged as collateral security for the payment of any sum "now or hereafter due from us to you." The agreement also provided that the securities pledged should be released only on the order of A. Ruffer & Sons, or against bankers' drafts approved by them. There is no evidence of any express agreement between the buyer of the drafts and the seller of them that the former should have the benefit of the securities.

The general rule is that a bill of exchange or draft does not operate as an equitable assignment where it has not been drawn on any particular fund. The rule is not changed by the fact that funds may have been placed in the drawee's hands as a means of payment. Pom. Eq. Jur. § 1284; Bowker v. Haight & F. Co. (C. C.) 146 Fed. 257 (1906); Florence Min. Co. v. Brown, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531. It is also settled that if, in the course of the transaction connected with the delivery of the bill or draft, it is understood and agreed that the bill or draft shall be a charge on and satisfied out of a specific fund, a court of equity will give effect to the agreement as against the drawer, mere volunteers, and parties charged with notice. Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 650, 41 L. ed. 855, 863, 17 Sup. Ct. Rep. 439, 442 (1897). In the above case there had been a specific representation by the seller of the check, which had been relied upon by the buyer. The case shows it is not necessary that there should be an express agreement. An implied agreement is sufficient. The opinion was written by the present chief justice of the court, who said: "In the light of these principles, we proceed to consider the facts certified, in order to ascertain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund or to give a lien or charge thereon, or whether, if not express, such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings, and the attendant circumstances."

In transactions of the nature of that under consideration, the surrounding circumstances may be considered with the view of determining the intention of the parties. If it was the understanding of the parties that the drafts were drawn against certain collateral securities deposited to the account of A. Ruffer & Sons, and if the drafts were purchased on the faith of those securities, and not on the general credit of H. B.

Hollins & Company, it is the duty of this court to give effect to the agreement.

We think the facts show that the drafts were not purchased on the general credit of H. B. Hollins & Company. The amount of the drafts, $75,000, is so large that we are not inclined to believe they would have been purchased by the International Banking Corporation had it not been understood that specific means of payment existed outside of and beyond the mere general credit of the seller. There exists a well-known and established custom in dealings between New York and foreign bankers, that where bills of exchange are drawn by a New York banker upon a foreign banker, such drawings are against specific security deposited by the drawers. This custom was known to the International Banking Corporation, and was relied upon in the purchase of the drafts. And when the purchase was being negotiated, H. B. Hollins & Company specifically stated that the drafts were drawn "pursuant to an agreement" with A. Ruffer & Sons, on whom they were drawn. This representation must have been understood as meaning that securities had been deposited according to custom, and that A. Ruffer & Sons had agreed to pay the drafts. That the drafts were drawn against these securities is admitted. If A. Ruffer & Sons had paid them according to agreement, they would have been entitled to reimbursement out of the securities as against the receiver in bankruptcy. See Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657. The fact that A. Ruffer & Sons declined to pay the drafts, thus breaking the agreement with H. B. Hollins & Company, on the faith of which the drafts were purchased by the International Banking Corporation, should not defeat the right of the latter to be made good out of the securities against which it is admitted the drafts were drawn.

We think the facts in the case are in principle not unlike those in Muller v. Kling, 209 N. Y. 240, 103 N. E. 138 (1913). It was held in that case that the circumstances attendant upon the purchase of a draft by plaintiffs from defendants' assignors disclosed that plaintiffs had parted with their money to such assignors on the supposed security of a fund to be created by the transfer by the drawers of a third party; that the rights of plaintiff to the fund arising from the payment of that debt were therefore superior to those of general creditors of such assignor. The court applied the equitable doctrine that where the just and clear rights of a party to payment of a debt from a particular fund could be secured in no other way, the fund or its proceeds would be regarded as a trust for his better security.

A trustee in bankruptcy takes the property of a bankrupt subject to equities in favor of third persons, whether arising out of the act of the bankrupt or by operation of law, provided the transactions are not invalid as to creditors. Gage Lumber Co. v. McEldowney, 124 C. C. A. 641, 207 Fed. 255 (1913); Re M. E. Dunn & Co. (D. C.) 193 Fed. 212 (1912); Re McConnell (D. C.) 197 Fed. 438 (1912); Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 171 Fed. 940 (1909). And we discover nothing in the transaction between H. B. Hollins & Company and A. Ruffer & Sons, or between H. B. Hollins & Company and the International Banking Corporation, which is invalid as to creditors. The receiver of H. B. Hollins & Company consequently stands in the shoes of the bankrupt firm, with no greater rights as against the plaintiffs than H. B. Hollins & Company possessed. As between H. B. Hollins & Company and the International Banking Corporation, it would not be equitable to allow H. B. Hollins & Company to appropriate the collateral against which the drafts were, as a matter of fact, drawn, and against which the International Banking Corporation understood they were drawn, and upon the faith of which the purchase was made.

If one without more agrees to give security upon specific property, the agreement to give the security in itself creates an equitable lien. If, as an inducement to purchase drafts, the buyer is given to understand that securities have been deposited to provide for the payment of the drafts offered for sale, and on the faith of that understanding the drafts are purchased, as between the buyer and the seller an equitable lien is created which gives the buyer of the drafts a right to have them paid out of the securities so deposited. As this would be the right as against the seller it is the right as against the receiver of the seller. Bispham in his treatise on Equity, § 351, says: "In modern times the doctrine of equitable liens has been liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific charges may be justly and effectually carried out. Any agreement sufficiently indicating an intention to make some particular property or fund therein described or identified a security for an obligation creates a lien upon the property as respects that obligation."

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

PIONEER MINING COMPANY, Appt.,
v.
JOHAN TYBERG et al.

(— C. C. A. —, 215 Fed. 501.)

Equity — jurisdiction — trust in proceeds of stolen property.

1. Equity has jurisdiction to enforce a constructive trust in property into which stolen property was converted, although no fiduciary relation existed between the owner and the one who took the property.

Same — custody of property — trust.

2. An employee charged with the care and custody of receptacles of gold dust sustains a relation of trust to his employer so as to give equity jurisdiction of a proceeding to reach property into which he has converted gold dust which he feloniously abstracted from the receptacles; at least where the property is *in custodia legis* so as not to be subject to legal process.

(May 26, 1914.)

APPEAL by plaintiff from a judgment of the District Court of the United States for the Second Division of the District of Alaska dismissing a suit for the establishment and enforcement of a constructive trust in respect to certain money in the hands of the defendant clerk of the court, and from an order denying an injunction *pendente lite* and discharging a temporary restraining order that had been issued. Reversed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and Dietrich, District Judge.

Messrs. **Metson, Drew, & Mackenzie** and **E. H. Ryan**, with Messrs. **O. D. Cochran** and **G. J. Lomen**, for appellant:

Equity recognizes the ownership of property to be in him from whom it has been fraudulently obtained, and will impress a trust upon the proceeds of such stolen property, and the same may be reclaimed by the owner wherever they may be found in the hands of either a voluntary assignee, a de-

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Note. — Existence of a trust in property stolen or embezzled.

The present note is concerned only with the question whether a trust may be declared in property stolen or embezzled, and not with the necessity of identifying or tracing the funds. Consequently, cases in which the trust was not enforced because of failure to identify the property, such as United States v. Bitter Root Development Co. 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318, are excluded.

Under certain conditions equity will declare a trust in property stolen or embezzled.

Thus, in Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294, money had been stolen by a servant of a bank whose duties were to care for the bank offices, and invested in real estate. In declaring that a constructive trust in such real estate existed in favor of the bank, it is stated by the court that "the doctrine of constructive trusts as developed by courts of equity was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate, and larceny, under the circumstances here disclosed, is none the less a fraud upon the owner of the property stolen because committed by a servant, instead of one who is, in the technical sense of the term, a trustee."

In Bank of America v. Pollock, 4 Edw. Ch. 214, a trust was declared in certain stock which had been purchased by a bank clerk with funds taken from the bank and assigned without consideration to his sister.

In National Mahaiwe Bank v. Barry, 125 Mass. 20, a trust was declared in real estate purchased with money stolen by a bookkeeper of a bank, and transferred to one who aided him in the theft, and who, with the fraudulent knowledge of his parents, purchased the real estate in question and took title in the mother's name.

In Riehl v. Evansville Foundry Asso. 104 Ind. 72, 3 N. E. 633, real estate purchased with money embezzled by a bookkeeper and salesman, and by him deeded to his wife, was impressed with a trust in favor of the employer. The wife in this case took title to the property with knowledge of the fraudulent appropriation of the employer's money by her husband.

On the contrary, the court in Campbell v. Drake, 39 N. C. (4 Ired. Eq.) 94, held that no trust existed in land purchased by a clerk in a store with money which he had stolen from his employer. It is stated that if the employer could actually trace the identical money taken from him into the hands of the person who got it without paying value, he could recover it, but that one who has obtained money by theft is not to be turned into a trustee of property merely by showing that the property was bought with the stolen money.

In Pascoag Bank v. Hunt, 3 Edw. Ch. 583, the court of chancery refused to assume jurisdiction of an action by a bank to compel the transfer to it of securities which had been purchased with funds embezzled by its cashier, and assigned to a third person as security for a loan. There is no discussion of the question in the case. Compare with Bank of America v. Pollock, supra.

It will be noticed that the preceding cases involved the taking of property by one who was employed by the one from whom it was taken. The doctrine that a trust will be declared in property taken has been extended to property taken by one not sustaining the relation of an employee.

Thus in Lamb v. Rooney, 72 Neb. 322, 117 Am. St. Rep. 795, 100 N. W. 410, cattle had

pository, or in the possession of anyone holding in bad faith.

3 Pom. Eq. Jur. § 1051; United States v. Carter, 96 C. C. A. 587, 172 Fed. 1, 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594; Ætna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200; Chavez v. Myer, 6 L.R.A.(N.S.) 793, and note, 13 N. M. 368, 85 Pac. 233; Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35; 1 Cooley, Torts, 3d ed. 151; Williams v. Dickenson, 28 Fla. 90, 9 So. 847; Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473; Blassingame v. Glaves, 6 B. Mon. 38; Boston & W. R. Corp. v. Dana, 1 Gray, 83; Howk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Newell v. Cowan, 30 Miss. 492; Newton v. Porter, 5 Lans. 416, 69 N. Y. 133, 25 Am. Rep. 152; Lightfoot v. Davis, 198 N. Y. 261, 29 L.R.A.(N.S.) 119, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747; Jaffe v. Weld, 155 App. Div. 110, 139 N. Y. Supp. 1101; Bishop v. Howe, 117 N. Y. Supp. 996; American Sugar Ref. Co. v. Fancher, 145 N. Y. 552, 27 L.R.A. 757, 40 N. E. 206; Holmes v. Gilman, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 295; National Mahaiwe Bank v. Barry, 125 Mass. 20.

Messrs. **O. L. Willett, Frank Oleson, George B. Grigsby,** and **Berkeley B. Blake,** for appellee Tyberg:

Property *in custodia legis* is not subject to legal process.

34 Cyc. 1367; Wilde v. Rawles, 13 Colo. 583, 22 Pac. 897; Cooley v. Davis, 34 Iowa, 128; Karr v. Stahl, 75 Kan. 387, 89 Pac. 669; Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

No trust could arise.

Perry, Tr. § 128, p. 197; Pascoag Bank v. Hunt, 3 Edw. Ch. 583; Doyle v. Murphy, 22 Ill. 502, 74 Am. Dec. 165; 1 Morse, Banks & Bkg. § 173.

Without title or possession there could be no trust.

39 Cyc. 169; Walker v. Bruce, 44 Colo.

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been stolen and sold, and a part of the proceeds of the sale invested in other cattle, and a trust was declared in the cattle thus purchased, in favor of the owner of the cattle stolen.

In Ætna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200, a constructive trust was declared in money which had been stolen from a bank and which was in the custody of police officers who had taken it from the thief, the court stating that confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property.

See Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152, and Lightfoot v. Davis, 198 N. Y. 261, 29 L.R.A.(N.S.) 119, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747, set out in the opinion in PIONEER MIN. CO. v. TYBERG.

See also National Mahaiwe Bank v. Barry, supra.

But in Doyle v. Murphy, 22 Ill. 502, 74 Am. Dec. 165, the owner of certain debentures locked them in an iron safe, and kept the keys in her possession, and left the safe with the one who was sought to be held as trustee. The one thus having possession, by means of false keys, opened the safe and abstracted the debentures and placed in their stead false and forged debentures for a similar amount. In holding that this created no trust relation, it is stated by the court that "this evidence, if it is to be credited, shows the want of all confidence and trust in . . . [the alleged trustee], as the safe containing these choses in action was locked against him, and the keys retained from him. The debentures were not placed in his possession as such, but they were locked against him. She gave him no power over them, but manifestly intended that he should have none. And if he ever acquired the possession of them it was by larceny, or at the least by a trespass, when he committed a forgery. And the acquisition of property by either larceny or trespass, it is believed, has never been held to create the relation of trustee and *cestui que trust*."

In Hawthorne v. Brown, 3 Sneed, 462, a declaration of trust in personal property which had been purchased with trust funds by one who stood in no fiduciary relation to the beneficiary, but who had wrongfully obtained a portion of the trust funds, was refused, the court stating that the bare statement of the case excludes the idea of any trust. The action here, however, was one in trover against an officer who had levied upon the property in question under an execution against the person thus purchasing it.

It is stated in Ensley v. Balentine, 4 Humph. 233, that it may well be questioned whether if the father or other person take into his possession the property of another acting under a claim of right in himself, and sell such property, in vesting the proceeds in land, a trust would result in favor of the true owner of the property so taken.

The right of a partner to have a trust declared in certain insurance policies on the life of a deceased partner, the premiums for which had been paid out of the firm funds, was sustained in Holmes v. Gilman, 138 N. Y. 369, 20 L.R.A. 566, 34 Am. St. Rep. 463, 34 N. E. 205, on the distinct theory that the partner occupied a fiduciary position with regard to his copartner and the funds of the firm, and the right to follow the funds sprang from this fiduciary nature of the partner's position.

W. A. E.

109, 97 Pac. 250; Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35; Christy v. Sill, 95 Pa. 380; Smith v. Des Moines Nat. Bank, 107 Iowa, 620, 78 N. W. 238; Moore v. Crump, 84 Miss. 612, 37 So. 109; Fetter, Eq. 198; People v. Houghtaling, 7 Cal. 348; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Bassett v. Spofford, 45 N. Y. 387, 6 Am. Rep. 101; 1 Perry, Tr. 520.

In a civil action over the same property which the defendant was convicted of stealing in the criminal case, the presumption of innocence obtains.

2 Greenl. Ev. § 408; Thurtell v. Beaumont, 1 Bing. 339, 8 J. B. Moore, 612, 2 L. J. C. P. 4, 25 Revised Rep. 644; Taylor, Ev. 97; Bishop, Marr. & Div. § 644; Thayer v. Boyle, 30 Me. 475; Butman v. Hobbs, 35 Me. 228; McConnel v. Delaware Mut. Safety Ins. Co. 18 Ill. 229; Pryce v. Security Ins. Co. 29 Wis. 270; Freeman v. Freeman, 31 Wis. 235; White v. Comstock, 6 Vt. 405; Brooks v. Clayes, 10 Vt. 37; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646.

The bill shows no equity.

Hurd v. Atchison, T. & S. F. R. Co. 73 Kan. 83, 84 Pac. 553.

An equity court will not take jurisdiction merely because of insolvency, and a bill in equity that states no other grounds for equitable interference is demurrable.

Pensacola & G. R. Co. v. Spratt, 12 Fla. 26, 91 Am. Dec. 747; Hailman v. Union Canal Co. 37 Pa. 100; Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703; Centerville & A. Turnp. Co. v. Barnett, 2 Ind. 536; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801; Dills v. Doebler, 62 Conn. 366, 20 L.R.A. 432, 36 Am. St. Rep. 345, 26 Atl. 398; Brown v. Birmingham, 140 Ala. 590, 37 So. 173; Reyes v. Middleton, 36 Fla. 99, 29 L.R.A. 66, 51 Am. St. Rep. 17, 17 So. 937; 22 Cyc. 839; Strang v. Richmond, P. & C. R. Co. 93 Fed. 71; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Morgan v. Palmer, 48 N. H. 336.

Appellant has an adequate remedy at law.

Sultan of the Ottoman Empire v. Providence Tool Co. 21 Blatchf. 437, 23 Fed. 572; Dumont v. Fry, 12 Fed. 21; Edelman v. Latshaw, 159 Pa. 644, 28 Atl. 475; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451, 7 Sup. Ct. Rep. 249; Sawyer v. Atchison, T. & S. F. R. Co. 63 C. C. A. 602, 129 Fed. 100; Fletcher v. Root, 240 Ill. 429, 88 N. E. 987; Lawrence v. Times Printing Co. 90 Fed. 24; Paine v. Doughty, 251 Ill. 396, 96 N. E. 212; Deepwater R. Co. v. Motter, 60 W. Va. 55, 116 Am. St. Rep. 873, 53 S. E. 705.

The title to this fund is involved and cannot be tried in this action.

22 Cyc. 821; Kistler v. Weaver, 135 N. L.R.A.1915B. C. 388, 47 S. E. 478; Baxter v. Baxter, 77 N. C. 118; Young v. Young, 9 B. Mon. 66; Power v. Alger, 13 Abb. Pr. 284; Cumberland River Lumber Co. v. Allen, 6 Ky. L. Rep. 741; Tacoma R. & Power Co. v. Pacific Traction Co. 155 Fed. 259; Erhardt v. Boaro, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 565, 15 Mor. Min. Rep. 477; Lanier v. Alison, 31 Fed. 100; Simmons v. Day, 151 Mich. 1, 114 N. W. 853; Hamilton v. Brent Lumber Co. 127 Ala. 78, 28 So. 698; Vaughn v. Yawn, 103 Ga. 557, 29 S. E. 759; Toledo, St. L. & N. O. R. Co. v. St. Louis & O. River R. Co. 208 Ill. 623, 70 N. E. 715; Munyos v. Filmore, 4 Ind. Terr. 619, 76 S. W. 257; Stone v. Snell, 4 Neb. (Unof.) 430, 94 N. W. 525; North Shore R. Co. v. Pennsylvania, 193 Pa. 641, 44 Atl. 1083; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724; Lownsdale v. Gray's Harbor Boom Co. 117 Fed. 983; Todd v. Staats, 60 N. J. Eq. 507, 46 Atl. 645; Hume v. Burns, 50 Or. 124, 90 Pac. 1009; Allott v. American Strawboard Co. 237 Ill. 55, 86 N. E. 685; Eastern Oregon Land Co. v. Willow River Land & Irrig. Co. 187 Fed. 466; Imperial Realty Co. v. West Jersey & Seashore R. Co. 79 N. J. Eq. 168, 81 Atl. 837; St. Louis, K. C. & C. R. Co. v. Dewees, 23 Fed. 691.

The property having been taken from Tyberg's person in connection with his arrest on a criminal charge, it cannot be subjected to any process, either legal or equitable, until it has first been returned to Tyberg, or until he has been convicted of stealing that identical property.

Welch v. Gleason, 28 S. C. 247, 5 S. E. 599; Holker v. Hennessey, 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090; B. F. Sturtevant Co. v. Bohn Sash & Door Co. 57 Neb. 671, 78 N. W. 265; Hill v. Hatch, 99 Tenn. 39, 63 Am. St. Rep. 822, 41 S. W. 349; Dale v. Brumbly, 98 Md. 468, 64 L.R.A. 112, 56 Atl. 807; Baker v. Peterson, 57 Neb. 375, 77 N. W. 774; Allen v. Gerard, 21 R. I. 467, 49 L.R.A. 351, 79 Am. St. Rep. 816, 44 Atl. 592; United States v. Parker, 166 Fed. 137; Cowart v. W. E. Caldwell Co. 134 Ga. 544, 30 L.R.A. (N.S.) 720, 68 S. E. 500; Priestly v. Hilliard, 109 C. C. A. 632, 187 Fed. 784; Morris v. Penniman, 14 Gray, 220, 74 Am. Dec. 675; Robinson v. Howard, 7 Cush. 257; Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 54 Am. Rep. 36, 19 N. W. 329, 22 N. W. 919; Richardson v. Anderson, 4 Tex. App. Civ. Cas. (Willson) 493, 18 S. W. 195.

Ross, Circuit Judge, delivered the opinion of the court:

This is an appeal from the judgment of the court below dismissing the suit brought

therein by the appellant for the establishment and enforcement of a constructive trust in respect to certain money in the hands of the clerk of the court, and for an injunction *pendente lite* as well as final, and from a final order denying an injunction and discharging the temporary restraining order that had been issued. The court, however, did enter an order directing that the property in controversy remain in the hands of the clerk of the court until its further order, upon the execution on the part of the plaintiff of a supersedeas bond in an amount fixed by the court.

The judgment was entered upon the refusal of the plaintiff in the suit to further amend its complaint after the sustaining of a general demurrer thereto filed by the defendant Tyberg, the appellee here.

The amended complaint, after setting out the corporate capacity of the plaintiff and the official position of the defendant Sundback, alleged in substance that the defendant Tyberg, alias Edwin Johanson, was, during the month of July, 1910, in the employ of the plaintiff company as foreman of the night shift in mining certain specified property of the plaintiff company, situated in the Cape Nome mining district, Alaska, upon which property were certain sluice boxes with gold dust, nuggets, and amalgam therein, all of which was the property of the plaintiff company; that, as such foreman and employee of the plaintiff, Tyberg had the care and custody of the said sluice boxes, gold dust, nuggets, and amalgam; and that it was then and there his duty to protect and safeguard the same, and not to remove from the sluice boxes, or permit to be removed therefrom, the said gold dust, nuggets, or amalgam, notwithstanding which he did, on or about the day mentioned, wrongfully and unlawfully, and without the leave or consent of the plaintiff company, take and carry away from the said sluice boxes the said gold dust, nuggets, and amalgam, to the value of more than $15,000, and concealed the same from the plaintiff, and converted the same to his own use; that thereafter, and in the month of September, 1910, the said Tyberg, after having retorted the amalgam, proceeded to the city of Seattle, in the state of Washington, and there sold to the United States assay officer in that city the said gold dust, nuggets, and amalgam so retorted, receiving therefor a certificate representing its value in the sum of $14,345.02; that thereafter, and in the same month, the said Tyberg presented the said certificate to the Union Savings & Trust Company for payment, and received in payment thereof $5,345.02 in cash and a draft drawn by the said Union Savings & Trust Company on the First National Bank of Portland, Oregon, in the sum of $9,000, payable to his said alias, Edwin Johanson, or order; that thereafter, and in the same month of September, the said Tyberg was arrested by a deputy United States marshal in the city of Seattle, charged with the larceny of the said gold dust, nuggets, and amalgam, and that the said $5,345.02 in money and the said draft, the proceeds of the gold dust, nuggets, and amalgam, were found by the marshal in the possession of the defendant Tyberg, and were by the marshal seized as the proceeds of the said stolen property, and as such proceeds were transmitted and delivered to the defendant Sundback as clerk of the said court; that thereafter the said clerk caused the said draft so received by him to be cashed, and received in payment thereof the sum of $9,000, its face value, and has ever since had in his possession, as such clerk, the said proceeds, in the aggregate sum of $14,345.02, "and has held the same for and on account of the case of the United States against said Johan Tyberg now adjudicated in said court, and should now hold the same on account of this action:" that the said defendant Tyberg is insolvent, and is not now an inhabitant of the district of Alaska, and that the defendant Sundback neither has nor claims any interest in the said proceeds, except as a mere depositary thereof for the use and benefit of the true owner, and holds the same subject to the orders and directions of the said court, and not otherwise; that the defendant Tyberg has by motion requested the said court to return to him the money so in the hands of the said clerk, and unless restrained from so doing he will demand and claim the said proceeds from the said clerk; that by reason of the premises there is due and owing from the said defendant Tyberg to the plaintiff the said sum of $14,345.02, for which he should be made to account, and that a constructive trust has attached thereto in favor of the plaintiff, and that a lien thereon to the extent stated should be declared in favor of the plaintiff, and a decree in its favor therefor entered. The prayer is for such decree, injunctive and general relief, and for costs.

It is contended on behalf of the appellee that the appeal should have been taken to the Supreme Court by virtue of those provisions of the "Compiled Laws of the Territory of Alaska" which provides as follows:

"Section 1336. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska, or for any division thereof, direct to the Supreme Court of the United States, in the following cases:

. . . In all cases which involve the construction or application of the Constitution of the United States. . . .

"Section 1337. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States, as provided in § 1336, . . . writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit. . . ."

It is sufficient to say concerning that contention that the proper disposition of the case in no way involves the construction or application of any provision of the Constitution of the United States.

It is further insisted on the part of the appellee that the defendant Tyberg sustained no trust relation to the plaintiff company, and for that reason that the case was not within the jurisdiction of a court of equity.

In the case of Ætna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200, it was held that, in a suit to declare and enforce a constructive trust with respect to stolen property, fiduciary relations between the parties are not essential to the jurisdiction of a court of equity, but that such a court may enjoin a police officer from transferring money taken by him from burglars who procured it by robbing a bank, and may restore it to the owner thereof; the court saying, among other things: "The first proposition argued by defendants relates to the nature of the case. It is a suit in equity or an action at law? It was heard below without a jury, over the objection of defendants, and this is urged as error. The main purpose of the litigation, as shown by the petition, was to trace the stolen fund through the burglars into the hands of the police officers, and restore it to the owner. It is alleged that the burglars are insolvent. The recovery of a judgment against them was consequently a secondary matter. They had in their possession only a portion of the amount stolen, when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others and by establishing a constructive trust. In the petition there was no attempt to describe the particular denominations of money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. Defendants were no less acountable because their possession grew out of a felony. Confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property, a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found. Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; Newton v. Porter, 5 Lans. 416."

In the case of Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152, the court of appeals of that state held that the owner of negotiable securities stolen and afterwards sold by the thief may follow and claim the proceeds in the hands of the felonious taker, or of his assignee with notice; and that the right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified, and the rights of a bona fide purchaser do not intervene. The court, after referring to the well-settled equitable doctrine that when a person standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired, said: "It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. 'One of the most common cases,' remarks Judge Story, 'in which a court of equity acts upon the ground of implied trusts *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party.' 2 Story, Eq. Jur. § 1255. And he states it to be a general principle that 'whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of prop-

erty, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the *cestui que trust*.' § 1258. See also Hill, Trustees, p. 222. We are of opinion that the absence of the conventional relation of trustee and *cestui que trust* between the plaintiff and the Warners is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See Bank of America v. Pollock, 4 Edw. Ch. 215."

In the case of Lightfoot v. Davis, 198 N. Y. 261, 29 L.R.A.(N.S.) 119, 139 Am. St. Rep. 817, 91 N. E. 582, 19 Ann. Cas. 747, the same court held that the owner of bonds which were stolen could maintain an action in equity commenced upon the discovery of the identity of the thief, against his estate for the amount of the bonds and interest thereon from the time of the theft, saying, among other things, that "the method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee."

In 3 Pomeroy's Equity Jurisprudence, § 1051, it is said: "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, —in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a bona fide purchaser for value and without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original *cestui que trust* who has thus been defrauded. . . . Whenever one person has wrongfully taken the property of another, and converted it into a new form or transferred it, the trust arises and follows the property or its proceeds."

And further, in § 1053, it is said: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice requires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

Under the averments of the amended bill in the present case, however, we think Tyberg did sustain a trust relation to the plaintiff company. To his care and custody the company committed its sluice boxes containing its gold dust, nuggets, and amalgram, all of which Tyberg, as foreman of the night shift, undertook to safeguard and protect. Instead of observing and executing that trust, he became himself the thief of the trust property. There is no magic in the mere name of a thing or act; but we find in the Century Dictionary this definition of the word "trustee:" "A person to whom property or funds have been committed in the belief and trust that he will hold and apply the same for the benefit of those who are entitled, according to an expressed intention either by the parties themselves, or by the deed, will, settlement, or arrangement of another; also, by extension, a person held accountable as if he were expressly a trustee in law."

The foreman of a gang of men is certainly properly accountable for that which was committed to his care and custody, and which the duty he undertook required him to safeguard and protect. The facts averred distinctly show not only that the trust property could be followed, but that it actually was followed and its proceeds found, in cash and in a draft, on the person of the foreman, and that it subsequently passed into the custody of the law, where the draft also was converted into money, and where the whole of the proceeds of the trust property still remain. Surely there ought to be no rule of equity why, if the facts be as alleged and as are to be here taken as true, a court of equity should not restore such proceeds to the rightful owner.

In the case of Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294, the

defendant to the bill, which was brought by the Nebraska National Bank, had been employed by the bank as a janitor, "his duties being, for a fixed compensation, to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties to watch over, guard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers." While so employed, he appropriated certain of the bank's money and invested it in certain real estate, upon which the bank sought by its bill to impose a constructive trust, which suit the supreme court of Nebraska sustained. After disposing of a question in respect to the quantum of proof required in such a case, the court proceeded and held as follows: "The other questions discussed are: (1) Whether the relation of the parties toward each other was a fiduciary one, in the sense in which that term is understood and employed by courts of equity; (2) whether assuming, as claimed, that the evidence fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring, in favor of the injured party, a trust with respect to property purchased by a thief with the fruits of his larceny? The propositions implied from the foregoing inquiries, although separately treated by counsel for defendants, are in fact so nearly akin that they may with propriety be discussed together. It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. It is sufficient that the doctrine therein asserted is, in our judgment, indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts, as developed by courts of equity, was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate; and larceny, under the circumstances here disclosed, is none the less a fraud upon the owner of the property stolen because committed by a servant, instead of one who is, in the technical sense of the term, a trustee. Speaking on that subject, it is said in a recent valuable work: 'The subject of constructive trusts is intimately connected with that of frauds. Indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a constructive trust is only a mode by which courts of equity work out equity, and prevent or circumvent fraud and overreaching. There are therefore two well-defined classes of constructive trusts, corresponding with the two classes of fraud, *viz.*: (1) Those which are raised in cases of actual fraud; and (2) those raised in cases of presumed or constructive fraud. Those of the first class are commonly called trusts *ex maleficio*.' 1 Beach, Mod. Eq. Jur. § 226. And in Fetter, Eq. (1895) 187, the rule is thus formulated: 'When, on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee.' See also 3 Pom. Eq. Jur. § 1053."

In the case of Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35, the supreme court of Wisconsin, speaking upon the subject of constructive trusts, said: "An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained *in specie*, or in its converted form, still remains in the possession of the wrongdoer. Three. In case of a constructive trust, an action lies in equity for its establishment and for an accounting even though the property wrongfully obtained is personal, and, *in specie* or in some new form into which it can be definitely traced, is within the reach of a plain remedy at law, where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation. 3 Pom. Eq. Jur. 3d ed. § 1053. This court quite recently held that the better rule is that the *cestui que trust* may always sue in equity for an accounting. Harrigan v. Gilchrist, 121 Wis. 127, 252, 99 N. W. 909. He may certainly do so where there are special circumstances which in the judgment of the court render equity jurisdiction competent to afford a more efficient remedy than can be obtained at law."

Nor do we think that the fact that the amended bill shows that the appellee Tyberg was charged with the larceny of the appellant company's property, and that that criminal charge was "adjudicated" in the court below, in any way affects the right of the company to pursue its civil remedy.

The case of Williams v. Dickenson, 28 Fla. 90, 9 So. 847, was a civil action brought to recover damages for the alleged burning of a certain building and fixtures, through the alleged criminal act of the defendant to the action, and in which civil action the defendant, among other things, pleaded in

abatement of it: "That the cause of action set forth in plaintiff's declaration is a tort which amounts to a felony, and the defendant has been indicted therefor in the circuit court of Jackson county, and said indictment is still pending and no trial has been had thereof; wherefore defendant prays that said suit be abated."

The trial court having sustained the plaintiff's demurrer to the plea, the ruling came before the supreme court of Florida, where that court said: "This plea seeks to invoke the doctrine held in the English courts,—that where a private individual has been damaged in person or property by the tortious act of another, which act amounts to a felony, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense, before the injured individual can seek civil redress for the private wrong inflicted upon him; the redress of the private wrong being postponed until after the public justice is satisfied. Two reasons for this rule are assigned in England: First. The party injured is relied upon to take the place of public prosecutor. In some cases he has even been required to employ counsel to prosecute on behalf of the Crown, and his interest in the accomplishment of public justice is kept alive by postponing the redress of his private grievance. And, second, in cases of felony, there was a forfeiture to the Crown of the felon's property, and the private individual was not allowed to acquire priority over the Crown in satisfaction of his demands upon the property of the felon. But in this country this doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the state without reliance upon the injured individual; and here we have no forfeiture of the felon's goods. The civil and the criminal prosecution may therefore go on *pari passu*, or the one may precede or succeed the other; or, if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. Neither is an acquittal or conviction upon the criminal charge any bar to the civil action. Cooley, Torts, 86 et seq.; Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473; Blassingame v. Glaves, 6 B. Mon. 38; Boston & W. R. Corp. v. Dana, 1 Gray, 83; Howk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Newell v. Cowan, 30 Miss. 492. The court below properly sustained the demurrer to the defendant's plea in abatement."

We are further of the opinion that the law did not afford the appellant a full, plain, and adequate remedy. It is expressly conceded in the brief of counsel for the appellee Tyberg that the proceeds of the stolen property, being in the custody of the court, were not subject to legal process; they there saying: "The authorities are unanimous that property *in custodia legis* is not subject to legal process."

We think there is nothing in the case of United States v. Bitter Root Development Co. 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318, relied on by the appellee Tyberg, in conflict with what we here hold. There there was no trust relation between the government and the Bitter Root Company concerning any of the timber wrongfully cut or disposed of, nor, as was expressly stated by the Supreme Court in that case, was there any pretense "that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants, or any of them." But in the case just cited, as well as in that of Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240, the court referred with approval to the familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

Such, in our opinion, is clearly the position of the appellee Tyberg under the allegations of fact contained in the amended complaint. And as the proceeds of the stolen property here involved were accurately and clearly traced and found in the possession of the thief, and passed from his possession into the custody of the law, we regard it as clear that it is not only within the power, but that it is the duty, of a court of equity, should the facts prove to be as alleged, to award the owner of the stolen property the proceeds thereof.

In view of what has been said, it becomes unnecessary to further discuss matters embraced by the motions interposed on the part of the appellee.

The judgment and order dissolving the restraining order are reversed, and the cause remanded to the court below, with instructions to reinstate the restraining order and for further proceedings in accordance with this opinion.

UNITED STATES SUPREME COURT.

BOSTON & MAINE RAILROAD, Plff. in Err.,
v.
KATHARINE HOOKER.

(233 U. S. 97, 58 L. ed. 868, 34 Sup. Ct. Rep. 526.)

Carriers — published tariffs — limitation of baggage liability.

1. A limitation as to the baggage liability of an interstate carrier, based upon the requirement to declare its value when more than $100, and pay an excess charge, is a regulation determinative of the rate to be charged and affecting the service to be rendered to the passenger within the meaning of the act to regulate commerce of February 4, 1887, § 6, as amended by the act of June 29, 1906, which requires regulations of that character to be filed and posted in accordance with its provisions as a part of the carrier's tariff schedules.

Same — limiting baggage liability — effect of regulation in published tariff.

2. A regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to $100 unless a greater value is declared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation, and regardless of the carrier's failure to inquire as to the value of the baggage, or of its outward appearance as indicating greater value, any state law or policy to the contrary having been superseded when Congress, by the amendment of June 29, 1906, to the act to regulate commerce of February 4, 1887, took possession of the subject of the interstate railway transportation of property.

Same — baggage — receipts.

3. A railway carrier receiving a passenger's baggage for interstate transportation is not required to give any other receipt than the customary baggage check by the provision of the act to regulate commerce of February 4, 1887, § 20, as amended by the act of June 29, 1906, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor.

(Mr. Justice Pitney dissents.)

(April 6, 1914.)

Note. — For effect of "Carmack amendment" on state regulations as to stipulations limiting liability of common carriers for loss or damage to goods, see notes to Adams Exp. Co. v. Croninger, 44 L.R.A. (N.S.) 257, and Louisville & N. R. Co. v. Miller, 50 L.R.A.(N.S.) 819.
L.R.A.1915B.

ERROR to the Superior Court of Massachusetts for Middlesex County to review a judgment entered pursuant to the mandate of the Supreme Judicial Court overruling the exceptions to a judgment of the Superior Court against defendant for the full value of certain lost baggage notwithstanding a limitation of such liability to the declared value, contained in its published tariffs. Reversed.

The facts are stated in the opinion.

Messrs. **Frederick N. Wier** and **Edgar J. Rich**, for plaintiff in error:

Rates, parts of rates, and regulations affecting or determining rates, fares, and charges, or the value of the service rendered, have the force of law, and therefore enter into and become a part of all contracts for interstate transportation.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 245, 50 L. ed. 1011, 1013, 26 Sup. Ct. Rep. 628; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 656, 57 L. ed. 683, 690, 33 Sup. Ct. Rep. 391; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

A common carrier may graduate its rates according to the value of the goods shipped.

New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 24 L. ed. 531; Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

The valuation, or the amount to which the carrier was to be answerable in damages, was an essential element in determining the rate paid by the shipper.

Re Released Rates, 13 Inters. Com. Rep. 550; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25, 24 L. ed. 531, 533; Hart v. Pennsylvania R. Co. 112 U. S. 331, 337, 343, 28 L. ed. 717, 719, 721, 5 Sup. Ct. Rep. 151; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; Mis-

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

The notice required at common law has been provided for by the general effect of the Hepburn act.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 654, 656, 57 L. ed. 683, 689, 690, 33 Sup. Ct. Rep. 391; Barstow v. New York, N. H. & H. R. Co. 158 App. Div. 665, 143 N. Y. Supp. 983.

The defendant in error was bound to take notice of the rates, and of their relation to the value of the baggage.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 656, 57 L. ed. 683, 688, 689, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

When a shipper or passenger has actual or presumptive knowledge that rates or charges are based upon valuation, he is held in effect to declare that the value of his goods shipped is in fact that valuation applicable to the rate of freight he assumes to pay.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 337, 28 L. ed. 717, 719, 5 Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 508, 57 L. ed. 314, 321, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 476, 57 L. ed. 600, 602, 33 Sup. Ct. Rep. 267.

When a shipper or passenger has declared or represented, by the act of taking advantage of a rate which he was bound to know was applicable to a certain valuation, that the value of his property was in fact that valuation, he cannot later show that the baggage had in fact a greater value, as his action in accepting this rate constitutes such a misrepresentation as will estop him from recovering more than the valuation which might rightfully have been shipped at this rate.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 341, 28 L. ed. 717, 720, 721, 5 Sup. Ct. Rep. 151; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 475, 477, 57 L. ed. 600, 602, 603, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 651, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 670, 57 L. ed. 690, 697, 33 Sup. Ct. Rep. 397.

Mr. Samuel Williston, for defendant in error:

By the rule of the common law a limitation of liability was invalid unless a special contract was made by which the shipper L.R.A.1915B.

agreed thereto, or unless the shipper was estopped by misrepresentation.

Brown v. Eastern R. Co. 11 Cush. 97; Malone v. Boston & W. R. Co. 12 Gray, 388, 74 Am. Dec. 598; Graves v. Adams Exp. Co. 176 Mass. 280, 57 N. E. 462; John Hood Co. v. American Pneumatic Service Co. 191 Mass. 27, 77 N. E. 638; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282; Henderson v. Stevenson, L. R. 2 H. L. Sc. App. Cas. 481, 32 L. T. N. S. 709; Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 361, 21 L. ed. 627, 634; Hart v. Pennsylvania R. Co. 112 U. S. 331, 343, 28 L. ed. 717, 721, 5 Sup. Ct. Rep. 151; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 441, 442, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469; Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15; Williams v. Central R. Co. 183 N. Y. 518, 76 N. E. 1116, affirming without opinion the decision as reported in 93 App. Div. 582, 88 N. Y. Supp. 434; Martin v. Central R. Co. 121 App. Div. 552, 106 N. Y. Supp. 226; Homer v. Oregon Short Line R. Co. 42 Utah, 15, 128 Pac. 522; Black v. Atlantic Coast Line R. Co. 82 S. C. 478, 64 S. E. 418; Elliott, Railroads, 4th ed. § 1510; Hutchinson, Carr. 3d ed. § 401.

No merely formal assent inferred from accepting a bill of lading or a receipt without actual knowledge of its contents, and without the shipper's attention being called by the carrier to the limitation, is valid.

Hutchinson, Carr. 3d ed. § 410; Plaff v. Pacific Exp. Co. 251 Ill. 243, 95 N. E. 1089; Hill v. Adams Exp. Co. 82 N. J. L. 373, 81 Atl. 859; Wichern v. United States Exp. Co. 83 N. J. L. 241, 83 Atl. 776.

Some actual assent is necessary.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 382, 383, 12 L. ed. 465, 482; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 328, 329, 21 L. ed. 297, 302, 303; Judson v. Western R. Corp. 6 Allen, 491, 83 Am. Dec. 646; Buckland v. Adams Exp. Co. 97 Mass. 124.

There is no estoppel barring the defendant in error from showing the value of her baggage.

Re Released Rates, 13 Inters. Com. Rep. 550.

The schedules filed make the defendant in error liable for the excess charge for value, and the railroad liable for the full value of the baggage.

Re Released Rates, 13 Inters. Com. Rep. 550; Kansas City Southern R. Co. v. Carl,

227 U. S. 639, 650, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

Mr. Justice Day delivered the opinion of the court:

Katharine Hooker brought an action in the superior court of Middlesex county, Massachusetts, to recover from the Boston & Maine Railroad as a common carrier on account of the loss of certain baggage belonging to her, which had been transported by the defendant in interstate commerce from Boston, Massachusetts, to Sunapee Lake station, New Hampshire, on September 15, 1908. The plaintiff recovered a judgment for the value of the baggage lost, with interest. The case was taken to the supreme judicial court of Massachusetts upon exceptions of the defendant, and upon its rescript, returned to the superior court, overruling the exceptions (209 Mass. 598, 95 N. E. 945, Ann. Cas. 1912B, 669), judgment was there entered for the plaintiff for $2,253.77.

The defendant insists that the recovery of the plaintiff should have been limited to the sum of $100, in view of certain requirements made by it concerning the transportation of baggage, and filed with the Interstate Commerce Commission. From the findings of fact it appears that the baggage was checked upon a first-class ticket purchased for the plaintiff (although not used by her, she traveling upon another similar ticket purchased by herself); that at the time the baggage was checked the plaintiff had no notice of the regulations hereinafter referred to, limiting the liability of the defendant (further than such notice is to be presumed from the schedules filed and posted as hereinafter stated); that no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value; that there was no evidence that any more expensive or different mode of transportation was adopted for baggage the value of which was declared to exceed $100 than for other baggage; that any reasonable person would infer from the outward appearance of the plaintiff's baggage when tendered to the defendant for transportation that the value largely exceeded $100, and that the loss of plaintiff's baggage was due to the negligence of defendant.

The court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, in accordance with the act of Congress relating to interstate commerce and amendments thereto and the orders and regulations of the Commission, schedules giving the rates, fares, and charges for transportation between different points, including Boston and Sunapee Lake station, all terminal, storage, and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations which in any way affected or determined such rates, fares, and charges or the value of the service rendered to passengers; that during the same time, in accordance with an order of the Commission of June 2, 1908, making comprehensive regulations as to rate and fare schedules, the defendant had placed with its agent in Boston all rate and fare schedules and the terminal and other charges applicable to that station, and had enabled and required him to keep in accessible form a file of such schedules, and had instructed him to give information contained therein to all seeking it, and to afford to inquirers opportunity to examine the schedules, and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the Commission with reference to such schedules. The court also found that the schedules contained provisions limiting the free transportation of baggage to a certain weight, and the liability of the defendant to $100, followed by a table of charges for excess weight, and also contained the following provision:

"For excess value the rate will be one half of the current excess baggage rate per 100 pounds for each $100, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents.

"Baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting a full ticket and $50 in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage;"

that the excess charge for transporting baggage valued at $1,904.50, which was the value of the baggage lost, from Boston to Sunapee Lake station during September, 1908, according to the schedules, was $4.75; that notices were posted at or near the offices where passenger's tickets were sold in the Boston station, stating that tariffs naming the rates on interstate traffic were on file with the agent, and would be furnished for inspection upon application, and that notices were posted in the baggage room of that station, in a conspicuous place, and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding $100 in value would be checked free for each passenger on presentation of a first-class ticket, and containing information with reference to excess weight. And the court fur-

ther found that the plaintiff did not declare at the time her baggage was checked that it exceeded $100 in value, and did not pay any charges for valuation in excess of that amount.

It is to be borne in mind that the action as tried and decided in the state court was not for negligence of the railroad company as a warehouseman for the loss of the baggage after its delivery at Sunapee Lake station, but was solely upon the contract of carriage in interstate commerce.

The supreme judicial court of Massachusetts, in deciding the case, held that the interstate commerce act did not in anywise change the common-law rule, applicable in Massachusetts, that regulations of this character, limiting the amount of recovery for baggage lost, must be brought home to the knowledge of the shipper and assented to, or circumstances shown from which assent might be implied. In reaching this conclusion that learned court relied upon the case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132, in which case it was held that a state might apply its local law and policy to recovery for the loss of a horse shipped in interstate commerce from Albany, New York, to Cynwyd, in the state of Pennsylvania, and injured by the negligence of a carrier in the latter state, notwithstanding the bill of lading contained an express condition that the carrier assumed liability to the extent only of the agreed valuation in event of loss. It was further held in the Hughes Case that the interstate commerce act, in the respect then under consideration, had not enacted an exclusive rule upon which recovery might be had governing responsibility for loss, and that as the law then stood the state might enforce its own regulations authorized by statute or judicial decision as to responsibility for such negligence.

Since the decision in the Hughes Case the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), has been passed, and this court has held that by virtue of that act (particularly § 7, the Carmack amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the states to control in such respect by their own policy or legislation. In this connection we may refer to the cases of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The cases in 226 and 227 U. S., it is true, involved liability for express or freight shipments made upon express receipts, bills of lading, or separate contracts, showing on their face or by reference to tariffs the opportunity for valuation for the purpose of fixing the rate and liability, and the limitation appearing in such form of contract was declared to be valid and effectual to relieve the carrier from a greater liability than that therein expressed. But the court did not stop there: In Adams Exp. Co. v. Croninger, 226 U. S. 509, 57 L. ed. 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, it said: "The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." In Kansas City Southern R. Co. v. Carl, 227 U. S. 652, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, this court said: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. . . . To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate." And in Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 669, 57 L. ed. 697, 33 Sup. Ct. Rep. 397, this court said that the shipper was compelled to take notice of the rate sheets contained in tariff schedules, "not only because referred to in the contract signed by them, but because they had been lawfully filed and published. . . . When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates

is the lawful rate." In Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383, this court said: "That rule of liability [the uniform rule established by the Hepburn act] is to be enforced in the light of the fact that the provisions of the tariff enter into and form a part of the contract of shipment, and if a regularly filed tariff offers two rates, based on value, and the goods are forwarded at the low value in order to secure the low rate, then the carrier may avail itself of that valuation when sued for loss or damage to the property." And in Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, this court said: "But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike, and was to be enforced by the courts in fixing the rights and liabilities of the parties. The tariffs are filed with the Commission and are open to inspection at every station. In view of the multitude of transactions, it is not necessary that there shall be an inquiry as to each article, or a distinct agreement as to the value of each shipment. If no value is stated, the tariff rate applicable to such a state of facts applies. If, on the other hand, there are alternative rates based on value, and the shipper names a value to secure the lower rate, the carrier, in the absence of something to show rebating or false billing, is entitled to collect the rate which applies to goods of that class, and if sued for their loss it is liable only for the loss of what the shipper had declared them to be in class and value."

Before these cases were decided this court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike, and from which there could be no departure. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Armour Packing Co. v. United States, 209 U. S. 56, 81, 52 L. ed. 681, 694, 28 Sup. Ct. Rep. 428; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265. This principle, it will be perceived, was fully recognized in the series of cases decided since the passage of the Hepburn act, beginning with the case of Adams Exp. Co. v. Croninger, supra. It is true that the Carmack amendment requires a receipt or bill of lading to be issued concerning shipments of property in interstate commerce, and that in the cases construing that amendment a bill of lading was issued, and according to the circumstances of the case, the bill of lading and its effect are discussed in each of these, but the effect of filing the schedule is not lost sight of, and the doctrine of the previous cases as to the purpose of filing and the necessity of adherence to such schedule is uniformly recognized.

The court below, after conceding that the subject-matter of passenger's baggage in interstate travel is within the control of Congress, and saying that there was no specific regulation respecting it, said:

"The precise position of the defendant is that, as the limitation of liability for baggage as filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which, under the interstate commerce law, it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent, or even misrepresentation. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Melody v. Great Northern R. Co. 25 S. D. 606, 30 L.R.A.(N.S.) 568, 127 N. W. 543, Ann. Cas. 1912C, 727."

It follows, therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate, and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100, and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached. As to the finding that the plaintiff's baggage was apparently worth more than $100, as above set forth, it appears that the contents of the two trunks and suit case were not disclosed or known to the carrier, and the finding in this respect, necessarily based on the appearance of the baggage, cannot be said to show a procurement of transportation in violation of the requirements of

the filed schedules at a rate disproportionate to its known value.

Let us now turn to the interstate commerce act and see whether the matter of the limitation of baggage liability is covered by that act. Section 6 provides:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act, and print and keep open to public inspection, schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public, and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities definied in this act.

. . . . . .

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. . . . " [24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3156, as amended by § 2 of act of 1906, 34 Stat. at L. 586, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1289.]

It is to be observed that the schedules are required to state, among other things, in naming certain charges, "all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." The question then is, did the limitation as to liability for baggage, based upon the requirement to declare its value when more than $100 was to be recovered, come within that provision?

It seems to us that the ordinary signification of the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier. It is a regulation which fixes and determines the amount to be charged for the carriage in view of the responsibility assumed, and it also affects the value of the service rendered to the passenger. Such requirements are spoken of, in decisions dealing with them, as regulations; as, a common carrier "may prescribe *regulations* to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter." York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171. "It is undoubtedly competent for carriers of passengers, by specific *regulations*, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such *regulations* may be practically effective and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the

passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation the carrier, at its option, can make such additional charges as the risk fairly justifies." New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533.

Mr. Justice Brewer, sitting in the circuit court, in Ames v. Union P. R. Co. 64 Fed. 165, 178, thus defined the term "regulation:" "Within the term 'regulation' are embraced two ideas. One is the mere control of the operation of the roads, prescribing the rules for the management thereof,—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word 'regulation,' as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation in this sense is attempted, it necessarily affects the property interests of the railroad owners; and it is 'regulation' in this sense of the term."

Turning to the act itself we think the conclusion that this limitation is a regulation required to be filed by the act is strengthened by § 22, which provides: "But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, *together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act.*" [As amended 28 Stat. at. L. 643, chap. 61, U. S. Comp. Stat. 1901, p. 3171.] This section would indicate that Congress thought that § 6 of the act had to do with specifications of the amount of baggage which would be carried free, and that such regulations should be filed under the requirement of § 6 to which it referred.

This conclusion is further strengthened by the action of the Interstate Commerce Commission, in requiring by its Tariff Circular No. 15A, entitled, "Regulations Governing the Construction and Filing of Freight Tariffs and Classification and Passenger Fare Schedules," effective April 15, 1908, and in force at the time of the loss here in question, that:

"34. Tariffs shall contain, in the order named:

"(g) Rules and regulations which govern the tariff, the title of each rule or regulation to be shown in bold type. Under this head all of the rules, regulations, or conditions which in any way affect the fares named in the tariff shall be entered. . . . These rules shall include . . . the general baggage regulations, and also schedule of excess-baggage rates, unless such excess-baggage rates are shown in tariff in connection with the fares."

This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act.

The act of June 18, 1910 (36 Stat. at L. 539, 546, chap. 309, U. S. Comp. Stat. Supp. 1911, p. 1288), defining, in § 1, the duties of carriers to make just and reasonable regulations affecting, among other things, the carrying of personal, sample, and excess baggage, may be noted in passing. This statute was before the Commission in a case involving such regulations. Regulations Restricting the Dimensions of Baggage, 26 Inters. Com. Rep. 292. Concerning it the Commission, by Clark, Chairman, said:

"Prior to June 18, 1910, the act to regulate commerce contained no specific provision relating to the interstate transportation of baggage, except in connection with the issuance of joint interchangeable mileage tickets. The Commission had, however, under authority of § 6, required carriers to publish and file their general baggage regulations and their schedules of excess baggage rates. Section 1 was amended on the date named, the amendment, in so far as it is material, reading as follows:

" 'It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce . . . just and reasonable regulations and practices affecting classifications, . . . the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, . . . the carrying of personal, sample, and excess baggage.' "

And it is to be observed that the Commission considers its requirement with reference to including baggage regulations in the tariff schedules, quoted above, as adequate, for the same provisions appear in its current circular.

We are therefore of the opinion that the requirement published concerning the amount of the liability of the defendant, based upon additional payment where bag-

gage was declared to exceed $100 in value, was determinative of the rate to be charged, and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute.

By permitting the baggage regulations, including the excess valuation rate, to be filed and become part of the tariff schedules, the rule of the common law that the carrier becomes an insurer of the safety of baggage against accidents not the act of God or the public enemy or the fault of the passenger (the rule established in this country, 3 Hutchinson, Carr. § 1241) was not changed. The effect of such filing is to permit the carrier by such regulations to obtain commensurate compensation for the responsibility assumed for the safety of the passenger's baggage, and to require the passenger, whose knowledge of the character and value of his baggage is peculiarly his own, to declare its value and pay for the excess amount. There is no question of the reasonableness or propriety of making such regulations, which would be binding upon the passenger if brought to his knowledge in such wise as to make an agreement or what is tantamount thereto. This much is conceded by the learned counsel for the plaintiff in error. The liability of a carrier under the interstate commerce act was said, in the Croninger Case (p. 511), to be (aside from the responsibility for the default of a connecting carrier) "not beyond the liability imposed by the common law, as that body of law applicable to carriers has been interpreted by this court as well as many courts of the states." And in that case (p. 509) it was laid down as the established rule of common law "as declared by this court in many cases that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk." And see the previous cases in this court there cited. But the effect of the regulations, filed as required, giving notice of rates based upon value when the baggage to be transported was of a higher value than $100, and the delivery and acceptance of the baggage, without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100 only.

The language of the regulation filed reads: Baggage liability is limited to personal baggage not to exceed $100 in value, etc., unless a greater value is declared, etc. We have said that this limitation does not relieve from the insurer's liability when the loss occurs otherwise than by negligence, and we think applies equally when negligence of the carrier is the cause of loss, as is found in this case. The effect of the filing gives the regulation as to baggage the force of a contract determining "Baggage liability." In Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, followed in the later cases in this court, it was held that a recovery may not be had above the amount stipulated though the loss results from the carrier's negligence. "The carrier must respond for negligence up to that value." The discussion and conclusion reached in the Croninger and Carl Cases, supra, leave nothing to be said on this point. This rule is recognized in New York (Tewes v. North German Lloyd S. S. Co. 186 N. Y. 151, 8 L.R.A.(N.S.) 199, 78 N. E. 864, 9 Ann. Cas. 909, 20 Am. Neg. Rep. 701; Gardiner v. New York C. & H. R. R. Co. 201 N. Y. 387, 34 L.R.A.(N.S.) 826, 94 N. E. 876, Ann. Cas. 1912B, 281).

If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to $100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum.

We do not think the requirement of the Carmack amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the Commission. Such checks are receipts, and there is no special requirement in the statute as to their form. It is doubtless in the power of the Interstate Commerce Commission to make requirements as to the

checks or receipts to be given for baggage if that subject needs regulation. Act of June 18. 1910, §§ 1 and 15 (36 Stat. at L. 539, chap. 309).

Reversed and remanded to the Superior Court of Massachusetts for further proceedings not inconsistent with this opinion.

Mr. Justice **Pitney**, dissenting:

I have been unable to find a previous instance where any court, in this country, at least, in an action by shipper or passenger against common carrier for loss of freight or baggage, occasioned by the negligence of the carrier or its employees, has held the recovery to be limited to an arbitrary sum unrelated to the value of the goods lost, and this without any previous valuation or agreement assented to by the shipper or passenger, without any representation of value made by him, and without even notice brought home to him of any rule or regulation upon which the limitation of liability is based. The effect given by the present decision to a "regulation" prescribed by the carrier, that, while formally promulgated, as in fact unknown to the passenger, seems to me an entire departure from the principles governing the duties and responsibilities of common carriers as heretofore recognized by this court and by the courts of the states generally, as laid down in the text-books and cyclopedias of law, and as reiterated and applied by this court in a recent series of notable decisions.

We are referred to the "act to regulate commerce" of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as amended in 1906 by the Hepburn act (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288), with citation of the provision in § 6 of the act respecting the filing and publication of schedules showing the rates, fares, and charges for transportation, etc., and with particular emphasis upon the so-called Carmack amendment. I do not find in either of these any phrase or expression that manifests a legislative intent to lessen or limit in any way the carrier's liability as quasi insurer, much less its responsibility for losses due to its own negligence or that of its employees. Neither enactment in terms imposes any duty or burden upon the shipper or passenger affecting the question at issue; and the Carmack amendment, at least, contains a clear expression of the legislative purpose to enforce the carrier's responsibility for losses of property caused by it, without regard to any rule or regulation exempting it.

The result reached in the present case—which seems so contrary to all previous adjudications and to the apparent meaning of the acts of Congress—is based (if I understand the opinion) not upon any legislation directly addressed to the particular subject, but upon inferences deduced by indirect reasoning from the assumed policy of the law. The reasoning, as I am constrained to believe, disregards familiar principles established by repeated decisions of this court, in the light of which Congress undoubtedly legislated; and it has the effect of placing honest but unskilled shippers and passengers at a serious disadvantage in dealing with common carriers, enabling the latter, by "regulations" never called to the attention of the former, to obtain practical immunity from responsibility for losses due to their own negligence.

The consequences are so serious that I have been unable to convince myself that I should acquiesce in silence.

The salient facts are mentioned in the opinion, but some are not noticed, and it is proper to state that plaintiff traveled, in September, 1908, as an interstate passenger upon defendant's train from Boston, Massachusetts, to Sunapee Lake, New Hampshire, having in fact paid two first-class fares, one ticket being used for the checking of her baggage, the other for her personal transportation. Defendant's schedules, filed with the Interstate Commerce Commission and published in the mode prescribed by the act of Congress, showed the rates of fares between these places, and contained a provision stating that "150 pounds of personal baggage, not exceeding $100 in value, will be checked free for each passenger on presentation of a full ticket. . . . For excess weight, charge will be made as follows [here was inserted a table of charges for excess weights, and at the foot of it the following]: For excess value, the rate will be one half of the current excess baggage rate per 100 pounds for each $100, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents. Baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting a full ticket . . . unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage." Plaintiff's baggage consisted of three pieces, of the value of $1,904.50, and the charge on this valuation for transportation from Boston to Sunapee Lake, according to the schedules, would have been 25c. for each excess $100 or fraction thereof, or $4.75 in all. Plaintiff did not declare and stipulate at the time the baggage was checked that it exceeded $100 in value, and did not pay any charge for valuation in excess of that amount.

Defendant's agents did not request any such declaration, and made no inquiry respecting value; but it is found as a fact that from the outward appearance of the baggage when tendered to defendant for transportation any reasonable person would have inferred that its value largely exceeded $100. There was nothing to show that any more expensive or different mode of transportation was adopted for baggage whose value was declared to exceed $100 than for other baggage. Nor was there anything to show that plaintiff, or her agent who attended to the checking of the baggage for her, had notice of defendant's regulations for limiting its liability. In the Boston passenger station notices were posted that "freight and passenger tariffs naming rates on interstate traffic are on file with the agent, and will be furnished for inspection upon application;" and in the baggage room was a notice that "150 pounds of personal baggage, not exceeding $100 in value, will be checked free for each passenger on presentation of a full ticket." There was nothing in either of these notices to call attention to any charge for excess value, nor any statement in terms that the baggage liability was limited to $100. Nor was it shown that the notices themselves were ever seen by plaintiff or her agent. It appears, however, that because the weight of her baggage exceeded by 45 pounds the weight allowable under the company's rules, a payment of 23 cents was made for checking the baggage. Ordinary numbered baggage checks appear to have been delivered to plaintiff's agent, but nothing else in the form of a receipt or bill of lading. The baggage was not lost in transit, but was destroyed by fire while in defendant's charge, more than twenty-six hours after its arrival at defendant's Sunapee Lake station. It was distinctly found as a fact that the loss was due to defendant's negligence.

In the trial court, plaintiff relied wholly upon a count of her declaration which, after reciting the status of defendant as a common carrier, and the contract of carriage in interstate commerce, averred as ground of recovery the neglect and refusal of defendant to deliver the baggage to plaintiff at Sunapee Lake upon demand made, accompanied with a tender of the checks. But the course of the trial shows that negligence was a principal issue, if not the only vital issue; both parties requested findings upon the question, and findings were made in response to their respective requests; and upon review the state supreme court treated negligence as the asserted ground of liability, saying (200 Mass. 599, 95 N. E. 945, Ann. Cas. 1912B, L.R.A.1915B. 669): "The plaintiff, an interstate passenger of the defendant, claims damages in excess of $2,000 for loss of her baggage occurring through the negligence of the defendant."

Although, according to the well-known Massachusetts doctrine, the railroad company's responsibility strictly as carrier would seem to have terminated with the completion of the transit and the safe deposit of the baggage in the railroad station, its responsibility thereafter being that of warehouseman (Thomas v. Boston & P. R. Corp. 10 Met. 472, 477, 43 Am. Dec. 444; Norway Plains Co. v. Boston & M. R. Co. 1 Gray, 263, 273, 61 Am. Dec. 423; Barron v. Eldredge, 100 Mass. 455, 459, 1 Am. Rep. 126; Lane v. Boston & A. R. Co. 112 Mass. 455, 462; Stowe v. New York, B. & P. R. Co. 113 Mass. 521, 523; Rice v. Hart, 118 Mass. 201, 207, 19 Am. Rep. 433), the distinction appears to have been ignored by the Massachusetts court in discussing the case, perhaps because it does not affect the responsibility for loss of goods attributable to negligence; there being in this respect no difference between a carrier and a warehouseman. But it might affect the question whether defendant's responsibility is to be determined in the light of the interstate commerce act; and I concede that it is.

It is, of course, true that in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, this court held that by the Carmack amendment (34 Stat. at L. 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307, set forth in the margin†) the subject-matter of the liability of railroads under bills of lading issued for interstate freight is placed under Federal regulation so as to supersede the local law and policy of the several states, whether evidenced by judicial decision, by statute, or by state Constitution.

And I concede that the supreme court of

†"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Massachusetts erred if it intended to hold that the carrier's responsibility for interstate passengers' baggage is not likewise within the sweep of the amendment.

The concrete question, therefore, is whether, under the interstate commerce act and the Carmack amendment, this defendant's liability to plaintiff, upon the facts stated, is properly to be limited to $100.

My views, in brief, are:

(a) That the baggage regulation limiting the liability to the amount named (if construed as operative without the knowledge or consent of the passenger, and in the absence of an actual valuation of the goods, assented to by the passenger), is not authorized or sanctioned by the commerce act, and is invalid because contrary to the established policy of the law governing the common carrier in the performance of its public duties, and because contrary to the letter and spirit of the Carmack amendment.

(b) That the regulation had not received the approval of the Interstate Commerce Commission, but, on the contrary, was covered by an adverse administrative ruling made by the Commission a few months before the occurrences that gave rise to this action.

(c) That, being invalid *per se*, the regulation derived no legal force or vitality from being included in the filed and published schedules.

(d) That the filing of the regulation cannot give it the force of a contract, because (1) plaintiff was ignorant of the regulation in fact; (2) to make it a part of her contract without her knowledge would render it a contract limiting the carrier's liability for negligence to an arbitrary sum, without any agreement or representation of value on the part of plaintiff, and therefore void as being contrary to the established public policy; and (3) the law will not raise by implication an agreement that is contrary to the policy of the law.

(e) That plaintiff is not estopped to recover the full value of her goods, for she was entirely free from blame in the matter, made no representation as to value, and sought no special advantage.

(f) That even were the contract of carriage as actually made invalid, this would not render the bailment unlawful, and (at least) the carrier would be responsible for the loss of the goods through negligence, irrespective of the contract.

(g) That by the terms of the Carmack amendment the railroad company in this case is precluded from setting up a limitation of liability, (1) because the limitation, as asserted against a passenger who was ignorant of the regulation, and had made no contract under it, amounts to a rule or regulation for exempting the carrier from liability for a loss of property caused by the carrier's negligence, contrary to the terms of the amendment; and (2) because the carrier waived any benefit of the regulation (if that were valid) by failing to deliver to plaintiff a receipt or bill of lading embodying the terms of the contract as required by the same enactment.

The importance of the subject seems to warrant a somewhat extended discussion.

(1) Reference is made to § 6 of the commerce act as amended by the Hepburn act; the portion relied upon being that which requires the filed and published schedules to state "any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." In this respect the act has remained substantially unchanged since the amendment of March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1911, p. 3158), quoted in the margin.†

It is important to observe that § 6, either before or since the Hepburn act, *does not prescribe what the rules and regulations*

†"Sec. 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing *the rates and fares and charges for the transportation of passengers and property* which any such common carrier has established and which are in force at the time upon its route. *The schedules* printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and *shall contain* the classification of freight in force, and shall also state separately the terminal charges and *any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.* Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . . And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

shall be. Neither this section nor any other section of the act confers upon the carrier any authority over the subject. It is implied that there may be, indeed must be, rules and regulations for carrying on the business of a common carrier, in order to secure system, efficiency, and a just performance of its public duties; and § 6, recognizing this, prescribes—and, as I think, only prescribes—that whatever rules and regulations may be duly established which "in anywise change, affect, or determine the rates, fares, and charges, or the value of the service rendered," shall be included in the filed and published schedules. But does it follow from this that the carrier may make any rules and regulations it chooses? Is the carrier to be a law unto itself? And, if not, what are the limitations upon its power? The answer, I think, is plain. The authority to establish rules and regulations, unless it arise from express legislative authority, is derived by implication from the necessities of the case, in view of the nature of the business, and is plainly subject to the limitation that the rules and regulations shall not be such as to contravene the letter or the policy of the law, nor such as to evade responsibility for the due performance of the public duties of the carrier.

This is a principle universally recognized from an early day by the courts of this country, and it lies at the foundation of the rule everywhere prevalent (differing, in this regard, from the rule that prevailed in England for a time prior to the railway and canal traffic act 1854, 17 and 18 Vict. chap. 31, § 7), that the carrier cannot limit his liability by any general regulation of published notice.

It is for this reason, primarily, that the regulation here in question,—"Baggage liability is limited to personal baggage not to exceed $100 in value . . . unless a greater value is declared," etc., if treated as intended to be effective without the knowledge or assent of the pas enger, seems to me to be a regulation entirely beyond the power of the carrier to establish. The state reports are full of cases recognizing the principle, and applying and enforcing it with respect to the particular subject-matter now under consideration. It is not necessary, however, to go outside of our own reports, for this court from the beginning until now has constantly recognized and steadfastly enforced this limitation of the authority of the common carrier with respect to regulations of the same essential character as the one now in question.

Thus, in New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 382, 12 L. ed. 465, 482, the court held that the carrier could not by published notices seeking to limit its responsibility exonerate itself from the duties which the law annexed to its employment. And, dealing with an express stipulation, the court, by Mr. Justice Nelson (p. 382), said: "But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. *He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.* He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in the case of Hollister v. Nowlen, 19 Wend. 234, 247, 32 Am. Dec. 455, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and *nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.*"

In York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 112, 18 L. ed. 170, 171, the court, speaking by Mr. Justice Field, said: "The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may . . . prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and *he cannot by any mere act of his own avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent*

is refused. The owner of the goods may rely upon this responsibility imposed by the common law, which *can only be restricted and qualified when he expressly stipulates for the restriction and qualification.* But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

In Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 329, 21 L. ed. 297, 302, the court, after repeating the language I have quoted from the opinion in 6 How., proceeded to say: "These considerations against the relaxation of the common-law responsibility by public advertisements *apply with equal force to notices having the same object,* attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. *It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them.* If the parties were on an equality in their dealings with each other there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. *It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. . . . The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow.*"

So, in New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533, the court said: "It is undoubtedly competent for carriers of passengers, by *specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duties to the public,* to protect themselves against liability as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, *it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value;* and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies."

(2) And if it is against the policy of the law for a common carrier to limit its "common-law liability"—that of quasi insurer of goods—by general regulation or published notice not assented to by the passenger or shipper, this is more emphatically true with respect to its responsibility for losses due to the negligence of the carrier or of its servants; for, even by express contract, upon whatever consideration, the carrier is not permitted to obtain exemption from liability for negligence. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 383, 12 L. ed. 465, 482; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 113, 18 L. ed. 170, 172; New York C. R. Co. v. Lockwood, 17 Wall. 357, 375, 384, 21 L. ed. 627, 638, 641, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co 93 U. S. 174, 183, 23 L. ed. 872, 876.

The rule admits of but one exception, and that is hedged with important qualifications. It is, that where a contract of carriage is fairly made between shipper and carrier agreeing upon a valuation of the property carried, or based upon a valuation declared by the shipper and relied on by the carrier, with a rate of freight based upon a condition limiting the carrier's liability to the amount of the agreed or declared valuation, and the valuation is in good faith relied upon by the carrier, and is not a mere cover for an attempt by the carrier to escape liability for negligence, the contract will be recognized as a proper mode of securing a due proportion between the amount for which the carrier is responsible and the freight he receives, and the shipper will be estopped from claiming more than the agreed or declared valuation, even in case of a loss due to negligence. So it was laid down by this court in Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151, and the grounds of decision were expressed in the opinion of the court (by Mr. Justice Blatchford) in terms so clear that besides being uniformly followed by this court until now, they have been adopted generally by states that adhere to the common-law

rules of liability. To quote from the opinion (112 U. S. 340): "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. *If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed* [citing cases]. This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid in large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to valu , in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. *The shipper is estopped from saying that the value is greater.*"

(3) Such was the state of the common law of this country, as universally recognized, when the interstate commerce act was passed, and I am unable to see in § 6, or elsewhere in that act, any purpose to change it. During the entire time that intervened between the passage of the act and the passage of the Hepburn act (including the Carmack amendment) in 1906, the courts of the states (except in the few states that adopted a policy less favorable to the carrier) and the Federal courts generally administered the law as before, and without a suggestion, so far as I have observed, that § 6, in requiring that all rules and regulations having a bearing upon rates should be filed and published, had in any way authorized common carriers by any mere rule or regulation, although properly promulgated, to limit the liability for damages by negligence in the absence of an express agreement as to value assented to by the shipper, or some representation of value made by him.

Indeed, this court, in the recent case of Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488, 48 L. ed. 268, 272, 24 Sup. Ct. Rep. 132, held that § 6, as it stood after the amendment of March 2, 1889, and before the Hepburn act, did not amount to a regulation of the matter of a limitation of the carriers' liability to a particular sum in consideration of lower freight rates for transportation. To quote from the opinion (pp. 487, 488): "It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. at L. 379, 382, chap. 104, U. S. Comp. Stat. 1901, p. 3154; 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158, provide for equal facilities to shippers for the interchange of traffic; for nondiscrimination in freight rates; *for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules, and regulations;* . . . giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation. . . . While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, *we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations*, and, until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject, although it

may to this extent indirectly affect interstate-commerce contracts of carriage?"

This query was by the decision answered in the negative. And as a result, notwithstanding § 6 of the commerce act, the courts of Pennsylvania were left free to disregard the rule laid down in Hart v. Pennsylvania R. Co. and to follow their own declared doctrine denying the right of a common carrier to limit its liability for losses due to negligence, even by a special agreement including a valuation assented to by the shipper. In this respect the situation was changed by the Carmack amendment to the Hepburn act, but not (so far as I can see) by any of the changes made in § 6 by that act.

(4) And I had supposed that since as before the Carmack amendment, under the decisions of this court in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and the other cases that have followed it along the same line, the general rules of law that disabled the common carrier from establishing regulations for limiting its liability by general notice not brought home to the shipper, and debarred the carrier from limiting its liability for losses due to negligence except by a special agreement including a fair valuation assented to by the shipper, had remained in full force and vigor, and indeed, by the effect of the amendment, had been made the exclusive rule of conduct for interstate carriers by rail. For the Croninger Case not only held (negatively) that the amendment superseded state laws upon the subject, but (affirmatively) that in matters not covered by its own express terms it had the effect of establishing the common-law rules respecting the carrier's liability, as laid down in previous decisions of this court, and adopted generally by the Federal courts. To quote from the opinion (p. 504): "Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States (Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151), or that determined by the supposed public policy of a particular state (Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132), or that prescribed by statute law of a particular state (Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289). Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject." (Page 505): "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it." (Page 507): "But it has been argued that the nonexclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to. . . . *To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action gives to it a more rational interpretation* than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself."

It was upon this construction of the act that we proceeded to determine the validity of the provision in the receipt or bill of lading there in question, which limited the liability of the carrier to the agreed value of $50; and we applied thereto the familiar rules to which I have already referred. Thus (p. 509): "That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Hart v. Pennsylvania R. Co. 112 U. S. 331, 338, 28 L. ed. 717, 720, 5 Sup. Ct. Rep. 151. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this, and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. *But the rigor of this liability might be modified through any fair, reasonable, and just agreement with*

the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported. It has therefore become *an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just, and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk.*"

The other decisions that have followed the Croninger Case (Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380) have simply applied the doctrine therein laid down, under varying circumstances.

In each of these cases there was a special contract, held by the court to have been fairly made, and to amount to a valuation by the shipper of the goods in question for the purposes of the shipment. In short, the court in each instance applied the rule of liability laid down in Hart v. Pennsylvania R. Co. supra.

(5) Because of this firmly established policy of the law respecting the carrier's responsibility for the consequences of his negligence, I should have construed the "regulation" in question, limiting the baggage liability to $100, in subordination to that policy. According to the canon uniformly applied in construing statutes, that of giving them no meaning beyond that which the legislature may constitutionally enact, I should have construed the baggage regulation as a formula for standardizing the contracts proposed to be made by the carrier with the assent of passengers; not that the formula of itself constituted a substitute for a contract, or was intended to become binding upon the passenger until directly brought to his notice and in some way consciously assented to by him.

But my brethren construe it as binding in the absence of any knowledge or assent on the part of the passenger. So considered, I deem it void as being a regulation that it was beyond the power of the common carrier to adopt. And if I am right about this, the fact that it was included in the filed and published schedules does not in the least add to its efficacy.

It is not a question of mere unreasonableness. A carrier may resort to practices that are so clearly unwarranted by law as to require no preliminary application to the Commission, and that not even the sanction of the Commission could validate. I think the attempt to enforce, *ex parte*, such a limitation of liability, is in that category.

(6) But, in fact, the Commission had distinctly ruled against the validity of the regulation in question, construed as the court now construes it; and had done this prior to the time this action arose.

I find nothing savoring of approval in ¶ 34(g) of Tariff Circular No. 15A, effective April 15, 1908. The reference to "excess-baggage rates" is to charges for excess weight, as I think sufficiently appears from 26 Inters. Com. Rep. 292. But, if intended to apply to excess value, it does not suggest that a limitation of liability for losses attributable to negligence, effective without the knowledge or consent of the passenger, is to be made a part of such regulations.

And in Re Released Rates, 13 Inters. Com. Rep. 550, decided May 14, 1908, the Commission, after full hearing and consideration, made an administrative interpretation of the Carmack amendment, holding distinctly that it did not abrogate the law of the Lockwood Case, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, and the Hart Case, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151. Among other rules laid down (Mr. Commissioner Lane writing) were these (p. 553): "(b) When the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith as their real value, the rate of freight being fixed in accordance therewith, the shipper cannot recover an amount in excess of the value he has disclosed, even when loss is caused by the carrier's negligence" [citing the Hart Case, and quoting in italics from the opinion to the effect that under the circumstances disclosed "*the shipper is estopped from saying that the value is greater*"]. And again (p. 554): "The same principle is applicable when the shipper has in some other way concealed

the nature or the value of his goods in order to secure a lower rate of freight. . . . It does not appear that this principle is in any respect in derogation of the provisions of § 20 [meaning the Carmack amendment]. The carrier is made liable 'for any loss, damage, or injury,' and 'no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.' But it is of the highest importance to note that this limitation is not secured by contract or notice—the contract has no validity *per se*. It is only right that a carrier who has acted in good faith should be protected against the frauds and misrepresentations of the shipper, and the law accomplishes this through the operation of the principle of estoppel. The shipper is estopped from recovering an amount in excess of the declared value, and the rule is in perfect harmony with the law as it stands to-day. 6 Cyc. title 'Carriers,' p. 401, note 5. (c) *If the specified amount does not purport to be an agreed valuation, but represents an attempt on the part of the carrier to limit the amount of recovery to a fixed sum, irrespective of the actual value, the stipulation is void as against loss due to the carrier's negligence or other misconduct.* Much confusion has arisen from failure to distinguish between this situation and the situation comprehended in Hart v. Pennsylvania R. Co. supra. That decision was expressly predicated upon the principle of estoppel; the shipper had misrepresented the value of his property, and had thereby secured the benefit of a lower rate than he was properly entitled to by virtue of the real value. He was estopped by his fraudulent conduct from recovering an amount in excess of the value he had declared. In the case we are now considering, the requisites of estoppel are wanting. An estoppel cannot arise unless the party invoking it has been the victim of misrepresentation, and has himself acted in good faith. Can it possibly be argued that when a carrier has arbitrarily placed in its bill of lading a stipulation limiting the amount of its liability, regardless of the actual value of the property, it may claim the benefit of an estoppel? Obviously not: it has not acted in good faith, neither has it been the victim of misrepresentation." And again (p. 556): "(d) *If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious, and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped in event of loss due to negligence.* This situation is substantially identical with that just considered,—the difference is one in form only."

(7) In the Hart Case, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, the fundamental ground of decision, as appears from what has been quoted from the opinion, was that since the shipper had entered into a special agreement for the purpose of cheapening the freight, *he was estopped from saying that the value of the goods was greater than the value represented by him for the purposes of the agreement.* So, also, in the Croninger Case, and the other recent cases referred to, *estoppel was the ground of decision*, as the opinions clearly show (226 U. S. p. 510, bottom; 227 U. S. p. 276, top; 227 U. S. p. 651, top; 227 U. S. p. 668, bottom). When participating in these decisions, I, for one, so understood them. In each case the principle of estoppel is essential to the reasoning. In the Carl Case, 227 U. S. 651, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, it was said: "When a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. If such a valuation be made in good faith for the purpose of obtaining the lower rate applicable to a shipment of the declared value, there is no exemption from carrier liability due to negligence forbidden by the statute when the shipper is limited to a recovery of the value so declared. The ground upon which such a declared or agreed value is upheld is that of estoppel" [citing the Hart Case upon this precise point]. And in the Harriman Case (227 U. S. 668, 57 L. ed. 696, 33 Sup. Ct. Rep. 397), the topic is summed up as follows: "The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle. This whole matter has been so fully considered in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, and Kansas City Southern R. Co. v. Carl, supra, that we only need to refer to the opinions in those cases without further elaboration."

That these decisions are inconsistent with the theory that the mere act of including the regulations upon the subject in the filed schedules would operate to limit the liability of the carrier, without any representation or agreement as to value, assented

to by the shipper, seems to me equally clear. Although in each case the relation of the rate differential to the question of valuation was brought home to the shipper, so that it appeared that the shipper had actual notice of the regulation upon the subject contained in the filed and published schedules, it was not suggested that the mere existence of such a regulation, coupled with the fact that the shipment was made at the more advantageous freight rate, had the effect of limiting the liability of the carrier in the event of a loss attributable to negligence. On the contrary, while the relation of the rate differential to the valuation was discussed, it was treated as merely showing that there was consideration for the agreement made by the shipper limiting the responsibility of the carrier, and as showing the reasonableness of that agreement and the grounds of the estoppel that grew out of it. It was in each case plainly implied, if not expressed, that some representation or valuation, consciously assented to by the shipper, was essential to the limitation of the carrier's liability.

In the present case there is no ground for an estoppel against the plaintiff. She made no representation of any kind, her silence being attributable to her ignorance of the existence of the baggage regulation. No estoppel arises where the conduct of the party sought to be estopped is due to ignorance founded upon an innocent mistake; and the same is more evidently true when the innocent party is silent because not asked to speak, and unaware that there is occasion—much less, duty—to speak. There is, I think, no support in reason or authority for holding that a person acting in good faith, but in ignorance of his rights or of the rights of the other party, should be estopped on the ground of knowledge imputed to him by a mere fiction of the law. It is only when good faith requires one to speak that silence estops him; and in the findings of fact in this case there is not the slightest ground to attribute to the plaintiff any want of good faith. Estoppel *in pais* presupposes an actual fault or a culpable silence. Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 605, 19 L. ed. 1008; Morgan v. Chicago & A. R. Co. 96 U. S. 716, 720, 24 L. ed. 743, 744.

And it seems sufficiently obvious that the railroad company did not in anywise rely upon plaintiff's silence to its disadvantage. There would, I think, be more reason for holding the company itself estopped, because it, and not the plaintiff, had knowledge of the baggage regulation; and, according to the findings, it was charged with notice that the baggage was worth much more than $100; and the circumstances appearing from the facts as found clearly indicate that plaintiff, through her agent, in effect tendered herself ready and willing to pay for her fare and baggage charges whatever was proper under the circumstances; and the company set its own price for the service it was to render.

When the carrier was thus applied to by one of the traveling public for the performance of a transportation service in the line of its public duty, without any intimation that anything less than the full measure of the carrier's responsibility would be accepted, it was the carrier's duty, I think, according to principles hitherto recognized, to quote a rate commensurate with the service demanded, including an unlimited responsibility where nothing less was mentioned. If the law required it to charge a higher rate for unlimited than for limited responsibility, it was its duty to quote such higher rate. Having failed to do this, it ought not afterwards to be permitted to take advantage of its own wrong. In view of the commerce act, I do not think the carrier, under such circumstances, is estopped from afterwards claiming the additional compensation that it ought to have exacted when quoting the rate. But I do think it ought to be held estopped from setting up any limitation of its responsibility, when no such limitation was in the contemplation of the patron on demanding the service.

(8) As I read the interstate commerce act, it expresses in its own terms the extent of the prohibition of special contracts of carriage. As has often been said, the main purpose of the act was to prevent discrimination, and the filing of the schedules is the principal means to that end. Section 6, as amended in 1906 (34 Stat. at L. 587, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1290), prohibits the carrier from transporting passengers or property unless the rates, fares, and charges upon which the same are transported have been filed and published in accordance with the act; from charging or collecting a different compensation for such transportation or for any service in connection with it than as specified in the tariff; and from refunding or remitting in any manner or by any device any portion of the specified rates, or extending to any shipper or person any privileges or facilities except such as are specified in the tariff. When, therefore, a carrier has established and promulgated its tariff, with regulations as to service such as it has a lawful right to establish, the effect of § 6 is to render unlawful any special contract of carriage made in contra-

vention of the rates and regulations thus standardized in accordance with the law. Such is the effect of § 6 of the act, and it was held to have that effect before the passage of the Hepburn act. Gulf, C. & S. F. R. Co. v. Hefley (1895) 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg (1906) 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. All of these cases arose before the Hepburn act, and the decisions were based upon § 6 of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as amended by act of March 2, 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158, set forth above in the margin), which required the carrier to print and publicly post at each station for the inspection and information of the public the schedules of fares and rates for carriage of passengers and property, and provided that it should be unlawful for the carrier to depart from the published schedules; and upon the 3d section of the original act, which made it unlawful to give any undue or unreasonable preference or advantage to any particular shipper. In the Hefley Case the question decided was simply that a statute of Texas imposed a penalty for a failure to deliver goods on tender of the rate named in the bill of lading was not applicable to interstate shipments. But the effect of the decision was to declare that one who had obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, but less than the published schedule of rates filed with and approved by the Interstate Commerce Commission and in force at the time, whether he did or did not know that the rate obtained was less than the scheduled rate, was not entitled to recover the goods upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the scheduled rates; in other words, that a special contract inconsistent with the published tariff could not avail. This principle was adopted as the ground of decision in the Mugg Case. And in the Kirby Case, likewise, it was held that as the broad purpose of the act was to compel the establishment of reasonable rates and their uniform application, a special contract by which advantage was given to a particular shipper could not be enforced. The distinction between a ground of action based upon the breach of such a special contract and one based upon the carrier's liability for negligence was clearly recognized in the opinion (p. 166), and the latter ground of liability rejected because not presented by the record. To the same effect is Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, which arose after the Hepburn act.

These cases rest fundamentally upon the ground that to allow the shipper to have the benefit of a special agreement for lower rates or for better service than the standard rates and service prescribed by the published schedules would in effect compel the carrier to violate the provisions of the act. In this sense, and to this extent, all shippers are "bound" by the provisions of the act that bind the carrier. But to say that because of this a shipper or a passenger who has made no special contract at all, and claims the benefit of none, shall be conclusively deemed to have made a special contract, involving terms and conditions of which he was wholly ignorant, strikes me as a manifest *non sequitur*. And to hold that a passenger whose rights rest not upon any contract of shipment, but upon the negligence of the carrier, shall be barred from recovering full redress for the consequences of that negligence, upon the theory that he has unconsciously attempted to make a special contract in contravention of the act, is, I submit with respect, equally illogical. It seems also a complete reversal of the Hart Case and the Croninger Case, which declare that a carrier's liability for negligence can only be limited by such a contract or representation as shall estop the shipper,—to now hold that without any express contract or representation by the shipper the liability is limited, on the theory that he is legally charged with notice of requirements of which he was in fact ignorant.

It is true that in the case at bar, the supreme court of Massachusetts (209 Mass. at p. 602) unnecessarily, and, as I think, erroneously, conceded that if the regulation limiting the baggage liability to $100 in value was so related to the rates of transportation of passengers as to be a part of such rate, the plaintiff was "bound," regardless of her knowledge or assent, and therefore her recovery in this action would be limited accordingly. The error, as it seems to me, arose from a misconception of the effect of the decisions in the Hefley and Mugg Cases. The fallacy, if I am correct in deeming it to be such, lies in the double sense of the word "bound." I respectfully suggest that this court, in a matter of such far-reaching importance, ought not to accept the concession without testing its soundness.

If it were said that because she did not

know of, and therefore did not assent to, a limitation of liability to $100, she remained still liable to pay to the railroad company the amount of money properly chargeable for the excess of valuation, and that the company had a lien upon the baggage for this amount on its arrival at destination, I could see the force of the suggestion. This would, perhaps, be within the doctrine of the Hefley and Mugg Cases. (Of course, I do not mean to say that the lien would survive after the goods were lost through the company's negligence.) But I can find nothing in any of the cases referred to that lends support to the view that a railroad company can limit its liability by limiting the rate charged, without according to the shipper or passenger any voice in the matter.

The expressions employed in the Carl Case, 227 U. S. 652, 57 L. ed. 688, 33 Sup. Ct. Rep. 391, that "the valuation the shipper declares determines the legal rate where there are two rates based upon valuation," and that "when there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value," had reference to the effect of a voluntary declaration made by a shipper who fixes the valuation of his goods for the purposes of the shipment, knowing that the valuation determines the rate that must be charged, although perhaps unaware what the precise rate may be. The same is true of similar language used in the Harriman Case, 227 U. S. at p. 669, 57 L. ed. 697, 33 Sup. Ct. Rep. 397, the Cramer Case, 232 U. S. at p. 493, 58 L. ed. 698, 34 Sup. Ct. Rep. 383, and the O'Connor Case, 232 U. S. at p. 515, 58 L. ed. 706, 34 Sup. Ct. Rep. 380. I am unable to see that the reasoning applies to the case of a shipper or passenger who has declared no valuation, has exercised no choice, and is unaware that a choice is open.

To say that constructive notice of the filed regulation, of which plaintiff was in fact ignorant, gave her an actual opportunity to declare the value of her baggage, pay the excess tariff rate, and thus secure the liability of the carrier to the full amount of her baggage, is to say that a fiction is the same as a fact.

(9) In the Croninger Case, and the others of the same class, the shipper consciously accepted a benefit in the form of a reduced freight charge as the consideration of an agreement voluntarily made, valuing the goods for the purposes of the shipment. But here the plaintiff did nothing of the kind. She paid the full price asked by the carrier for transportation of herself and her baggage, unaware of any regulation of the carrier that would require the payment of an additional charge for an unlimited liability for baggage. If she were setting up and relying upon any special contract made in violation of the law, the doctrine of the Hefley, Mugg, and Kirby Cases would apply. But her cause of action is complete without resort to any contract, special or general; and the contract of which her passage tickets and the baggage checks were the tokens was merely the medium by which the carrier became possessed of her baggage. Having that baggage in its possession, the responsibility of the carrier for the exercise by itself and its employees of reasonable care for the safety of the goods arose under general principles of law independent of the contract; and those general principles as administered in the Federal courts (the same as in the courts of Massachusetts), entitled her to compensation upon the basis of the actual value of the goods lost, in the absence of a special agreement or of some representation of value made by her, limiting that liability.

Conceding, for argument's sake, that the contract of carriage as made between plaintiff and defendant, if deemed to import responsibility for the entire value of the baggage, was invalid because not made in accordance with the regulations filed and published in connection with the rate schedules, and because of the provisions of the interstate commerce act that in effect forbid the making of contracts otherwise than in accord with those schedules,—even so, the plaintiff was in nowise at fault. She was unaware that she was at liberty to exercise any option, to say nothing of being under an obligation to do so. The fault was wholly with defendant, for it made no inquiry respecting the value of her baggage, and gave her no notice of any limitation of liability, although itself charged with notice from the very appearance of the baggage that it must have been worth more than $100. And her present action is based upon the carrier's negligence, and not upon an affirmance of the contract.

Irrespective of the contract, the carrier, like any other bailee for hire, was bound to take reasonable care to preserve the property ready for delivery to its owner. I can find nothing in the letter or the spirit of the commerce act that forfeits her property or any part of its value because of her violation of the act, supposing her to have violated it. And since, through the carrier's negligence, the property was lost, it follows, on general principles, that her right of action, upon grounds independent of the contract, remains; it being based upon the general obligation of the bailee to do justice. The principle is fundamental and familiar,

and has been applied in a great variety of cases. Planters' Bank v. Union Bank, 16 Wall. 483, 500, 21 L. ed. 473, 480; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 217, 16 L. ed. 433, 435; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 58, 26 L. ed. 347, 350; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433, 466, 33 L. ed. 747, 759, 10 Sup. Ct. Rep. 450; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 75, 35 L. ed. 107, 111, 11 Sup. Ct. Rep. 496; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808. And see Newbury v. Luke, 68 N. J. L. 189, 191, 52 Atl. 625; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545, 555; Re T. H. Bunch Co. 180 Fed. 519, 527.

In Merchants' Cotton Press Co. v. Insurance Co. of N. A. 151 U. S. 368, 388, 38 L. ed. 195, 205, 4 Interc. Com. Rep. 499, 14 Sup. Ct. Rep. 367, this court held that while an agreement for special rates, rebates, or drawbacks was void under the interstate commerce act, the law did not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for the freight received; that such a construction would encourage rather than discourage unlawful agreements for rebates, since the carrier might prefer them to a liability for the freight; and that although the contract for rebate was void and unenforceable, the shipper could nevertheless recover for loss of his freight through the carrier's negligence. This decision has never been overruled or qualified, and it seems to me quite decisive of the present question.

(10) Thus far I have treated the case as one arising under the common-law rules respecting the carrier's liability, as laid down in the decisions of this court and adopted generally by the Federal courts. I have endeavored to show that a limitation of the carrier's liability is not permitted except it result from some actual representation or contract consciously assented to by the shipper, valuing the goods for the purposes of the shipment; that the sole ground for limiting the responsibility to this extent is that the shipper is estopped by his contract or his representations; that no different result is to be derived by any implication from the provisions of § 6 of the interstate commerce act, which merely prevents the making of a special agreement inconsistent with the schedules, and does not compel the assumption (contrary to the fact) that a special agreement was made in conformity to them; that an agreement inconsistent with the schedules, even if void in itself, does not make the contract of affreightment otherwise void, nor prevent liability on the part of the carrier for loss of the goods attributable to its negligence; and that a shipper who has acted in good faith is not to be estopped upon the theory that a fiction or presumption of knowledge is equivalent to actual knowledge, or amounts to the same as conscious misrepresentation. I have hitherto refrained from attributing any special force to the Carmack amendment as regulative of the subject-matter.

But let us now consider the specific force of that amendment (34 Stat. at L. 595, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307, quoted in marginal note, ante, 459. It declares (*inter alia*) that a railroad company receiving property for interstate transportation "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it . . . , and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It was concerning this provision that the court said in the Croninger Case, speaking by Mr. Justice Lurton, 226 U. S. 505, 57 L. ed. 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148: "That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract." This was equivalent to saying that because the carrier was obliged to issue to the shipper a receipt or bill of lading for the goods, and because the terms of the contract of carriage and rules and regulations pertaining thereto are presumably embodied in the receipt or bill of lading, therefore the act must be deemed an exercise by Congress of its general and exclusive power over the subject-matter.

And the language of the enactment shows that it was framed in view of the general and familiar practice of embodying in the receipt or bill of lading all the terms of the contract, including the valuation of the goods and the rules and regulations for limiting the liability of the carrier. Is it not perfectly manifest that when Congress declared that the carrier "shall issue a receipt or bill of lading" it intended that this document should embody the "contract, receipt, rule, or regulation" that are mentioned in the same clause? Is it possible, without twisting the words from their plain meaning, to read this so that the duty of the carrier shall be performed if it issues

a receipt or bill of lading that does not evidence the contract between the parties, and the whole of that contract?

But in the present case there was no receipt or bill of lading within the meaning of the Carmack amendment as thus interpreted. There was nothing but three baggage checks, each bearing an identifying number, but, so far as the case shows, nothing else. I cannot agree that the statute leaves the carrier free to give a mere identifying token, instead of a "receipt or bill of lading." But, if I am wrong in this, it seems too clear for argument that so far as the carrier intends that any of its rules or regulations respecting its responsibility for the baggage are to be imported into the contract, it is incumbent upon it to set them forth plainly in a bill of lading delivered to the shipper or passenger. If the act admits of the construction that a mere identifying token or check can be used in the place of a formal receipt or bill of lading, it for that reason must require the construction that the carrier may, and that he does thereby, waive the benefit and protection of the rules and regulations. For I cannot believe that the Carmack amendment is open to the construction that the shipper shall be bound by special terms or conditions respecting anything pertaining to the contract of carriage and the carrier's responsibility, while the shipper is in fact ignorant of them. This would leave the carrier free to set a trap for the innocent shipper or passenger. Nor can I agree that the act requires any affirmative regulation by the Interstate Commerce Commission prescribing the form of receipts to be given for baggage. I concede the Commission may regulate the matter, so long as it does so in conformity to the letter and spirit of the statute; but not that the act remains without vitality until the Commission breathes into it the breath of life. In my view, the railroad company in the present case, having failed to give such a receipt or bill of lading as the statute contemplates, cannot be heard to set up any limitation of its liability for the value of the goods, for it would thereby in effect claim a benefit from its own violation of the law.

I submit that the Hepburn act, like the original act and its other amendments, is intended to impose duties upon the carrier,—the public servant,—not upon the shipper or passenger. There is nothing in the letter or the policy of the acts to absolve the carrier from its long-recognized duty to treat all shippers and passengers fairly, and to give them an actual opportunity to make a choice, where a choice is legally open to them. A carrier may not absolve himself in whole or in part from his responsibilities by any *ex parte* action. And where the rate schedules and accompanying regulations are designed to give an option to the shipper, it is, I submit, incumbent upon the carrier to see that the option is in good faith tendered, or else abide by the more onerous of the alternatives. The Carmack amendment means this, at least, if it means nothing more. Therefore, the failure to deliver a bill of lading evidencing the limitation of liability should impose upon the carrier the highest responsibility, not the least, that the regulations admit of; that is to say, an unlimited responsibility for the goods.

(11) The serious consequences of the present decision are sufficiently manifest. Heretofore, shippers and passengers have been entitled to rest in the assurance that a common carrier who accepted their goods for transportation in the ordinary course of a carrier's public employment became responsible, without any express contract upon the subject, for the full value of the goods, in case of their destruction through any negligence of the carrier or its agents, unless there was a distinct understanding to the contrary, participated in by the shipper or passenger. Hereafter, so far as interstate shipments by rail are concerned, the traveler or shipper cannot rest upon any such assurance, and will not be safe in dealing with a railroad company without being authoritatively instructed respecting the latest regulations filed by the carrier with the Interstate Commerce Commission at Washington. He cannot rely upon finding the regulations posted in the railroad station, for this is not essential to the efficacy of the schedules (Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358). He cannot rely upon public notices that may be in fact posted in the station, for these may be misleading, as they were in the present case. He cannot rely upon receiving information from the company's local agents, for this may be withheld, as it was in this case. Unless he is possessed of a copy of the tariff schedules as filed, with time enough to scrutinize them, and skill enough to comprehend them, he must perforce accept whatever terms the railroad company may see fit to offer, and may not hope to be furnished with even a scrap of paper to indicate what those terms are.

I can find no support for the result thus reached, either in the statute or in any previous decision.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

WALTER B. KENNEDY, Plff. in Err.,
v.
WILLIAM BRODERICK.

(— C. C. A. —, 216 Fed. 137.)

Bills and notes — separate provision for accelerating maturity — effect on negotiability.

A note payable at a time certain and purporting to be secured by collateral is not rendered non-negotiable by the fact that when the note is executed the paper contains an agreement, not part of the note proper, that if the collateral depreciates in value more will be delivered or the note mature at once, and that on the maker's default collateral may be sold at public or private sale, although this agreement is written beside the signature to the note.

(June 15, 1914.)

ERROR to the District Court of the United States for the Eastern Division of the Northern District of Illinois to review a judgment in plaintiff's favor in an action on a promissory note. Affirmed.

Statement by **Baker**, Circuit Judge:

Kennedy signed and delivered to Purse a written instrument, of which the following is a copy:

Kansas City, Mo., June 5, 1911.
$4,000 No. ....

Ninety days after date, for value received, I promise to pay to the order of W. D. Purse, four thousand and no/100 dollars, at National Bank of Commerce, Kansas City, Mo., with interest from maturity until paid, payable annually at the rate of 6 per cent per annum, and if not so paid, compounded. Demand, protest, and notice of nonpayment of this note is waived by both makers and indorsers hereof. To secure the payment of this note, securities herewith delivered to the payee, are pledged as collateral security.

W. B. Kennedy.

Note.** — **Bills and notes: provision accelerating maturity as affecting negotiability.

This note supplements the one appended to Holladay State Bank v. Hoffman, 35 L.R.A.(N.S.) 390.

For the effect on the negotiability of a promissory note of a provision permitting an extension of time, see the note to State Bank v. Bilstad, 49 L.R.A.(N.S.) 132, and the earlier notes referred to therein.

Option of maker.

Supplementing note in 35 L.R.A.(N.S.) 390.

The mere option on the part of the maker of an otherwise negotiable note to pay a part of the debt before maturity, the exact time for maturity being fixed, does not destroy its negotiability. Fisher v. O'Hanlon, 93 Neb. 529, L.R.A.1915, —, 141 N. W. 157.

So a note payable "on or before" a certain date is negotiable. Lovenberg v. Henry, 104 Tex. 550, 140 S. W. 1079.

See also Bell v. Riggs and Goss v. Sorrell, infra.

But in Pierce v. Talbot, 213 Mass. 330, 100 N. E. 553, it is held that a note payable at a certain date, "with the privilege of anticipating payment upon said sum, in whole or in part, at any time," is not negotiable.

Failure to pay instalment—in general.

Supplementing note in 35 L.R.A.(N.S.) 391.

A note payable by instalments, with a provision for its maturity at the option of the holder upon default for thirty days in L.R.A.1915B.

the payment of any instalment, is negotiable. Harrison v. Hunter, — Tex. Civ. App. —, 168 S. W. 1036.

—instalments of interest.

Supplementing note in 35 L.R.A.(N.S.) 391.

In Taylor v. American Nat. Bank, 63 Fla. 631, 57 So. 678, Ann. Cas. 1914A, 309, it is held that a note is negotiable under a provision of the negotiable instruments law that the sum payable is certain though payable by stated instalments, with a provision that upon default in payment of any instalment or of interests, the whole shall become due, where a provision for acceleration of payment in case of default in payment of interest was in a mortgage securing the note, but not in the note.

In First Nat. Bank v. Garland, 160 Ill. App. 407, a provision that upon default in the payment of interest or in any agreements of the collateral mortgage the whole should become due at the option of the mortgagee or his heirs or assigns was held not to affect the negotiability of the note.

A stipulation in a note that it shall become due and payable if there is a default in the payment of interest for ten days after demand is valid. Newbern Bkg. & T. Co. v. Duffy, 153 N. C. 62, 68 S. E. 915.

But in Smiley v. Watson, 23 Cal. App. 409, 138 Pac. 367, it is held that a provision in a note for acceleration of maturity upon default in payment of interest at the option of the holder renders it non-negotiable; the court recognizing that the weight of authority elsewhere is otherwise, but considering itself bound by former decisions of the supreme court.

And provisions in a note, executed before

The above collateral has a market value of $5,500. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And we hereby authorize payee or his assigns or the legal holder hereof, on default of payment of this note or any part thereof, according to the terms thereof, to sell said collateral or any part thereof, at public or private sale and with or without notice, and by such sale the pledgeor's right of redemption shall be extinguished.

In the original document the part shown in the copy above Kennedy's signature was printed in large type, and the part below the signature was printed in small type in the lower left corner of the paper, so that the signature in the lower right corner was below the large-type matter and opposite the small-type matter. Both parties of course agree that Kennedy intended to be bound by all the agreements and stipulations that appear upon the paper.

Broderick averred in his declaration that before the maturity of the instrument he purchased it in due course from Purse for full value, and that Purse duly indorsed and delivered it to him.

Kennedy admitted that this was so, but sought to avoid the effect thereof by pleading that he signed and delivered the instrument to Purse as surety for Joyce, on Purse's promise to obtain Joyce's signature, and thereupon to advance the money to Joyce; that Purse failed to make the loan, failed to obtain Joyce's signature, and wrongfully sold the instrument to Broderick; and that this was done without his knowledge or consent.

On the court's sustaining a demurrer to this plea, Kennedy declined to move further, and judgment followed.

Prior to 1911, Missouri had adopted the

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passage of the negotiable instruments act, for maturity at the option of the holder upon default in payment of interest, and for payments upon the principal before maturity at the option of the maker, render it non-negotiable. Bell v. Riggs, 34 Okla. 834, 41 L.R.A.(N.S.) 1111, 127 Pac. 427; Goss v. Sorrell, 33 Okla. 586, 127 Pac. 435.

Upon failure to comply with conditions of mortgage.

Supplementing note in 35 L.R.A.(N.S.) 391.

A provision in a collateral mortgage that in the event of certain contingencies the whole sum for which notes were given might be declared due does not destroy the negotiability of the notes. Smith v. Nelson Land & Cattle Co. 212 Fed. 56.

A provision in a mortgage that upon failure of the mortgagor to perform any of certain agreements the whole debt should become due at the option of the mortgagee or his assigns does not render the note to which the mortgage is collateral, non-negotiable. Des Moines Sav. Bank v. Arthur, — Iowa, —, 143 N. W. 556.

See also First Nat. Bank v. Garland, 160 Ill. App. 407, supra.

Failure to furnish additional security.

Supplementing note in 35 L.R.A.(N.S.) 392.

A provision in a note giving the holder the right to call for additional securities, and thus cause it to mature on that call, makes the note payable upon contingency, and therefore not negotiable. Hibernia Bank & T. Co. v. Dresser, 132 La. 532, 61 So. 561; Continental Bank & T. Co. v. Baker, 132 La. 543, 61 So. 575.

When payee deems himself insecure.

Supplementing note in 35 L.R.A.(N.S.) 392.

A provision in a note that whenever the payee or his agents deem themselves insecure they shall have power to declare it due renders it non-negotiable. Reynolds v. Vint, — Or. —, 144 Pac. 526.

Miscellaneous provisions.

Supplementing note in 35 L.R.A.(N.S.) 393.

Notes given for a threshing machine, which was not sold on conditional sale, title being retained as security only, were not rendered non-negotiable by a provision contained in them that "if default is made in the payment of any note, or the machine is levied upon or undersigned attempts to remove the same, said company may declare all the notes due." Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524.

In Bright v. Offield. — Wash. —, 143 Pac. 159, it is held that, while considered only from the standpoint of accelerating maturity, a provision in a note making it payable upon failure to pay taxes upon mortgaged premises would not render a note non-negotiable under the negotiable instruments law, it would render it non-negotiable because making the amount payable uncertain. It is further held that another provision in the note, that if the maker "shall do any act whereby the value of said mortgaged property shall be impaired, the whole amount shall at once become due and payable," would also destroy its negotiability. R. L. S.

uniform negotiable instruments act Rev. Stat. Mo. 1909, §§ 9972 et seq.

Argued before Baker, Seaman, and Mack, Circuit Judges.

Mr. **J. M. Rader**, for plaintiff in error:

The provision in the note that depreciation of the collateral and failure of the maker to furnish additional security to the satisfaction of the holder matures the note, rendered it non-negotiable.

Smith v. Marland, 59 Iowa, 645, 13 N. W. 852; Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Lincoln Nat. Bank v. Perry, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 887; Wisconsin Yearly Meeting v. Babler, 115 Wis. 289, 91 N. W. 678; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. St. Rep. 604; First Nat. Bank v. Carson, 60 Mich. 432, 27 N. W. 589; Richards v. Barlow, 140 Mass. 218, 6 N. E. 68; Kimpton v. Studebaker Bros. Co. 14 Idaho, 552, 125 Am. St. Rep. 185, 94 Pac. 1039, 14 Ann. Cas. 1126.

Mr. **Edmund W. Burke** for defendant in error.

Baker, Circuit Judge, delivered the opinion of the court:

Under the general law, as well as under the negotiable instruments act, the writing in question, if the small-type matter in the lower left corner be disregarded, constitutes a perfect negotiable promissory note.

Does the inclusion within the same document of an agreement respecting a pledge of collateral securities, by the terms of which the pledgee may anticipate maturity, sell collaterals, and leave an uncertain amount unpaid, render the instrument non-negotiable?

No, if this is a question of Missouri law. For her courts have clearly and unmistakably arrived at the following position: If two instruments are executed at the same time, in the course of the same transaction, and covering the same subject-matter, they are to be read and construed together as one instrument. But this doctrine does not apply to a transaction in which two separate and distinct matters are involved. Each is to be considered and interpreted as a complete entity, whether they be written upon one paper or several. An unconditional promise to pay a certain sum at a certain time is a matter apart from security by way of deed of trust, or mortgage of land, or pledge or mortgage of chattels. One is governed by the law merchant, the other by property laws. The owner may rely, if he chooses, exclusively upon the promise to pay, according to its terms. Conditions for his benefit in the mortgage or pledge agreement may be availed of only in his capacity of mortgagee or pledgee; they are limited to the purposes of the mortgage or pledge; they cannot be read into the promise to pay, and so render a certain promise uncertain, convert a negotiable into a non-negotiable instrument. Morgan v. Martien, 32 Mo. 438; Mason v. Barnard, 36 Mo. 384; Hurck v. Erskine, 45 Mo. 484; Brownlee v. Arnold, 60 Mo. 79; Whelan v. Reilly, 61 Mo. 565; Noell v. Gaines, 68 Mo. 649; Owings v. McKenzie, 133 Mo. 323, 40 L.R.A. 154, 33 S. W. 802; McMillan v. Grayston, 83 Mo. App. 425; Westminster College v. Peirsol, 161 Mo. 270, 61 S. W. 811; Curry v. La Fon, 155 Mo. App. 678, 135 S. W. 511.

If the question is one of general law, the answer is the same. In Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999, within one document were contained an unconditional promise to pay a certain sum at a certain time and a collateral agreement that the note, being one of a series given to the Northwestern Car Company for the purchase of cars, should become due and payable on default of payment of principal and interest of any note of the series, and that the title to the cars should remain in the payee for the equal and ratable security of all the notes. "The agreement that the title should remain in the payee until the notes were paid—it being expressly stated that they were given for the price of the cars sold by the payee to the maker and were secured equally and ratably on the property—is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability."

But even if the two matters were to be read together, it is clear that the stipulations for additional collaterals and the sale of collaterals are pertinent only to the pledge part of the transaction, and that the only condition which could, in any event, be carried into the promise to pay part, is the one by which maturity might be anticipated. That condition, however, could only affect the time provision of the note to the extent of causing the maker to promise to pay ninety days after date, or sooner on demand of the holder after the maker's default in putting up additional securities. The applicable doctrine is correctly stated,

we believe, in Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297: "There can be no difference, in principle, between the exercise of an option by the maker to pay before a certain day, or a provision that the note shall be due upon the happening of some event prior to the date fixed and an option of the holder to declare it due upon the occurrence of some event."

The judgment is affirmed.

UTAH SUPREME COURT.

JOSEPHINE FLINT ESCAMILLA, Respt.,
v.
JAMES PINGREE, Admr., etc., of Richard Flint, Impleaded, etc., Appt.

(— Utah, —, 141 Pac. 103.)

Appeal — equity case — form of verdict.

1. No error can be predicated upon the form of a verdict directed by the court in an equity case in which questions of fact were submitted to the jury.

Bills and notes — presumption from possession.

2. The presumption that title to an unindorsed note payable to order is in the payee is not overcome by the fact that it is in possession of another.

(April 30, 1914.)

APPEAL by the administrator of Richard Flint, deceased, from a judgment of the District Court for Weber County in plaintiff's favor in an action on a promissory note and to foreclose a mortgage given to secure payment of it. Affirmed.

The facts are stated in the opinion.

Messrs. **Boyd, De Vine, & Eccles** and **J. N. Kimball** for appellant.

Mr. **C. R. Hollingsworth**, for respondent:

Possession of a note not payable to bearer nor indorsed in blank by a third person is not prima facie evidence of ownership.

Bowers v. Johnson, 49 N. Y. 432; Dorn v. Parsons, 56 Mo. 601; Tiedeman, Com. Paper, § 303, p. 524; Dan. Neg. Inst. 3d ed. §§ 574, 664a, 741.

Possession of an unindorsed note does not relieve the holder from the presumption that the note still belongs to the payee.

Cavitt v. Tharp, 30 Mo. App. 131; Rice v. McFarland, 41 Mo. App. 489; Richardson v. Moffitt-West Drug Co. 92 Mo. App. 515, 69 S. W. 398; Durein v. Moeser, 36 Kan. 441, 13 Pac. 797.

Frick, J., delivered the opinion of the court:

This action was brought by the plaintiff, hereafter called respondent, as the payee, to recover on a certain promissory note, and to foreclose a mortgage which was made and delivered to secure the payment of said note. The defendants Joseph H. and Martha Jane Hellewell were made such as the makers of said note and mortgage, and the Wheelwrights were made parties as subsequent purchasers of the real estate described in said mortgage. James Pingree, as administrator of the estate of Richard Flint, deceased, was also made a party to the action for the reason that he, as such administrator, claimed some interest in the mortgaged premises. The Wheelwrights appeared and in their answer admitted the execution and delivery of the note and mortgage, admitted that they claimed some interest in the real estate described in said mortgage, setting forth that they purchased the premises, and as part of the purchase price thereof had assumed and agreed to pay said note and mortgage, that they were, and always had been, able and willing to pay said note, but could not safely do so because of the disputes existing between the respondent and said administrator respecting the ownership of said note and mortgage; the said administrator claiming that the same were owned by his intestate during his lifetime, and were the property of his estate. The administrator also answered respondent's complaint, and in his answer denied that the respondent was the owner of said note and mortgage, and averred that the same were owned by his intestate during his lifetime and now belong to his estate, setting forth the facts respecting the said claim of ownership. The parties entered into a stipulation whereby it was in effect agreed that the Wheelwrights might pay into court the money due on said note and mortgage. The court approved the stipulation, and the money was paid to the clerk of the court, and he was directed to hold the same until it was determined by the court to whom it should be paid. The respondent and said James Pingree, as administrator, then proceeded to a trial to determine who should have judgment for the money paid as aforesaid. A jury, it seems, was impaneled to try the question of fact, and, after hearing the evidence produced by both sides, the court directed the jury to return a verdict in favor of respondent, which was done, and judgment was ac-

Note. — Aso to effect of production of bill or note not transferable by delivery to establish prima facie plaintiff's title thereto, see note to Johnson County Sav. Bank v. Scoggin Drug Co. 50 L.R.A.(N.S.) 581.

cordingly entered, from which the administrator alone appeals.

Counsel for appellant have assigned a number of errors relative to the admission of evidence, and in refusing to strike certain evidence from the record. In view of the conclusions reached, all those assignments are immaterial, and we shall not discuss them. The case is purely equitable, and the mere fact that a jury was called to pass on the facts in no way affects the character of the case. Nor did that fact in any way affect the province or duties of the trial court. Nor can it affect those of this court relative to equity cases. In view of this, we shall not discuss the objection that is made to the form of the verdict. The verdict in equity cases, at most, is merely advisory; but, in view that in this case the court directed what the verdict should be, it does not even amount to that, and hence no error can be predicated upon the form of the verdict.

In view of the record there is but one question in the case, and that is whether appellant has overcome the presumption that the judgment appealed from is right, and that the proceedings culminating in the judgment were without prejudicial error to any of the substantial rights of the appellant. The ultimate question in issue was: Which one, the respondent or appellant, was the owner of the note and mortgage sued on? The note was made payable to the respondent or order, without any conditions whatever, and she had never indorsed it in any form. It was, however, claimed by appellant that the consideration for the note was money which belonged to his intestate, who was the father of respondent. It was appellant's misfortune, however, that he could produce no substantial evidence to sustain his claim in that regard. Appellant's intestate himself clearly negatived that contention. While it is true that, although the note and mortgage were made payable to respondent or her order, yet her father, appellant's intestate, had possession of them from the time they were made until a short time before his death, at which time he turned them over to appellant. Before this action was commenced by the respondent, and while appellant's intestate had possession of the note and mortgage, respondent, it seems, placed the matter in the hands of a lawyer who lived in the town where she and the deceased both lived. The lawyer wrote a letter directed to the deceased in which the lawyer asked the deceased to call at the former's office. The deceased called, and the lawyer, in regard to the interview had between them, testified as follows: "He [the deceased] told me he had received our letter and wished to know what we wanted to see him about. I told him that we wished to know if he claimed an interest in the Hellewell mortgage, and on what ground he made the claim. He stated he did claim the money due on the mortgage, that he claimed all of it, and that his reasons for claiming it were that he was out more than the amount due on the mortgage on account of the loss he had sustained at the hands of his daughter Josephine Flint's [respondent's] former husband, a Mr. Stanley. We did not go into the claim further than that."

While the deceased claimed the money due on the note, yet his claim in no way sustains appellant's contention that the deceased furnished the consideration for the note and mortgage. Upon the contrary, it clearly negatived that contention. There is other evidence of a similar character from which it might be inferred that the deceased did not claim to be the owner of the note and mortgage, and that in making the loan he acted as attorney in fact for the payee; but it is not necessary to set it forth here. The question, therefore, is: Is there sufficient evidence in this record to overcome the presumption that respondent was the owner of the note and mortgage in question?

Appellant's counsel in his brief contends, and in his oral argument claimed, that the fact that the deceased had possession of the paper constituted prima facie evidence of his ownership, and that respondent had not overcome that presumption. We do not understand the law to be as claimed by counsel, nor do the cases cited by him sustain his contention. Upon the other hand, the authorities are to the effect that, where a promissory note is made payable to a certain person or order, the possession of such paper by another without indorsement by the payee does not affect the presumption of ownership. In passing on that question in Rice v. McFarland, 41 Mo. App. 490, the rule in the headnote is stated thus: "The possession of an unindorsed note does not relieve the holder from the presumption the note still belongs to the payee."

In Dorn v. Parsons, 56 Mo. 601, the rule is stated in the following words: "The possession of a note, not payable to bearer nor indorsed in blank, by a third person, is not even prima facie evidence of ownership."

In Cavitt v. Tharp, 30 Mo. App. 131, the law is stated thus: "Possession of an unindorsed promissory note by one other than the payee is no evidence of ownership in the holder."

In 2 Enc. Ev. 517, the law upon the subject is thus briefly stated: "The payee of a

note is presumed to be the owner until the contrary is shown."

To the same effect are Bowers v. Johnson, 49 N. Y. 432; Richardson v. Moffitt-West Drug Co. 92 Mo. App. 515, 69 S. W. 401; Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089; 1 Dan. Neg. Inst. 6th ed. 1913, §§ 664a and 741. Although the deceased had possession of the note, and before his death turned it over to appellant, yet that possession in no way affected the presumption that respondent, the payee thereof, was the legal owner, and, until that presumption is overcome by some legal and competent evidence, the judgment in her favor should not be disturbed. Practically all that appellant offered to rebut the presumption was his own evidence that he remembered when the note and mortgage were made; that the deceased "turned the money to Joseph Hellewell [one of the makers of the note] for this mortgage, $200 of which was a cashier's check given by our bank to th deceased. I cannot state . . . what the other money was." In addition to this, there were two letters written by respondent to her brother; but there is nothing in those letters which would authorize an inference even that the note and mortgage did not belong to her. Appellant's evidence, therefore, was at most merely conjectural. There was therefore not sufficient evidence to dissipate the presumption that respondent was the owner of the note and mortgage in question. But suppose it be assumed that there are a few isolated facts from which an inference against respondent's ownership might be drawn; yet the evidence in that respect is so weak and inconclusive and of such a character that inferences might be drawn from it both ways. It therefore does not rise to the dignity of evidence. This is, as we have pointed out, an equity case, and therefore, unless the presumption of the correctness of the proceedings and judgment is clearly overcome, the judgment must prevail. Appellant has not overcome the presumption, and hence the judgment should be, and it accordingly is, affirmed. Costs to respondent.

McCarty, Ch. J., and Straup, J., concur.

WASHINGTON SUPREME COURT.
(Department No. 1.)

FAIRBANKS STEAM SHOVEL COMPANY
v.
HOLT & JEFFERY.

(79 Wash. 361, 140 Pac. 394.)

Evidence — parol — skeleton contract.

1. An order for machinery containing the parties, consideration, time, subject-matter, and mutual assent, and properly signed, is not subject to modification or enlargement by parol evidence on the theory that it is a mere skeleton.

Sale — secondhand machine — warranty.

2. An agreement to overhaul a secondhand machine which is the subject-matter of sale, and put it in first-class shape, is a warranty that the machinery is reasonably certain, when properly handled, to do the work intended which is known to the vendor, and is free from structural defects.

Same — decayed condition of timber.

3. The rotten condition of the inside of the boom stick of a dredge which causes a break after five and one-half months' use is a breach of warranty that the machine is in first-class condition, if the defect could have been discovered by reasonable tests.

Damages — break of part of machine — breach of warranty.

4. The damages for breach of warranty of a machine a part of which breaks down are not necessarily the amount paid for a new part.

(April 29, 1914.)

CROSS APPEALS from a judgment of the Superior Court for King County in plaintiff's favor in an action brought to recover the balance alleged to be due upon the purchase price of a certain dredge; plaintiff appealing from the amount of the judgment rendered in its favor, and defendant appealing from so much of the judgment as disallowed certain of its claims. Remanded.

The facts are stated in the opinion.

Messrs. **Holzheimer & Herald** and **Hodgson & Thompson** for plaintiff.

Messrs. **Preston & Thorgrimson**, for defendant:

In order to arrive at the contract in this case, the court must necessarily have admitted the written correspondence that pre-

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Note. — Warranty upon sale of secondhand article.

The law of warranty in the sale of personal property is largely affected by the nature of the contract and the subject-matter of the sale. This note is confined to the question of warranty where the subject-matter of the sale is a secondhand article. As to the questions of warranty where the subject-matter of the sale is trees, plants, shrubs, or vines, see note in 49 L.R.A.(N.S.) 1151. Where the subject-matter of the sale is seeds, see note in 37 L.R.A.(N.S.) 79; as to warranties in the sale of horses, see notes in 3 L.R.A. 184, 12 L.R.A. 695, and 32 L.R.A.(N.S.) 182; and as to whether or not an express warranty as to quality will exclude an implied warranty as to quality as applied to different articles, see

ceded the order and which contained the offers, as well as the oral statements of the agent making the offers.

17 Cyc. 741; Interstate Engineering Co. v. Archer, 64 Wash. 629, 117 Pac. 470; Phelps v. Whitaker, 37 Mich. 73; Palmer v. Roath, 86 Mich. 602, 49 N. W. 590; Grand Rapids Veneer Works v. Forsythe, 83 Hun, 230, 31 N. Y. Supp. 601; Briggs v. Hilton, 99 N. Y. 517, 52 Am. Rep. 63, 3 N. E. 51; Routledge v. Worthington, 119 N. Y. 592, 23 N. E. 1111; Luitweiler Pumping Engine Co. v. Ukiah Water & Improv. Co. 16 Cal. App. 198, 116 Pac. 707, 712.

Chadwick, J., delivered the opinion of the court:

Plaintiff sold defendant certain dredging machinery under the terms of the following writing:

6-12-11.

Order to Al H. Hoffman, Spokane, Washington. Charge to name: Holt & Jeffery, Seattle, Washington . . . One one and one-half yards, Fairbanks Dredge with fifty-foot boom, and iron for vertical spuds complete, f. o. b. Marion, price $6,050. Machinery to be overhauled at factory and put in first-class shape. Delivery of machinery from factory to cars not later than sixty days from date. Plans to be furnished for scow immediately. Delivery of machinery from factory not later than sixty days from date. Boiler to pass Seattle inspection. This is a secondhand dredge that

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note in 33 L.R.A.(N.S.) 502. As to implied warranty in sales by description, see note in 35 L.R.A.(N.S.) 258; for questions relating to the remedy for breach of warranty, see the series of notes in 50 L.R.A. (N.S.) pages 111, 753, 774, 778, 783, 796, 805, 808; and for other questions relating to the law of warranties, see Index to L.R.A. Notes, "Sales."

As a rule only cases are included herein wherein the question of warranty is considered as affected by the fact that the article to which the warranty relates, or to which it is sought to be applied, is a secondhand article.

Implied warranty.

In most jurisdictions the rule prevails that there is no implied warranty as to the condition, adaptation, fitness, or suitability for the purpose for which made, or the quality, of an article sold as and for a secondhand article—

—Johnson v. Carden, — Ala. —, 65 So. 813, holding that there is no implied warranty of a secondhand machine as to its reasonable adaptation to the purpose and use for which it was purchased;

—Yellow Jacket Min. Co. v. Tegarden, 104 Ark. 573, 149 S. W. 518, asserting it to be the general rule that ordinarily in the sale of secondhand machinery there is no warranty as to the quality or condition of the property, unless expressly made. To the same effect, see J. F. Hartin Commission Co. v. Pelt, 76 Ark. 177, 88 S. W. 929; J. I. Case Threshing Mach. Co. v. Bailey, 89 Ark. 108, 115 S. W. 949;

—Ramming v. Caldwell, 43 Ill. App. 175, holding that there is no implied warranty that machinery sold as secondhand will answer the purpose for which it was made;

—Norris v. Reinstedler, 90 Mo. App. 626, holding that there is no implied warranty of condition in the sale of a secondhand steam pump; and where it is purchased after an examination, the purchaser cannot refuse to receive it and complete the purchase, although he discovers that it is old and practically worthless as a pump;

—Hanna-Breckinridge Co. v. Holley-Matthews Mfg. Co. 160 Mo. App. 437, 140 S. W. 923, holding there is ordinarily no implied warranty in the sale of secondhand articles, as to quality, or that they are fit for the purpose for which they are made;

—Joy v. National Exch. Bank, 32 Tex. Civ. App. 398, 74 S. W. 325, holding there is no implied warranty as to the good running condition of a secondhand machine sold as such;

—Stevens v. Smith, 21 Vt. 90, holding there is no implied warranty as to the quality of iron in old kettles, where sold as such.

A purchaser of an automobile at a price much below the usual price for a new machine of the same kind cannot claim an implied warranty as to the length of time a shaft will last. Morley v. Consolidated Mfg. Co. 196 Mass. 257, 81 N. E. 993.

Upon the sale of a secondhand engine and dynamo to be used in a theater requiring about one thousand lights, where the buyer uses his own boiler and wiring in connection therewith, there is no implied warranty that the engine and dynamo will furnish the necessary current; and where the machinery to be furnished is specifically described, the furnishing of machinery answering the description complies with the contract. Kernan v. Crook, 100 Md. 210, 59 Atl. 753.

And in Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co. 131 Mo. App. 540, 110 S. W. 630, it is held that there was no implied warranty that a secondhand machine was fit and suitable for the purpose for which it was intended, where the purchaser knew the machine and had examined it. The court said that as bearing upon this question it attached but slight importance to the fact that the machine was secondhand. It added, however, that "nevertheless it would be difficult to conceive a case presenting less reason for implying a warranty that a purchased article should be fit for the purpose for which it was bought. The machine was not sold by plaintiff as a manufacturer, or by sample. Defendant's manager had.

operated in Missouri. Terms: $1,000 when equipt, arrives at Seattle. One half of the balance 60 days and balance 60 days later, 6 per cent. This order is taken with the understanding that old bank spuds iron are included. Salesman: E. L. Kelzer.

Signed by: Holt & Jeffery, by J. C. Jeffery, Sec.

Plaintiff brought suit to recover the balance due, and was met by certain defenses and counterclaims. The court entered a judgment for plaintiff in the sum of $749.38, and disallowed claims of both parties, and both sides have appealed. The judgment of the court depends in part upon the character of the instrument quoted above. The court held that it was not a contract; that it was a mere "skeleton" or "order," and admitted much testimony which tended to modify and enlarge it. We think this was error. The writing has every essential of a contract,—parties, consideration, time, subject-matter, and mutual assent. The property has been delivered and partly paid for. Counsel cite many cases to the point that a contract is not complete where it does not contain all of the representations of the agent making a sale and which induced the sale. We shall not discuss the authorities relied on, with the exception of Interstate Engineering Co. v. Archer, 64 Wash. 629, 117 Pac. 470. We there said: "Where it appears that only a part of the contract is in writing, the part not in writing may be proved by parol, in so

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no cause to rely on the judgment of plaintiff regarding the fitness of the machine, did not rely on it, and the price of a first-class machine was not paid. Defendant's manager said he was acquainted with the one in controversy, knew it had been in use for . . . years, and was old, very much worn, and worth less than . . . the price he offered. . . . A warranty of the fitness of a chattel for a certain purpose is not implied necessarily because the seller knows the buyer is buying it for such purpose. Courts do not treat the doctrine of implied warranty of fitness as an unconditioned dogma of the law. If they did, the most unjust consequences would ensue."

In this jurisdiction, however, it has been held that where an order for a secondhand threshing outfit contained a warranty, but recited that it did not apply to secondhand machines, there was no express warranty, and hence the sale is left with the ordinary rules applicable to warranties in sales of personal property where there is no express warranty; and in such case where the property is sold for a specific purpose there is an implied warranty that it is fit and suitable for such purpose. New Birdsall Co. v. Keys, 99 Mo. App. 458, 74 S. W. 12.

But see J. I. Case Threshing Mach. Co. v. Erickson, 21 N. D. 478, 131 N. W. 269, holding that the purchaser of a secondhand threshing-machine outfit could not assert a breach of an oral warranty of condition, where the order for the outfit contained a provision that the warranted article did not apply to secondhand machines, and that no representations made by any person as an inducement to give and execute this order shall bind the company.

In Walker, E. & C. Co. v. Ayer, 80 S. C. 292, 61 S. E. 557, involving an alleged breach of warranty as to the condition and working qualities of type-setting machines, it is declared to be the rule of that state that the seller, without an express warranty or representation of value, is held to warrant the articles sold to be of value for the purpose for which it is ordinarily

accepted. No point is made of the fact that the machines were secondhand.

And it has been held that where the seller had knowledge as to the work a secondhand machine he was selling was expected by the buyer to do, there was an implied warranty that the machine furnished would do that work. Latham v. Shipley, 86 Iowa, 543, 53 N. W. 342.

Express warranty.

Of course there may be an express warranty of an article sold as secondhand. Johnson v. Carden. — Ala. —, 65 So. 813. It may relate to the condition of the article, and words of description by way of indicating the character or quality of the article may constitute such a warranty. Hanna-Breckinridge Co. v. Holley-Matthews Mfg. Co. 160 Mo. App. 437, 140 S. W. 923. To the same effect see Kelly v. Times Square Automobile Co. 170 Mo. App. 64, 156 S. W. 62. Or it may relate to the condition or working qualities of the article (Neave v Arntz, 56 Wis. 174, 14 N. W. 41); or to the horse power of a secondhand engine (Shoe v. Maerky, 35 Pa. Super. Ct. 270).

Construction of warranty.

It is not necessary that there should be a warranty in specific terms. A representation of a secondhand machine as being in first-class order and as doing good work, and that it will do the work of the buyer, constitutes a warranty that the machine is in good order, and will do good work and the work of the buyer. Latham v. Shipley, 86 Iowa, 543, 53 N. W. 342.

And in Udell v. Sarafian, 19 Misc. 542, 43 N. Y. Supp. 1092, enforcing an express warranty as to the condition of secondhand machines, it is said that to constitute such a warranty, it is not necessary that the seller use the word "warrant" or "warranty," but it is sufficient in this regard if the language used, by fair construction, amounts to or is equivalent to an undertaking on the part of the seller that the property is as it is represented to be.

The assertion by the seller of a second-

far as it is not inconsistent with the written portion." The order or contract in that case was similar to the one before us, but with this very marked difference,—no time for delivery was stipulated. The writer of the opinion twice observed this lack of essentiality. He says: "The letter upon its face does not purport to state the whole agreement;" and, "But it does not appear upon the face of the letter that it purports to contain the whole contract." It was held that, no time being fixed, the court could refer to collateral matters to determine what, under the circumstances, would be a reasonable time. Such holdings do not destroy contracts or violate the rule against receiving oral testimony to alter or modify them, but are consistent with the rule that, where a writing containing all the essentials of a contract is offered, the law will presume that the parties have culminated their negotiations in it. Ramming v. Caldwell, 43 Ill. App. 175. If it were not so, we would be constantly resorting to parol evidence to make an ambiguity or omission, and to like testimony to explain it.

In the case at bar the machine was in use about five months when the boom stick broke and had to be entirely replaced. This brings us to the second proposition of law; that is, the liability of a seller of a secondhand article to answer as upon a warranty of quality. Plaintiff contends: (a) That there is no warranty in the sale of a secondhand article; and (b) that more than a reasonable time elapsed between the delivery of the goods in August, 1911, and January 7, 1913, for examination and acceptance, and that it cannot now be held. Our attention is called to Smith v. Bolster, 70 Wash. 1, 125 Pac. 1022, where the court held that representations that a secondhand automobile was "in first-class condition, as good as any new car," was "seller's praise." That case seems to have turned on the words, "first-class condition, as good as any new car," the court saying that the fact that the car was sold at 21 per cent less than a new car would have cost was evidence that it was of less value than a new car; that the words were seller's praise in the light of the vendee's conduct, he having driven the car about 6,700 miles and kept it two seasons. In that case, too, the trial judge found the fact to be that the car was not in first-class condition, upon the sole ground that it had been used as a demonstration car.

The general rule is that there is no implied warranty in the sale of secondhand goods and machinery. 35 Cyc. 408.

The question in this case is whether an

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hand engine, who is in possession thereof, that it is as good as new in every point and particular, has been held to be an assertion of a specific fact which he assumes to know, and which the purchaser may properly rely upon except as to obvious defects. Milwaukee Rice Machinery Co. v. Hamacek, 115 Wis. 422, 91 N. W. 1010.

But it has been held that although a used automobile is sold under a representation that the tires are as good as new, the purchaser cannot claim that this representation constitutes a warranty, where he knew the tires had been used. For in such case the statements are merely expressions of opinion. Warren v. Walter Automobile Co. 50 Misc. 605, 99 N. Y. Supp. 396. To the same effect as to representations that a secondhand sewing machine was in very good condition, see Ginsberg v. Lawrence, 121 N. Y. Supp. 337.

Under the sales of goods act of England 1893, § 13, it has been held that the sale of a secondhand reaper under the representation that it was new the year previous, and had been used to cut only 50 or 60 acres of grain, raised an implied condition that the machine would comply with this description, where it was purchased without inspection; and, where the purchaser, after inspection, refused to receive it for noncompliance therewith, and returned it, no action could be maintained against him for the purchase price, where the machine actually failed to correspond with the description. Varley v. Whipp [1900] 1 Q. L.R.A.1915B.

B. 513, 69 L. J. Q. B. N. S. 333, 48 Week. Rep. 363.

Extent of warranty.

A general warranty as to the condition of a secondhand machine out of condition and in need of repair will not cover defects plainly visible and equally within the knowledge of both parties. Scott v. Geiser Mfg. Co. 70 Kan. 498, 78 Pac. 823, affirmed on rehearing in 70 Kan. 500, 80 Pac. 955.

A purchaser of a secondhand mill sold as such under a warranty that it would be put in first-class condition, with a provision in the contract that he may remedy any defects discovered therein and deduct the cost from the purchase price, cannot operate the mill in its defective condition for several months after obtaining knowledge of such defects, and thereafter repair and reconstruct it virtually as a new mill at the expense of the seller, since this warranty is not that the machine shall be new, but only that it shall be in first-class condition as secondhand. Yellow Jacket Min. Co. v. Tegarden, 10 Ark. 573, 149 S. W. 518.

—existence of warranty whether question for the jury.

Where the evidence as to whether or not there is an express warranty of a secondhand machine is in dispute, the fact of the making of such a warranty is properly for the jury. Johnson v. Carden, — Ala. —, 65 So. 813. A. G. S.

engagement to put the dredge in first-class condition is a warranty. Whether words are to be taken in the sense of a warranty is usually a question of mixed law and fact. Here the seller knew the purpose for which the dredge had been purchased. The vendee knew that it had operated in another state. The seller agreed to overhaul and put it in "first-class shape." This is a warranty that the machine was understood to be reasonably certain, when properly handled, to do the work intended, and was free from structural defects. This court has never intended to hold that everything said to induce the sale of a secondhand article is seller's praise. To so hold would be to say there could be no warranty upon the sale of a secondhand article. If a person buys an article secondhand, there is no implied warranty; but there may be an express one. As in all other transactions, it depends on the contract made by the parties themselves. The engagement to put the machine in "first-class shape" was a warranty of quality and fitness.

There can be no question that the boom stick was rotten on the inside or in the inner timbers. It was season checked, and had been puttied and painted. We attach no significance to this circumstance, as it is well known that large timbers check and good workmanship demands that they be puttied and painted. Plaintiff insists that it was not required to make more than an ordinary surface inspection, or find any defect that the eye would not reveal; but the testimony upon this point is not in harmony. There is evidence tending to show that the defect was observable around certain bolts, and that the only proper way to test timbers for rot or imperfections is to bore into them.

Our conclusion is that plaintiff is answerable for the defective boom stick; that defendant had a right to rely upon it as one "in first-class condition;" and that five and one-half months was not an unreasonable time to use it without discovering the latent but discoverable defect if a physical test had been made.

Defendants claimed the sum of $2,369.88, the alleged cost of making a new boom stick; it having paid the Seattle Construction & Dry Dock Company $2,121.88 of that sum and the difference to others, for freight and material. There is testimony tending to show that the cost of a new boom would not exceed $843. As between these sums the court arbitrarily allowed the sum of $1,000. The amount paid out does not in itself furnish a measure of recovery. Torgeson v. Hanford, 79 Wash. 56, 139 Pac. 648. Nor are we satisfied that the record shows it to have been a reasonable sum. As between the two amounts, we are disposed to and will follow the finding of the trial judge. Bearing in mind these legal conclusions, and without discussing the particular items included or excluded, the judgment of the court will be recast as follows:

For plaintiff, upon its first cause of action	$2,500.00		
Second cause of action		479.05	
Third cause of action		250.00	$3,229.05
For defendant, reasonable cost of repairing boom	$1,000.00		
On account of fact that dredger was not fully equipped		215.62	
Rent for scows		450.00	$1,665.62
Amount due plaintiff			$1,563.43

Remanded, with instructions to enter a judgment for $1,563.43, with interest.

Crow, Ch. J., and Gose, Ellis, and Main, JJ., concur.

Petition for rehearing denied.

CONNECTICUT SUPREME COURT OF ERRORS.

ELECTA B. MERRILL
v.
JAMES W. HODSON et al., Appts.

(88 Conn. 314, 91 Atl. 533.)

Food — warranty of quality by restaurant keeper.

There is no implied warranty of the quality of food furnished by a restaurant keeper to a customer for immediate consumption, since the transaction does not constitute a sale, but a rendition of service.

(July 13, 1914.)

Note. — Liability for serving unfit food.

This note supplements a note on the same subject in 40 L.R.A.(N.S.) 480.

Generally, as to liability of packer or vendor to persons not in privity of contract, for injuries from unfit food, see notes to Tomlinson v. Armour & Co. 19 L.R.A. (N.S.) 923, and Mazetti v. Armour & Co. 48 L.R.A.(N.S.) 213.

A railroad company operating its own dining cars is not liable for injury to a patron by partaking of canned food served in regular course upon the car, where the food was purchased of a reputable dealer, bore a well-known brand, was of the highest grade, and was guaranteed under the pure food and drug act, while it was prepared for service with due care by an experienced chef, and there was nothing to indicate that it was not fit for food. Bigelow v. Maine C. R. Co. 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396.

So, in Trafton v. Davis, 110 Me. 318, 86

APPEAL by defendants from a judgment of the Superior Court for New Haven County in plaintiff's favor in an action brought to recover damages for an alleged breach of an implied warranty of fitness of food sold by defendants to plaintiff while a customer in their restaurant. Reversed.

The facts are stated in the opinion.

Messrs. **William Brosmith** and **R. C. Dickenson**, for appellants:

There is no implied warranty as to quality in the case of food furnished by restaurant keepers to their guests. They are liable only for knowingly or negligently furnishing bad and deleterious food, and they do not impliedly warrant the wholesomeness of food supplied by them to their guests.

22 Cyc. 1081; 16 Am. & Eng. Enc. Law, 2d ed. 547; Beale, Innkeepers & Hotels, § 169; 2 Schouler, Pers. Prop. 357; Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; Bishop v. Weber, 139 Mass. 417, 52 Am. Rep. 715, 1 N. E. 154; Benjamin, Sales, 7th ed. 1899; Doyle v. Fuerst & Kraemer, 129 La. 838, 40 L.R.A.(N.S.) 480, 56 So. 906, Ann. Cas. 1913B, 1110; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 178, 100 N. E. 1078, Ann. Cas. 1914B, 884; Pantaze v. West, 7 Ala. App. 599, 61 So. 42; Bigelow v. Maine C. R. Co. 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396; Green v. Ashland Water Co. 101 Wis. 258, 43 L.R.A. 117, 70 Am. St. Rep. 911, 77 N. W. 722, 5 Am. Neg. Rep. 265.

The doctrine of implied warranty as applied to the sale of provisions generally, and as applied under the sales act, relates only to "dealers,"—that is, to those who deal in provisions as merchandise,—and not to innkeepers or restaurant keepers.

Farrell v. Manhattan Market Co. 198 Mass. 283, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Hoover v. Peters, 18 Mich. 51; Benjamin, Sales, 7th ed. 1899; American Notes by Bennett, 691–693.

There is neither an implied warranty nor liability for negligence where the selection is made by the buyer.

Farrell v. Manhattan Market Co. 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 211; Elliott, Connecticut Law of Sales, 239.

Messrs. **U. G. Church** and **E. B. Kelley**, for appellee:

There is at common law and under the sales acts an implied warranty of fitness where food is sold for immediate consumption.

Atl. 179, the court remarked that hotel keepers and victualers who furnish to their guests canned goods of a high grade, packed and inspected in accordance with approved methods, and expressly guaranteed under the pure food acts, and with no defect discoverable by the exercise of sight, smell, or taste, are not liable for injuries to such guests caused by eating such food, although it is in fact found to be poisonous.

In Malone v. Jones, 91 Kan. 815, L.R.A. 1915A, 328, 139 Pac. 387, judgment affirmed on rehearing in 92 Kan. 708, L.R.A. 1915A, 331, 142 Pac. 274, it was held that where a son lived on his father's farm and had sole charge of it, hiring hands and paying his parents for their board, the son and the father and mother were jointly liable for negligence to an employee of the son, in an action to recover damages for injuries sustained as a result of eating tainted meat, although the father and son had no knowledge of the tainted condition of the meat until it was put upon the table. Upon rehearing, however, the court changed its opinion to the extent of holding that there was evidence from which the jury might have found that the father did have knowledge of the tainted condition of the meat before it was placed upon the table.

The court stated that the son's liability for negligence was not any different from what it would have been had he furnished the food by the help of servants in the ordinary way; that the parents, having undertaken to provide and prepare food for those sitting at the table, owed to them the duty at least to exercise reasonable care in this service, whether the persons for whom the food was intended were their employees or not, in analogy to the liability of a manufacturer where a consumer purchases unfit food through a retailer.

And a finding that a servant in a hotel who received board as part of her compensation ate tainted meat, which was the cause of her illness, is sustainable upon proof that the plaintiff and other witnesses tasted the meat and stated that it was bad, and that six other servants were similarly ill the same night, although there was no chemical analysis of the meat or of the waste. Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, 3 N. C. C. A. 106.

But a railroad company which operates a dining car on its line is liable for negligence in preparing and furnishing unfit food to a customer, resulting in injury to him, if, in its selection of food, or in the preparation thereof for the customer, it does not exercise the same degree of care which a reasonably prudent man skilled in the art of selecting and preparing food for human consumption would be expected to exercise in the selection and preparation of food for his own private table, and if, through such want of care, the customer who eats the food becomes sick. Travis v. Louisville & N. R. Co. — Ala. —, 62 So. 851.

A finding that a restaurant keeper was guilty of negligence in preparing and furnishing food to a customer is not sustainable

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1 Parsons, Contr. 8th ed. 588; 2 Addison, Contr. Morgan's ed. p. 218, § 621; Williston, Sales, §§ 241, 242; McQuaid v. Ross, 85 Wis. 492, 22 L.R.A. 195, 39 Am. St. Rep. 864, 55 N. W. 705; Farrell v. Manhattan Market, 198 Mass. 286, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Doyle v. Fuerst & Kraemer, 129 La. 838, 40 L.R.A. (N.S.) 480, 56 So. 906, Ann. Cas. 1913B, 1110.

Prentice, Ch. J., delivered the opinion of the court:

The complaint charges, and the plaintiff claims to have proved, that the defendants, as copartners, conducted a restaurant where they prepared and served to their customers food for immediate consumption on the premises; that the plaintiff visted their restaurant and ordered from the bill of fare for immediate consumption a dish designated thereon as "creamed sweetbreads;" that in response to the order a dish known by that name was served to her, prepared and ready to be eaten by her; that the food so served was not wholesome or fit to be eaten; that the plaintiff ate the food; and that as a consequence, and by reason of the unwholesomeness of the food provided, she was made sick, and suffered severely in her health. It is alleged that the food served was "sold" to the plaintiff, and that its sale was attended with the implied warranty that it was wholesome and fit for consumption. There is no allegation or pretended proof of either an express warranty of quality, or of knowledge on the part of the defendants of the unwholesome character of the food served, or of any of its ingredients, or of the defendants' negligence in the premises.

The plaintiff's right to recover was, in both pleading and proof, made to rest on the existence of an implied warranty of quality attending the furnishing of the food. If there was no such implied warranty, the plaintiff was not entitled to a verdict, and cannot recover under her complaint.

A question underlying the case is thus presented as to the existence of such warranty. This question was presented to the court in the defendants' motion for a direction of a verdict, in their request to charge, and in their motion in arrest of judgment. Upon each of these occasions the court was asked to rule in substance, in the language of the requests to charge, that "the furnishing of food to a customer by restaurant keepers like these defendants does not constitute a sale within the meaning of the

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upon mere proof that the customer bought and ate the defendant's food and became sick from what the jury might find to have been ptomaine poisoning, due to the food which he had eaten, where there is testimony on defendant's part indicating that all food was purchased from reputable dealers, was strictly inspected when received, that great care was exercised in the preparation of the food, that whatever was left unsold at the end of each day was thrown away, and that the premises were kept in a sanitary condition. Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884.

In Pantaze v. West, 7 Ala. App. 599, 61 So. 42, it was held that it was a question for the jury whether the keeper of a public restaurant was negligent in preparing and serving unfit food consisting of tainted brains to a customer so as to be liable in damages for injuries sustained by eating such food, where it appeared that the brains furnished in fact caused plaintiff's illness; that brains of the kind served were of such a nature as to easily spoil and become unfit for food, causing ptomaine poisoning when taken into the system under such conditions; that the bacteria poison produced in tainted brains may often be destroyed or rendered harmless by sufficient cooking; that the taint in brains developed by decomposition has a peculiar odor easily detected before cooking; and the evidence of the defendant consisted of proof that the brains were in a first-class condition when he purchased them from a wholesaler early in the morning of the same day that they were prepared for food, and that the package in which they were contained had been carefully inspected and had no odor or tainted smell about it, and that they were properly and carefully prepared and served.

In MERRILL v. HODSON, it was held that where a restaurant keeper furnished a guest with unwholesome food, there was no transfer of the "general property" in the food so as to constitute a sale under a statute, and thus create an implied warranty of quality, and that the liability, if any, was for negligence.

But in Race v. Krum, 162 App. Div. 911, 146 N. Y. Supp. 197, reargument denied in 163 App. Div. 924, 147 N. Y. Supp. 818, it was held that there was an implied warranty as to quality in the sale of ice cream to a customer in a drug store for immediate consumption upon the premises.

And in Leahy v. Essex Co. 148 N. Y. Supp. 1063, it was held that there was an implied warranty as to quality in the sale of pie furnished a customer in a lunch room.

In Valeri v. Pullman Co. 218 Fed. 519, an action arising in New York, the Federal court, in the absence of a decision by the New York court of appeals, refused to follow the decisions of the appellate division just cited and held that the proprietor of a buffet car was not an insurer of the fitness of the food served, nor liable upon an implied warranty, but was answerable only for negligence. A. H. N.

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sales act;" and that "there is no implied warranty by a restaurant keeper as to the quality of food furnished to a customer."

The court entertained a different view expressed in its instructions to the jury, in part, as follows: "If, then, you do find those two things,—first, that she made known in some way to these defendants the purpose for which she ordered this food, and that, next, she relied upon their skill or judgment to provide it,—then the law is such that there is an implied warranty that the goods shall be fit and wholesome for the purpose for which she ordered them. To use the language of the statute, 'there is an implied warranty that the goods shall be reasonably fit for such purpose;' that is, for the purpose for which they were ordered."

This view conformed to the plaintiff's claim and contention, and to the theory upon which the complaint was framed, to wit, that the transaction in the course of which the food was supplied involved a sale of the food as goods within the meaning of our sale of goods act (chapter 212 of the Public Acts of 1907), with the consequence that the provisions of § 15 of that act respecting implied warranty of quality were applicable to it. The court was mistaken in this fundamental proposition.

The act defines a sale of goods as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Section 1. A transaction, to come under the provisions of the act, must therefore be one which concerns "goods," and one which involves a transfer to the purchaser of the property therein. "Goods" are, in the act, defined to include "all chattels personal other than things in action and money;" and it is added that the term "includes emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale." Section 76. By "property" is meant "the general property in goods, and not merely a special property." Section 76. Transactions within the provisions of the act are thus limited to those embodying an agreement whereby a seller transfers the general property in chattels personal, as that term is defined, other than things in action and money, to a buyer for a consideration called the price.

A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter. Beale, Innkeepers & Hotels, §§ 35, 301. In so far as the character of the service performed by a restaurant keeper and innkeeper to their respective patrons is concerned, it is the same. In Saunderson v. Rowles, 4 Burr. 2067, 2068, Lord Mansfield, commenting upon this fact, observed that "the analogy between the two cases of an innkeeper and a victualer is so strong that it cannot be got over."

In neither case does the transaction, in so far as it involves the supply of food or drink to customers, partake of the character of a sale of goods. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire,—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.

Prof. Beale, in his work on Innkeepers & Hotels, § 169, well analyzes and states the situation as follows: "As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs, and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of food supplied him, nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself.

The title to food never passes as a result of an ordinary transaction of supplying food to a guest."

For the reasons thus stated, the English courts have held that an innkeeper was not a trader, and so not within the provisions of existing bankrupt laws. In Crisp v. Pratt, Cro. Car. 549, it was said, in connection with such a ruling, that "an innkeeper doth not get his living by buying and selling, for, although he buy provision to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gain, and the guests do not take it at a certain price, but they may have it or refuse it if they will."

In Saunderson v. Rowle, supra, Lord Mansfield, having observed as already indicated that a victualer and innkeeper stood in the same position in the matter of buying and selling, added: "And we are all clear that this man [a victualer] is not within these laws, upon the authority of a determined case of an innkeeper, and also upon the reason of the thing. He makes no particular contract like a trader; he cannot be said to get his living by buying and selling as a trader does. He buys only to spend in his house, and when he utters it again it is attended with many circumstances additional to the mere selling price."

In Parker v. Flint, 12 Mod. 254, it was said that "an innkeeper as such cannot be a bankrupt, because he does not sell, but utters his provision." Other cases to the effect that an innkeeper is not a trader are Newton v. Trigg, 3 Mod. 327, 330; Harman v. Clarkson, 22 U. C. C. P. 291.

The transaction between the plaintiff and the defendants did not involve a sale of goods, and the provisions of § 15 of the sales act, relied upon as creating an implied warranty of quality, furnish no foundation for a right of action.

The situation was not different at common law. Our sale of goods act has not, either in its definition of a sale or its provisions for implied warranty of quality, departed from the common law in any respect pertinent to this case. This becomes clear from a comparison of the common-law rule and those furnished by the act.

Benjamin, in his work on Sales (7th ed.) § 1, defines a common-law sale of personal property as "a transfer of the absolute or general property in a thing for a price in money." In the leading case of Jones v. Just, L. R. (1868) 3 Q. B. 197, 202, 23 Eng. Rul. Cas. 466, Mellor, J., stated at length the common-law rules touching the subject of implied conditions or warranties. The fourth he stated as follows: "Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. . . . In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own."

It is difficult to discover in what particular of present importance a substantial change in the law has been wrought by our recent legislation. This is not surprising since our act in its pertinent provisions does not differ substantially from the English act, either in its definition of a sale, or in respect to the subject of implied warranty of quality, and the English act was, as its author has said, the result of an endeavor to reproduce as exactly as possible the existing law. Chalmers, Sale of Goods (7th ed.) Introduction, VIII. While there is in our act some departure from the phraseology of the English touching these subjects, the changes in substance are slight, and they all concern matters irrelevant to the present situation. In fact the similarity in expression is such as to forcibly suggest that § 15 of our act, which deals with the subject of implied warranty of quality, was, with slight changes here immaterial, taken directly from its English predecessor.

This being the case, we may safely look for light in resolving the question before us to common-law cases, as well as to any which may have arisen under the modern sales legislation. As far as we are aware no case of the latter sort, save the present, has ever reached an appellate tribunal. Of common-law cases we find the following four: Sheffer v. Willoughby, 163 Ill. 518, 34 L.R.A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; Pantaze v. West, 7 Ala. App. 599, 61 So. 42; Doyle v. Fuerst & Kraemer, 129 La. 838, 40 L.R.A.(N.S.) 480, Ann. Cas. 1913B, 1110, 56 So. 906. In all of them the right of action was based upon negligence. We know of no case, aside from the present, in which an attempt has ever been made in cases brought to recover for the harmful consequences resulting from unwholesome food or drink supplied by the keeper of an inn, restaurant, or boarding house in the line of his business, to recover upon the strength of an implied condition or warranty of quality. Those which have grown out of a sale of provisions by a dealer are, of course, not in point. In the first of the cited cases the obligations of a restaurant keeper are discussed, and a state-

ment of the law made which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care. Beale, Innkeepers & Hotels, §§ 169, 302, so states the law. See, to the same effect, 22 Cyc. 1081; 16 Am. & Eng. Enc. Law (2d ed.) 547.

In Bigelow v. Maine C. R. Co. 110 Me. 105, 43 L.R.A.(N.S.) 627, 85 Atl. 396, action was brought against the defendant for the consequences to the plaintiff of her having eaten unwholesome canned asparagus served to her in the defendant's dining car. The declaration was in case, and its allegation was that the defendant was negligent. Notwithstanding this statement of the pleadings, the plaintiff contended that she was under no duty to show either privity of contract or negligence, since there was an implied warranty of wholesomeness, and the defendant was an insurer of the quality of the asparagus. The court held that in any event the defendant could not be held to be an insurer of the quality of canned goods, or a warrantor of it, and for that cause directed judgment for the defendant. This case, followed by Trafton v. Davis, 110 Me. 318, 86 Atl. 179, presents an aspect of the subject of implied warranty under common-law principles, which does not concern us, and in its disposition no light is shed upon the views of the court as to whether there would have been an implied warranty had the food served not been canned goods.

Reasons of appeal for other causes than that discussed call for no consideration, since the plaintiff must fail in her action.

There is error, the judgment is set aside, and a new trial ordered.

In this opinion the other Judges concur.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS EX REL. SAMUEL D. PEELER et al., Appts.,

v.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY.

(262 Ill. 492, 104 N. E. 831.)

Eminent domain — compelling removal of bridge over stream.

1. A railroad company which has constructed for railroad purposes a bridge over a stream with sufficient provision for its flow cannot, in view of the constitutional provision against taking property without compensation, be compelled to widen the span to accommodate the water of a river which a drainage district wishes to turn into the channel of the stream by dredging its channel, reversing its flow, and constructing an outlet from its head.

Drainage — removal of bridge — statutory requirement.

2. A statute requiring a railroad to enlarge its bridge crossing a stream upon the line of which a drainage ditch is located, where the span is not sufficient to accommodate the natural flow of the stream, does not require the enlargement of a bridge span over a stream to accommodate the flow of a river which is to be turned into the channel.

Same — exercise of police power — right of drainage district.

3. A drainage district organized to redeem land for agricultural purposes is not such a governmental agency that it can take private property without compensation in the exercise of the police power for the suppression of disease, although the construction of its system may remove stagnant water which may tend to breed disease.

(February 21, 1914.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Massac County sustaining a demurrer to the complaint in a mandamus proceeding to compel defendant to remove certain obstructions from a water course. Affirmed.

The facts are stated in the opinion.

Messrs. **Courtney, Helm, & Helm,** for appellants:

The duties of a railroad in crossing a water course are the same in respect to the removal of all obstructions, building all bridges, erecting necessary guards, and

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Note. — Duty of railroad company to construct or alter bridges at its own expense over public drainage ditches.

Earlier cases covering the question under annotation will be found in the note to Chicago, B. & Q. R. Co. v. Appanoose County, 31 L.R.A.(N.S.) 1118.

PEOPLE EX REL. PEELER v. CHICAGO & E. I. R. Co., in holding that a railroad company is not required to enlarge at its own expense a bridge across a natural water course used by a drainage district, where the current of the stream is increased or accelerated by artificially reversing its flow so as to make it an outlet of another stream, instead of a tributary, is, as pointed out in the opinion, distinguishable from earlier Illinois cases, where the streams were already outlets for water naturally flowing through their channels, although artificially increased.

And see also Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635, and a later appeal in the same case, 264 Ill. 97, 105 N. E. 699, which were appeals from judgments by the county court

keeping the same in good repair, as when the railroad crosses a public highway.

Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635; Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Lake Erie & W. R. Co. v. Cluggish, 143 Ind. 347, 42 N. E. 743; National Waterworks Co. v. Kansas, 28 Fed. 921; Louisville, N. A. & C. R. Co. v. Smith, 91 Ind. 119; Cooke v. Boston & L. R. Corp. 133 Mass. 185; Lake Erie & W. R. Co. v. Smith, 61 Fed. 885; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529.

Where a natural water course or highway is crossed by a railroad company, without any specific grant to obstruct it, the company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all reasonable requirements of the public as the changed conditions and increased use may demand.

Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635; Chicago & N. W. R. Co. v. Drainage Dist. 142 Iowa, 607, 121 N. W. 193; Mason City & Ft. D. R. Co. v. Board of Supervisors, 144 Iowa, 10, 121 N. W. 39; Lake Shore & M. S. R. Co. v. Sharpe, 38 Ohio St. 150; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Illinois C. R. Co. v. Swalm, 83 Miss. 631, 36 So. 147; People ex rel. Kimball v. Boston & A. R. Co. 70 N. Y. 569; Northern C. R. Co. v. Baltimore, 46 Md. 445; New York & N. E. R. Co. v. Waterbury, 60 Conn. 1, 22 Atl. 439; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174; Yonkers v. New York C. & H. R. R. Co. 165 N. Y. 142, 58 N. E. 877; Worcester, N. & R. R. Co. v. Nashua, 63 N. H. 593, 4 Atl. 298; Pavesich v. New England L. Ins. Co. 122 Ga 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, 2 Ann. Cas. 561; Reg. v. Ely, 15 Q. B. 827, 4 New Sess. Cas. 222, 19 L. J. Mag. Cas. N. S. 223, 14 Jur. 956; Rex v. Morris, 1 Barn. & Ad. 441, 9 L. J. K. B. 55; Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; Gulf, C.

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confirming verdicts of jury assessing benefits for the same improvements as those involved in PEOPLE EX REL. PEELER v. CHICAGO & E. I. R. Co., where it was held (255 Ill. 398, 99 N. E. 635) that a railroad company is not entitled to compensation even though the current of the stream is reversed, if the burden imposed by law is not increased, but that (264 Ill. 97, 105 N. E. 699) where the burdens imposed by law on the railroad company are increased by such an act, the company is entitled to compensation.

Since the earlier note it has been held in People ex rel. Thompson v. Gunzenhauser, 237 Ill. 262, 86 N. E. 669, that under the farm drainage act, where a ditch is dug by the drainage district across a railroad right of way at a point where no natural water course had previously existed, the drainage district, and not the railroad company, has the duty to construct and maintain any bridge or culvert that may be necessary. This decision is in harmony with the earlier Illinois decisions as to the duty of maintaining bridges across a public highway at points where there had previously existed no natural water course; and is distinguishable from Illinois cases found in the previous note, where the drainage district widened or deepened a natural water course, such cases holding that the railroad company had the duty to construct and maintain the bridges.

And in Wabash R. Co. v. Jackson, 176 Ind. 487, 95 N. E. 311, 96 N. E. 466, it was held, on authority of Chicago & E. R. Co. v. Luddington, 175 Ind. 35, 91 N. E. 939, 93 N. E. 273, cited in former note, that where, in constructing a drainage ditch, it is necessary to widen or deepen a natural water course which crosses the right of way of a railroad company, the cost of a new culvert is not to be included in the cost of constructing the drain, but must be borne by the railroad company.

And in Kaw Valley Drainage Dist. v. Kansas City Southern R. Co. 87 Kan. 272, 123 Pac. 991, it was held that the expense of elevating a railroad bridge over a navigable stream must be borne by a railroad company, where a drainage district, in pursuance of its right, requires the bridge to be elevated to correspond with the height of levees constructed by the district.

But a state court cannot order the elevation of bridges over a navigable stream, which are necessary parts of lines of interstate commerce, until the proper Federal authorities have approved the plans. Kaw Valley Drainage Dist. v. Kansas City Southern R. Co. 87 Kan. 272, 123 Pac. 991, reversed in 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564.

And so the removal of the existing railroad bridges over a navigable stream, which form necessary parts of lines of interstate commerce, cannot be ordered by a state court, even in the avowed expectation that such order will lead to the desired elevation of the bridges, which the state court could not order directly without the authority of the Secretary of War. Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564, reversing 87 Kan. 272, 123 Pac. 991, where writs were allowed requiring the railroad companies to remove from the channel of the river all obstructions of all kinds where their lines crossed the stream.

As to duty as to highway crossed by ditch constructed by drainage district, see note to Richardson County ex rel. Sheehan v. Drainage Dist. 43 L.R.A.(N.S.) 695.

J. H. B.

& S. F. R. Co. v. Milam County, 90 Tex. 355, 38 S. W. 747; Pierce, Railroads, 254; Rorer, Railroads, 583; 3 Elliott, Railroads, 1092, 1098.

The right of drainage is paramount to the right of the individual.

Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219; Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635.

Where a railroad crosses a natural water course, and partially obstructs the same by such crossing, it may be compelled to remove such obstruction without compensation, where such water course is needed for drainage purposes.

Cache River Drainage Dist. v. Chicago & E. I. R. Co. supra; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, 212 Ill. 103, 72 N. E. 219.

When a railroad crosses a public highway already in existence, it must not only construct, at its own expense, all necessary bridges, viaducts, approaches, and guards at such crossing, for the safety and convenience of the public for present use, but it must anticipate all future needs of the public, and the crossing must be kept and maintained so as to meet all the growing needs and necessities of the public for all future time.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; Com. v. Alger, 7 Cush. 53; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; Woodruff v. Catlin, 54 Conn. 277, 6 Atl. 849; State ex rel. Lancaster County v. Chicago, B. & Q. R. Co. 29 Neb. 412, 45 N. W. 469.

All property is acquired and held under the implied liability that the use of it may be so regulated that it shall not be injurious to the rights of the community.

Ohio & M. R. Co. v. McClelland, 25 Ill. 140; Legal Tender Cases, 12 Wall. 529, 20 L. ed. 305; Com. v. Alger, 7 Cush. 86.

All persons possess their rights, whether to things tangible or intangible, subject to the police power of the state.

Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695; Boston Beer Co. v. Massachusetts, 97 U. S. 32, 24 L. ed. 991; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892.

L.R.A.1915B.

Mr. E. H. Seneff, with Messrs. Robert J. Folonie, Homer T. Dick, and C. L. V. Mulkey, for appellee:

The railroad company is not required at its own expense, after properly bridging a small ditch, to rebuild so as to accommodate waters of a large river, diverted artificially through the ditch.

Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

The rights and duties of a railroad company are the same as those of a private owner under similar circumstances.

Ibid.

The right to compel enlargement or removal of a bridge over a natural non-navigable water course, without compensation to the owner, exists only when required to effectuate a natural flow to which a dominant heritage is entitled. An inferior heritage, or one standing in no relation whatever naturally to a parcel of land, may not require, as of right, accommodation for the drainage of surface waters artificially diverted.

Ibid.; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Gormley v. Sanford, 52 Ill. 158; People ex rel. Deneen v. Economy Light & P. Co. 241 Ill. 290, 89 N. E. 760.

The burdens of defendant would be increased greatly by diversion of a river through Post creek, and for this reason mandamus will not lie. To sustain the petition and take defendant's bridge would be violative of its constitutional rights.

Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635; People ex rel. Deneen v. Economy Light & P. Co. 241 Ill. 290, 89 N. E. 760.

The demand of petitioners is unreasonable, and therefore should be denied.

Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

Mandamus is an extraordinary remedy, and it will not be granted unless a clear right is shown.

Chicago & E. I. R. Co. v. Snedaker, 223 Ill. 396, 79 N. E. 169; People ex rel. Chicago & I. R. Co. v. Glann, 70 Ill. 232.

To change the direction of the flow of water is an unlawful increase of the burden on defendant. The change of flow and diversion are contrary to natural right, and a denial of constitutional guaranties.

Fenton & T. R. Co. v. Adams, 221 Ill. 201, 112 Am. St. Rep. 171, 77 N. E. 531; Graham v. Keene, 143 Ill. 425, 32 N. E. 180; Crossville v. Stuart, 77 Ill. App. 513; Davis v. Highway Comrs. 143 Ill. 9, 33 N. E. 58.

Award of a writ of mandamus would be violative of defendant's constitutional rights.

Cleveland, C. C. & St. L. R. Co. v. Pole-

cat Drainage Dist. 213 Ill. 83, 72 N. E. 684; People ex rel. Deneen v. Economy Light & P. Co. 241 Ill. 290, 89 N. E. 760; Spring Creek Drainage Dist. v. Elgin, J. & E. R. Co. 249 Ill. 260, 94 N. E. 529; Bradbury v. Vandalia Levee & Drainage Dist. 236 Ill. 36, 19 L.R.A.(N.S.) 991, 86 N. E. 163, 15 Ann. Cas. 904; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201.

Farmer, J., delivered the opinion of the court:

Appellants, the commissioners of Cache river drainage district, filed their petition in the circuit court of Massac county praying a writ of mandamus to require appellee, the Chicago & Eastern Illinois Railroad Company, to remove certain obstructions placed in the channel of Post creek, in Pulaski county, in order to permit the use of said creek for drainage purposes. The petition, as amended, recited that Cache river drainage district was organized in May, 1911, and embraced lands in Massac, Pulaski, Union, Johnson, and Pope counties, in all about 68,000 acres in the Cache river basin, which extends about 30 miles east and west, and is from ¾ to 7½ miles in width; that the land embraced in this district is swampy and overflowed and largely covered with sloughs, ponds, swamps, and stagnant water; that the soil is all black loam and is very productive when drained. The petition recites that Cache river affords the only outlet for the water in said basin; that said river enters this basin in Johnson county and runs in a tortuous, crooked course, with a slow, sluggish current, for more than 55 miles through this basin, and empties into the Ohio river near Mound City, in Pulaski county. The petition further recites the drainage of this basin is of public importance and benefit both as an agricultural and sanitary measure; that commissioners appointed by the governor pursuant to an act of the legislature of May 16, 1903, reported the feasibility of draining the said basin by dredging and straightening the channel of Cache river; and that said commissioners reported such plan practicable by diverting the waters of Cache river into Post creek, a tributary of Cache river, in Massac county, and thence, by excavations from the headwaters of Post creek, into the Ohio river. The petition states that because of the report of said commissioners, and soon thereafter, the district was organized; that the main ditch proposed is to be 40 feet wide at the bottom, and is to deflect the water from Cache river into Post creek at a point in Pulaski county, running said water up said Post creek to its headwaters, where by a deep excavation an outlet of about ½ mile in length is afforded into the Ohio river; and that by this means a new bed for the waters of Cache river is afforded, running nearly on a straight line to the Ohio river; that Post creek is a natural water course, with a deep, well-defined channel, and is a tributary of Cache river. The petition further states that the appellee has constructed across said Post creek, in Pulaski county, a bridge 280 feet long, supported by piling, thereby obstructing the channel of said stream and leaving a very small passageway for the water; that said obstructions prevent the flow of water intended to be carried by said ditch to its outlet into the Ohio river, and further prevent the dredge boat of, or in the employ of, appellants, from passing under said bridge or trestle. Appellants aver it is the duty of appellee to remove the obstructions and restore the channel to its original condition. To the petition is attached, with proof of service upon appellee, notice of the commissioners' intent to use Post creek for drainage purposes, with a request that appellee remove the obstructions before described, and to increase the bridge span at this point to 98 feet, without any piling, posts, pillars, abutments, or other obstructions to the flow of the water therein. The prayer of the petition is that a writ of mandamus issue directing appellee to remove the obstructions and increase the span length of the bridge, and for further relief. Appellee filed a general and special demurrer, claiming the relief sought by the petition was in contravention of the 14th Amendment to the Constitution of the United States, and of § 2 of article 11 of the Constitution of the state of Illinois; that it is not alleged in the petition the burdens imposed upon appellee are not increased by the reversal of the flow and diversion of the water from Cache river through Post creek; that said petition shows the present bridge opening is in excess of the requirements of petitioners; that the petition fails to show the natural channel, if Post creek is in any wise obstructed so as to prevent the passage of the natural flow of said stream. The demurrer was sustained in the trial court, and the record is brought to this court by appeal.

Appellants' principal contentions are that the Cache river drainage district is organized under and derives its powers from an act entitled "An Act to Provide for the Construction, Reparation, and Protection of Drains, Ditches, and Levees across the Lands of Others, for Agricultural, Sanitary, and Mining Purposes, and to Provide for the Organization of Drainage Districts" (Hurd's Stat. 1911, p. 872); that when appellee erected its bridge across Post creek, it

did so with notice that its right to cross said natural water course was burdened with the right of the public to an easement in said water course for all time to come; that under the statute, as well as the common law, it is made the duty of a railroad crossing a natural water course at its own expense to so construct and maintain its crossing or bridge as not only to serve the present but future demands for the flow of water through such water course; also, that appellants are invested with the right to exercise the police power of the state, and that the taking or damaging of private property in the exercise of that power without making just compensation does not violate any constitutional right of the owner, because all private property is held subject to such regulation under the police power of the state as the public safety or welfare demands.

The Cache river drainage district was organized under what is known as the levee act as distinguished from the farm drainage act. Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219, and 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, much relied upon by appellants, involved the provision of the farm drainage act respecting bridges, which is § 40½ of that act. That section is not the same as § 56 of the levee act upon the same subject. But aside from that fact, the decision does not sustain the appellants' right to the relief sought in this case. That case was a petition filed by the drainage commissioners for a writ of mandamus to require the railroad company to construct, enlarge, deepen, and widen a natural water course crossed by the railroad, and also for the construction of a railroad bridge across such widened water course. The petition was held good on demurrer, and the writ was granted by the trial court. Upon appeal the judgment was affirmed by this court, and the judgment of this court was affirmed by the United States Supreme Court. 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. In that case the petition alleged Rob Roy creek "is the natural and only outlet for the land included in the drainage district," whereas Post creek, in the case at bar, is a tributary of Cache river, which the petition alleges is the only natural outlet for the district sought to be drained, and the use of Post creek as an outlet for said district can only be availed of by reversing the flow of its waters, deepening its channel, and connecting by deep excavation its headwaters with the Ohio river. The petition in the case above referred to alleged that "by the proposed system of drainage no water other than the water that has its natural drainage in Rob Roy creek will be carried through the same." No such allegation as to Post creek is contained in the petition in the case at bar, for here it is not the intent or purpose of appellants to increase the natural flow of water in Post creek by enlarging or straightening its channel, or by ditching and draining into it or its tributaries water which in a course of nature drains through its channel; but it is proposed to reverse its flow by artificial means, change its grade levels, divert Cache river into it, so that instead of its being a tributary of and flowing into Cache river, as it does in a state of nature, Cache river will become its tributary and flow its water into Post creek.

Post creek, as shown by the petition, is about 5 miles in length. Cache river is about 55 miles in length, draining many thousand acres of land, so that, it can readily be seen, turning into Post creek the waters of Cache river will greatly increase the burdens of appellee in constructing and maintaining a bridge of sufficient capacity to accommodate the increased flow of water. It is not alleged that the present bridge of appellee over Post creek is insufficient to accommodate the water now flowing through said creek or such water as might naturally flow through said creek channel if accelerated by artificial means, which clearly distinguishes this case from Chicago, B. & Q. R. Co. v. People, supra. The statement of the United States Supreme Court in that case, that how and in what way the channel of Rob Roy creek would be used was a concern of the public only, and that the duty of the railroad company would end when it removed the bridge obstructions, was made in answer to a contention with reference to the increased volume of water diverted into Rob Roy creek by the system of drainage proposed, and in view of the allegation in the petition that said creek was the "natural and only outlet for the land included in the drainage district."

Section 56 of chapter 42, being part of the levee act, provides: "When any ditch or drain or other work of enlarging any channel or water course is located by the commissioners on the line of any natural depression or water course crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water course is constructed, it shall be the duty of the commissioners to give notice to such railroad company to construct or enlarge such bridge or culvert or opening in the grade of such road, for such ditch or ditches or other work, of the dimensions named in such notice, within twenty days from the service thereof." We do not understand this section was meant to embrace any

more than the natural flow of water accelerated by improved drainage methods in the territory, which in a state of nature drains or flows in a described water course. It could not, we think, by the most liberal construction, be held to provide for the reversal of the flow in such stream and by artificial means adding the water from a territory comprising more than 60,000 acres and drained by a river 55 miles in length. This is not such a contemplated or expected circumstance or state of facts as can be said to have been in the mind of the legislature at the time of the passage of the act. Such section provides for the natural flow of water, increased, from time to time, by changed conditions and better drainage, but not by a reversal of the flow of a water course and turning into it water which in a state of nature flowed in a different direction, through a different water course, to its outlet. There may be language in the opinion in Chicago, B. & Q. R. Co. v. People, supra, used *arguendo*, from which the inference might be drawn that the public interest and welfare were so involved that the petitioner had the right to invoke the police power of the state. But that was not the basis of the decision. The basis of the decision, which is clearly and unmistakably shown by the opinion, is the established doctrine of the right of the dominant heritage to drainage over the servient heritage. The right of drainage through a natural water course is an easement appurtenant to the land of every individual from whose land the surplus waters flow into such natural water course, whether such flow is increased by artificial means or not. This is too familiar to require the citation of authorities. But no such easement exists in the servient estate to change the natural course of drainage and flow the water upon the dominant estate.

Appellants also rely upon Cache River Drainage Dist. v. Chicago & E. I. R. Co. 255 Ill. 398, 99 N. E. 635, which was an appeal from a judgment of the county court of Massac county confirming an assessment against the railroad company for benefits. The court there said: "The commissioners have the right to keep the water course open for the free flow of water, and, in deepening it to increase its capacity, they take nothing from the appellant [the railroad company], but are in the exercise of a lawful right. The further fact that they expect to improve the water course by changing the direction of the flow from the north to the south does not change the character of their right or affect the appellant, so long as the burden imposed upon it by law is not increased." The right of appellant, as there defined, was expressly limited to conditions which would not increase the burdens imposed by law to provide for the unobstructed natural flow of water. The statement is correct, but does not support appellants' present position, for the proposed change in the flow of water in Post creek increases the burdens imposed by law upon appellee. The petition does not allege such changes will not increase the burdens of appellee. This is a necessary averment. People ex rel Chicago & I. R. Co. v. Glann, 70 Ill. 232. Mandamus is an extraordinary remedy, and the writ will only be awarded where there is a clear right to it. Chicago & E. I. R. Co. v. People, 222 Ill. 396, 78 N. E. 784, 13 Enc. Pl. & Pr. 667.

It may be conceded that the removal of stagnant water which produces malaria and breeds disease may be a subject for the exercise of the police power of the state (Green v. Swift, 47 Cal. 536); but appellants' drainage district is not such a governmental agency as is authorized to take private property without compensation in the exercise of the police power of the state for the suppression of disease. It was organized upon petition of the requisite number of landowners in the district to reclaim the land for agricultural purposes within the district at the expense of the landowners in the territory embraced therein. In Bradbury v. Vandalia Levee & Drainage Dist. 236 Ill. 36, 19 L.R.A.(N.S.) 991, 86 N. E. 163, 15 Ann. Cas. 904, a suit against the district to recover damages to land caused by a levee, and where the district attempted to justify the overflow of lands outside the district, caused by its levee, as a lawful exercise of the police power, the court said: "The act under which the defendant is organized provides for drainage for agricultural or sanitary or mining purposes, to be maintained by special assessment upon the property benefited thereby. If the county court finds that the proposed drains, ditch or ditches, levee, or other works, is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby, for either agricultural or sanitary or mining purposes, the district is to be organized. It is not contended that any other than sanitary purposes come within the undefined limits of the police power, and districts formed under the act are not necessarily organized as a police regulation to drain lands which would be a menace to public health or a breeder of malaria and disease. So far as it appears, this district, with its scheme for a levee, was organized for the purpose of improving the lands within the district for agricultural purposes, which is not an exercise of the police power, and it was organized upon the petition of a majority of the

owners of lands in the belief that they would be benefited by the organization. To deny to the plaintiffs a recovery of the damages which they have suffered by the effort of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice, and we find no sufficient reason for exempting the district from liability, whether the levee is regarded as a wrongful obstruction to the waters of the river, or as a lawful one under the decree of the county court." And again, quoting from the same opinion: "Lands taken or damaged by a drainage district for its purposes are taken or damaged for a public use, and compensation must be made therefor." We think the language above quoted applies in the case at bar.

That the public have an easement in the channel of Post creek is uncontradicted, and the right of appellee to maintain its bridge is subject to such easement, but before appellee can be asked to comply with the requirements of the petition, and increase, at its own expense, the length of its bridge span, it must appear that petitioners are entitled to such relief as a means of affording the unobstructed flow of such waters as have their natural outlet through Post creek.

The petition did not state a case justifying the relief prayed, and we think the judgment of the Circuit Court was right in sustaining the demurrer to it. The judgment is affirmed.

Petition for rehearing denied April 15, 1914.

KANSAS SUPREME COURT.

HOLDEN LAND & LIVE STOCK COMPANY et al.
v.
INTERSTATE TRADING COMPANY et al.
(Two cases.)

(87 Kan. 221, 123 Pac. 733.)

Mortgage — agreement for forfeiture on default.

1. An agreement by a mortgagor that he will forfeit all interest in the mortgaged property, if he fails to pay the debt secured by a fixed time, will not be enforced, although made after the execution of the mortgage.

Same — deed — escrow — effect on title.

2. Where, by the agreement of the mortgagor and mortgagee, the note secured and a deed for the mortgaged property from the mortgagor to the mortgagee are deposited in escrow, both to be delivered to the mortgagor if he pays his debt by a certain date, otherwise the note to be delivered to him and the deed to the mortgagee, the delivery of the deed in accordance with the agreement does not devest the mortgagor's title.

Same — deed as.

3. If such a deed is regarded as taking effect at the time of its deposit in escrow, the continued existence of the indebtedness thereafter characterizes it as a mortgage. If it is regarded as taking effect at the end of the designated period, it is invalid as an absolute conveyance of title, because it is an attempt to procure in advance a release of the equity of redemption.

Same — lease to mortgagor — effect.

4. When a deed has been given under such circumstances that it amounts to a mortgage, the fact that the grantor accepts and signs a lease of the property from the grantee does not preclude him from asserting his right to redeem.

Same — declaring deed, mortgage — conditions.

5. Where a party asks a court to declare a deed to be in effect a mortgage, he may be required, as a condition to receiving such equitable relief, to forego the advantage of any statutory penalties for the exaction of usury, and submit to a charge of the principal of the debt and legal interest.

(May 11, 1912.)

CROSS APPEALS from a judgment of the District Court for Shawnee County in plaintiffs' favor in consolidated actions to have deeds declared to be mortgages, and to establish the rights of plaintiffs thereunder; defendants appealing from so much of the judgment as granted plaintiffs any relief whatever, and plaintiffs appealing from so much as charged them interest on a note given to the bank, and as required enforcement of the first mortgage against them other than by foreclosure and sheriff's sale. Modified and affirmed.

The facts are stated in the opinion.

Headnotes by MASON, J.

Note. — Effect of deed delivered in escrow as further security for a mortgage debt.

This note is supplementary to the one appended to Plummer v. Isle, 2 L.R.A.(N.S.) 627. No additional cases have been found which are exactly in point, Plummer v. Isle and HOLDEN & LIVE STOCK CO. v. INTERSTATE TRADING CO. apparently being the only cases in which a deed was delivered in escrow contemporaneously with the execution of a mortgage for the purpose of cutting off the right of redemption thereunder.

In Weston v. Livezey, 45 Colo. 142, 100 Pac. 404, no right to redeem was claimed, but on the contrary the suit was brought by the administratrix of the mortgagee

Messrs. **Edward P. Garnett** and **Charles Blood Smith** for plaintiffs.

Messrs. **Ferry, Doran & Dean** and **Elijah Robinson** for defendants.

Mason, J., delivered the opinion of the court:

On June 6, 1901, the Holden Land & Live Stock Company executed to the Mutual Benefit Life Insurance Company a mortgage for $90,000, due in five years, upon a tract of land in Shawnee county, containing about 5,603 acres, of which it was the record owner. On July 1, 1901, the Holden Company executed a note to Howard M. Holden for $82,000, secured by a second mortgage on the same tract. This note and second mortgage, with other security, Holden at once transferred to the National Bank of Commerce of Kansas City, Missouri, to secure his note to that bank for $80,000, bearing the same date, due in one year, and drawing 8 per cent interest, which was subsequently renewed. Holden had personally purchased a tract of land in Missouri, borrowing a part of the amount necessary for the purpose from the bank. To secure the bank the deed was made to one W. H. Winants. Afterwards it was agreed that he should hold the title as further security for Holden's note to the bank. In May, 1904, Holden caused to be executed to the Interstate Trading Company deeds covering the tracts in Kansas and Missouri, less parts of the former that had been sold; most of the proceeds having been applied to cutting down the encumbrances. On February 13, 1908, Holden and the Holden Company brought an action against the bank and the Interstate Trading Company, alleging in substance that the deeds had been given by way of security for the indebtedness owing to the bank, and asking, if this should be found to have been paid in full, a decree quieting title; otherwise, a decree declaring title to be held under the deeds as security for whatever balance should be found due. The defendants maintained that the deeds were intended as absolute conveyances, and operated as such. The court found, in accordance with the report of the referee before whom the case was tried, that the defendants were precluded, by their course of dealing with the plaintiffs, from claiming the absolute title to the land; that the plaintiffs should be allowed to redeem it by paying the defendants what they had in it, amounting at the time the action was begun to $81,091.93, this including the first mortgage, which the bank had purchased. Judgment was rendered that, if the plaintiffs should pay this amount (which had been reduced to $65,233.67 by sales of land made during the litigation) within six months, their title should be quieted; that if they failed to make the payment within that time, they should be barred of all interest in the land. The defendants appeal on the ground that the court should have denied the plaintiffs any relief whatever. The plaintiffs appeal upon two principal grounds: (1) That in the accounting they should not have been charged with interest on the note given to the bank, because by the exaction of usury all interest thereon had been forfeited; and (2) that the first mortgage should not have been enforced against them otherwise than by a foreclosure and sheriff's sale.

The plaintiffs complain of some of the findings of fact made by the referee and approved by the court. The objections have been examined and are found not to be well taken. The findings will therefore be spoken of as the established facts. The details of the transactions will be stated no further than is thought necessary to present the questions of law that are regarded as controlling.

The flood of 1903 rendered a part of the Kansas land temporarily unproductive, and occasioned loss to Holden, who in consequence failed to keep up his payments of interest and taxes. The deeds in question were executed in connection with two written contracts entered into on May 12 and May 14, 1904. The referee found that these

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against the mortgagor upon items of indebtedness covered by the mortgage, and the defense was that the indebtedness had been canceled by delivery to the mortgagee of a deed. This deed was executed by the mortgagor to the mortgagee and delivered in escrow under an agreement that it was to be delivered to the mortgagee on failure of the mortgagor to apply dividends from the mortgaged property to the debt, or, in any event, upon a certain date unless the full indebtedness had been paid. The agreement also provided that if the debt was paid the deed was to be returned to the mortgagor, and that in case of delivery to the mortgagee, the mortgagor should have a right to a reconveyance at any time within six months upon payment of the balance due to the mortgagee. It did not state what the consideration for the deed was; nor did it state that the mortgagor was to dispose of the property and account to the mortgagee for the proceeds. The court therefore concluded that it was the intention of the parties, as between themselves, to cancel the indebtedness by the conveyance, for the reason that where the mortgagee acquires the fee in the land by conveyance from the mortgagor, the mortgage debt, so far as the mortgagee is concerned, is extinguished, unless a contrary intention is manifest.

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contracts were intended to include, and did include, all matters in negotiation between the parties up to the time of their execution. The defendants maintain that they show that the deeds were intended as absolute conveyances, and that oral evidence is not admissible to give them a different effect. We reach the conclusion, however, that the writings themselves, interpreted in the light of the situation of the parties, show that under the law the deeds did not devest the mortgagor of the right to redeem the property.

The contract of May 12th was made between the Interstate Trading Company and Holden. This company was a corporation organized, owned, and operated by the bank, for its own convenience, and for practical purposes the bank and corporation were the same. The Holden Company sustained the same relation to Holden. The contract recited that Holden had caused to be conveyed to the trading company the absolute title to the lands in question, and had transferred to it various stocks, bonds, and notes which were held as collateral security for the same indebtedness; that in consideration thereof the trading company had paid Holden's note to the bank for $77,873.90, and also the sum of $6,253.30 advanced by the bank to keep down the taxes and the interest on the first mortgage. Provision was then made that Holden, until November 9th following, was to have the right to sell the property as the agent of the trading company for not less than the sum of the amounts named, with interest; he to retain as commission anything in excess of that sum. At the time of the execution of this contract, the Holden Company executed the deed to the Kansas land, which was delivered to the trading company, and Holden authorized Winants in writing to make a deed conveying the absolute title to the Missouri land to the trading company.

A mortgagor may, of course, sell the mortgaged property to the mortgagee, although the transaction will be scrutinized closely to determine its fairness,—being almost as much open to suspicion, it is said, as a purchase by a trustee from his beneficiary. Villa v. Rodriguez (Alexander v. Rodriguez) 12 Wall. 323, 20 L. ed. 406. It is also said that a conveyance of the mortgaged premises from the mortgagor to the mortgagee will be regarded as a mere change in the form of security, unless it clearly and unequivocally appears that both parties intended otherwise. Ennor v. Thompson, 46 Ill. 214; Earle v. Blanchard, 85 Vt. 288, 81 Atl. 913, 915. It may be assumed that this contract on its face contemplated an actual sale, leaving Holden with nothing but a right to repurchase within a fixed time for a stated price. But so far as there is any inconsistency between the two, this contract must yield to that of May 14th, which was executed by the bank, the trading company, Holden, and the Holden Company. The second contract recited that the bank had deposited with James A. Patton (an agent of the bank) Holden's note to the bank for $77,873.90 (with some collateral security), and a demand note for $6,253.30, which Holden had given the bank May 12th (being for the taxes and interest on the first mortgage); that the trading company had deposited with Patton its note to the bank for $83,675.32, due November 9, 1904; that Holden had deposited with Patton a bill of sale transferring to the trading company the bonds, stocks, and notes securing Holden's note, and deeds to the trading company for the Kansas land, executed by the Holden Company, and for the Missouri land, executed by Winants. The provision was made that if Holden's notes were paid by July 9, 1904, Patton should deliver to Holden the notes, the collateral, and the deeds; if the notes were not paid by that date, Patton should deliver the bill of sale and the deeds to the trading company, deliver the trading company's note to the bank, and surrender Holden's note to Holden. This contract was extended several times, the last extension expiring October 11, 1904; but finally delivery was made as directed in the event the notes were not paid by the date fixed.

Plainly, the second contract superseded the first. It recited the delivery in escrow by Holden to Patton of documents which the first contract represented him as already having delivered to the trading company. The first contract recited that Holden's note and his obligation for $6,253.30 had been paid, while the second one showed them still to be in full force. The case must be determined by the effect of the second contract. What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9th to pay his debt. If he fails to do so, he is to relinquish all claims to the land, and the bank is to become the owner. The trading company's function is merely to provide a method for carrying the property in the guise of commercial paper if the bank should become its owner. The deposit of the instruments in escrow does not affect the character of the transaction. It is but a device to insure performance. The important question is, What rights did the law give the parties under this arrangement, rather than, What did they conceive their rights to be?

It is a familiar and undisputed proposition that no force will be given to a stipulation in a mortgage (or in a deed intended as a mortgage) by which the mortgagor agrees that, if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property. 27 Cyc. 1098. It is equally well settled that no effect will be given to such an agreement made separately from the mortgage, but at the same time. 11 Am. & Eng. Enc. Law, 243.

This principle renders ineffectual the deposit of a deed in escrow by the mortgagor at the time he gives the mortgage for delivery to the mortgagee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded. Plummer v. Ilse, 41 Wash. 5, 111 Am. St. Rep. 997, 82 Pac. 1009, and note to same in 2 L.R.A.(N.S.) 628. It is often said that after the execution of a mortgage the mortgagor may release to the mortgagee his "equity of redemption,"—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory right to redeem after a sale on foreclosure. 11 Am. & Eng. Enc. Law, 243; note to 55 Am. St. Rep. 105; 3 Pom. Eq. Jur. 3d ed. § 1193, note 1, p. 2371; 2 Jones, Mortg. 6th ed. § 1045. What is meant, however, as is shown by an examination of the cases cited in support of such statements, is merely that the mortgagor may at any time after the execution of the mortgage sell to the mortgagee outright all his interest in the property by a conveyance operating at once, and in that sense release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, if he does not pay his debt by a certain time in the future, he will forfeit all right to the property. The recognition of such a right in a few cases, of which Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract made by the borrower at the inception of his loan, that he will forfeit his interest in the property he offers as security if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes a like contract upon a renewal of the loan or an extension of the time of its payment. To hold otherwise would be to deprive of the benefits of the rule those most in need of its protection. If at any time after the execution of a mortgage the mortgagee could, by an extension of time or upon any other new consideration, obtain from the mortgagor a valid agreement that if he did not pay the debt in full by a certain date he should forfeit the entire security, then virtually the ancient common-law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption. The modern tendency is to extend, rather than to contract, the scope of equitable relief against forfeitures.

"There is no principle in equity better settled than that every contract for the security of a debt, by the conveyance of real estate, is a mortgage; and all agreements of the parties tending to alter, in any subsequent event, the original nature of the mortgage, and prevent the equity of redemption, is void. If the conveyance or assignment was a mortgage in the beginning, the right of redemption is an inseparable incident, and cannot be restrained or clogged by agreement." Henry v. Davis, 7 Johns. Ch. 40, 42.

"The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent agreement tending to preclude the exercise of the right of redemption." 2 White & T. Lead. Cas. in Eq. (Hare & W.) p. 1984, note.

"Once a mortgage always a mortgage may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee, by which the equity of redemption is to be shortened or cut off. The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor. But it cannot be done by a contemporaneous or subsequent executory contract by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures." Batty v. Snook, 5 Mich. 231, 239, 240.

"Where land is conveyed to another by a deed absolute on its face, but to secure the payment of money, and the grantee gives the debtor a written agreement to convey the land on payment of the debt, the conveyance will be a mortgage only, and its character will not be changed by giving a new note and taking a new agreement to convey in which time is made of the essence of the contract, and which provides that, in case of failure to pay on the day named, 'the intervention of equity' shall be forever barred,—the relation of mortgagor

and mortgagee will still exist." Tennery v. Nicholson, 87 Ill. 464, syllabus, ¶ 1.

A valuable article upon "The Clog on the Equity of Redemption," in 21 Harvard L. Rev. 459, 466, cites Wynkoop v. Cowing, 21 Ill. 570, as holding that an executory contract for the release of the equity of redemption may be held valid if made subsequently to the mortgage. The court there decided that the original transaction was a sale, and not a mortgage, and what was said as to the release of the equity of redemption was avowedly *dictum*. The precise point here under consideration was not discussed.

If the deeds to the trading company are conceived as taking effect at the time of their deposit in escrow, or at the time of their first delivery to the trading company, then they amounted to mortgages under the usual test,—the continued existence of the indebtedness. McNamara v. Culver, 22 Kan. 661; 1 Jones, Mortg. 6th ed. §§ 264, 265; 27 Cyc. 1010. If the parties by the plan outlined in the first contract intended to carry out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its repurchase, they are shown by the second contract not to have consummated their purpose, but to have voluntarily abandoned that course and adopted one of a radically different nature, which made the deed, which had been signed and acknowledged, but not finally delivered, in effect a mortgage. The second contract distinctly recognizes the notes as subsisting obligations of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date. This feature is the more noticeable because the first contract professed to show that the indebtedness had been extinguished. It is true that the notes were to be returned to Holden at the end of the period fixed, whether they were paid or not, and in the meantime they were in the hands of a third party, so that he was well protected against the enforcement of a personal liability upon them. But the fact remains that they were not to be returned to him until the expiration of the time named, and in the meanwhile he was not entitled to them. The existence or nonexistence of an indebtedness is of importance in determining whether a transaction is a sale or a mortgage, because it interprets and gives character to the language and conduct of the parties. The practical likelihood of the debtor being called on to respond to a personal liability is not an element in the determination of the matter. It is not material to inquire what purpose of the bank was subserved by the continued existence of the notes. It is enough that they were for some reason kept alive, and Holden remained a debtor to the bank. In November, 1904, Patton offered to deliver the notes to Holden, but he refused them. In February, 1906, the assistant cashier of the bank delivered them to him. The note of the Holden Company was never returned.

Two Kansas cases are cited as supporting the view that the deeds to the trading company passed an absolute title. They are Martin v. Allen, 67 Kan. 758, 74 Pac. 249, and Fabrique v. Cherokee & P. Coal & Min. Co. 69 Kan. 733, 77 Pac. 584. In the former, Martin owned land subject to a mortgage and several other liens. He deeded it to Allen, who assumed the payment of all Martin's indebtedness, and agreed to reconvey to Martin at any time within three years, upon payment of the amount, with interest. The transaction was held to be a sale, and not a mortgage, because there was no indebtedness owing from Martin to Allen at any time. Allen continued to be indebted to the mortgagee and to the holder of a judgment lien, but they were strangers to the deed. The second case cited was entirely similar in principle, although there the grantee in the deed, who assumed and paid a number of the grantor's debts, took an assignment of a mortgage. As this had been foreclosed before the deed was made, the judgment had probably been released. At all events, the case was decided upon the theory that there was nothing owing from the grantor to the grantee. In the present case Holden was not indebted to the nominal grantee, the trading company; but the bank was not a stranger to the transaction. It was the real party in interest,—the actual beneficiary of the deed. No consideration moved from the trading company to Holden. It neither assumed nor paid his debts. The contract was between the bank and Holden,—the mortgagee and the mortgagor. See, in this connection, Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309.

On October 12, 1904, the deed to the Kansas land was recorded. Holden, on learning of the fact, filed for record (on November 7, 1904) his copy of the contract of May 12th, to which he added an acknowledged statement that the deed, with the contract, constituted, if anything, only a mortgage upon the property. On February 16, 1905, a lease for the Kansas land for that year was executed from the bank to the Holden Company; the rental named being $10,000. Holden, who had been in continuous possession, paid to the bank the income of the property, amounting to $8,300.57. No request was ever made for any further payment on that account. Holden continued in possession until this action

was begun. The lease was not formally renewed. He paid the income for 1906 to the bank—$5,005.78. In 1907 it received from a wheat crop $472.95. It is argued that the making of the lease was a recognition by Holden of the bank's ownership of the property. We regard it only as a circumstance to be weighed with other matters in determining the attitude of the parties. Wright v. Bates, 13 Vt. 341. It is capable of the explanation offered by the plaintiffs, that it was a method of pledging the income to the bank to apply upon the debt. That no request was made for any balance gives additional plausibility to this view. As the formal legal title was in the bank (or in the trading company for the bank), the execution of the lease was a natural step, conforming to that situation, although Holden still claimed to be the equitable owner. The lease was not more significant of the actual title than a deed, and he had already placed upon record his declaration of his claim that the deed constituted only a mortgage.

We agree with the referee and the trial court that, whatever may have been the legal effect of the writings entered into by the parties, their subsequent conduct was such as to preclude the defendants from denying to the plaintiffs a right to redeem the property. It was worth at the time of the contracts $60,000 above the liens against it. Holden continued to negotiate sales of parts of it, incurring considerable trouble and expense. Commissions were paid by the bank to him, but he turned them over to the agents who had made the sales. With the consent of the bank he retained in two instances a part of the proceeds. In order to carry through one sale, he included an unencumbered tract of his own; the bank knowingly receiving the benefit. The bank kept what it called the "Holden collateral account," in which record was made of the amounts received and disbursed in connection with the property referred to. This, however, was a matter of convenience, and in accordance with its usual plan of carrying real estate assets. At the request of the Federal banking officials, a deed was made by the trading company to the bank in the early spring of 1905. Holden expended considerable sums in permanent improvements on the property. No accounting was had or asked by the bank concerning these expenditures or the rent account for three years. As the sales of parts of the Kansas land were made, the bank executed partial releases of the mortgage given by the Holden Company to Holden, and by him transferred to the bank; the releases reciting that the mortgage was still in force. We think that, upon any theory of the effect of the contracts, the bank must be deemed to have permitted Holden to act upon the assumption that he was to have the benefit of his exertions, and was to own the property whenever the bank had received the amount of its claims, with interest and expenses. Having allowed Holden to act upon this conception of his rights, the bank cannot deny him the privilege of redemption.

Pending the litigation, the rights of the defendants were transferred to the Terrace City Realty & Securities Company. Holden has died since the cause was submitted, and it has been revived in the names of the successors in interest. The issues are not in any way affected by these changes. The trial court, having concluded that the plaintiffs had only an equitable right to redeem the property, rendered judgment accordingly. As this court concludes that the relations of the parties have at all times been in effect that of mortgagor and mortgagee, the appropriate remedy is a foreclosure and sale. In effect at least the indebtedness is now all extinguished except a part of the first mortgage; the precise situation depending upon the application of payments. There would be no purpose in attempting to apportion the remainder between the first and second mortgages, and the order will be made for the sale of the property to pay the balance due.

Usury was charged and collected upon the Holden note. By the national banking act the exaction of usury destroys the interest-bearing quality of a debt. The referee decided that the plaintiffs were estopped from claiming the benefit of that provision. Nothing was said about usury until the present action was begun. Whether or not an actual estoppel has arisen, it was proper under the circumstances, in view of the equitable relief sought, that the plaintiffs should be charged with the principal and legal interest.

"When the borrower appears in any capacity in a court of equity asking affirmative relief against a usurious contract to pay money, such relief will, in the absence of statute providing otherwise, be granted him only upon condition of his doing equity; that is tendering the money actually due. . . . The rule . . . applies when the relief sought is the reformation or cancelation of a deed or mortgage or other instrument evidencing or securing a usurious debt, or an injunction against threatened damaging action by the creditor, or, in fact, whatever be the character of the relief sought. . . . In case the usurious interest has been reserved or paid in advance, the amount equitably due is the principal debt less the usurious excess of

interest paid. In the absence of statute providing otherwise, if the contract for the usurious interest is still executory, the sum equitably due is the principal debt with legal interest thereon." 39 Cyc. 1010–1012.

The plaintiffs complain of the action of the trial court in dividing the costs; but that is a discretionary matter, not ordinarily subject to review (Civ. Code, § 615 [Gen. Stat. 1909, § 6210]), and there is nothing in the present case to suggest an abuse of discretion.

The judgment will be modified by requiring the lien upon the Kansas land to be enforced by sheriff's sale, subject to the statutory right of redemption. Otherwise it is affirmed.

Dismissed by the Supreme Court of the United States, May 4, 1914, 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661.

KENTUCKY COURT OF APPEALS.

GEORGE G. HAMILTON et al., Appts.,
v.
KENTUCKY TITLE SAVINGS BANK & TRUST COMPANY.

(159 Ky. 680, 167 S. W. 898.)

Duress — demanding premium to accept payment of unmatured loan.

That a bank holding a long-time loan, payments on which were overdue, was urging payment of the arrearages, and had the right to declare the whole debt due if the arrearages were not paid, does not render its demand of a premium for acceptance of the whole sum and release of the security, so as to permit the debtor to secure a loan elsewhere, such duress as to enable the debtor to recover the premuim paid.

(June 19, 1914.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Montgomery County in defendant's favor in an action brought to recover an amount alleged to have been wrongfully and usuriously charged by defendant in consideration of the acceptance by it of payment of an unmatured loan. Affirmed.

The facts are stated in the opinion.

Messrs. **Robert H. Winn** and **R. G. Kern**, for appellants:

The amount paid by plaintiffs was an illegal usurious exaction that they are entitled to recover.

30 Cyc. 1308, 1309; Kilpatrick v. Germania L. Ins. Co. 183 N. Y. 163, 2 L.R.A. (N.S.) 574, 111 Am. St. Rep. 722, 75 N. E. 1124; Joannin v. Ogilvie, 49 Minn. 569, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217; First Nat. Bank v. Sargent, 65 Neb. 594, 59 L.R.A. 297, 91 N. W. 595.

The right of one to recover money which he has been coerced to pay to save his land from seizure has repeatedly been recognized in Kentucky.

Torbett v. Louisville, 9 Ky. L. Rep. 202, 4 S. W. 345; Mills v. Hopkinsville, 11 Ky.

Note. — Duress of real property.

The user of the present note is referred to the note accompanying Kilpatrick v. Germania L. Ins. Co. 2 L.R.A.(N.S.) 574, for many of the earlier cases upon the question here considered.

This note is confined to cases in which it was sought to recover money on the ground that it had been paid under duress of real property. It does not cover the right to recover money paid on account of taxes, assessments, or licenses.

For notes on different phases of right to recover illegal taxes paid, see Index to L.R.A. Notes, "Taxes," 86.

As to right to recover back license fee unlawfully exacted under color of authority, see notes to Levy v. Kansas City, 22 L.R.A. (N.S.) 862; Eslow v. Albion, 22 L.R.A. (N.S.) 872; and the supplemental note to Spalding v. Lebanon, 49 L.R.A.(N.S.) 387.

There is a well-settled rule that money in addition to that lawfully due, which has been paid involuntarily to prevent the loss of real property, may be recovered back. The question as to what constitutes an involuntary payment, or one made under duress, however, as stated in the note in 2 L.R.A.(N.S.) 574, depends largely upon the facts and circumstances of each case. L.R.A.1915B.

It will be noticed that in some instances the payments in question were made to induce one to refrain from exercising the legal right, or to induce him to do what he was not legally bound to do. In such cases little or no ground exists for claiming that the payments were made under duress.

In other cases the payments appear to have been made to induce the payee to refrain from doing an unlawful act, or attempting to enforce an unlawful demand, or to induce him to do what he was legally bound to do. Such circumstances, when coupled with the necessary element of compulsion in order to preserve a right in real property, in many cases constitute duress.

By keeping the difference in the nature of the demands as above indicated in mind, the apparent conflict in some instances is dissipated.

Recovery of payment unlawfully demanded by mortgagees.

The payments demanded by the mortgagees in the following cases were held not to have been involuntarily made, and not to be recoverable on the ground that they had been made under duress:

—where a mortgagor, when the mortgage was about to be foreclosed, arranged

L. Rep. 164, 11 S. W. 776; Louisville v. Anderson, 79 Ky. 334, 42 Am. Rep. 220; Louisville & N. R. Co. v. Com. 89 Ky. 531, 12 S. W. 1064; Louisville v. Becker, 139 Ky. 17, 28 L.R.A.(N.S.) 1045, 129 S. W. 311.

Money compulsorily paid to prevent an injury to one's property rights, or to escape further ills, is involuntarily paid.

Tripler v. New York, 125 N. Y. 617, 25 N. E. 721; Scholey v. Mumford, 60 N. Y. 498; Buckley v. New York, 30 App. Div. 463, 52 N. Y. Supp. 452; Radich v. Hutchins, 95 U. S. 210, 24 L. ed. 409.

Usury is the taking upon a loan or forbearance of money a greater sum than lawful interest, without respect to whether it be a percentage calculation, or what it may be called by way of subterfuge.

Simpson v. Kentucky Citizens' Bldg. & L. Asso. 101 Ky. 496, 41 S. W. 570, 42 S. W. 834; New York L. Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; Penn's Mut. L. Ins. Co. v. Barnett, 124 Ky. 266, 96 S. W. 1120, 99 S. W. 228; Mutual Ben. L. Ins. Co. v. Davis, 115 Ky. 404, 73 S. W. 1020; Fitzpatrick v. Apperson, 79 Ky. 272.

Messrs. **Bruce & Bullitt**, with Mr. **Keith L. Bullitt**, for appellee:

The payment of money for the privilege of paying unmatured notes is not the exaction of usury.

Smithwick v. Whitley, 152 N. C. 366, 28 L.R.A.(N.S.) 113, 67 S. E. 914, 20 Ann. Cas. 1348; Young v. Miller, 7 B. Mon. 540; Locknane v. United States Sav. & L. Co. 103 Ky. 266, 44 S. W. 977.

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for a loan from a third party upon an assignment of the mortgage, and the mortgagee refused to assign until the mortgagor paid the amount of the premium for a policy of title insurance on the premises, which had been lent to the mortgagor by the mortgagee's husband, Hess v. Cohen, 20 Misc. 333, 45 N. Y. Supp. 934;

—where a mortgagee who, by the terms of an agreement, was entitled to twenty days' notice of payment, and to interest during the twenty days, told the mortgagor that she would accept the money on any day when the latter might be in funds derived from the negotiation of another mortgage, but on the day of the closing of the new mortgage the mortgagee was represented by an attorney, who insisted on receiving the interest for twenty days before he would deliver a satisfaction piece, Scheer-Ginsberg Realty & Constr. Co. v. Devin, 76 Misc. 201, 134 N. Y. Supp. 505;

—where payment was made to prevent the foreclosure of a mortgage, Smith v. Hunter, 171 Ill. App. 35;

—where a security on the bond of a mortgagor procured foreclosure proceedings to be stayed and a third person to take an assignment of the mortgage, but was obliged to pay a sum in the nature of an allowance which the mortgagee demanded before he would execute an assignment, the court holding in this case that the mortgagee was not bound to give an assignment, and that it was also possible for the plaintiff to have protected himself by making a tender of the amount lawfully due, Bliss v. Wallis, 3 How. Pr. N. S. 325.

So, where a guarantor of a mortgage debt after a decree had been entered declaring a claim of a creditor of the mortgagor superior to that of the guarantor failed to protect his interest during appeal by securing a restraining order from the supreme court, but paid under protest the amount necessary to redeem the mortgaged property from the mortgagor's creditor, the guarantor cannot, after a reversal declaring the grantor's lien superior, recover the amount paid, since his possession could have been fully protected by a restraining order, L.R.A.1915B.

and his payment was therefore voluntary. Manning v. Poling, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30.

In Williams v. Rutherford Realty Co. 159 App. Div. 121, 144 N. Y. Supp. 357, the plaintiff was held not entitled to recover the amount of an attorney's fee which had been demanded by the defendant, a mortgagee, upon the plaintiff's desiring to pay off the mortgage, and which she had paid to free her property from the lien, so that she might consummate another loan, it being held that the amount was lawfully due under an agreement made with the mortgagee, and that as the latter had made no threat and commenced no proceedings to recover the money, and was entirely willing to allow the mortgage to remain, the payment was not made under duress. Clarke, J., in a dissenting opinion, relying upon the decision in Kilpatrick v. Germania L. Ins. Co. 2 L.R.A.(N.S.) 574, took the view that the lower court was justified in submitting the facts to the jury for them to determine whether the payment was voluntary or involuntary, and that the jury were justified in finding that the plaintiff was compelled to make a payment not contemplated in the original transaction, and for which she was not liable, in order to remove the lien so that she might close another loan.

In the following cases, however, the payments were held to have been made to the mortgagees under duress:

—where the plaintiff mortgaged property to the defendant, and assigned the rents and profits of it to him to secure a loan, and when the plaintiff undertook to pay the loan at a time he was entitled to pay it, the defendant refused to discharge the mortgage or reassign the rents unless a sum in addition to that legally due was paid, Fout v. Giraldin, 64 Mo. App. 165;

—where a mortgagor paid a specified amount with which he was not chargeable, but which was demanded by the mortgagee's attorney as a condition of stopping sale of the property under a power of sale in the mortgage, Close v. Phipps, 7 Mann. & G. 586, 8 Scott, N. R. 381;

—where the payee of a note secured by an

Nunn, J., delivered the opinion of the court:

In 1907, the appellants, George G. Hamilton and J. Carroll Hamilton, became indebted to the appellee, Kentucky Title Savings Bank & Trust Company, in two loans aggregating the sum of $105,000. $40,000 of it was secured by mortgage on 835 acres of Bath and Montgomery county land, and $65,000 of it was secured by mortgage on 1,150 acres of Bath county land. The loans ran ten years; that is, the principal sum on each loan was payable in ten equal annual instalments. The interest was payable semi-annually. These instalment bonds for the principal and interest were, by the terms of the mortgages, negotiable. The mortgages further provided that for any failure by the Hamiltons to pay the taxes or insurance, or should they fail to pay within thirty days after maturity any of such bonds or interest coupons: "Then in any of such cases the holder of any such overdue bond or coupon on demand may declare all the bonds hereby secured to be immediately due, and may forthwith enforce this mortgage therefor; and in any such cases the Kentucky Title Savings Bank may forthwith enter on said premises and collect and apply the rents and profits therefor, first to the payment of a reasonable compensation to itself including attorney's fees, for its services, and next the *pro rata* satisfaction of the debts and demands hereby secured, and such compensation and fees shall become a part of the debt hereby secured."

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assignment of the maker's interest in his father's estate, apparently consisting in part of real estate, required the payment of a certain sum per month in addition to that lawfully due, and the maker, in order to release the property from the lien and obtain another loan to protect himself from bankruptcy, paid it, Rowland v. Watson, 4 Cal. App. 476, 88 Pac. 495;

—where a mortgagee agreed, upon payment of the mortgage debt, to assign, but refused to execute the assignment until a claim for costs to which he was not entitled was paid, and the assignee, with the mortgagor's consent, accordingly paid it, Fraser v. Pendlebury, 31 L. J. C. P. N. S. 1, 10 Week Rep. 104;

—where a first mortgagee foreclosed by advertisement, claiming in his notice of sale about twice the amount actually due, and bid in the property for the amount claimed, and afterward required a second mortgagee to pay this amount in order to redeem, Bennett v. Healey, 6 Minn. 240, Gil. 158.

Recovery of payments required by one holding title as trustee.

In Gilpatrick v. Sayward, 5 Me. 465, where the plaintiff made a parol agreement for the purchase of a farm for which he paid a certain sum, and procured the defendants to become sureties for the balance, and as indemnity against their liability it was orally agreed that the deed should be to them made alone, it was held that the plaintiff could not recover from the sureties the amount which he was required to pay them before they would give him a deed, and to which he claimed they were not entitled, since it was held that they were not legally bound under the oral contract to convey the realty to him, and since the conveyance accordingly constituted a consideration for the amount paid.

And where the plaintiff's farm was to be sold on execution, and he entered into an oral contract with the defendant to bid it in and reconvey to him within a specified time on payment of the purchase price, interest, and something for his trouble, it was held that the plaintiff could not recover an amount which he was forced to pay the defendant in addition to the principal and interest before he would reconvey the property, since it was held that the defendant was not, under the oral agreement, legally bound to reconvey, and that in doing so he was entitled to treat the plaintiff as a purchaser, and exact such terms as he saw fit. Hall v. Shultz, 4 Johns. 240, 4 Am. Dec. 270.

And where one advanced money for the payment of land, and a deed was made to him under an agreement to convey it to another on repayment of the purchase price, interest, and payment for trouble, and subsequently, on a settlement between the parties, the person making the advance refused to execute a deed unless he was repaid a specified sum, which he claimed had been paid by him, it was held that this sum could not be recovered back on the theory that he was compelled to pay the money in order to get his land, it appearing that it was a disputed question whether the sum had in fact been paid, and that the payment sought to be recovered was made to compromise a doubtful matter. Pearl v. Whitehouse, 52 N. H. 254.

But in Teeter v. Veitch, — N. J. Eq. —, 61 Atl. 14, where one received a conveyance of real property as trustee under a written contract to convey it to a corporation to be formed, and without right demanded the payment of a sum of money before he would make such conveyance, it was held that the payment of this amount was made under duress, and might be avoided by the persons paying it by acting promptly.

In Redford v. Weller, 27 S. D. 334, 131 N. W. 296, under § 1196 of the Civil Code, providing that "an apparent consent is not real or free when obtained through . . . undue influence," and § 1204, providing that "undue influence consists . . . in taking a grossly oppressive and unfair advantage of another's necessities or distress," it was held that the complaint showed a right to recover the amount paid where it was alleged that the plaintiff purchased land upon which there was a balance due; that he

In the autumn of 1909 the Hamiltons were in default in the payment of a past-due $4,000 bond, a past-due $6,500 bond, six months' interest ($1,200) on the first-named debt, and one year's interest ($3,900) on the second debt, making a total of $15,600 in arrears. Early in January, 1910, the Hamiltons secured a loan from the Northwestern Mutual Life Insurance Company for $115,000, a sum sufficient to pay all of the bank debt and interest. This Northwestern loan, was secured by mortgage on the same lands, and was on a 5 per cent basis, and was obtained for the purpose of paying the bank debt, which was drawing 6 per cent; but a prerequisite, of course, to the Northwestern loan was the cancelation and release of the bank debt and mortgages. The bank and the Northwestern each sent a representative to Mt. Sterling, one to turn over the money on the new loan, the other to receive it and satisfy of record the mortgages. At the same time, the Hamiltons paid to the bank representative $1,050 in addition to the debt and interest. This payment, it will be noticed, is equivalent to 1 per cent on the principal debt of the bank.

This suit was brought by the Hamiltons against the bank to recover that sum, $1,050. Their right of recovery is the only question involved on this appeal. Their suit was based on the idea: "That same was exacted, and was wrongfully and usuriously charged and collected by the defendant; that it, the defendant, refused to release its mortgages save upon the payment of said

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entered into an oral contract with defendant to advance such balance, and that, as security, the defendant took the title from the grantor; that plaintiff was also indebted to defendant for other sums secured by chattel mortgages; that plaintiff sold the premises to other parties, and desired to obtain a deed from the defendant; that before the latter would execute a deed for the premises he extorted a sum of money in excess of that lawfully due, consisting of usurious interest and bonuses on account of moneys advanced by him; that at the time the plaintiff was in financial distress and greatly in need of the money, and by reason thereof the defendant took unfair advantage of him.

Recovery of unlawful payments demanded by vendor.

It has been held that the purchaser of land cannot recover a part of a payment made to his vendor which he claimed was in excess of the amount due on account of a shortage in the number of acres purchased, where he bases his right to recover on the theory that the payment was made under duress consisting of the fear that a holder of a trust deed which the purchaser had assumed to pay would begin foreclosure proceedings at the maturity of the note secured, where he fails to show that an extension of the loan could not have been obtained, or that he was unable to pay it, and it appears further that the contract of sale under which he purchased contained no forfeiture clause. Keeley v. Pope, 160 Ill. App. 492.

And in Smithwick v. Whitley, 152 N. C. 369, 67 S. E. 913, one who had entered into possession of property under an alleged contract to purchase for a specified sum per acre was held not entitled to recover an amount in addition to the price per acre which he claimed had been agreed upon, and which he paid the vendor, where the latter claimed that the contract alleged by the plaintiff was not binding, and refused to execute a deed except upon the payment of the increased amount, the court holding that the plaintiff had a right to stand on his legal rights in the land if he had any, and that he did not make the payment under duress.

In Pemberton v. Williams, 87 Ill. 15, it was held a fair question for the jury whether the plaintiff's payment was involuntary and made under duress where there was evidence that the plaintiff, an assignee of a title bond, had contracted to sell the land to another, who demanded to see the plaintiffs' deed, and that the original vendor refused to give the plaintiff a deed until he paid a sum largely in excess of that due, which the plaintiff paid to secure the deed to carry through his sale.

Although the case was not rested on this point, the court in Congdon v. Preston, 49 Mich. 204, 13 N. W. 516, said that they were of opinion that one who, in order to secure a performance of a contract for the sale of land, has been obliged to pay to his vendor the amount paid by the latter for taxes on the land in addition to the amount agreed upon, might recover the amount so paid in an action at law, and that he was not bound to tender the purchase price and sue for specific performance, since the latter course would prevent using or disposing of the land during the controversy.

Payments on account of executions and judgments.

It has been held that a partner who deposits money in court to protect his claim and redeem property which has been sold on execution in a suit brought by an individual creditor of his copartner may, upon a reversal of the lower court's decision, which held the creditor's equity superior, recover back the money deposited, since his payment was coerced by the sale of the property, which he was compelled to redeem. Buford v. Briggs, 96 Ark. 150, 131 S. W. 351.

In Lathrope v. McBride, 31 Neb. 289, 47 N. W. 922, it was held that one who, under protest, paid a judgment recovered against him in a replevin suit in order to remove it as a supposed cloud on his title to a homestead, so that he could obtain a loan

$1,050 of usurious interest, nor could this plaintiff secure the money upon their said new loan and mortgage upon said premises above named, save after the release of the defendant's mortgages."

The bank admits that it received this excess sum, but denies that it was paid in the way of usury, or that it is usury in any sense. On the contrary, it says that its debt still had a period of eight years to run, and that the Hamiltons were desirous of paying off the bank debt, which drew 6 per cent interest, by borrowing the money elsewhere at 5 per cent, thus saving the difference of 1 per cent for a period of eight years, or approximately $4,500, and to this end the bank contends that the $1,050 was paid to it as a consideration for its surrender of a valuable right; that is, a right to carry the loan for eight years longer, and earn the amount of interest which the Hamiltons had contracted to pay; in other words, it insists that it surrendered a valuable right for a consideration of $1,050.

Kentucky Statutes, § 2219, thus defines and invalidates usurious interest: "All contracts and assurances made, directly or indirectly, for the loan or forbearance of money, or other thing of value, at a greater rate than legal interest, shall be void for the excess over the legal interest."

We concur with appellee's view of the law that this payment cannot be considered as having been made for a loan or for-

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on the homestead property, could not recover the amount paid, since the judgment was not a lien on the homestead, and it was open to him to have removed all doubt by bringing an action to remove the apparent cloud on his title, and since his election to pay the judgment was voluntary; and this was held especially true where, so far as appeared, he was justly indebted for the amount paid.

And where it was sought to recover a sum paid to the sheriff under protest to redeem real estate belonging to the plaintiff from an execution issued on a judgment recovered against a former owner of the land in an action in which an attachment of the land was made before the plaintiff received his deed, but in which judgment was not recovered until after the deed was executed, it was held that the plaintiff could not recover the money so paid where the complaint failed to show that a release of the attachment, which appeared to have been made, did not remove any cloud which might have existed on the plaintiff's title. Maskey v. Lackmann, 146 Cal. 777, 81 Pac. 115.

So it has been held that where a purchaser of land failed to record his deed until after the rendition of a judgment against his grantor, the levy of execution issued on the judgment on the land did not constitute such compulsion as to interfere with the purchaser's freedom of action, and that he could not recover money derived from property conveyed by him to satisfy the judgment. Stover v. Mitchell, 45 Ill. 213. The court said: "But we can discover no duress or compulsion where an execution against A is levied on the land of B. The latter is not disturbed in his person, or the possession or enjoyment of his property. If confident of his title, he need give himself no trouble. If the superiority of his title to the lien of the judgment is questionable, or depends on matters *in pais*, resting in parol proof, and he fears a sale may create a cloud upon his title, he can stay the sale by injunction. If, instead of this, he prefers to buy his peace, he cannot subsequently say he acted under compulsion, and call on the courts to give him back his money. In this case the sale was not advertised, as we may rightly infer from the record, and Stover was under no necessity of hasty action, but would have had several weeks in which to sue out an injunction."

In Re First Nat. Bank, 49 Fed. 120, it was held that a payment made by a debtor under a statute giving him the right to redeem real estate sold on execution by paying the amount for which it was sold, with interest, at any time within six months, waived all defects in the proceedings, and was a voluntary payment, and not recoverable back because of such defects.

Miscellaneous.

In White v. Heylman, 34 Pa. 142, where the plaintiff employed the defendant as his agent to purchase certain land warrants, and subsequently agreed to make a deed to a third person by a certain day, it was held that he might recover money paid to the defendant, and defend an action on a note given on account of patents to the land which the agent had fraudulently procured another to obtain and assign to him, and which he refused to deliver to the plaintiff until he paid the money and executed the note.

And in Motz v. Mitchell, 91 Pa. 114, it was held that where one obtained possession of a deed which formed a link in the plaintiff's title, and used it for the purpose of extorting money from the latter as the price of its preservation or of permission to use it in defending his title in a pending action, and by threats, express or implied, gave the plaintiff to understand that the deed would be withheld or destroyed unless his demand was complied with, the payment was involuntary and might be recovered back.

In Peters v. Kraft, 9 Lanc. L. Rev. 35, it was held that one who had contracted with another to have a house built could not recover the amount paid by him to materialmen and subcontractors on overdrafts given them by the contractor where no liens had been filed, and where such liens could, if filed, have been defeated by showing that the contractor had been paid all that he was entitled to.

J. T. W.

L.R.A.1915B.

bearance. When one allows a debtor, for a consideration, to prepay a debt, it is not a loan or forbearance of money, rather the converse. The privilege of prepaying a debt is as much the subject of sale as any other chattel, and a creditor has as much right to sell or discount negotiable paper to the payor as to any other person, and the discount or proceeds of the sale should not, for that reason, be considered usury. The Hamiltons do not seriously dispute this proposition, and by brief they concede that the word "usurious," as used in their petition, does not accurately describe the transaction; in other words, it is a misnomer. They admit that, if the Hamiltons agreed to pay this sum for the right to cancel their debt before maturity, its receipt by the bank would not be unlawful. The case of Young v. Miller, 7 B. Mon. 540, supports this view: "It is going far enough to say that the purchaser, on payment of a note, by the debtor himself before it is due, at a discount greater than the rate of 6 per cent for the time the note has to run, or for a sum on which a greater rate of interest is charged for the same time, as a means of ascertaining the extent of the purchase or of the payment, is not usurious. There being, however, neither a loan nor the forbearance of a debt, if the transaction is in good faith, either a purchaser or a payment, the prohibition of the usury laws does not directly apply."

But from other facts set up in their petition, the Hamiltons seek to recover this fund upon the ground that the bank knew and took advantage of their weakened financial condition, and threatened to enter upon and take possession of the mortgaged premises and precipitate the whole debt, and that such a course by the bank would mean their utter ruin; that by reason of some serious domestic troubles and financial reverses they were, for the time, unable to liquidate the principal and interest bonds past due, and until the bank would release its mortgages of record they could not borrow any sum elsewhere; that in this way, and under such circumstances, the Hamiltons were coerced and put in duress, and in order to save their property they were compelled to pay it before maturity; that this was a form of coercion on the part of the bank which gives the Hamiltons a legal and moral right to recover.

As to the facts, there is a stipulation in the records explaining why the Hamiltons did not testify. The explanation is that neither of them had any communication with the bank with reference to the defaulted payments, or cancelation of the indebtedness; that all the negotiations in their behalf were conducted by two gentlemen, one their attorney, and the other a friend. It is conceded that they were in default on the interest and annual instalment bonds then due, and that the bank had been very insistent upon the payment of all arrears, and appellants say had even been threatening to precipitate the entire debt by declaring it all due, as it had a right to do under the terms of the contract, and it even reminded the Hamiltons that it could enter and take possession. The Hamiltons' attorney conferred with the bank at Louisville about this matter once or twice in October, and again a few days before Christmas, when their friend, above referred to, was present. The purpose of these visits was to get the bank to agree to accept a present payment of its indebtedness, and surrender its right to carry the loan for the full contract term. It is apparent that the Hamiltons, since they got in arrears, had also been negotiating with the Northwestern for the 5 per cent loan. Hamiltons' witnesses testify that they understood or were impressed from Mr. Swearingen's conversation (the bank's president) that the bank fully intended to take steps to collect its whole debt, or that, if the Hamiltons did not pay the same, the bank would take their property, but as soon as the bank found out that they could get their money, or ascertained that these negotiations with the Northwestern Company were pending, that it insisted upon the payment of the bonus in question for a surrender of its right. Rather, when it found it could get the whole debt paid, it did not want it.

As above indicated, neither of these witnesses of the Hamiltons undertake to detail the words, or their substance, which the bank president used on either of these occasions. They merely testify as to impressions they gained, or the understanding they had of the bank's intention. Their evidence, as we take it, does not show that the bank was making demand for payment of anything more than the amount which the Hamiltons were in default.

For the bank, Mr. Swearingen testifies that, after the Hamiltons got behind, he was insisting on them living up to their contract, and paying the interest and principal sums as they became due, but that he never at any time demanded payment of the whole debt, and did not want to do that if it could be avoided. While he says he knew his rights under the contract, and may have reminded the Hamiltons of them,—he presumed the Hamiltons knew them also,—yet he never threatened to declare the whole debt due. On the contrary, he was careful not to do so, for he says the bank preferred to carry the debt rather than to cancel it. He explains that it was

the business and custom of this bank to borrow money at 5 per cent and put it out on long-term loans, such as the Hamiltons' at 6 per cent, and that the bonds or notes evidencing the loans were negotiated, and came into the hands of other holders with the mortgage pledged and held by trustee. In this way, these bonds being in the hands of third persons, it was troublesome and inconvenient for the bank to locate them and secure consent of the holders that the debt might be paid before maturity; and that, if the bank had been permitted to carry the debt, it would have earned a profit, from that time, of approximately $4,500, and that it surrendered such possible profit for a cash consideration of $1,050. Appellants answered this by a reference to Swearingen's evidence which shows the bank was able to locate and satisfy these bondholders promptly, and did reloan the money to other parties without delay, so that in fact it suffered very little, if any, loss. If this were material, it is answered by the suggestion that the sole motive of the Hamiltons in getting in arrears, and in seeking to anticipate the debt, was in order to save the difference between the 6 per cent, which it was paying on the present debt, and the 5 per cent which it was to pay on the new one.

On the theory that this $1,050 was coerced, appellants relied in the first place upon the authority of 30 Cyc. 1308: "Where a person unlawfully demanding a payment is in a position to seize or detain the goods or other personal property of a person against whom the claim is made, without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to recover or retain the property will be considered as made under compulsion, and the money can be recovered back."

For this rule to apply it must appear that the payment was unlawfully demanded, and that it was made under protest. We fail to see how it can be claimed that the facts bring this case within either requisite. It was not unlawful for the bank to insist upon carrying the debt until maturity or demand a cash consideration for surrendering this right. The two gentlemen above referred to, who testified for the Hamiltons, say that they argued with Swearingen in an endeavor to have him voluntarily agree to a prepayment, but that he would not consent to do so except upon payment of this additional sum. While these witnesses protested to Swearingen against the injustice of it, and say they never agreed to pay it because, in fact, they had no authority from the Hamiltons so to do, at the same time the Hamiltons proceeded with their negotiations with the Northwestern Company for the new loan, secured it, and arranged with the bank to send a representative to Mt. Sterling to cancel the debt, and release the mortgage, and the whole debt was then and there paid, together with this sum in question. We must presume that it was done voluntarily, and in accordance with the bank's demand at the prior conversation related by the Hamiltons' witnesses, for there is no testimony as to what occurred at Mt. Sterling other than the simple facts above related.

Appellants also rely upon the case of Kilpatrick v. Germania L. Ins. Co. 183 N. Y. 163, 2 L.R.A.(N.S.) 574, 111 Am. St. Rep. 722, 75 N. E. 1124, where a creditor had loaned his debtor $80,000 with a stipulation in the mortgage that upon default in payment the creditor might declare the whole debt due. Upon becoming delinquent in the payment of interest instalments, the creditor instituted a foreclosure proceeding; whereupon the debtor arranged a mortgage loan for $95,000 with another lender on the same premises, and notified the creditor of that fact and of his purpose to pay off the $80,000 debt and interest; thereupon the creditor, finding that it could get its money, changed its position, dismissed its foreclosure proceeding, and declared that it would not accept payment save upon the additional payment of $1,000. The debtor paid the note and the $1,000 additional demanded, thereby securing the release of its mortgage; the payment being made out of the proceeds of the new mortgage, which he then executed. He sued to recover the $1,000. The court upheld the recovery upon the idea that the debtor was under duress where he had to submit himself to the exaction of the $1,000 in order to make ready his title for the new mortgage, and in order to save himself and his property from ruin.

There are several points in the Kilpatrick Case radically different from the one here. The creditor had declared the whole debt due, and actually instituted a suit to foreclose. Having precipitated the debt, the court, of course, held that it had waived its privilege to insist upon a continuance of the loan, and the debtor thereby acquired the absolute right to pay the entire debt. This same distinction applies in the other case cited by appellants.

We do not find any proof that appellee bank had precipitated the debt. It had never instituted suit, nor taken any step which could be held as a waiver on its part to further carry the loan.

The lower court took this view of the case, and its judgment is therefore affirmed.

MICHIGAN SUPREME COURT.

CROSBY BROWN, Plff. in Err.,
v.
GEORGE H. HADWIN, Sheriff.

(— Mich. —, 148 N. W. 693.)

False imprisonment — defect in complaint — liability of officer.

1. An officer is not liable for false imprisonment in arresting and confining one for illegally selling liquor, because neither the complaint, warrant, nor commitment stated to whom the sale was made, which rendered the complaint void on direct attack.

Arrest — complaint on information and belief.

2. A justice of the peace has no jurisdiction to issue a warrant of arrest upon a complaint upon information and belief not supported by witnesses having knowledge of the facts.

False imprisonment — insufficient complaint — liability of officer.

3. An officer is not liable for false imprisonment in acting upon a warrant fair on its face, although it is based on a complaint on information and belief unsupported by witnesses.

Jury — uncontradicted evidence — necessity of submission.

4. No question for the jury as to whether or not an officer had a warrant when making arrests exists where there is positive testimony that he had one, with no positive or direct testimony to the contrary.

(October 2, 1914.)

ERROR to the Circuit Court for Iosco County to review a judgment in defendant's favor in an action brought to recover damages for false imprisonment. Affirmed.

The facts are stated in the opinion.

Messrs. **Edwin Rawden** and **C. H. W. Snyder**, for plaintiff in error:

Where the offense consists in the act of selling or furnishing or giving away liquors, it is essential that the person to whom the liquor is alleged to have been sold, furnished, or given away be named or identified in the information.

People v. Keefer, 97 Mich. 18, 56 N. W. 105; People v. Minnock, 52 Mich. 628, 18 N. W. 390; People v. Heffron, 53 Mich. 527, 19 N. W. 170.

An indictment for selling intoxicating

Note. — Liability of officer for making an arrest.

This note supplements earlier notes appended to Leger v. Warren, 51 L.R.A. 193, and Lawton v. Harkins, 42 L.R.A.(N.S.) 69. In addition to analogous annotation referred to in the note in 42 L.R.A.(N.S.), see the note to State use of Johnston v. Cunningham, 51 L.R.A.(N.S.) 1179, dealing with the liability of a peace officer or his bond for shooting a person while attempting to arrest him.

An officer who makes an arrest under a bench warrant issued on an indictment is not liable for false imprisonment, even though the person arrested was not guilty of the offense and the indictment was dismissed. Madden v. Meehan, 153 Ky. 648, 156 S. W. 116.

Under warrant—generally.

Supplementing notes in 51 L.R.A. 193, and 42 L.R.A.(N.S.) 69.

—where court has no jurisdiction.

Supplementing notes in 51 L.R.A. 199, and 42 L.R.A.(N.S.) 70.

As shown in the earlier note, where the arrest is under a warrant, the question of the officer's liability as affected by the jurisdiction of the court issuing the warrant depends upon whether the court had no jurisdiction at all, or whether it had some jurisdiction, but exceeded the same. Conformably to that distinction, it is held in Cleveland v. Emerson, 51 Ind. App. 339, 99 N. E. 796, that a town marshal is liable in an action of false imprisonment for arresting a person under a warrant issued by a town clerk under a repealed statute which gave the town clerk power to issue the same. On the other hand, it will be noted that in BROWN v. HADWIN the officer was held not liable where a warrant was issued upon a technically insufficient complaint, the same being insufficient to charge the sheriff with notice that the warrant was issued without authority.

Without a warrant.

Supplementing notes in 51 L.R.A. 203, and 42 L.R.A.(N.S.) 71.

In making an arrest from personal observation, and without a warrant, the officer will not be excused where no offense has been perpetrated, unless the circumstances are such as warrant the belief that the offense has been committed; and when the officer is sued in an action of false imprisonment, the defendant must establish justification, and the question is one for the jury. Sigmon v. Shell, 165 N. C. 582, 81 S. E. 739.

A statute providing that prosecutions for violation of the game law shall be instituted only upon complaint of the person or his agent upon whose land or water the trespass has been committed does not prevent an officer from making an arrest without a complaint, where the officer is duly authorized by the landowner, and especially where the officer makes the arrest on view. Williams v. Morris, 32 Ohio C. C. 453.

Manner of making arrest.

Supplementing notes in 51 L.R.A. 215, and 42 L.R.A.(N.S.) 72.

liquors to divers persons without a license is fatally defective.

Clark, Crim. Proc. 232; 1 Chitty, Crim. Law, 21; State v. Stucky, 2 Blackf. 289; 23 Cyc. 232.

The warrant was void on its face, and afforded no justification to defendant when he arrested plaintiff by authority thereof.

Frazier v. Turner, 76 Wis. 562, 45 N. W. 411; Blythe v. Tompkins, 2 Abb. Pr. 468; Baldwin v. Hamilton, 3 Wis. 747; Elsemore v. Longfellow, 76 Me. 128; Rex v. Gay, Quincy (Mass.) 91; Moore v. Watts, Breese (Ill.) 18; Gorton v. Frizzell, 20 Ill. 291; Warner v. Perry, 14 Hun, 337; LaRoe v. Roeser, 8 Mich. 537; Sheldon v. Hill, 33 Mich. 171; Livingston v. Burroughs, 33 Mich. 511; Bryan v. Congdon, 29 C. C. A. 670, 57 U. S. App. 505, 86 Fed. 221.

The warrant was void because based upon a complaint made upon information and belief.

People v. Heffron, 53 Mich. 527, 19 N. W. 170; Badger v. Reade, 39 Mich. 774; People ex dem. Van Valkenburgh v. The Recorder, 6 Hill, 429; Proctor v. Prout, 17 Mich. 473; People v. Berry, 107 Mich. 256, 65 N. W. 98; Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982.

Mr. **Albert W. Black**, for defendant in error:

The warrant protected defendant in making the arrest.

Voorhees, Arrest, 56–160; 19 Cyc. 345–347; Cook v. Hastings, 150 Mich. 289, 14 L.R.A.(N.S.) 1123, 114 N. W. 71, 13 Ann. Cas. 194; Brown v. State, 109 Ga. 570, 34 S. E. 1031; Montgomery v. State, 7 Ohio St. 107; Payne v. Barnes, 5 Barb. 465; Miller v. Woods, 23 Neb. 200, 36 N. W. 483; People v. Quider, 172 Mich. 280, 137 N. W. 546; James v. Sweet, 125 Mich. 132, 84 N. W. 61; Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633; Tillman v. Beard, 121 Mich. 475, 46 L.R.A. 215, 80 N. W. 248, 13 Am. Crim. Rep. 7; Gardner v. Couch, 137 Mich. 358, 109 Am. St. Rep. 684, 100 N. W. 673, 101 N. W. 802; Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982; Wheaton v. Whittemore, 49 Mich. 348, 13 N. W. 769; People v. Pichette, 111 Mich. 461, 69 N. W. 739; People v. Stockwell, 135 Mich. 341, 97 N. W. 765; Haskins v. Ralston, 69 Mich. 67, 13 Am. St. Rep. 376, 37 N.

Where a town marshal, in arresting a person, is accompanied by a deputy, and each is heavier and more powerful than the person to be arrested, and together they can readily handle him without beating him on the head with a loaded pistol, the marshal is liable in damages for having so beaten him at the risk of killing him, and so lacerating his scalp that he is covered with blood. Stoehr v. Payne, 132 La. 213, 44 L.R.A.(N.S.) 604, 61 So. 206.

In an action against an officer for excessive force in making an arrest, the plaintiff is entitled to recover for only such mental and physical suffering as resulted from force in excess of what was necessary in order to effect the arrest, or to retain the plaintiff in custody after the arrest was made. Romans v. McGinnis, 156 Ky. 205, 160 S. W. 928.

Arresting wrong person.

Supplementing notes in 51 L.R.A. 219, and 42 L.R.A.(N.S.) 72.

An officer is not liable for arresting the wrong person upon a John Doe warrant, where he had reasonable cause to believe that such person was guilty of the offense charged. White v. Jansen, — Wash. —, 142 Pac. 1140.

Subsequent detention.

Supplementing notes in 51 L.R.A. 216, and 42 L.R.A.(N.S.) 73.

A game warden is liable for false imprisonment where, having arrested a person with probable cause to believe that he has violated the game law, he retains him in a public place for an hour without taking him before a magistrate, and then discharges him from custody. Jackson v. Miller, 84 N. J. L. 189, 86 Atl. 50, citing with special approval the note in 51 L.R.A. 216.

The case of Salo v. Smith, — Cal. App. —, 143 Pac. 322, declares without discussion that an officer who, in violation of statute, fails to take a person whom he has arrested without a warrant, in the belief that he has committed assault to commit murder, before a magistrate without undue delay, and delays in order to ascertain the nature of the offense to be charged, which depends upon whether the person assaulted dies or lives, is guilty of a trespass and liable for the damages thereby caused. The question in the case relates to the amount of damages, the court holding that, in fixing the same, the fact that the officer had reasonable cause to believe that the plaintiff had committed the offense removed any inference of malice that might be drawn from the fact that the arrest was made without a warrant.

Probable cause.

Supplementing notes in 51 L.R.A. 225, and 42 L.R.A.(N.S.) 75.

The question whether a sheriff, in arresting a person under a John Doe warrant, had probable cause to believe that he was the person charged with the crime, is for the jury, where it appears that the sheriff was accompanied by a police officer who told him that he, the police officer, had known such person for fourteen years, and advised the sheriff not to make the arrest without obtaining some evidence of his identity, such advice being disregarded by the sheriff. White v. Jansen, supra. L. A. W.

W. 45; Doty v. Hurd, 124 Mich. 671, 83 N. W. 632; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539; Pardee v. Smith, 27 Mich. 33; Turner v. People, 33 Mich. 363; Yaner v. People, 34 Mich. 286; People v. Rutan, 3 Mich. 42; Daniels v. People, 6 Mich. 381; Leger v. Warren, 62 Ohio St. 500, 51 L.R.A. 197, 78 Am. St. Rep. 738, 57 N. E. 506; Cooper v. Adams, 2 Blackf. 294; Webster v. Farley, 6 Blackf. 163; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084; Mitchell v. State, 54 Am. Dec. 266, note; Fletcher v. State, 2 Okla. Crim. Rep. 300, 23 L.R.A. (N.S.) 581, 101 Pac. 599; Johnson v. Maxon, 23 Mich. 129; Henke v. McCord, 55 Iowa, 378, 7 N. W. 623; Schultz v. Huebner, 108 Mich. 274, 66 N. W. 57; Rogers v. Olds, 117 Mich. 368, 75 N. W. 933; Murphy v. Walters, 34 Mich. 180.

Kuhn, J., delivered the opinion of the court:

This action was originally begun for malicious prosecution and false imprisonment. The count for malicious prosecution was withdrawn by the plaintiff at the opening of the trial of the case, which left the action one for false imprisonment alone. The plaintiff, who resides in Saginaw, was arrested at Tawas City, to which place he had been brought by a subpœna commanding him to appear before William B. Kelly, one of the justices of the peace in and for Iosco county, to testify in a criminal case. The complaint and warrant drawn by the prosecuting attorney, charge him with a violation of the local option law. He was committed to jail, and was discharged on the day set for his examination, on request of the prosecuting attorney, without any examination being held. The complaint, which was made by the defendant herein, and the warrant, show that the complaint is made on information and belief, and no one with any knowledge of the facts was sworn in support thereof before the warrant was issued. At the close of the proofs a verdict was directed for the defendant by the trial court. There are five assignments of error, which relate to two questions: First, those relating to the court's ruling that the warrant and commitment issued protected the officer; second, that the court erred, in not submitting to the jury the question of fact as to whether or not the sheriff had a warrant when the arrest was made.

It is the contention of the plaintiff and appellant that the warrant was absolutely void on its face, and therefore no protection to the defendant when he served it on the plaintiff, and did not protect him in making the arrest and keeping him in custody, because the commitment follows the warrant and contains the same claimed defects as the warrant. In this connection the first proposition urged is that the offense was not properly stated in the complaint, warrant, and commitment. The complaint charges the plaintiff with having at a certain time and place, sold, furnished, given away, and delivered a certain quantity of malt, brewed, fermented, and intoxicating liquor, to wit, whisky, and otherwise charges a violation of the local option law, which it is conceded was in effect at the time in Iosco county. It does not, however, state the name of the person or persons to whom it is charged the plaintiff sold, furnished, and delivered the liquor, and the failure to allege this, it is claimed, makes the complaint and subsequent proceedings void; and the cases of People v. Minnock, 52 Mich. 628, 18 N. W. 390; People v. Heffron, 53 Mich. 527, 19 N. W. 170, and People v. Keefer, 97 Mich. 18, 56 N. W. 105, are relied upon. The general rule as to what constitutes a sufficient warrant so as to protect the officer who serves it is stated in Cooley on Torts, 3d ed. vol. 2, p. 883, as follows: "The process that shall protect an officer must, to use the customary legal expression, be fair on its face. By this it is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is that it shall apparently be process lawfully issued and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

In the cases cited the attack on the proceedings was a direct one, and not made in a collateral proceeding, and it is true that in such a direct attack a warrant might be held invalid and still be sufficient protection to the officer and parties for any arrest made thereunder. Wheaton v. Whittemore, 49 Mich. 348, 13 N. W. 769. To protect the officer it must appear, as stated in Cooley on Torts, supra, that the process proceeds from a court having authority of law to issue process of that nature; that it is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. In the instant case a proper rule of pleading had been violated, as the complaint and warrant were not specific enough to give the respondent

proper notice, and on motion to quash in a direct attack the complaint would necessarily have been held insufficient as a pleading. The proceeding was not one triable by the justice, and the respondent was entitled to an examination. In this examination the proofs would have disclosed the name of the party to whom it was claimed the liquor was furnished or sold. The respondent could not plead guilty until an information had been filed against him in the circuit court, and in such information the name of the person to whom the liquor was sold might have been stated, as the information is based on the preliminary proceedings, and the technical defect in the complaint thus remedied. People v. Pichette, 111 Mich. 461, 69 N. W. 739; People v. Stockwell, 135 Mich. 341, 97 N. W. 765.

There is no question that the process in the instant case issued from a court having authority of law to issue such process, and that the process was legal in form, and we are of the opinion that the failure to allege to whom the liquor was furnished or sold is not such a defect as to notify or fairly apprise the officer that it was issued without authority. As was said by Justice Marston in Wheaton v. Whittemore, supra, 49 Mich. at pages 350, 351: "An officer to whom a criminal warrant is delivered by a magistrate may be indicted for refusing to serve or return the same. 1 Bishop, Crim. Law, § 350. If no cause or an insufficient cause appear therein, and the person accused resists and kills the officer, then, according to the extent of the authority of the officer, his death may be murder, manslaughter, or perhaps justifiable homicide. Hoye v. Bush, 1 Mann. & G. 775, 2 Scott, N. R. 86, 1 Drink. 15, 10 L. J. Mag. Cas. N. S. 168, cited in Drennan v. People, 10 Mich. 183. The officer is not bound to look behind a regular warrant coming from a proper jurisdiction. In many cases it must be exceedingly difficult for the officer or his advisers to determine whether a warrant is or is not defective upon its face, and in view of the peculiar position in which the officer is placed, in all such cases, he cannot be held liable in a civil action for damages for making the arrest."

See also Gardner v. Couch, 137 Mich. 358, 109 Am. St. Rep. 684, 100 N. W. 673, 101 N. W. 802; Leger v. Warren, 51 L.R.A. 193, and note, 62 Ohio St. 500, 78 Am. St. Rep. 738, 57 N. E. 506; Lawton v. Harkins, 42 L.R.A.(N.S.) 69, and note (34 Okla. 545, 126 Pac. 727).

The complaint shows upon its face that it was made on the information and belief of the complaining witness, the defendant herein. It appears affirmatively from his testimony that no other witnesses were sworn before the warrant was issued. The failure to support the complaint by the examination of other witnesses was fatal to the jurisdiction of the justice to issue the warrant. In People v. Heffron, 53 Mich. 527, 529, 530, 19 N. W. 170, 171, where the complaint was made on information and belief, the following is stated: "This affidavit, within the repeated rulings of this court, as well as the most elementary principles of criminal law, is entirely insufficient to confer any jurisdiction upon the justice to issue a warrant for the arrest of the respondent. Bishop, Crim. Proc. §§ 716–719; Com. ex rel. Parker v. Certain Lottery Tickets, 5 Cush. 369; Brown v. Kelley, 20 Mich. 27; People ex rel. Hackett v. Wayne Circuit Judge, 36 Mich. 334; Swart v. Kimball, 43 Mich. 451, 5 N. W. 635. The complaint must set up the facts constituting the offense on the knowledge of the person making the complaint, and if he does not know them, other witnesses must be examined who do know them; and no person can be arrested on the mere belief of the person making the complaint. The liberty of the citizen is not held upon so slender a tenure as that. Badger v. Reade, 39 Mich. 774; People ex dem. Van Valkenburgh v. The Recorder, 6 Hill, 429; Proctor v. Prout, 17 Mich. 473."

When the warrant recites that an examination has been had of witnesses, the court will presume that sufficient appeared to justify the issuance of a warrant and confer jurisdiction, even if the testimony has not been reduced to writing. People v. Bechtel, 80 Mich. 623, 45 N. W. 582; Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982. In the instant case no examination is claimed by the justice, no recital of it is made in the warrant, and the contrary appears affirmatively from the evidence of the defendant, who made the complaint that no witnesses were sworn at the time the warrant was issued. The warrant issued was nevertheless fair on its face, and this proceeding against the process server is an action of false imprisonment alone. In such an action this court has not required the officer to look behind the process. In serving the process he has a right to rely on the warrant, and is not compelled to examine the complaint or other preliminary proceedings. Wheaton v. Beecher, supra.

We are of opinion that the trial judge properly refused to submit to the jury the question as to whether or not the defendant had the warrant at the time the arrest was made. The prosecuting attorney, who prepared the complaint and warrant prior to the arrest of the plaintiff, testified that he saw the paper, meaning the warrant, in the hands of the sheriff at the time the ar-

rest was made. The defendant testified positively that he had the warrant at the time. Against this there was no positive or direct testimony, and the plaintiff on cross-examination stated:

Q. Can you now positively swear under oath that he did not have a paper in his hands at the time he arrested you?

A. No; I could not positively swear that he did not.

Q. So that, as a matter of truth, you are not certain now as to whether he had a warrant in his hand or not?

A. No; he might have had. I did not take the time to look at his hands.

There was no evidence of such a nature as to justify submitting this question to the jury.

Judgment is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

AUGUST GROLLIMUND
v.
GERMANIA FIRE INSURANCE COMPANY, Plff. in Err.

(82 N. J. L. 618, 83 Atl. 1108.)

Insurance — two buildings — severance.

1. A policy of insurance for "$2,000 on two three-story frame building tin roof, and its additions and foundation walls, while occupied as a dwellings, Nos. 69 and 71 East Twelfth street, Paterson, New Jersey, and being $1,000 on each building," is in its legal effect a specific policy of $1,000 on No. 69 East Twelfth street and $1,000 on No. 71 East Twelfth street, and is not a blanket policy on both Nos. 69 and 71.

Same — blanket.

2. A policy of insurance for "$2,000 upon the three-story frame building, and its additions adjoining and communicating, including gas and water pipes, heating apparatus and all permanent fixtures, while occupied as a dwelling house and situated Nos. 69 and 71 East Twelfth street, Paterson, New Jersey," is not a specific policy on No. 69 and No. 71, but is a blanket policy on both, and covers to its full amount of $2,000 both Nos. 69 and 71.

Same — loss — distribution.

3. In distributing the loss upon two parts of a building under one roof, and each part capable of being described and insured by street numbers, between an insurance policy covering both parts for a gross sum and a policy specifically liable on each part, both of which policies grant permission to "effect other insurance," and provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policy should be regarded as insuring each part to the entire amount unappropriated when it is reached, making the adjustment part by part in the order of the greater loss, if that will work substantial equity and justice to all concerned, and deducting the sum appropriated to the part as it is adjusted and passed.

Headnotes by TRENCHARD, J.

(June 20, 1912.)

Note. — Adjustment between blanket and specific fire insurance policies.

The question considered in this note, as stated by the court in GROLLIMUND v. GERMANIA F. INS. Co., has sometimes been considered one of the most troublesome in the law of insurance. The authorities, as might be anticipated, are not in harmony. Some courts have held that blanket and specific policies do not constitute double insurance, and that they therefore do not prorate. The rules adopted by courts holding that such policies do prorate may properly be divided into the Vermont, the Connecticut, and the Kentucky rules, each of which will be considered under a separate subdivision.

Cases considering whether any apportionment may be had between blanket and specific policies—whether such policies constitute double insurance, or a part of the insurance for purposes of apportionment.

A rule laid down in an early New York case to the effect that blanket and specific policies do not constitute double insurance, and therefore do not prorate, has become strongly engrafted in Pennsylvania, and is still adhered to by the courts of that state.

In the New York case referred to, Howard Ins. Co. v. Scribner, 5 Hill, 298, where one policy insured fixtures for a specified amount and stock for another amount, and a subsequent policy insured a given amount on the fixtures and stock as one parcel, and a loss occurred on both the stock and fixtures, it was held that the last policy was not "other insurance" within the meaning of a clause in the first policy, providing that "in case of any other insurance upon the property hereby insured" the insurer should be liable only for a proportionate amount of the loss, the court holding that in order to warrant contribution in such case there must be two other separate policies, or one insuring separate sums on the fixtures and stock.

This case was overruled in New York by Ogden v. East River Ins. Co. 50 N. Y. 388, 10 Am. Rep. 492, which is set out under subdivision on "Adjustment where loss exceeds insurance."

The decision in Howard Ins. Co. v. Scribner, supra, was followed in Pennsylvania, however, in Sloat v. Royal Ins. Co. 49 Pa. 14, 88 Am. Dec. 477, where one policy covered a building and another the building

ERROR to the Supreme Court to review a judgment in plaintiff's favor in an action brought to recover an amount alleged to be due under a fire insurance policy. Reversed.

The facts are stated in the opinion.

Mr. **John R. Hardin**, for plaintiff in error:

The insured cannot apply the Vermont rule under the evidence.

Angelrodt v. Delaware Mut. Ins. Co. 31 Mo. 593; Cromie v. Kentucky & L. Mut. Ins. Co. 15 B. Mon. 432; Page v. Sun Ins. Office, 33 L.R.A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203, affirming 64 Fed. 194.

The Connecticut, or "gradual reduction," rule, applies in this case.

Schmaelzle v. London & L. F. Ins. Co. 75 Conn. 397, 60 L.R.A. 536, 96 Am. St. Rep. 233, 53 Atl. 863.

Mr. **Edward A. Day**, for defendant in error:

Both policies were "compound," or "blanket," policies, and were, therefore, concurrent, and, being in equal amounts, should share the loss equally.

Stone v. United States Casualty Co. 34 N. J. L. 371.

Treating the policy in suit as "specific" insurance, the judgment of the court below was correct.

New Jersey Rubber Co. v. Commercial Union Assur. Co. 64 N. J. L. 580, 46 Atl. 777; Page v. Sun Ins. Office, 33 L.R.A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed.

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together with the machinery, tools, etc., contained therein, it being held that there was no double insurance, and that the first insurer was liable to the full amount of his policy, and not entitled to prorate with the second insurer.

The court in Clarke v. Western Assur. Co. 146 Pa. 561, 15 L.R.A. 127, 28 Am. St. Rep. 821, 23 Atl. 248, refused to overrule the Sloat Case because Howard Ins. Co. v. Scribner, the New York case followed in the Sloat Case, had been overruled by Ogden v. East River Ins. Co. supra, remarking that the rule established by the Sloat Case was a safe one and easily understood, and where one policy insured fixtures and other property in a building, and another insured the fixtures only, and provided that the insurer should not be liable for a greater proportion of any loss on the described property than the amount thereby insured bore the whole insurance, whether valued or not, covering such property, the doctrine of double insurance should not be applied, and that the policies did not prorate.

And in Meigs v. Insurance Co. of N. A. 205 Pa. 378, 54 Atl. 1053, the court quoted with approval the remarks of the court in the preceding case relative to following the rule established in the Sloat Case, and where some policies covered a building and additions and others covered only the additions, and both provided that the insurer should not be liable for a greater proportion of any loss than the amount insured bore to the whole insurance, in an action on the latter policies, it was held that there was no double insurance, and that the first policies did not prorate with the second. The loss in this case was only partial, but the court, in referring to the contention that in such a case the first policies (spoken of as class A) and the second ones (designated as class B) should prorate, said: "It is contended by the defendant company that the *pro rata* clause requires the two classes of policies in case of a partial loss to contribute ratably to the loss on the east wing and its contents. Clearly the application of that doctrine would not give full effect to both classes of policies and protection to the insured to the amount of the policies. It must be conceded that that rule has no application where there is a total loss of the whole property, and, as we have seen, it has been so decided by the court. It therefore might be sufficient to say that the rule cannot have a dual application; that it must be applied alike in case of a total and a partial loss. In a case of partial loss it is apparent that it would deny to the insured the full value of his policy. If a *pro rata* contribution is to be enforced here against class A policies on the loss to the east wing and its contents, then the full amount of those policies will not hereafter be available in case of a loss on the main building and its contents. To the extent of the sum taken from class A policies applied to the loss on the east wing and its contents, the protection of those policies is withdrawn from the main building. This interpretation of the contracts, evidenced by the two classes of policies, not only does manifest injustice to the plaintiff as regards his indemnity on the A policies, but also effects a result that deprives him of the full value of his B policies. These policies contract to pay him $60,000 in case of a total loss of the east wing of the building. If, however, the A policies, $135,000, on the main building, prorate with the B policies, the latter will contribute about one third of their value to the loss on the east wing. The residue of the B policies, which insure no other part of the plaintiff's buildings, is retained by the companies, and the plaintiff loses it. Such a construction of the policies is not a reasonable one, is against the obvious intention of the parties, and should not be applied."

The liability involved in Meigs v. London Assur. Co. 126 Fed. 781, affirmed in 68 C. C. A. 249, 134 Fed. 1021, arose out of the same facts as were involved in Meigs v. Insurance Co. of N. A. supra; but the Federal court refused to follow the Pennsylvania rule, and where there were policies covering a building and its additions, and others covering only the additions, and both classes provided that the insurer should not be liable for a greater proportion of any loss than

203; Richards, Ins. 3d ed. § 318; Meigs v. Insurance Co. of N. A. 205 Pa. 378, 54 Atl. 1053; First Unitarian Congregation v. Western Asso. Co. 26 U. C. Q. B. 175.

The "gradual reduction," or Connecticut, rule, should not be followed.

Schmaelzle v. London & L. & F. Ins. Co. 75 Conn. 397, 60 L.R.A. 536, 96 Am. St. Rep. 233, 53 Atl. 863.

The "reading, or Vermont, rule," should be applied.

Chandler v. Insurance Co. of N. A. 70 Vt. 562, 41 Atl. 502; Blake v. Exchange Mut. Ins. Co. 12 Gray, 265; Ogden v. East River Ins. Co. 50 N. Y. 388, 10 Am. Rep. 492.

Messrs. **Hunziker, Randall, & Cunningham** also for defendant in error.

Trenchard, J., delivered the opinion of the court:

August Grollimund sued to recover the amount claimed as indemnity under a contract of insurance issued to him December 2, 1907, by the Germania Fire Insurance Company. The insurance was against loss or damage by fire for the term of three years from the date of the policy, in the amount of $2,000, "on two three-story frame building, tin roof, and its additions and foundation walls, while occupied as a dwellings Nos. 69 and 71 East Twelfth street, Paterson, New Jersey, and being $1,000 on each building." The policy was on the standard form, and contained the following provision: "This company shall not be liable under this policy for a greater pro-

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the amount insured bore to the whole insurance, it was held, upon its appearing that the total loss was less than the amount of the insurance, that the insurance was double, and that the insurers were liable *pro rata*.

And a like result was reached in Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868, where a warehouse company insured their own merchandise and that held by them in trust, or in which they had any interest, and some of the owners of property in the possession of the warehouse company secured specific policies, it being held that there was double insurance, and that the insurers were liable *pro rata*, each contributing proportionately. And to the same effect is Hough v. People's F. Ins. Co. 36 Md. 398.

In Lesure Lumber Co. v. Mutual F. Ins. Co. 101 Iowa, 514, 70 N. W. 761, a provision in a blanket policy covering three lumber yards, that the insurer should not be liable "for a greater proportion of any loss on the described property . . . than the amount hereby insured shall bear to the whole insurance . . . covering such property," was held not to limit the insurer's liability to the proportion which its policy bore to all of the insurance on the lumber yards, including a specific policy on one of the yards, as to which no loss occurred; and it was held that the latter policy was to be disregarded in determining the amount of liability under the blanket policy.

—rule where policies exclude liability on property covered by specific policies, except as to excess.

In Fairchild v. Liverpool & L. F. & L. Ins. Co. 51 N. Y. 65, a floating policy upon merchandise provided that if the merchandise should, at the time of loss, be insured by any specific insurance, the floating policy should "not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy;" and where there were specific policies on the property far exceeding its value when a loss occurred, it was held that the loss did not reach the interest insured by the floating policy, and that that policy was not liable to contribute any proportion of the loss.

In Klotz Tailoring Co. v. Eastern F. Ins. Co. 116 App. Div. 723, 102 N. Y. Supp. 82, where a policy insuring property for a certain sum provided that the insurer should not be liable for a greater proportion of any loss than the amount thereby insured should bear to the whole insurance, it was held that a floating policy, covering the property, and providing that it did not cover in whole or in part any property on which there was specific insurance, except on the excess of value over and above such specific insurance, when such specific insurance was exhausted, should not be included in determining the "whole insurance," and that the first insurer was liable for the full amount insured, the loss having exceeded that sum.

In Cutting v. Atlas Mut. Ins. Co. 199 Mass. 380, 85 N. E. 174, where a policy covering iron tanks of the insured, and their contents of petroleum while in the state of Pennsylvania, provided that the insurance should not attach until all specific insurance was exhausted, and there were other policies on the insured's property situated in a specified place in Pennsylvania, it was held unnecessary to decide whether these last policies were specific, it being held that if they were, since it appeared that the insurers issuing them had paid their liability for a loss on a part of the property, the insurance was "exhausted" within the meaning of the first policy, and that the insurer issuing that policy was liable, although the second insurers were still liable in case of loss to other property covered by their policies, the court holding that specific insurance is exhausted not only when the entire amount insured is required to meet a loss, but also when all that is collectible in respect to any given loss has been paid.

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portion of any loss on the described property, or loss by the expense of removal from premises, endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon or attached or appended hereto."

To the policy in question, pursuant to the terms of the standard clause just quoted, there was attached a rider, granting privilege "to effect other insurance," and containing, with reference to such other insurance, the following paragraph: "Provided, however, that if there shall be any other insurance on said building, this company shall be liable only for such proportion of any loss as the amount issued hereby shall bear to the whole insurance on the property hereby insured, whether such insurance applies in the same manner or not."

The property insured was damaged by fire March 23, 1909, the total damage being $1,760.93, being distributed between the two parts in the proportion of $1,477.73 to No. 69 and $283.20 to No. 71.

The trial, at the Passaic circuit, before the judge sitting without a jury, resulted in a judgment for the plaintiff against the company for $880.47, with interest, being one half of the total loss, and the company sued out this writ of error. The defendant,

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Adjustment where loss exceeds insurance.

In Niagara F. Ins. Co. v. D. Heenan & Co. 81 Ill. App. 678, affirmed in 181 Ill. 575, 54 N. E. 1052, the court said that they were of opinion that where there are general policies upon an entire building, and special policies upon parts of it, there can be no theory of contribution or apportionment among the several policies which will relieve the general policies from liability to their full amount until the insured has received complete indemnity for his loss; and that if the loss upon the building is greater than the sum of all the policies, general and special, thereon, the general policies must be paid in full. And see Angelrodt v. Delaware Mut. Ins. Co., cited under—"Vermont rule," infra.

In Ogden v. East River Ins. Co. 50 N. Y. 388, 10 Am. Rep. 492 (overruling Howard Ins. Co. v. Scribner, 5 Hill, 298, holding that blanket and specific policies did not constitute double insurance), where one policy covered specific property and others covered the same and also additional property, and all of the property insured was burned, and the loss exceeded the amount of the insurance, it was held that the sum insured by the more comprehensive policy should not be considered as so much additional insurance upon the parcel separately insured, but that the amount insured by such policy should be distributed among the several items in the proportion which the sum insured by that policy bore to the total value of all the items, and that where the portion allotted to the parcel specifically insured, together with the amount of the specific insurance, was less than the loss on that parcel, there was no occasion for any apportionment.

The rule laid down in Sloat v. Royal (set out under subdivision dealing with the question whether specific and blanket policies constitute double insurance, supra) was followed in Royal Ins. Co. v. Roedel, 78 Pa. 19, 21 Am. Rep. 1, where the loss exceeded the entire insurance by all the policies, some general, covering goods on all floors of a building, and one special, covering goods on one floor only, it being held that the latter policy was payable in full, and not entitled to prorate with the others. The court said: "A rule of average which would exempt the general policies from a portion of their peculiar loss below, in order to carry it to the relief of the special policy above, and thus to exonerate each from a portion of a total loss of different subjects, would directly contradict the very spirit and intent of the contract of insurance; the subjects being different, and the loss upon each being greater than the insurance on each specially applicable to it, it is evident that the average would effectuate no equity it was intended to cover." And a like result was reached in Lebanon Mut. F. Ins. Co. v. Kepler, 106 Pa. 28.

In American Cent. Ins. Co. v. Heath, 29 Tex. Civ. App. 445, 69 S. W. 235, where one policy permitting concurrent insurance covered the whole of a stock of goods, and another policy covered only a part, and the loss exceeded the whole insurance, it was held that the amount collected on the specific policy should be deducted from the total loss, and the liability of the blanket insurer should be based on the remainder.

In Erb v. Fidelity Ins. Co. 99 Iowa, 727, 69 N. W. 261, where a provision in a policy that the insurer should not be liable for a greater proportion of any loss on the property insured than the amount it insured bore to the whole insurance, the insurer was nevertheless held liable for the full amount of the policy upon its appearing that the total value of the property covered by the policy and destroyed was in excess of the total insurance thereon, although it appeared that a small part of the property was, with other property, covered by other policies which exceeded the amount of the loss.

In Baltimore F. Ins. Co. v. Loney, 20 Md. 20, where the policy sued on covered the insured's own goods, and provided that, in case of loss, the insured should not be entitled to recover any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount of the several insurances, and there

at the trial, conceded that it was liable for $633.13, and requested the court to find that amount to be its total liability. The assignments of error center on the effect of other insurance on the same property upon the extent of the liability of the defendant upon the policy in suit.

The description of the property as contained in this policy, when literally copied, reads rather strangely, but so reads because it is partly written on a printed blank, and, as often happens in filling banks, singulars and plurals are slightly mixed, but without detriment to the evident meaning. It is in legal effect a specific policy of $1,000 on No. 69 East Twelfth street and $1,000 on No. 71 East Twelfth street, and is not a blanket policy on both Nos. 69 and 71. It was so declared on, and the court below properly so held.

If there were no other insurance on the property described in this policy, the whole amount of the specific insurance on No. 69 would be insufficient to meet the loss on that number, while on No. 71 the specific insurance would exceed the loss. The insured would in that case, therefore, have been entitled to recover $1,000 on 69 and $283.20 on 71, or $1,283.20 in all.

But on June 8, 1907, several months prior to the taking out of the defendant's policy, the insured secured from the Rochester German Insurance Company a three-year policy, which, however, was not specific on No. 69 and No. 71, but was a blanket policy, and covered, to its full amount of $2,000,

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were also other policies which covered the insured's goods and those held by him on commission, it was held, upon it appearing that the loss on the goods held on commission was sufficient to exhaust all the policies covering them, that the latter policies were not "insurances" within the meaning of the covenant in the first policy relating to several insurances, and that the insurer issuing it was not entitled to any abatement of its liability by reason of the blanket policies.

Cases considering modes of apportionment.

The main requisite of any rule of apportionment is that the assured shall be afforded indemnity to the full extent of his rights under the policies. Niagara F. Ins. Co. v. D. Heenan & Co. 81 Ill. App. 678, affirmed in 181 Ill. 575, 54 N. E. 1052; Taber v. Continental Ins. Co. 213 Mass. 487, 100 N. E. 636, Ann. Cas. 1914A, 664; Meigs v. Insurance Co. of N. A. 205 Pa. 378, 54 Atl. 1053.

—Vermont rule.

By the so-called "Vermont rule," which appears to have been most often applied, the blanket policies are turned into specific policies for the purposes of adjustment; that is, the blanket amount is applied to the different items in proportion to their value. This so-called "Vermont rule" seems in reality to have originated in Massachusetts, and to have been first applied in Blake v. Exchange Mut. Ins. Co. 12 Gray, 265, where it was held that policies covering manufactured and unmanufactured stock must sustain their proportion of the loss with policies covering only the unmanufactured stock, the court laying down the rule as follows: "The rule of adjustment will be this: Ascertain the stock covered by the policies at the time of the loss, manufactured and unmanufactured. Ascertain the amount of the manufactured and of the unmanufactured separately. Then as the value of the entire stock is to the sum insured, so would be the amount of the unmanufactured to the result sought."

This case was followed in Taber v. Continental Ins. Co. supra, where two policies insuring a double apartment building as a whole, and another policy, insuring "an equal amount on each half," provided that the insured should recover no greater proportion of the loss sustained than the sum insured in each policy bore to the whole amount insured, both halves of the house being damaged, it being held that the proportion of the value of the property destroyed to be paid by each insurer was that which the amount of his policy bore to the amount of all the insurance thereon, and that the blanket policies should be applied to the different items covered by the policies in proportion to the values of the items.

The question first arose in Vermont in Chandler v. Insurance Co. of N. A. 70 Vt. 562, 41 Atl. 502, where policies insured specific sums on different items, and provided that the insurer should not be liable for a greater proportion of a loss than the amount thereby insured should bear to the whole insurance covering such property, and other policies covered the same property for a lump sum, it being held that as, by the terms of the specific policies, they could not be converted into a blanket policy, the only way in which the loss could be adjusted was to turn the blanket policies into specific ones; *i. e.*, determine how much of the full amount of a blanket policy should be apportioned to each of the different items according to their respective values.

The same principle was applied in Bloomfield v. London Mut. F. Ins. Co. Rap. Jud. Quebec, 29 C. S. 143, where there was a general policy on a stock of goods, and also special policies covering parts of the stock, and the policies provided that the insurers should be liable for such ratable proportion of the loss as the amount insured by the policies bore to the whole amount insured, it being held that in a case of loss less than the total insurance the general policy should be distributed in proportion to the loss on each part.

In Angelrodt v. Delaware Mut. Ins. Co. 31 Mo. 593, an action on a specific policy which provided that, in case of plurality, the

both numbers 69 to 71. The court below properly so held. In the Rochester policy, the insurance was "$2,000 on the three-story frame building, and its additions adjoining and communicating, including gas and water pipes, heating apparatus and all permanent fixtures, while occupied as a dwelling house and situated Nos. 69 and 71 East Twelfth street, Paterson, New Jersey." This policy was also on the standard form, and contained permission for other insurance without notice.

At this point we pause to remark that Grollimund, the plaintiff in this case, has recovered a judgment in like amount against the Rochester German Insurance Company on the policy last referred to, and has sued out a writ of error in that case, so that the judgments entered against both the Germania and the Rochester are now before this court, and have been argued together.

The insured, as we have seen, made the Rochester contract first, and it was blanket insurance, and on what was described as a single building (such description being, without doubt, not strictly accurate). He later took out specific insurance on the two parts of the same building in the specific amount of $1,000 each, having been permitted so to do by the leave given in the earlier policy to take out further insurance without notice. He has thus created a situation which leads to embarrassment in determining the liabilities of the insurance companies under the two contracts.

Now, the insured's rights as against the defendant in this case (and in the other case also) must be determined from the contract made between the insured and the company, and not by an adjustment of equities between insurance companies, requiring the court to rewrite the contract so sued upon and make a new and different contract. Questions of contribution between coinsurers have caused much trouble to the courts, a large part of which has arisen

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company should be liable for such ratable proportion of the loss or damage to the subject insured as the amount insured by the company bore to the whole amount insured thereon, the lower court appears to have adopted practically the method of apportionment of the Vermont rule, except that the computation seems to have been based upon the amounts of the losses upon the respective items, rather than upon the values of those items. The supreme court, while reversing the judgment below, said that the plan adopted was undoubtedly the correct mode of adjusting the loss, as between the insurers contributing to make it good, and would have been proper to apply in the case at bar if thereby the loss sustained by the plaintiffs were made good; but as in this case the loss sustained on the items covered by both policies exceeded the face of the specific policy and the difference between the face of the blanket policy and the loss on the property not covered by the specific policy, the defendant was liable to the plaintiffs on the specific policy for the full amount thereof, less, of course, any amounts that it had already paid on account of the loss.

And in Mayer v. American Ins. Co. 18 N. Y. S. R. 53, 2 N. Y. Supp. 227, where one policy covered property in the basement and on the first floor of a building and others covered the same property and also that on the third floor, and it was provided that the insurer should not be liable to a greater proportion of any loss upon any property described than the sum thereby insured bore to the whole sum of the insurance, it was held, upon its appearing that the loss was less than the amount of the policies, that the sum insured by the blanket policy should be distributed among the several parcels in the proportion which the sum insured by that policy bore to the total value of all the parcels.

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Kentucky rule.

By the Kentucky rule, when compound policies cover property in addition to that covered by specific policies, it is held that any loss on property not covered by the specific policies should be deducted from the compound policies, and only the remainder brought into calculation in determining the proportional liability of such policies.

This rule appears to have originated in Cromie v. Kentucky & L. Mut. Ins. Co. 15 B. Mon. 432, where, although it was not necessary to determine the proportions for which the several insurers were liable, the court stated that they were of the opinion that where one policy covered only a building, and others covered the building and additions, the loss falling on the latter insurers on account of the additions should be deducted from their policies before their aggregate amount was brought into the calculation by which the proportional liability of each was to be ascertained.

The Kentucky rule also appears to have been applied in adjusting the loss in Meigs v. London Assur. Co. 126 Fed. 781. There was, however, no discussion of the method adopted by the court in that case.

In Liverpool & L. & G. Ins. Co. v. Delta County Farmers' Asso. 56 Tex. Civ. App. 588, 121 S. W. 599, where a policy covered property in one location, and provided that the insurer should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance, and another policy covered the same, together with additional property situated elsewhere, it was held that, in the event of a loss less than the whole amount of the insurance, the first insurer was liable only for a proportionate part of the loss, the amount of the loss occurring on the property not covered by such policy being deducted from the amount of the general policy,

through efforts to equalize equities outside of the contract. This trouble is lessened if the parties are left with their contracts as they themselves have made them.

That the judgment against the Germania Company in the present case is manifestly unjust and contrary to its contract is, we think, demonstrable. The contention that the insurance, in respect to both policies, was concurrent, and that therefore both companies, having insured for equal amounts, should pay in equal proportions the loss, is not supported by the contracts. In the Rochester policy, the insurance was $2,000, covering both numbers. Any structure under one roof, with two separate entrances, is, in a general sense, one building; and, if the Rochester company chose to insure in blanket form, it elected to take all the loss that was coming on either building. At the time the Rochester policy was taken out, there was no other insurance; and, if the fire had taken place before the option to take other insurance had been exercised, the loss of the Rochester Company would have been, inasmuch as the loss did not equal the total insurance, the whole amount of $1,760.93, and it would have made no difference in the liability of the Rochester Company whether the loss was all on 69, or all on 71, or equally divided between 69 and 71.

The permission in the Rochester policy to take out other insurance did not limit the insured to blanket insurance on both 69 and 71, but permitted him to take out specific insurance on 69 and 71, or on either, if he so preferred. He did elect to take out specific insurance of $1,000 on each number, and, in adjusting the amount to be paid by the Germania, it is entitled, as against the insured, to the benefit of the coinsurance represented by the Rochester policy, and is liable only for such proportion of the total loss occasioned by the fire at No. 69 as the sum of $1,000 shall bear to the whole in-

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and the balance being brought in to contribute with the specific policy on the loss on the property covered by that policy.

The Connecticut rule.

The so-called "Connecticut rule" followed in GROLLIMUND v. GERMANIA F. INS. CO. was established in Schmaelzle v. London & L. F. Ins. Co. 75 Conn. 397, 60 L.R.A. 536, 96 Am. St. Rep. 233, 53 Atl. 863, which is fully set out by the court in the principal case. This rule in substance may be stated to be that, in the adjustment between blanket and specific policies, the blanket policies are not treated as specific ones, but that such policies are regarded as insuring each item to the entire amount of the policy unappropriated when the particular item is reached; that is, the whole blanket insurance is to be applied to one of the parcels covered by the specific, and prorated therewith, the remainder to the next item, etc., the adjustment being made item by item in the order of the greatest loss, if that will work equity.

This rule appears to find support in Sherman v. Madison Mut. Ins. Co. 39 Wis. 104, where policies of insurance covering live stock generally provided that the insurer should not be liable for any greater proportion of a loss than the amount insured bore to the whole amount insured on the property, and two other policies were in force on the live stock, one providing that no animal should be valued at more than a specified amount, and the other, that the insurer's liability should not exceed a stated amount on any one animal. A loss occurred as to two animals, each valued at less than the amount limited as the liability on any one animal by the latter policies, and a loss also occurred on one animal valued at four times the amount so limited. It was held, in an action on the first or general policy, L.R.A.1915B.

that the insured was entitled to recover from the three insurers the full amount of his loss, and that the three insurers were liable for the first two animals *pro rata*, and that as to the last animal, the first insurer was liable for the amount which was necessary in addition to the sum limited by the other insurers to make the insured's loss good.

Miscellaneous.

In Page v. Sun Ins. Office, 33 L.R.A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203, affirming 64 Fed. 194, where property situated on two blocks was covered by one policy, and the property situated on one of the blocks only by another, which provided that the insurer should not be liable for a greater proportion of any loss on the property described therein than the amount insured thereby should bear to the whole insurance covering such property, and it appeared that the property specifically insured was alone destroyed, it was held that the first policy covered each parcel to its full amount, and that the second insurer was liable only for the proportion which the amount insured by it bore to the total amount of both the specific and compound policies.

In Royall v. Hartford F. Ins. Co. 158 Ill. App. 463, where one policy insured a building generally for $2,500, and another insured the same property "against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding $2,500 to the following described property," and described the property as three adjoining buildings, and the policies contained provisions that the insurers should not be liable for a greater proportion of any loss "than the amount hereby insured shall bear to the whole insurance," it was held, in an action by the insured against the company issuing the specific policy, in which it ap-

surance on that number, and on No. 71 as the sum of $1,000 shall bear to the whole insurance on that number.

The loss on 69 was $1,477.73. If the insured had taken out no specific insurance on No. 69 and $1,000 on No. 71, the Rochester Company would have been called upon to pay $1,477.73, the entire loss on No. 69, and, as to No. 71, the balance of its policy, or $633.13, would have prorated with the specific Germania insurance policy of $1,000. So, if the insured had taken out $1,000 of specific insurance in the Germania on No. 69 and no specific insurance on No. 71, the Rochester Company would have been called upon to pay on No. 71 the loss on that number of $283.20; the remaining amount of its policy, not needed to satisfy that loss (that is to say, $1,716.80), would have prorated with the Germania specific insurance of $1,000 in paying the loss of $1,477.73 on No. 69.

If we now consider that the insured had no policy in the Rochester and had $1,000 on No. 69 in the Germania and $1,000 on No. 71 in the Germania, the Germania's loss would be, on No. 69, $1,000, and on No. 71 $283.20, or $1,283.20 in all. The assumption, therefore, that the situation as to the two companies—the Rochester with a blanket policy of $2,000 on both numbers, and the Germania with $1,000 on each number—is the same as shown groundless, because, without consideration of the other, the liability of the Rochester under the blanket policy is $1,760.93, and of the Germania under the two specific policies is $1,283.20. Under the policies issued by both companies, neither company is liable under the policy for a greater proportion of any loss on the property described therein than the amount thereby insured shall bear to the whole insurance covering such property.

This clause for prorating is a limitation upon the contract to indemnify the assured to the extent of his loss. The assured has not taken from either company an unqualified obligation to indemnify him to the extent of his loss, or to the extent of his loss limited to the amount of his policy. He has made with both companies contracts which give them, as against him, a benefit arising from coinsurance. The liability of each company to the assured is limited, depending upon the existence of the amount of the coinsurance of the other. Each company is liable only for the proportion of the loss on the described property in its policy that the amount insured shall bear to the whole insurance on such property.

It is true that the insured is entitled to have from the two companies, if his loss did not exceed the total amount of insurance available to meet the loss, the amount of such loss. But, in the present case, to divide the loss equally between the two companies would compel a contribution from the Germania to the Rochester of $880.47, or only $402.73 less than the total liability of the Germania on its policy on both numbers, without reference to the Rochester; and the Rochester, with a total liability on its policy of $1,760.93, without reference to the existence of the Germania policy, would be relieved of exactly half of its responsibility, or $880.46. This method of dividing the loss would work to the advantage of the Rochester Company by the difference between $880.46, of which it would be relieved, and $402.73, of which the Germania would be relieved; such difference being $477.73. By this method the blanket policy on both numbers, carrying naturally the greater loss, would derive from the prorating clause a greater benefit than the specific risks on each number of lesser amount.

Such a result is manifestly wrong, and writes a new contract for the Germania, in

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peared that there had been a partial loss to the three buildings, that the words "the amount insured" meant the whole amount of the insurance covered by the policy, *i. e.*, $2,500, and that the words "the whole insurance" meant the total of the two policies, *i. e.*, $5,000, and that each company should bear one half of the loss.

In Merrick v. Germania F. Ins. Co. 54 Pa. 277, there were specific policies covering machinery in certain designated buildings only, and also blanket policies covering the machinery in the several buildings generally, and providing that "if . . . the assured shall have insurance under a floating policy or policies, not specific, but covering goods generally in various places, not designated, and yet within limits which include the property herein insured, such policy, as between the assured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurances thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess." It was held that the language employed was obsure and must be most strongly construed against the insurer; and that, so construed, the liability of the insurers under the latter policies was not confined by such provision to the excess of loss above that covered by the specific policies, but that they were liable to contribute ratably in paying the loss on the property specifically insured and covered by both classes of policies.

J. T. W.

that it deprives it of proper contribution from its coinsurer, but more markedly writes a new contract for the Rochester, in that it converts its blanket policy into a specific policy of $1,000 on each number. By this method there is absolutely no difference between the two contracts, and blanket insurance and specific insurance involve exactly the same risk on the part of the two companies; and this notwithstanding that, if the blanket policy alone had been on the property, the loss under it would have been $1,760.93, and if the policy, with specific risks on the two numbers, had been alone, its loss could have been only $1,283.20. It is axiomatic that a blanket policy is a greater risk than the specific, and in natural equity the assumption of the greater risk is not inequitably attended by larger loss.

It is true that in a general sense the amount of the Germania policy was equal to the amount of the Rochester policy, inasmuch as the ultimate possibility of loss on each policy was $2,000. But under the Rochester policy $2,000 could be lost on either No. 69 or No. 71, while under the Germania policy only $1,000 could be lost on No. 69 and only $1,000 could be lost on No. 71.

There is but little, if any, conflict of law, text-book or case, on the general principle that blanket insurance covers every item included in the property described in the policy to its whole amount, and the destruction of any item so covered, even though all other items should remain entirely uninjured, demands an indemnity from the insurer, if the loss be so great, to the entire amount of the policy.

Of course, policies are sometimes issued blanket in form, with limitation of loss to a specific amount of any one item, as, for instance, policies on live stock, with a loss not to exceed a small amount on any one animal. Policies also sometimes contain what are called "distribution" clauses, by which the amount insured attaches in proportion of the value of the property contained in individual parcels to the value of the property as an entirety. But the blanket policy in the present case contains nothing by way of limitation or distribution, and its full amount is fully applicable at all times to every part and parcel of the property described in the policy. To forget this is to make the policy specific and a different thing than what it was, and was intended to be. To remember this is to leave the contract as the parties made it.

It has been said that questions arising out of the application of blanket insurance and specific insurance are among the most troublesome in the law of insurance; and it must be conceded that there is considerable difference of opinion evidenced by the authorities. It must also be conceded that every rule that has been worked out has been the subject of criticism, and no rule has been as yet formulated which absolutely commends itself in all supposable cases. The function of the court, however, is not safely discharged in the endeavor to lay down a rule which will meet all supposable cases. Contracts and facts are seldom exactly identical in even two cases. The contract and the facts before the court in the given case are the safest guide to a correct conclusion.

The learned trial judge adopted the Vermont rule, so-called, applied in the case of Chandler v. Insurance Co. of N. A. 70 Vt. 562, 41 Atl. 502. The reason advanced by the court for this rule is as follows: "As, by the terms of the specific policies, they cannot be converted into blanket policies, it necessarily follows that the only way in which the loss can be adjusted is to turn the blanket policies into specific ones, *i. e.*, determine how much of the full amount of a blanket policy shall be apportioned to each of the three respective items, according to their respective values." But this seems to us without justification in any blanket contract of insurance considered by itself, and inequitable in relation to specific insurance on items covered by the blanket policies, inasmuch as it puts blanket and specific contracts on a level of liability, when, in the very nature of the two contracts, there is great difference in the risk assumed.

In the Chandler Case, the court arrived at the amounts of the specific policies into which it converted the blanket policy by taking the amount of the loss as to each item as the representative of its value, because in that case the loss was the full value and less than the total amount of insurance. The rule as announced by the court calls for an apportionment according to sound value. What function such value has under the circumstances for the fixing of indemnity collectible under a contract of insurance is not perceivable, except in so far as indemnity is sometimes limited in amount by sound value or some proportion thereof. Moreover, it is admitted that the application of this rule, which is also sometimes called the "reading rule," may lead, under some conditions, to results violative of the principle that the assured should receive full indemnity. To this principle every rule should bend.

In the present case, however, the insured cannot apply the Vermont rule, under the evidence. No proof has been offered by the plaintiff of sound value, and the court can-

not assume that Nos. 69 and 71 are of equal sound value.

The effect of the Vermont or reading rule is exactly the same as though the policy had originally contained a distributive clause, applying its blanket amount to different items in proportion to value. This clause is sometimes put in policies, and, if so, the rule is, no doubt, properly applied. In the absence of such a clause, the application of the rule makes a new contract.

The rule which we think should be applied to the present case is that which is called the Connecticut rule, of which the case of Schmaelzle v. London & L. F. Ins. Co. 75 Conn. 397, 60 L.R.A. 536, 96 Am. St. Rep. 233, 53 Atl. 863, is an application. This rule is sometimes styled by text writers the "gradual reduction rule." Like other rules, it has been the subject of criticism; but its reasoning is, when applied to the trial of an issue in a court of law, much more satisfactory than can be found in the cases supporting the other rules. It proceeds on the validity of the contract of insurance as made between the assured and the company, and enforces the contract as it is found.

In the Schmaelzle Case, the plaintiff was the owner of premises upon which stood a brewery and a shed. In the brewery were machinery and stock, upon which buildings, machinery, and stock the plaintiff carried, in 34 different companies, insurance against fire, aggregating $60,000 in amount. These policies were all of the standard form, and contained a provision as to prorating found in the policy of the Germania Company in this case and also in the Rochester policy. Thirty-one of the policies, covering insurance for $55,000, were "blanket" policies; that is, they covered buildings, machinery, and stock as a whole, and without distributing the amount of the insurance among several items. The remaining policies, containing insurance for $5,000, were of the kind known as "specific" policies; that is, the amount insured thereby was distributed among the several items of property, with a specific amount for each item. Each of these specific policies covered in the whole precisely the same property as did the compound insurance, but distributively. This distribution was uniform among the specific policies, and was among four separate items —the main or brewery building, stock, machinery, and a shed. The loss was distributed without friction, and the question was as to the apportionment between the blanket and specific policies. The court held that in distributing the loss upon the building, machinery, and stock between the insurance policies covering all the items for a gross sum and those specifically liable on each item, all of which provided that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached making the adjustment item by item in the order of the greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed.

That case is on all fours with the case now before the court, in that the items mentioned in the specific policies comprised in the aggregate the property described in the blanket policies. It is an exact authority from a court of high reputation, and the principles on which it rests are strongly presented. When applied to the facts of this case, the opinion itself contains an answer to every criticism that has been advanced against it. True it has been criticized as penalizing the blanket policy. It is not clear that the criticism is well founded; but it is clear that such criticism ought not to be given undue weight in the enforcement of a contract in a court of law. If parties are not to be left to make their own contracts in matters of insurance, it is for the legislature, which has already established the standard form, to go further and prescribe a clause covering the apportionment of blanket and specific insurance.

It is said that the Schmaelzle Case works an interference with the modern 80 per cent coinsurance clause; but in the present case there is no such difficulty, as there is no such clause or other limitation of like character in the policies.

The only criticism against the Connecticut rule (which is free from attack on many of the grounds to which the others are open), not fully answered by an appeal to the contract itself, is its arbitrary application of the order in which the blanket insurance shall be applied in the course of "gradual reduction" to the items covered by it. The Connecticut court as to this said: "One other point remains to be considered. As the existence of the specific policies compels the adjustment of the loss by items, these items must be taken up in some order. This order might very materially affect the result, both as respects the companies and the insured, since that portion of a blanket policy which is exhausted in the settlement upon the first item no longer remains to be applied to the second item, and so on through the list. This matter of order is one upon which the policies in suit and policies ordinarily are silent. Evidently nothing re-

mains but some arbitrary method of selection, in which the considerations influencing a choice should be what, on the whole, under the conditions, best satisfies the ends of fairness and justice as between the companies, the assured being given his rightful amount of indemnity. A little study of the peculiar situations which may arise may convince one that no rule of universal and unvarying application can be safely laid down. Whether one suggests the order of the greatest losses, or of the least losses, or the order of the enumeration in the special insurance, or an order to be determined by lot, two at least of which methods appear to have been used, or some other order, he will quite likely be met with an assumed situation in which his system seems to fail to fully accomplish equity and justice. Fortunately we have no need to search for a universal rule. In the present case, it matters not to the assured, and little to the insurers, what order of adjustment is adopted. The order first indicated, to wit, that of the greatest losses, is one which, as a general rule, has some consideration in its favor. In this case it works out substantial equity and justice to all concerned. We therefore select it for the purposes of this case as, on the whole, the best." The language is applicable to the case now before the court.

Our conclusion, therefore, is that the problem now before the court should be solved by the application of the following rule: In distributing the loss upon two parts of a building under one roof, and each part capable of being described and insured by street numbers, between an insurance policy covering both parts for a gross sum and a policy specifically liable on each part, both of which policies permit of other insurance and provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policy should be regarded as insuring each part to the entire amount unappropriated when it is reached, making the adjustment part by part in the order of greater loss, if that will work substantial equity and justice to all concerned, and deducting the sum appropriated to the part as it is adjusted and passed.

The application of that rule to the present case results as follows: The loss on No. 69 is $1,477.73. The Rochester blanket policy of $2,000 being first applied on No. 69 makes, with the specific Germania insurance of $1,000, a total insurance on No. 69 of $3,000, which would prorate the loss between the Rochester and the Germania $985.16 to the Rochester and $492.37 to the Germania. The payment of the Rochester's $985.16, being its share of the loss on No. 69, would reduce the face value of its policy to $1,014.84, leaving that amount still applicable on No. 71 to prorate with the specific policy of $1,000 on that number. The loss on that number was $283.20, which would be apportioned between the two companies as follows: $142.64 to the Rochester and $140.56 to the Germania. The Rochester's total loss would be on both numbers $1,127.80, and the Germania's total loss on both numbers would be $633.13, together aggregating $1,760.93, the total loss of the assured. This would call for a judgment against the defendant in favor of the plaintiff in the present case for $633.13, with interest from May 23, 1909.

The result is that the judgment of the court below will be reversed and a venire de novo awarded.

NORTH CAROLINA SUPREME COURT.

JOSEPHINE FLOYD et al., Appts.,
v.
ATLANTIC COAST LINE RAILWAY COMPANY.

(— N. C. —, 83 S. E. 12.)

Dead body — who may sue for mutilation.

The father, and not the mother, is the proper party to sue for damages for mental anguish for the wrongful mutilation of the dead body of their child, where, by statute, he is entitled to its personal effects.

(Clark, Ch. J., dissents.)

(October 14, 1914.)

Note. — Who may maintain action for mutilation of corpse.

The old law knew no civil action for the mutilation of the body of a dead person. The recognition of such an action has, in general, made its way in the American courts mostly through the idea that, as the nearest relatives have the duty of burial, therefore they have the right of burial and of the possession of the body intact for that purpose, the spouse being in this matter considered as the nearest of relatives, and executors and administrators of the decedent being excluded. While one proceeds without much practical break from the theory of duty to the theory of right, the connection is not entirely satisfactory in a logical sense. Perhaps it would have been better if the courts, in sustaining the right of action, had done so as affording a remedy for an independent right standing by itself, and dissimilar in nature from any other legal right; and eventually it may be that the action will come to be so considered.

APPEAL by plaintiffs from a judgment of the Superior Court for Sampson County in defendant's favor in an action brought by the *feme* plaintiff to recover damages for the negligent mutilation of the dead body of her son, alleged to have been killed by one of defendant's trains. Affirmed.

The facts are stated in the opinion.

Mr. **Henry A. Grady**, for appellee:

Plaintiff was not the next of kin, and could not maintain this action for mental anguish.

Kyles v. Southern R. Co. 147 N. C. 394, 16 L.R.A.(N.S.) 405, 61 S. E. 278; Burney v. Children's Hospital, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401; Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 135 N. C. 73, 47 S. E. 234; Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471.

Walker, J., delivered the opinion of the court:

This action was brought by the *feme* plaintiff to recover damages for the negligent mutilation of the dead body of her son, Grady O'Berry Floyd, who, it is alleged, had theretofore been killed by one of the defendant's trains. The plaintiff's counsel state very frankly in their brief that the action is one solely in behalf of the *feme* plaintiff, her coplaintiff and husband being joined with her as a nominal party under

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Of course, in any case, rules of some rigidity will be necessary as to the particular relative entitled to enforce the right. How far the matter is or will be complicated in actions which, whether in tort or contract, arise out of contractual relations,—as with carriers, undertakers, etc.,—it is not easy at present to say.

Many of the cases are concerned more with the question whether the action will lie at all than with the question whether the plaintiff is the proper person to bring it, and it is quite usual to find such cases uninforming as to what relatives the deceased left surviving him. In fact, there are but few cases where the question as to what particular person may bring the action was distinctly litigated.

For the general subject of damages for mutilation of corpse in general, see the note to Long v. Chicago, R. I. & P. R. Co. 6 L.R.A.(N.S.) 883.

For right of action against railroad company for mutilation of the body of a person killed on track, see the note to Kyles v. Southern R. Co. 16 L.R.A.(N.S.) 405.

For duty of carrier as to transportation of corpse, see the note to Adams Exp. Co. v. Hibbard, 38 L.R.A.(N.S.) 432.

For mental anguish, as element of damages, in action for breach of contract relative to corpse, see the note to Beaulieu v. Great Northern R. Co. 19 L.R.A.(N.S.) 564.

For right to recover for mental anguish consequent upon failure of telegraph company to transmit money to prepare corpse for burial, see the note to Cumberland Teleph. & Teleg. Co. v. Quigley, 19 L.R.A.(N.S.) 575.

For injunctive relief as to cemetery property, burial or removal of remains, see the note to Wormley v. Wormley, 3 L.R.A.(N.S.) 481.

Judicial explanations of the subject.

One of the most frequently cited American cases is Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, where the court affirmed the judgment of the lower court in overruling a demurrer to an action brought by a widow for the mutilation and dissection of the body of her husband, and in which it was contended on the part of the defendant that if anyone could maintain such an action, it should be the personal representative. The court said: "All courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties; and that this is a right which the law will recognize and protect. The general, if not universal, doctrine, is that this right belongs to the surviving husband or wife or to the next of kin; and while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise. We have no doubt, therefore, that the plaintiff had the legal right to the custody of the body of her husband for the purposes of preservation, preparation, and burial, and can maintain this action if maintainable at all."

In Foley v. Phelps, 1 App. Div. 551, 37 N. Y. Supp. 471, in holding that a wife might maintain an action for the unlawful dissection of the body of her husband, the court expressly stated that it did not pass on the question of damages or upon mental anguish, and said: "Irrespective of any

the statute, and disavowing any right to recover in his behalf. It is therefore to be regarded as her suit, and not as his. In the start it may be taken as settled by us in Kyles v. Southern R. Co. 147 N. C. 394, 16 L.R.A.(N.S.) 405, 61 S. E. 278, that the cause of action set out in the complaint is recognized as a legal one, and plaintiff is entitled to recover damages, provided she is the party entitled to sue for them, and establishes her case before the court and jury. These authorities may be added to those cited in the Kyles Case:

"At common law there can be no property in a dead human body, and after burial of such dead body it becomes a part and parcel of the ground to which it was committed. Nevertheless, the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect. While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, to which certain persons may have rights as they have duties to perform towards it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it." 13 Cyc. 267, 268.

"In more recent times the obdurate common-law rule has been very much relaxed, and changed conditions of society, and the necessity for enforcing that protection which is due to the dead, have induced courts to re-examine the grounds upon which the

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claim of property, the right which inhered in the plaintiff as the decedent's widow, and in one sense his nearest relative, was a right to the possession of the body for the purpose of burying it; that is, to perform a duty which the law required someone to perform, and which was her right by reason of her relationship to the decedent to perform. That right of possession is a clear legal right." See also the second quotation from this case in FLOYD v. ATLANTIC COAST LINE R. Co.

In Koerber v. Patek, 123 Wis. 453, 68 L.R.A. 956, 102 N. W. 40, infra, "Son of deceased," the court said: "The conclusion seems to us irresistible that in the nearest relative of one dying, so situated as to be able and willing to perform the duty of ceremonious burial, there vests the right to perform it; and this is a legal right which, as said in some of the cases, it is a wrong to violate, and which, therefore, courts can and should protect and vindicate. . . . We should deem it indisputable that the tort alleged is one 'affecting the liberty' of plaintiff. The right to entomb the remains of his deceased mother in their integrity and without mutilation, we have already decided must be recognized as a legal one." The court further concluded that executors and administrators had not the right of authority over the dead body before burial, as distinguished from the family, that the surviving spouse had primarily the right, as had the parents in case of a minor child of the household, or an adult child in case of "a widowed parent, either a member of the child's family circle, or not a member of any other."

Personal representatives.

An executor or administrator, as such, may not recover damages for the unlawful mutilation of a dead body. Griffith v. Charlotte, C. & A. R. Co. 23 S. C. 25, 55 Am. Rep. 1, where the court did not pass definitely upon the question whether anyone could bring such an action, but considered that it would be a violent assumption to conclude that because the administrator must pay the funeral expenses as the first of debts, that he became on that account the legal custodian of the remains. The Griffith Case was cited and apparently followed in Pinson v. Southern R. Co. 85 S. C. 355, 67 S. E. 464, where the report is brief upon this point.

Upon a contention that, if anyone could bring such an action, it should be the personal representatives, the court sustained the right of the widow in Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238.

"A right of possession is recognized which is vested in the husband or wife or next of kin, and not in the executors." Burney v. Children's Hospital, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401, infra, "Parents of deceased."

See also Koerber v. Patek, supra, "Judicial explanations of the subject," and other cases in this note in which recovery was had by spouse or relatives.

Spouse.

A widower or widow may maintain an action for the unlawful mutilation of the body of the plaintiff's spouse. Medical College v. Rushing, 1 Ga. App. 468, 57 S. E. 1085 (widower); Larson v. Chase and Foley v. Phelps, supra (widow); Jackson v. Savage, 109 App. Div. 556, 96 N. Y. Supp. 366 (widower); Kyles v. Southern R. Co. 147 N. C. 394, 16 L.R.A.(N.S.) 405, 61 S. E. 278 (widow); Farley v. Carson, infra (widow); Philipps v. Montreal General Hospital, Rap. Jud. Quebec 33 C. S. 483 (widow); also a decision in an unnamed case by Prentiss, J., in Ohio, reported in 6 Am. L. Rev. 182; see also, in this connection, Cook v. Walley, infra, "Right of contracting party."

Thus, the brother of a decedent may not bring an action for the wilful and malicious mutilation of the body while the wife of the decedent is living unless it appears that the wife has yielded her right of control and disposition of the remains, or that she has been totally estranged and totally separated from the decedent in his lifetime; as, until these facts appeared, no action would lie

common-law rule reposed, and have led to modifications of its stringency. The old cases in England were decided when matters of burial and the care of the dead were within the jurisdiction of the ecclesiastical courts, and they are not longer absolutely controlling." Foley v. Phelps, 1 App. Div. 551, 555, 37 N. Y. Supp. 471.

And again, in the same case: "The right is to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative."

It was said in Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead,—a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case."

So that it may be considered as finally

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in any other person. Thompson v. Pierce, 95 Neb. 692, 146 N. W. 948.

The right of the spouse has been upheld in cases where the mutilation was by a carrier with whom the spouse had contracted for the transportation of the body. Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128, 18 Am. Neg. Rep. 26 (widow); Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 823; Wilson v. St. Louis & S. F. R. Co. 160 Mo. App. 649, 142 S. W. 75 (widower); Hale v. Bonner, 82 Tex. 33, 14 L.R.A. 336, 27 Am. St. Rep. 850, 17 S. W. 605 (widow; where, by delay of the carrier, the body was decomposed before burial could be made).

In Louisville & N. R. Co. v. Blackmon, 3 Ga. App. 80, 59 S. E. 341, it was said that it was conceded that the unauthorized mutilation of the dead body of the husband gives a right of action to the wife.

In a case where a widow was joined in the action by her minor son, the court stated that the right was in the widow, not referring to the son. Farley v. Carson, 5 Ohio L. J. 786. While judgment was for the defendant on the ground that there was no mutilation, the court, in holding that the petition itself set up a cause of action, said: "It alleged wilful desecration and mutilation, which words were comprehensive enough to include that disturbance of the decent fitness of the body for burial which would constitute the violation of a right. This was a right in plaintiff as widow, and entitled her to an application of the rule that wilful infringement by one person of a right existing in another imports damage."

It has been held, however, in a Quebec case, that the children are to be considered, but the facts are not completely reported. Thus, in Re Grothé, 7 Quebec Pr. Rep. 111, upon the petition of the children of a decedent the court annulled an order permitting a life insurance company to make a medical examination of the decedent's body, the court stating "that said order was given on the representation and on the belief that the widow of the deceased was the only person having a family interest in relation of the removal of the body from the vault, and its examination."

Parents of deceased.

A father may recover for an unlawful or improper autopsy upon his minor son. Palenzke v. Bruning, 98 Ill. App. 644.

The father of a minor child, as his natural guardian, may maintain an action for an autopsy on the child without his consent. Burney v. Children's Hospital, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401, where the court said: "A right of possession is recognized, which is vested in the husband or wife or next of kin, and not in the executors." See also the quotation from this case in the FLOYD CASE.

So a widow may recover for an unlawful autopsy upon the body of her unmarried minor son. Darcy v. Presbyterian Hospital, 202 N. Y. 259, 95 N. E. 695, Ann. Cas. 1912D, 1238, reversing 137 App. Div. 924, 122 N. Y. Supp. 1126; motion for reargument denied in 203 N. Y. 547, 96 N. E. 1113.

It was held that a mother might recover for an unlawful autopsy upon the body of her adult, unmarried son, who resided with her, in Hassard v. Lehane, 143 App. Div. 424, 128 N. Y. Supp. 161, where it was suggested that the decedent left no father.

In Meyers v. Clarke, 122 Ky. 866, 5 L.R.A.(N.S.) 727, 90 S. W. 1049, 93 S. W. 43, while the case was for the defendants on the facts, the court approved instructions which would have enabled a mother to recover for an unlawful autopsy on her dead daughter. It is perhaps suggested that the father of the deceased was dead, but the age of the deceased is not reported.

In Hassard v. Lehane, supra, the court said: "It was conceded that the decedent was unmarried, had no children, and resided with the plaintiff, who was his mother, and that upon her rested the obligation to bury the remains, and that she 'had a right to bring this action.' . . . The plaintiff, on the facts stipulated, had a legal right to the possession of the corpse of her son in the condition it was in at the instant of

settled that an action will lie in such a case by the proper person; it being an actionable wrong to him. There are very able and learned discussions of the question in Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, by Judge Mitchell, and in Pierce v. Swan Point Cemetery, supra, by Judge Potter, in which it is maintained that there is a quasi property in a dead body, which belongs to certain of the relatives of the deceased, or to those who sustained close relations to him while living, which will be protected by the courts.

The judge below ruled that plaintiff was not the proper party to sue, but that the father of the deceased is the proper party, and the cause of action, if it exists, belongs to him. He, therefore, gave judgment of nonsuit, and plaintiff appealed. The recovery is claimed for mental anguish, caused by the mutilation of the body. It is said in the Kyles Case, 147 N. C. at pages 398 and 399: "The right to the possession of a dead body for the purpose of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and when the widow was living with her husband at the time of his death, her right to the possession of the husband's body for such purpose is paramount to the next of kin. Larson v. Chase, supra. A widow has a right of action for the unlawful mutilation of the remains of her deceased husband. Ibid. Foley v. Phelps, 1 App. Div. 551, 37 N. Y.

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death, for the purpose of preserving and burying the remains; and without her consent, or statutory authority therefor, no one had a right to deprive her of such possession, or to dissect or otherwise mutilate the body of her son; and the law gives her a cause of action to recover damages, which are measured by the injury to her feelings, caused by the invasion or violation of this right."

If the FLOYD CASE is to be considered as a case brought only by the mother (and so the majority of the court holds), it would seem to be a case of first impression, although in a case arising out of a contract made by the mother she was allowed to recover, although the father was living. Miner v. Canadian P. R. Co. infra, next subdivision. For cases of the joinder of both parents in actions arising out of contracts, see infra, "—both parents."

—cases arising out of contracts.

In Loy v. Reid, — Ala. App. —, 65 So. 855, a recovery was had by a father who had paid the defendant for embalming his infant child, on the ground that there had been no embalming, and that therefore the body was not properly preserved during the time when it was withheld from burial, relying upon the supposed embalming.

A recovery has been sustained by a mother, although the father was living, where the action was against a carrier to whom the mother delivered for transportation the body of her daughter, which became decomposed by delay. Miner v. Canadian P. R. Co. 15 West. L. Rep. (Can.) 161, where the plaintiff was the executrix of the deceased, but did not expressly sue as such, and there is no suggestion that the parents were separated, as the father was assisting in the funeral arrangements.

On the other hand, the mother was not allowed to recover where the contract was made by a friend of the family, who did not disclose the mother's existence to the defendant. Thus, in Nichols v. Eddy, — Tex. Civ. App. —, 24 S. W. 316, it was held that a mother could not recover damages against a carrier for delay in transporting the body of her daughter, which resulted in its being so far advanced in decomposition on its arrival that friends thought that the mother ought not to see it, and she did not do so, where the contract of transportation was made with the carrier by a friend of the family, who did not disclose to the carrier the existence of the mother, or her relationship to the deceased.

See also, in this connection, Beam v. Cleveland, C. C. & St. L. R. Co. infra, "Right of contracting party."

— —both parents.

It has been held in Washington, in an action arising out of a contract, that both parents may join in an action for desecration of the body of their infant child. Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172, infra (where, however, there was no actual mutilation).

In Texas there seems to be a difference of opinion in the courts.

In Wells, F. & Co's Exp. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412, where a judgment in favor of a father against a carrier for delay in forwarding the body of his son was reversed on other grounds in particular, it was held that the father could not, in the action, recover for the mental suffering of his wife, the mother of deceased, as the mother was in no way named in the contract, nor was her relationship disclosed to the carrier. It does not appear from the report whether or not any mutilation or decomposition occurred by reason of the delay. This case was cited by counsel, but was not referred to in the opinion of the court in Missouri, K. & T. R. Co. v. Hawkins, 50 Tex. Civ. App. 128, 109 S. W. 221, which sustained a verdict for the plaintiff, who had sued a carrier for injuries to the feelings of the plaintiff and his wife on account of injury to the body of their infant child by reason of the negligent handling of the carrier. The court said: "There was no exception to the pleading on the ground that no recovery could be had for the wife's suffering, nor was there any objection to

Supp. 471. While a dead body is not property in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect, and any violation of it will give rise to an action for damages. 8 Am. & Eng. Enc. Law, 2d ed. 834, and cases cited; 13 Cyc. 280, and cases cited. While the common law does not recognize dead bodies as property, the courts of America and other Christian and civilized countries have held that they are quasi property, and that any mutilation thereof is actionable. Larson v. Chase, supra. This is not an action for the negligent killing of the deceased, but an action by the widow (8 Am. & Eng. Enc. Law, 2d ed. 838, and cases cited) for the wilful, unlawful, wanton, and negligent mutilation of his dead body. She was entitled to his remains in the condition found when life became extinct; and for any mutilation incident to the killing the defendant would not be liable, but it is liable in law for any further mutilation thereof after death, if done either wilfully, recklessly, wantonly, unlawfully, or negligently. Larson v. Chase and Foley v. Phelps, supra; Louisiana & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128, 18 Am. Neg. Rep. 26; Lindh v. Great Northern R. Co. 99 Minn. 408, 7 L.R.A.(N.S.) 1018, 109 N. W. 823. Where the rights of one legally entitled to the custody of a dead body are violated by mutilation of the body or otherwise, the party injured may, in

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the evidence in this respect. The evidence shows that the wife accompanied the plaintiff as a passenger on the ticket purchased for her by him at Caney to Greenville, and was present at the depot when the injury was done. The husband has the right to sue and recover for injuries to the wife. He was acting for her, as well as for himself, in buying the tickets and arranging for the transportation of the corpse. She was accompanying him as a passenger on their sad errand, and under the circumstances we think she sustained such relation to the transportation of the corpse that a recovery for her suffering was warranted. But if it could be said that no such relation as to the transportation existed as to her, the act was a wrongful one by which she was injured, and for which a recovery could be had."

In Wright v. Beardsley, supra, the court said: "The persons who are the lawful custodians of a deceased body may maintain an action for its desecration. . . . The mother and father certainly may join in such an action." But the judgment for the plaintiffs was reversed on the ground of excessive damages, the action being by the father and mother of an infant child, for their mental anguish, it appearing that the body had been placed in a rough coffin and buried on top of the coffin of another child, and only a little distance under the ground.

It may be noted that in Long v. Chicago, R. I. & P. R. Co. 15 Okla. 512, 6 L.R.A. (N.S.) 883, 86 Pac. 289, 6 Ann. Cas. 1005, 20 Am. Neg. Rep. 710, where the parents of a minor son brought an action against a carrier which, in transporting the body, had dropped it, breaking the casket, and mutilating and disfiguring the body, and the defendant offered to confess judgment to the amount of the actual damages necessary to restore the body and the casket for burial, the court held that the defendant was not liable for any mental anguish, and judgment, therefore, was for the defendant.

Son of deceased.

In Wall v. St. Louis & S. F. R. Co. — Mo. App. —, 168 S. W. 257, the court sustained the right of a son to maintain an action for the wilful and wanton mutilation of the body of his widowed mother, who lived with and was supported by him, against the carrier to which he had intrusted it for transportation.

It is error to sustain the demurrer to a complaint of a son for the unlawful and wilful mutilation of the body of his mother, which alleges that he is the son and heir, and that he was requested by her, before her death, and instructed, to take charge of her body, and was the only person interested, for this allegation is sufficient on demurrer to exclude existence of any surviving husband, or any other child having equal or greater rights or duties to supply proper burial for his mother's remains, and if others exist whose rights would suffer invasion by such acts as are charged, so that they would have actions therefor, that fact can be set up by the defendant, and the necessity or propriety of their joinder can be then considered. Koerber v. Patek, 123 Wis. 453, 68 L.R.A. 956, 102 N. W. 40.

Brother of deceased.

See Thompson v. Pierce, supra, "Spouse." See Beam v. Cleveland, C. C. & St. L. R. Co. infra, next subdivision.

Right of contracting party.

Cases will be found throughout this note where the action arose out of contract. It is only intended to refer here to cases discussing the effect of the complication of the question, "In whom is the right of recovery?" by the fact that the mutilation occurs by the action or default of one to whom it has been delivered for some proper purpose.

For mental anguish as element of damages in action for breach of contract relative to corpse, see the note to Beaulieu v. Great Northern R. Co. 19 L.R.A.(N.S.) 564, and also the case of Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151.

In Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128, 18 Am. Neg. Rep. 26, the court said, in holding that an action would lie by a widow against a

an action for damages, recover for the mental suffering caused by the injury. Perley, Mortuary Law, 20; Reniham v. Wright, 125 Ind. 536, 9 L.R.A. 514, 21 Am. St. Rep. 249, 25 N. E. 822; Larson v. Chase, supra; Hale v. Bonner, 82 Tex. 33, 14 L.R.A. 336, 27 Am. St. Rep. 850, 17 S. W. 605."

In that case the widow sued for the mutilation and disfigurement of her husband's body. Here the mother sues for the wrong done her in the mutilation of her son's body, the father being still alive. Can she do so? is the question for us to decide. It is said in 13 Cyc. at page 281, that "an unauthorized and unlawful mutilation of a corpse before burial gives rise to an action for damages in favor of the surviving husband or wife or next of kin. So the next of kin of a dead person has a cause of action against a carrier for an injury to the body of such deceased person, caused by the negligent act of the carrier while transporting it for hire."

And in Burney v. Children's Hospital, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401, it appeared that a child died in a Boston hospital and an autopsy was performed upon the body without any authority from the parents. It was held that the father of the child, being its natural guardian, and after its death having a right to the possession of the body for burial, could maintain an action for damages against the hospital authorities for such unauthorized autopsy, and the court held that as "in the case at bar, there was no executor, and there could be none, as the deceased was a minor, the father, as the natural guardian of the child, was entitled to the possession of its body for burial. Being entitled to the possession of the body, for the purposes of burial, is not his right, against one who unlawfully interferes with it and mutilates it, as great as it would be if the body was buried in his lot, and was thence unlawfully removed? That an action may be maintained in the latter case we have already seen, and we are of opinion that it may be in the former."

Speaking to the same question in Bogert v. Indianapolis, 13 Ind. at page 138, the court said: "We lay down the proposition that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."

Whatever was formerly the law under Rev. Code, chap. 64, § 1, and subsecs. 5 and 6; Revisal, chap. 1, § 132, subsecs. 5 and 6

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railroad company for permitting her husband's body to become soaked and otherwise mutilated during its transportation engaged by her: "It certainly cannot be said by the defendant company that a corpse is sufficiently property for a railroad company to receive and accept pay for its transportation, but is not sufficiently property to authorize a recovery for a breach of duty arising therefrom, or to prevent any duty from arising under such circumstances. If it received this body to be transported for hire, it was bound to discharge the duties arising from so doing; and for a failure to do so would be liable to an action."

The brother of a decedent, when sued by a carrier for transportation of the decedent's body, was held entitled to recoup damages for injury to the body, although it appeared that the decedent left a mother and another brother. Thus, in Beam v. Cleveland, C. C. & St. L. R. Co. 97 Ill. App. 24, the defendant, when sued in assumpsit by the carrier for transportation by special train of the body of his dead brother, set up in recoupment that he had hired the carrier to take the body of his brother by ordinary train, and the carrier having made a mistake, it became necessary to order a special train; and that, owing to the delay, the body became decomposed, and was thus unfit for public view when it reached the destination. It was held that the claim for damages occasioned to the body was a proper subject-matter of recoupment by the defendant when he was sued by the carrier to recover for such transportation, and the court was also of the opinion that he, as the brother of the deceased, and the one who had undertaken to pay for such transportation, had such an interest in the dead body as entitled him to damages for an injury occasioned thereto by the negligent act of the carrier while transporting the same for hire.

The question of the contract may have entered into the decision in Miner v. Canadian P. R. Co. supra, "Parents of deceased—cases arising out of contracts."

In Cook v. Walley, 1 Colo. App. 163, 27 Pac. 950, the court referred to the question of the various rights of heirs or of the husband of a wife, living separate from her husband and children at the time of her death, to bring an action for damages for an unlawful dissection of her body against undertakers hired to prepare the body for burial by two of the children and heirs. The court was of opinion that it was the husband's duty to attend to the burial, but the case was decided on the ground that there was good reason for the autopsy.

While perhaps not strictly within the scope of this note, reference may be made to Dunn v. Smith, — Tex. Civ. App. —, 74 S. W. 576, where the mother, sisters, and brother of an intestate decedent contracted with an undertaker to deliver a coffin and robe which they had purchased of him at a pesthouse, where the decedent had died, and the defendant furnished no robe, but a small and poor coffin, which burst, and the re-

(Gillespie v. Foy, 40 N. C. [5 Ired. Eq.] 282); the Public Laws of 1911, chap. 172; Pell's Revisal (Supplement) § 132, p. 4,—the law has now been made clear, as that act provides that "If, in the lifetime of the father, any of his children shall die intestate without wife or children, then the father shall be entitled to all of the personal property of such deceased child."

This was an amendment to Revisal, § 132, subsec. 6. When the father is dead the former law is in force, and if there is no widow or children of the deceased child, the mother and brothers and sisters take equally as distributees, and if there is a widow, she and the mother take equally. Wells v. Wells, 156 N. C. 246, 72 S. E. 311 (on rehearing in 158 N. C. 330, 74 S. E. 114). But the latter question, where there is no father, does not arise in this case, and we only mention it incidentally and in passing. We are concerned, though, with the recent clear and explicit statement of the law in act of 1911, chap. 172, by which the father is made next of kin or nearest relative of his child, to the exclusion of the mother. He is the natural guardian of his child, as we have seen, and while there may have been formerly some doubt as to his status in the succession to his deceased child's personal estate, there can be none since the passage of that act, which applies to this case, as the death occurred in April, 1912, after the act took effect. There is therefore every reason why he should be preferred to the mother. When a contest arises between them as to the child's custody, and there is no personal disqualification of the father, he is given the preference. Harris v. Harris, 115 N. C. 587, 44 Am. St. Rep. 471, 20 S. E. 187; Newsome v. Bunch, 144 N. C. 15, 56 S. E. 509; Re Turner, 151 N. C. 474, 66 S. E. 431. He is primarily liable for the support, maintenance, and education of his child, as between himself and its mother. 29 Cyc. 1606. He is entitled to its services and earnings. Id. 1623; Williams v. Southern R. Co. 121 N. C. 512, 28 S. E. 367, 3 Am. Neg. Rep. 456, where Justice Clark (now Chief Justice) says: "For the services the son had rendered, compensation belonged to the father." And in 29 Cyc. at pages 1637 et seq., it is said: "A parent has, as a general rule, a right of action against a person whose wrongful act or omission has caused an injury to the child. As between the parents this right belongs primarily to the father; but, as a general rule, is given to the mother where, by reason of the father's death or otherwise, the right to the custody and services of the child has devolved upon her. The parent's

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mains had to be shoved or packed into the box. The plaintiffs were allowed to recover damages for the price of the articles bought, less the value of those furnished, for mental anguish, and exemplary damages; and decedent's half-brothers, not parties to the contract, were properly not parties to the action.

Miscellaneous.

An insurance company which has issued a policy of accident insurance containing a provision that it shall "have the right and opportunity to make an autopsy in case of death" has the right, where it is in doubt whether the insured died from accident or not, to make an examination of the vital parts, which is superior to any property rights in any member of the family of the assured, particularly as against the widow, claiming the custody of the organs as widow, and also as the beneficiary under certain policies upon the life of her husband, and also as against the child who is the beneficiary in the policy issued by the company issuing the accident policy. Painter v. United States Fidelity & G. Co. 123 Md. 301, 91 Atl. 158, where the court affirmed a judgment appointing a physician receiver of the organs in question, and directing him to make a full and complete chemical and pathological examination of such organs or remains of organs, or to make such partial examination as the complainant insurance company might require. The court said: L.R.A.1915B.

"The appellants made the contention, both in the demurrers and the answers, that the proposed examination would amount to a deprivation of their property without due process, within the meaning of the 14th Amendment to the Constitution of the United States, and also within the meaning of the like provision of the Constitution of Maryland. Some of the American courts have followed the old English rule that one cannot dispose of his body after death; but the great weight of authority in this country is that one can dispose of his body by will. See cases cited in 40 Cyc. 1050. The courts hold that the surviving husband or wife or next of kin have a quasi property right in the body in the absence of testamentary disposition. The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial. And courts of equity will protect those having this right from unreasonable disturbance."

In Doxtator v. Chicago & W. M. R. Co. 120 Mich. 596, 45 L.R.A. 535, 79 N. W. 922, 6 Am. Neg. Rep. 293, the case went for the defendant on the ground that it was not responsible for what had occurred, and therefore the court did not reach the question whether the widow of a man might recover because, when he was fatally injured, part of his legs, which were amputated during his lifetime, were cremated and not returned to her. B. B. B.

right to recover for an injury to the child rests upon the doctrine of compensation. It is generally stated that the basis of the right of action is the resulting loss of the services of the child; and, according to some authorities, this is the sole basis, so that if there be no actual loss of services, there can be no recovery by the parent; but other authorities base the right of action upon the right to services rather than the actual rendition of services. The more reasonable view is that the right of action is based, not only upon the right to services, but also upon the duty of care and maintenance; so that if the parent is, by the wrong of another in injuring the child, put to extra expense in fulfilling his duty, he is entitled to recover indemnity from the wrongdoer, without reference to any loss of services resulting from the injury" (citing King v. Southern R. Co. 126 Ga. 794, 8 L.R.A.(N.S.) 544, 55 S. E. 965; Louisville, N. A. & C. R. Co. v. Goodykoontz, 119 Ind. 111, 12 Am. St. Rep. 371, 21 N. E. 472; Citizens' Street R. Co. v. Willoeby, 15 Ind. App. 312, 43 N. E. 1058; Keller v. St. Louis, 152 Mo. 596, 47 L.R.A. 391, 54 S. W. 438, and other cases).

This does not include injuries personal to the child. 29 Cyc. 1653; Durkee v. Central P. R. Co. 56 Cal. 388, 38 Am. Rep. 59. There are many other primary rights and responsibilities of the father with respect to his child which could be enumerated, but those already mentioned will suffice to show the general trend of the law with regard to his priority of claim and interest, as against the mother. If he is entitled to the preferential right to sue in the cases we have recited, why not where the body of the child, with whose decent burial he is charged, has been mutilated or disfigured after death? "At common law it was the duty of the father to decently inter his child and defray necessary expenses thereof, if he possessed the means."

Would it not seem to follow logically and naturally, as the night the day, that if he must attend to its decent burial, he is entitled to recover for any indignity to or defacement of the body, by which its decent interment is prevented or rendered more difficult? We are unable to perceive why this is not so. It seems to be settled that the right to sue in a case of this kind must go to the next of kin in the order of their seniority of rank as fixed by the law, the father, in respect to a deceased child, being placed at the head of the class which may take in succession from the child, and there is no double headship, in which he shares this right with the mother. When he dies, the mother goes to the front, and if she be dead, then the next of kin, who are in equal degree of kinship, are advanced to this position. It is said in Iredell on Executors, pp. 559, 560: "The next of kin, referred to by the statute, are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration. These rules have been already considered, but it may be convenient to repeat in this place some of their results. When a child dies intestate, without wife or child, leaving a father, the latter is entitled, as the next of kin in the first degree, to the whole of the personal estate of the intestate, exclusive of all others. Formerly, if a child had died intestate, without a wife, child, or father, his mother was entitled, as the next kin in the first degree, to his whole personal estate; but now, by our statute, every brother and sister, and the representatives of them, shall have an equal share with her. The principle of this provision is, that otherwise the mother might marry and transfer all to another husband."

It may be well to note that the recent legislation of the Congress, known as the Federal employers' liability act, places the father in the forefront of those allowed to recover for the death of his son, caused by negligence of the employer, while the son was engaged in interstate commerce, where there is no surviving husband, widow, or children of the deceased child, as in this case. See Thornton, Federal Employers' Liability, § 79.

We have been referred by learned counsel of the plaintiff to Davis v. Seaboard Air Line R. Co. 136 N. C. 115, 1 Ann. Cas. 214, 48 S. E. 591, as establishing the principle in this state that the father and mother are jointly the beneficiaries, under the statute of distributions already cited, of any recovery for the death of the child caused by negligence or wrongful act, but this is not so, as an examination of that case will show. The chief justice there expressly says: "We refrain from passing upon the point because it is not raised in this record, but it may become pertinent in another trial."

Even that question is specially left open for future decision, when presented. But that is not the point here; and, even if that question had been decided, as counsel supposed it had been, it would not necessarily alter our conclusion, and certainly not since the law has been changed by the act of 1911, chap. 172. Nor does Laws of 1913, chap. 13, giving to a married woman her earnings, under a contract for her personal

services, and any damages for personal injury to her, or other tort sustained by her, have any bearing upon the case. The law of 1911 is explicit, beyond the possibility of cavil, that the father shall be considered as next of kin to his child. As the male plaintiff has expressly entered a disclaimer in this case of any damages for the mutilation, and the case therefore rests solely upon the right of the *feme* plaintiff, the judge's ruling was obviously correct. A cursory reading of Price v. Charlotte Electric R. Co. 160 N. C. 450, 76 S. E. 502, will show that it has no application to this case. There the husband and wife were conceded to have separate and distinct causes of action, and the husband, having consented that his damages for loss of her services might be included in the judgment in favor of his wife, was estopped thereby to set up thereafter any claim to his said damages. There could not be two recoveries for the loss of his wife's services, one by her, with his consent, and then one by him. Having given up his cause of action to her, he could not sue upon it himself. Here there is no prosecution of his cause of action, but solely a claim of the wife for damages supposed to be due directly to her.

Affirmed.

Clark, Ch. J., dissenting:

There is, strictly speaking, no property in a dead body, though its possession can be recovered. This is not an action to recover the possession of the body, but an action of tort for the mental anguish caused the mother by the wrongful mutilation of the body of her son.

The statute of distributions has no application. In Kyles v. Southern R. Co. 147 N. C. 394, 16 L.R.A.(N.S.) 405, 61 S. E. 278, it was held that the widow could recover punitive damages for mutilation of the dead body of her husband. This proves that an action for the tort is not required to be brought by the next of kin, for the widow is not the next of kin of her husband. This action is a tort to be sued for by the person who most naturally would have suffered mental anguish by reason of the wrongful mutilation and indignity inflicted on the body of the dead son. He was eighteen years old and the support of his mother. Her husband is an invalid, but was joined as a plaintiff as in Price v. Charlotte Electric R. Co. 160 N. C. 450, 76 S. E. 502. In that case, where the husband was joined in an action with his wife to recover damages for a personal injury to them both, arising from the same negligent act, and his counsel withdrew all claim for damages for him, and the action was successfully prosecuted to recover damages for the injuries inflicted on the wife, including personal and physical anguish, and loss of time, the court held that she could recover. This case is exactly like that, and the judgment in her favor could be recovered, even as the law formerly stood.

But in fact the position of the wife is rendered much stronger by the act which was immediately passed as soon as the next general assembly met (chapter 13, Laws 1913), which provides, among other things, "Any damages for personal injuries or other tort can be recovered by her suing alone." This is a tort pure and simple, and the wife is entitled to recover for it just as she has recovered in actions for failure to deliver a telegram whereby she, as well as her husband, has suffered mental anguish. Gerock v. Western U. Teleg. Co. 147 N. C. 7, 60 S. E. 637. This action is for mental anguish and damages suffered by her, and not by the estate of her son, who was eighteen years of age. If an action had been brought for his wrongful death, it should have been brought by the administrator.

The court granted a nonsuit upon the ground that the wife was not the "next of kin," but that the husband was. If so, he was also a party. The statement is incorrect as a matter of fact. It is true that chapter 172, Laws 1911, does amend the statute of distributions, by providing that the father shall receive "all the personal property of any of his children who shall die intestate, without wife or children," thereby giving him preference over the wife and to her total exclusion in his favor. Whatever may be said as to the justice or injustice of such provision, it does not enact an untrue statement of fact by saying that the father is nearer of kin to the child than the wife. That statute has no application to an action of this kind, which is a tort for the anguish suffered by the mother by reason of the mutilation of the body of the son whom she brought into the world and nourished. Great nature tells us that her suffering is something apart from and usually greater than that of her husband. It is for this wrong that she has sued, and not for a share in his estate. Indeed, he had none, being a boy eighteen years old, her sole support for her and her invalid husband, and, of course, the pride of her heart.

The plaintiff is entitled to recover as a matter of justice and of right under the legislation enacted for the benefit of married women in such cases under chapter 13, Laws 1913.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA
v.
S. M. POLLARD, Appt.

(— N. C. —, 83 S. E. 167.)

Homicide — self-defense — effect of willingness to fight.

The mere fact that one who shoots another who seems to be about to make a murderous assault upon him was willing to enter into a fight with decedent with deadly weapons does not destroy his right to rely on self-defense as justification for the killing, if he acted solely for the protection of his own life, and not to inflict harm upon his adversary.

(Clark, Ch. J., dissents.)

(October 14, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Pitt County convicting him of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. **Manning & Kitchin, Jarvis & Wooten, Harry Skinner, L. G. Cooper, F. G. James & Son, Moore & Long, Julius Brown,** and **N. W. Outlaw,** for appellant:

Defendant was entitled to rely on self-defense as justification for the killing, if he acted solely for the protection of his own life.

Wharton, Homicide, 3d ed. § 223; Wallace v. United States, 162 U. S. 467, 40 L. ed. 1039, 16 Sup. Ct. Rep. 859; State v. Mazon, 90 N. C. 676; State v. Blevins, 138 N. C. 668, 50 S. E. 763; State v. Barrett, 132 N. C. 1005, 43 S. E. 832; State v. Turpin, 77 N. C. 473, 24 Am. Rep. 455; State v. Gray, 162 N. C. 608, 45 L.R.A.(N.S.) 71, 77 S. E. 833; State v. Blackwell, 162 N. C. 672, 78 S. E. 316; State v. Vann, 162 N. C. 535, 77 S. E. 295; State v. Johnson, 166 N. C. 392, 81 S. E. 941.

Messrs. **T. W. Bickett, Attorney General,** and **T. H. Calvert, Assistant Attorney General,** for the State:

If defendant was willing to enter into a fight with the deceased with a deadly weapon, and immediately drew his pistol and shot and killed the deceased, he would be guilty of manslaughter.

State v. Robertson, 166 N. C. 356, 81 S. E. 689; State v. Ray, 166 N. C. 420, 81 S. E. 1087.

Walker, J., delivered the opinion of the court:

The prisoner was indicted in the court below for the murder of T. H. Smith, and convicted of manslaughter. Sentence having been pronounced, he appealed to this court. The deceased was chief of police at Farmville, North Carolina, and was shot by the prisoner at the latter's store in Farmville, on January 17, 1914, it being Saturday night. There was evidence tending to show that there had been some ill feeling between the two men, on account of the fact that the deceased had been watching the prisoner's place of business, and had threatened to prosecute him for gambling on his premises and selling liquor, and that deceased was very angry with and had threatened to kill the prisoner. They had an altercation the Saturday night of the week before the homicide was committed. It was shown that the deceased was a man of violent temper and dangerous, to the knowledge of the prisoner. On the night of the homicide, the deceased entered the prisoner's store and was ordered out, prisoner saying to him, "I have told you to keep out of my place of business, and I wish you would get out." In order to better understand the occurrences at the time of the shooting, it is well to give a brief description of the drug store. The

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Note. — The fault which the majority of the court in STATE v. POLLARD found in the instruction seems to have been in its exclusion, whether so intended by the trial court or not, of the possible hypothesis that the defendant, though willing to enter into a fight, did not in fact do so, but merely defended himself, acting lawfully upon the reasonable appearance of serious danger to himself. If the instruction was calculated to give the jury the impression that defendant's mental attitude, which did not affect his actual conduct, would deprive him of the right of self-defense, it was erroneous. As a matter of evidence, the fact that defendant was willing or even anxious to have an opportunity to shoot the deceased would doubtless, in some cases, weigh strongly against the evidence offered in his behalf to show that he was not the aggressor, and that it was not a case of mutual combat voluntarily and willingly entered into. But if, in spite of the fact, the jury are convinced that the defendant was not in fact the aggressor, and that he acted upon the reasonable appearance of danger which he had not invited by his own conduct, it seems clear that his mere mental attitude should not affect his right of self-defense.

Gratification at the result of the exercise of a legal right is not the equivalent of the gratification of a private grudge under the guise of the exercise of a legal right. In the view which the majority of the court took of the instruction, it could not, of course, be justified under the doctrine as to mutual combat, which forms the subject of the note to Ex parte Colby, 45 L.R.A. (N.S.) 646. G. H. P.

store stands on the corner of the street, and the entrance to the store is at the corner. On the left as one enters there is a row of show cases; then in front of the door near the wall there is another row of show cases, on one of which stands the soda fountain and on the other stands the cigar case, with a space of about 2 feet between the two; then near the wall parallel to the first row of show cases is the third row of show cases. Smith entered the store at the door and walked first where some young men were punching a punch board near the soda fountain; one of them asked him to take a punch, and he said, "No, I am not taking any chances to-night," and then turned and walked in the direction of the third row of show cases. When Smith entered the store, defendant was standing behind his counter near the soda fountain, where the young men were punching; about this instant some customer called for a package of cigarettes, and defendant walked down behind the counter to the cigar case to wait on the customer. While defendant was standing behind the cigar case Smith walked from the door up to within 6 or 7 feet of where defendant was standing. Defendant said to Smith, "I have told you to keep out of my place of business, and I wish you would get out." Smith replied, "I am not going anywhere, you damn son of a bitch," and then threw his right hand to his right hip, putting his left foot a little forward. This position placed Smith partly facing and partly sidewise to the defendant. When defendant saw Smith throw his right hand to his hip pocket, he fired the fatal shot, believing, as he says, that his own life was in danger. When defendant fired, Smith was near enough to him to reach out his left hand and catch hold of the pistol in defendant's hand. A struggle then ensued for the possession of the pistol, and while the struggle was going on, the second shot was fired, which went in the floor behind the counter, defendant remaining all the time behind the same. When Smith entered the store, he had his hands in his pants pocket, so nearly all the witnesses say, but he had his right hand out of his breeches pocket just before the shooting took place, according to those who were looking at him at the time. This was the defendant's contention, as stated in his brief. The prisoner introduced testimony to show that he acted strictly in self-defense and for the protection of himself against a threatened assault by Smith, which would have endangered his life. Smith had two pistols; one in his right overcoat pocket, and the other in his left hip pocket. As he was being taken from the store after the shooting, he fired at the prisoner with one of these pistols, but did not hit him. The prisoner contended, and offered proof to show, that just before he fired the fatal shot Smith had placed himself in a hostile and menacing attitude, which at once inspired him with the fear or apprehension that he was about to attack him with one of his pistols, and for this reason he shot him, knowing his violent character, and that he had threatened to kill the prisoner. There was a vast deal of evidence bearing more or less upon the pivotal question whether the prisoner fired in self-defense, or because of his animosity toward Smith, or whether he entered into the altercation willingly. The state contended that the pistol was fired by the prisoner without any legal provocation, though the solicitor announced that he would not prosecute him for murder in the first degree; and that the prisoner was, at least, guilty of manslaughter, as he entered into the fight willingly.

This brings us to an instruction of the court, which we think was erroneous and entitles the prisoner to a new trial. It is this: "If you should find from the evidence that the defendant, Pollard, saw the deceased, Smith, when he came in the store, and saw that his face was red, and that he appeared to be mad, and that he, defendant, then walked from the position he occupied to the cigar case to wait upon a customer, and that the deceased saw the defendant there and approached him and came in about 6 or 7 feet from him, and the defendant told deceased to get out, and the deceased replied, 'I am not going anywhere, you damn son of a bitch,' and turned and carried his right hand to his hip pocket, and the defendant believed the deceased was about to draw his pistol for the purpose of assaulting the defendant with it, and that the defendant was willing to enter into a fight with the deceased with deadly weapons, and immediately drew his pistol and shot and killed the deceased, defendant would be guilty of manslaughter; and this would be so if the manner and appearance of deceased were such as to cause defendant to believe that Smith was armed with deadly weapons, and that he was about to harm him with them."

It will be seen, at a glance, that the learned presiding judge has blended the doctrine of self-defense and that of manslaughter in one instruction, without proper discrimination between the two, and he used an expression which was manifestly calculated, though of course not intended, to mislead the jury as to the true nature of manslaughter, and to produce confusion in their minds. Every man who is induced to act in his self-defense by reason of a threatened and deadly attack upon himself, in a

sense, and a very genuine sense, is willing to enter into the fight, for every man may fairly be supposed to be willing to defend his life and limb against one who threatens either by a demonstration of force. What his Honor intended to say, we assume, was this: That if the prisoner justifiably fought upon a principle of self-defense, they should acquit, for he had said this before in his charge; but if he did not, and entered into the fight willingly, but with legal provocation, he would be guilty of manslaughter. This he did not say. The very same kind of instruction, now under consideration, was given by the court in State v. Baldwin, 155 N. C. 494, 71 S. E. 212, Ann. Cas. 1912C, 479, and met then with our condemnation. In that case, Justice Hoke said, with reference to it:

The judge charged: "'If you should find that he fought willingly at any time up to the fatal moment, it would be your duty to convict the defendant of manslaughter, there being no evidence that he retreated or otherwise showed that he abandoned the fight; but if you should find that he entered into the combat unwillingly, then you should proceed to consider his plea of self-defense.' In Garland's Case, 138 N. C. 675–678, 50 S. E. 853, the court said: 'It is the law of this state that where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life' (citing Fost. C. L. p. 276). But authority does not justify the position as contained in the excerpt from his Honor's charge, 'That if he fought willingly at any time up to the fatal moment, it would be your duty to convict of manslaughter.' This would be to inculpate a man who fought willingly, but rightfully, and in his necessary self-defense. True, the concluding portion of the statement would seem to qualify the position to some extent, but not sufficiently so to correct it, and in a case of this importance, and as the matter goes back for another hearing, we have considered it best to advert to the error."

If he had fought willingly, and with legal provocation, which was not sufficient, though, to acquit or to reduce his assault to self-defense, he would still be guilty of manslaughter. If the homicide is neither murder in the first nor second degree, and yet is not excusable in law as having been done in the slayer's self-defense, it follows that it must be manslaughter. The judge may have had in mind the doctrine as stated in State v. Quick, 150 N. C. at page 824, 64 S. E. 170, where it is said: "There is evidence tending to prove that the quarrel was a 'drunken brawl,' started suddenly by an altercation over some gin; that the deceased whipped out his pistol and shot at defendant about the same time, if not a little sooner, than defendant shot at him; that the parties fought willingly, suddenly, and upon equal terms. This brings the case within those precedents which hold that if two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter. State v. Massage, 65 N. C. 480; State v. Hildreth, 31 N. C. (9 Ired. L.) 429, 51 Am. Dec. 364; State v. Brittain, 89 N. C. 481; State v. Ellick, 60 N. C. (2 Winst. L.) 56, 86 Am. Dec. 442. Killing, the result of passion produced by fight, is manslaughter. State v. Miller, 112 N. C. 878, 17 S. E. 167; State v. Crane, 95 N. C. 619. It is further held that if a person upon whom an assault is made with violence resent it immediately by killing the aggressor, and act therein in heat of blood, and not exclusively in his own defense, it is manslaughter. State v. Tackett, 8 N. C. (1 Hawks) 210; State v. Roberts, 8 N. C. (1 Hawks) 350, 9 Am. Dec. 643; State v. Smith, 77 N. C. 488; State v. Barnwell, 80 N. C. 466."

But that does not justify the charge given in this case. In order to be guilty at all he must have fought willingly, but wrongfully. If he fought willingly, but rightfully, that is, exclusively in his own defense, no excessive force being employed, he should be acquitted. But he is entitled to have the jury judge his conduct by circumstances as they reasonably appeared to him at the time of the homicide. It is the reasonable apprehension of danger by him, to be found by the jury, that excuses his act, and he may act upon appearances. We recently stated the principle in State v. Blackwell, 162 N. C. at page 683, 78 N. E. 320, citing State v. Barrett, 132 N. C. 1005, 43 S. E. 832, as follows: "'The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon; but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and take his life, or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation, and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was misled; provided, always, as we have said, the jury find that

his apprehension was a reasonable one, and that he acted with ordinary firmness.' The prisoner must not only have thought that he was in danger of his life or of receiving great bodily harm, but his apprehension must be based on reasonable grounds, to be found by the jury in the manner we have stated, and not by the prisoner."

Also citing State v. Cox, 153 N. C. 638, 69 S. E. 419; State v. Kimbrell, 151 N. C. 702, 66 S. E. 208, 614; State v. Dixon, 75 N. C. 275; and State v. Nash, 88 N. C. 621. It was also well stated by Justice Allen, very recently in State v. Johnson, 166 N. C. 392, 81 S. E. 941, thus: "These authorities (and many others to the same effect could be cited) establish the following propositions: (1) That one may kill in his defense . . . to prevent death or great bodily harm; (2) that he may kill when not necessary, if he believes it to be so, and has a reasonable ground for the belief; (3) that the reasonableness of the belief must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing."

And formerly in State v. Gray, 162 N. C. 613, 45 L.R.A.(N.S.) 71, 77 S. E. 834, by the same justice: "One may kill when necessary in defense of himself, his family, or his home, and he has the same right when not actually necessary, if he believes it to be so, and has a reasonable ground for the belief."

See State v. Vann, 162 N. C. 535, 77 S. E. 295; State v. Robertson, 166 N. C. 356, 81 S. E. 689; State v. Ray, 166 N. C. 420, 81 S. E. 1087. This benignant principle of the law was denied to the prisoner by the instruction of the court which we have quoted, because, however willingly a man may fight, if he is in the right and keeps within the legitimate bounds of self-defense, the law will protect him. It is only when, under the guise of self-defense, he is acting from some ulterior motive of vengeance or malice, and not strictly in defense of his person, that he will be condemned. The very question was presented in State v. Garland, 138 N. C. 678, 50 S. E. 854, where Justice Hoke said: "Where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life.' Fost. C. L. p. 276."

It will be observed that the learned judge there states that the prisoner must unlawfully and wilfully enter a mutual combat with his adversary, and this explains what is said in State v. Exum, 138 N. C. 618, 619, 50 S. E. 283, citing State v. Kennedy, 91 N. C. 572, and State v. Brittain, 89 N. C. 481. But in this case there was ample evidence tending to show that the prisoner did not commit any unlawful act, although he may willingly have stood his ground and defended himself against what he had reason to believe was a murderous assault upon him. The jury may have found from the evidence that the prisoner had been informed of the deadly threat made against him by the deceased; that he had also heard of his violent temper and dangerous tendencies, and if some of the evidence be true, and the jury must pass upon its credibility, that, by his threatening attitude toward the prisoner when he approached him in the store, he had determined to execute his threats then and there, and that such was the impression reasonably made upon the prisoner by his conduct. If such were the case, as has been formerly and justly said by this court, the prisoner could not be expected to confront a lion with the same composure as he would a lamb, a pronounced enemy and belligerent, as he would a friend or a man of peaceful intentions. He must not only be willing to defend himself against attack, but he must also be in the wrong to deprive him of the favorable consideration of the law.

If the instruction of the court be correct, it would be difficult, if not impossible, to make out a case of self-defense, because every man who is in the right when defending his person against a threatened and deadly assault would be convicted of manslaughter, if the jury should find that he acted willingly in protecting himself against the attack. We would then have the converse of the *dictum* of Foster and Hale, for instead of every homicide being turned into self-defense, every case of genuine self-defense would be turned into murder or manslaughter. It is possible for an assailant to be in the right, if he has not himself created the necessity for the assault, or brought the trouble upon himself by some unlawful act. In this instance, the jury may have found that the situation demanded prompt action by the prisoner in order to save himself from a menaced attack of a man known by him to be his enemy, and who had actually declared

vengeance against him, who was doubly armed for any eventuality, and who had said, almost at the fatal moment, that he would take no chances that evening. All these questions were for the jury upon the the evidence. They may have rejected this testimony and have found, on the contrary, that the prisoner did not assault the deceased honestly and with good faith in his self-defense, but unlawfully and with a bad motive, convicting him of murder or manslaughter, as upon the evidence, they might find the facts to be; but the prisoner was entitled to a legally proper consideration of the testimony for and against him, and was handicapped by an erroneous view of the law, by which his willingness to defend himself was made the test of his criminality.

In a very true sense every man acts willingly when defending himself,—that is, he exercises his volition naturally and irresistibly in favor of his own life,—although, in another sense, he may be compelled to act in order to save his life, or to prevent grievous bodily harm to himself. He may be said not to act by choice, and, still being fiercely assaulted, he may be willing, by natural impulse, to resist it even to the taking of his assailant's life. It is otherwise if he engages in a fight willingly, and not merely in self-defense, for this is also unlawful, being an affray. He begins in the wrong and ends, therefore, in the toils of the law. Being then in fault, the principle, as stated by Foster and Hale, applies: "He, therefore, who in case of a mutual conflict would excuse himself upon the foot of self-defense must show that before a mortal stroke given he had declined any farther combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances, he will incur the penalties of manslaughter." Fost. C. L. pp. 276, 277; State v. Garland, 138 N. C. 675, 50 S. E. 853.

Justice Ashe, quoting from Hale, stated the rule strongly and clearly in State v. Brittain, 89 N. C. at page 500, as follows: "If A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannot retreat to the wall or other non ultra without danger of his life, and then kills B, this shall not be interpreted to be *se defendendo*, but to be murder or simple homicide, according to the circumstances of the case; for otherwise we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo*. The party assaulted indeed shall, by the favorable interpretation of the law, have the advantage of this necessity to be interpreted as a flight, to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by the way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter."

But these are cases where the prisoner was, at first, in the wrong, or by his own conduct provoked the difficulty. His act was wrongful and unlawful in the beginning and committed willingly, and he will be adjudged guilty of murder or manslaughter, according as the jury may find the facts to be, unless he has, in good faith, abandoned the conflict and retreated to the wall, in which case his plea of self-defense may be restored to him. It was said in State v. Baldwin, 152 N. C. 822, 68 S. E. 148: "Our decisions are also to the effect that, though there may have been previous ill feeling between the parties, yet if they afterwards meet accidentally, and a fight ensues, in which one of them is killed, it shall not be intended that they were moved by the old grudge, 'unless it so appear from the circumstances of the affair.' This was directly held in the case of State v. Hill, 20 N. C. (4 Dev. & B. L.) 629, 34 Am. Dec. 396, where there had previously been a fight between the parties; the ruling being expressed as follows: 'Where two persons have formerly fought on malice and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended,' etc. The principle was affirmed and again applied in State v. Johnson, 47 N. C. (2 Jones, L.) 247, 64 Am. Dec. 582, and in the opinion of this case is put by way of illustration: 'But where A bears malice against B, and they meet by accident, and upon a quarrel B assaults A with a grubbing hoe, and thereupon A shoots B with a pistol, the rule of referring the motive to the previous malice will not apply.' And this is in accord with the doctrine generally prevailing."

But it is added that this does not conflict with the rule as stated in many cases, notably in State v. Miller, 112 N. C. 885, 17 S. E. 169, by Justice Avery, who there said: "It is true that when the killing with a deadly weapon is proved and admitted, the burden is shifted upon the prisoner, and he must satisfy the jury, if he can do so, from the whole of the testimony, as well that offered for the state as for the defense, that matter relied on to show mitigation or excuse is true. State v. Vann, 82 N. C.

631; State v. Willis, 63 N. C. 26; State v. Brittain, 89 N. C. 481. But when it appears to the judge that in no aspect of the testimony, and under no inference that can be fairly drawn from it, is the prisoner guilty of murder, it is his duty, certainly when requested to do so, to instruct the jury that they must not return a verdict for any higher offense than manslaughter, just as it would be his duty to instruct, in a proper case, that no sufficient evidence had been offered to either excuse or mitigate the slaying with a deadly weapon. Though the law may raise a presumption from a given state of facts, nothing more appearing, it is nevertheless the province of the court, when all of the facts are developed and known, to tell the jury whether in every aspect of the testimony the presumption is rebutted. State v. Roten, 86 N. C. 701; Doggett v. Richmond & D. R. Co. 81 N. C. 459; Ballinger v. Cureton, 104 N. C. 474, 10 S. E. 664."

In the further development of this case, it may be that the principles above stated may have close application to the facts as disclosed by the testimony. They are now mentioned as showing that the law is more lenient than would be indicated by the instruction of the court to which exception was taken.

It is just as unlawful to kill a man who gambles or illegally sells liquor as it is one who is innocent of these offenses; and even if the prisoner harbored malice towards the deceased because of his real or imagined persecutions as a public officer, he yet had the right to defend himself against a dangerous assault by him. This court said in State v. Ta-cha-na-tah, 64 N. C. 614: "The question whether, where an antecedent grudge exists, and the parties between whom it exists meet and an affray ensues, and one is killed, the killing shall necessarily, or by a presumption of law, be referred to the antecedent grudge, so as to make the killing murder, or whether the existence of malice in giving the mortal blow shall be matter of inference for the court or jury, from all the circumstances, of which the antecedent grudge is one, was considered with great care and ability in Johnson's Case, supra, and we think the rule there announced cannot be shaken. The latter view was there asserted. We think the instructions of his Honor differ widely from that view, and they seem to be founded on what is said in that case to be a mistaken view of Johnson's Case, 23 N. C. (1 Ired. L.) 354, 35 Am. Dec. 742. His Honor refused the instruction asked for, that if the appellant fought only in self-defense and to save his own life, the homicide was not malicious, although a previous ill will were shown, and told the jury that if there was malice (by which we understand malice implied in law from the antecedent quarrel), the appellant was guilty of murder. In this we think there was error. It is true the jury convicted the appellant only of manslaughter, but the instructions were erroneous, and we cannot see that they did not operate prejudicially to the appellant."

This was approved in State v. Brittain, with the comment that "this court held the instructions to be erroneous, because they could not see 'that they did not operate prejudicially to the appellant.'"

The question at last is, Did the prisoner kill in defense of himself, because he reasonably believed that he was about to suffer death or great bodily harm? If he did, an acquittal should follow, although he did so willingly, for in such a case he has committed no unlawful act. If the prisoner fired his pistol and killed deceased with malice, and not in self-defense, he is guilty of murder in the second degree, unless he did it deliberately and with premeditation, when it would be murder in the first degree, for which the state does not contend: if he did so without malice and upon sufficient legal provocation and in the sudden heat of blood, it is manslaughter, and the same result would follow in law, if he used excessive force; but if he killed either because it was necessary to do so, or because he had good ground to believe it necessary in his defense, acting upon the circumstances as they reasonably appeared to him at the time, and with ordinary firmness, he is not guilty, and the jury should be instructed so to find. He was not bound to wait for his adversary to execute his threat or to put himself in condition to do so, provided he had reason to believe that his intention was to slay him with his pistol, or to do him great bodily harm. The jury must pass upon the reasonableness of his belief, giving him the benefit of the rule we have already stated that they must judge his case by the circumstances as they appeared to him when he fired his pistol and inflicted the mortal wound, and not by the real situation as it may be found to have been. State v. Nash, 88 N. C. 621; State v. Barrett, 132 N. C. 1005, 43 S. E. 832, and the other cases cited on this point.

The evidence in the case is voluminous Some of it is incompetent, but as it may not be offered again, we need not consider it. There is other evidence which is competent when confined to its proper limits, but so calculated to prejudice the prisoner by an improper use of it by the jury that they should be carefully instructed as to its legitimate bearing on the case, and strictly cautioned not to be influenced by it except

in so far as it is relevant to the issue. The prisoner is entitled to this treatment of the evidence to prevent any wrong and prejudicial consideration of it.

The judgment will be set aside and a new trial awarded, because of the error indicated in this opinion.

Clark, Ch. J., dissenting:

The deceased was chief of police of Farmville and was shot and killed by the prisoner on the night of January 17, 1914, in the store of the prisoner. The testimony of the witnesses for the state is that a few minutes before he was shot the deceased entered the prisoner's store and walked down towards the middle. The prisoner kept his eyes on him, and when he was within 5 or 6 feet ordered the deceased to get out and shot him. Several witnesses testified that the prisoner ordered the deceased to get out and shot at the same time. Others said it was almost immediately after. There was evidence that the two men had had a quarrel in a barber shop, and that several times during the week the prisoner had made statements which amounted to threats against deceased. There was also evidence tending to show motive, that the prisoner kept a blind tiger and a gambling room and the prisoner had said that if the deceased came there "searching or rambling over his business" he would ask him out, intimating violence if he did not go. There was also evidence that the prisoner during the same week, and just before the homicide, had bought a pistol. The deceased under the solemnity of approaching death made dying declarations, in which he stated that the prisoner ordered him out and shot him instantly without giving him any opportunity to defend himself or giving him any chance. Immediately after the shooting the two men grappled, and there is evidence that the only pistol in sight was the one the prisoner had used. As the deceased was being taken out of the store, he pulled out one of his pistols, which he was entitled to carry as chief of police, and attempted to shoot the prisoner. Taking the evidence of the prisoner himself (who testified under the most powerful inducement of saving his own life), he told the deceased to get out, and the deceased, replying with an insulting expression, carried his hand to his pocket, and thereupon the prisoner shot him. It is needless to go into the long drawn out evidence and the 129 exceptions that are made. The above is the kernel of the whole case. From the record it appears that the prisoner was defended by eleven able counsel, among them many of state-wide reputation. The trial was presided over by one of the ablest and most impartial judges in this state; the prisoner had the benefit of twelve peremptory challenges against only four allowed to the state, and was convicted by twelve jurors, each of whom answered that he was satisfied beyond a reasonable doubt of the prisoner's guilt. With these overwhelming advantages in favor of the prisoner, the jury found him guilty of manslaughter. It should require more than a mere technical error to cause us to grant a new trial. The sentence of the court to five years in the state's prison is not a severe one in view of the evidence.

The point principally relied upon by the defense is the charge of the court that if "the defendant believed the deceased was about to draw his pistol for the purpose of assaulting the defendant with it, and the defendant was willing to enter into a fight with the deceased with a deadly weapon, and immediately drew his pistol and shot and killed the deceased, the defendant would be guilty of manslaughter." It is insisted that the judge should have said, "If the prisoner entered into the fight unlawfully and willingly." But this element appears when the jury was required to find that the prisoner was willing to enter into a fight with a deadly weapon, and immediately drew his pistol. This amply supplies the word "unlawfully," for it is not controverted that the prisoner shot before the deceased had drawn any weapon.

The advantages in favor of a prisoner on trial for homicide are so overwhelming that a new trial should not be granted in such cases (nor indeed in any case, civil or criminal), unless it can be plainly seen that if there was error, it was such error as reasonably caused the result. This trial has been long drawn out and the prisoner's interests were amply guarded at every point. He has no cause to complain of the verdict or of the punishment. Under the common-law procedure before amended by statute, the prisoner would not have been allowed the benefit of counsel nor of summoning witnesses nor of cross-examining the state's witnesses. The humanity of the judges in such cases properly allowed the prisoner the benefit of every possible error or technicality. But since the law itself has humanely removed these grievances and put the prisoner not only on a level with the state in these respects, but still gives him enormous advantage, not only requiring a unanimous verdict in which each and every juror must find him guilty beyond a reasonable doubt, but of a great disparity in the number of challenges to the jury, and that errors committed against the state cannot be reviewed on appeal, errors which cannot be seen to have reasonably influenced the result ought not longer to be taken as

ground for a new trial. Indeed the better thought of the age is that unless the verdict is clearly contrary to justice, no verdict in any case should be reversed on appeal.

I feel that it is useless to discuss the case more fully. A perusal of the entire testimony would probably satisfy any disinterested person that whatever errors had been assigned or discussed, justice would not suffer, and the public interests for the preservation of human life would be served, by the refusal to grant a new trial in this case.

The object of a trial of one who has committed homicide is not vengeance, but the protection of the lives of others by the punishment of those who do murder. That this end is not attained can be seen from the very large number of homicides annually committed in this state as reported by the attorney general under the statute, and the very rare cases of conviction. There must be a defect in the administration of justice, when this is the case.

In the present case, if the dying declarations of the deceased and the testimony of the state's witnesses are to be believed, the prisoner ordered the deceased out of his store and immediately shot him without any provocation, and there is evidence which, if believed, tends to show that this was done for fear that the officer would expose him as a lawbreaker. If the prisoner's own evidence is to be believed, rejecting that for the state, the prisoner ordered the deceased out of his store, and upon the deceased replying with an insult and moving his hand towards his pocket, the prisoner shot at him. If the jury had believed the first state of facts, the prisoner should have been convicted of murder. If they believed the last, they would have acquitted him. There remained the third theory that the prisoner ordered the deceased out of his store, as he said, and upon receiving an insulting reply, reached for his pistol, for it was not contradicted that he alone had his pistol out when he fired, and the judge properly told the jury in this connection that if the prisoner fought willingly with a deadly weapon, he was guilty of manslaughter. By fighting "willingly" the judge evidently meant if he used his pistol without necessity, for he charged correctly upon the phase of self-defense. If, when the prisoner ordered the deceased out and the deceased replied (if he did) with an insulting expression, the prisoner had struck with his fist, the resulting fight would have been an affray. So if, instead of his fist, the prisoner used a pistol and the deceased had done the same, the death of either would have been manslaughter. Certainly it is none the less so when the prisoner alone used his weapon.

In State v. Exum, 138 N. C. 618, 50 S. E. 283, Hoke, J., speaking for a unanimous court, approved the following charge: "If you should find from the evidence that the prisoner willingly engaged in a fight with the deceased, and that the deceased threw his hand to his hip pocket and advanced upon the prisoner in a threatening manner, and that the prisoner, being willing to fight, seized a pistol and shot the deceased, and the deceased died from the wound (then inflicted by the prisoner), the prisoner would be guilty of manslaughter, provided that you should find from the evidence that the appearance and manner of the deceased were such as to cause the prisoner to believe that the deceased was armed with a deadly weapon, and that the prisoner did believe he was armed with a deadly weapon and was about to harm him with it,"—this court adding: "The charge is supported by abundant authority. State v. Kennedy, 91 N. C. 572; State v. Brittain, 89 N. C. 481."

This case has been cited frequently since as authority. See citations in the Annotated edition. It will be seen at once that, if this charge was warranted in the Exum Case, and was supported by "abundant authority," as the court said, and as has been repeatedly approved since, certainly the case is very much stronger against the prisoner here on the evidence of this case, even taking his own statement, and there was no error in the charge of Judge Daniels.

On a thorough perusal of the entire evidence I think the ends of justice require that a new trial should not be granted. In a long trial of this kind with numerous able counsel, if the result on appeal is to depend upon the judge running the gauntlet of every conceivable exception, as in this case, it is the judge, and not the prisoner, who is on trial. It is almost impossible under such circumstances, that some technical flaw may not be found. It must be remembered that if the judge commits an error against the prisoner it cannot be reviewed.

OHIO SUPREME COURT.

PETERSBURG FIRE BRICK & TILE COMPANY, Plff. in Err.,
v.
AMERICAN CLAY MACHINERY COMPANY.

(89 Ohio St. 365, 106 N. E. 33.)

Sale — several articles — divisibility

1. A written contract for the sale of

Headnotes by DONAHUE, J.

several articles of personal property for a sum in gross is indivisible except by subsequent agreement of the parties, and the seller cannot recover the contract price or any part thereof unless he substantially performs, or tenders performance of, all the terms of the contract on his part to be performed.

Same — partial delivery — performance.

2. Under such a contract the delivery of a part of the personal property sold, equal in value to about one third of the total contract price, is not a substantial performance on the part of the seller.

Same — additional conditions.

3. Where a contract for the sale of personal property specifically provides for the manner and method of delivery, the seller has no right or authority to impose other or further conditions precedent to delivery than those named in the contract.

Same — delivery to carrier — effect.

4. Delivery of personal property to a common carrier, the bill of lading being taken in the name of the seller, and forwarded to a bank in a city other than the purchaser's place of business, with the demand upon the purchaser that he execute and deliver to this bank, for the seller, notes covering the entire purchase price, before the bill of lading will be delivered to him, does not constitute a delivery or a sufficient tender of delivery under a contract of sale of personal property which provides for delivery f. o. b. cars at shipping point for shipment to the purchaser, and which further provides for the payment of one fourth of the purchase price within thirty days after the arrival of the property on the cars at its destination, the residue thereof to be paid in four, eight, and twelve months, respectively, deferred payments to be evidenced by notes of even date with the bill of lading.

(February 10, 1914.)

ERROR to the Circuit Court for Lawrence County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover an amount alleged to be due and unpaid for property sold by plaintiff to defendant. Reversed in part.

Statement by **Donahue, J.**:

On the 8th day of March, 1906, the Petersburg Fire Brick & Tile Company accepted in writing a written proposition of the American Clay Machinery Company to furnish one two-mold dry-press brick machine, one 8-foot dry pan, and one agitating clay feeder, of certain styles and numbers as shown by the catalogue of the machinery company. This contract was approved on the 10th day of March, 1906, by the secretary and manager of the American Clay Machinery Company.

On the 8th day of May, 1906, the dry pan mentioned in the contract was shipped to Coal Grove, Ohio. The bill of lading, being in the name of the machinery company, was transferred by it to the brick company, by indorsement thereon, and forwarded to the brick company by mail. The brick company received this dry pan, put it in place in its factory, and continued to use same.

On the 28th day of July, 1906, the machinery company shipped to its own order to Coal Grove, Ohio, the dry-press brick machine and agitating clay feeder described in the contract, forwarding the bill of lad-

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Note. — Retaining control of bill of lading to insure payment as affecting sufficiency of delivery to carrier as compliance with provision requiring delivery at place of shipment.

On the general question of the passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee, see note to Ramsey & G. Mfg. Co. v. Kelsea, 22 L.R.A. 415.

And on the narrower question of the passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee when shipped with a draft attached to the bill of lading, see notes to Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. 2 L.R.A.(N.S.) 79, and Hamilton v. Joseph Schlitz Brewing Co. 2 L.R.A.(N.S.) 1078.

PETERSBURG FIRE BRICK & TILE CO. v. AMERICAN CLAY MACHINERY CO. seems to be the only case in which the specific question has arisen whether a provision in the contract requiring delivery at the place of shipment is complied with where the vendor retains control of the bill of lading to insure payment of the purchase price.

In Gray v. Gannon, 6 Thomp. & C. 245, however, it is held that, where there is no explicit stipulation in the contract to the effect that payment shall be made only upon literal performance thereof, merely a substantial performance of a condition requiring delivery at the point of shipment is necessary; and that the act of the vendor in naming himself as shipper in the bill of lading, while not a literal performance of the contract, is sufficient. In this case, however, the purchaser was named as consignee in the bill of lading, and it does not appear that the vendor did any further act which amounted to retention of control of the bill of lading.

See also the note on the passing of title by delivery f. o. b., appended to Dentzel v. Island Park Asso. 3 L.R.A.(N.S.) 54, which is supplemental to note in 62 L.R.A. 802.

E. L. D.

ing with four unsigned promissory notes covering the entire purchase price of all the machinery to the First National Bank of Ironton, Ohio. That bank was instructed, upon the execution and delivery of these notes by the brick company, to turn over to that company the bill of lading covering this shipment. The brick company refused to accept the shipment or to execute the notes, and thereupon the dry-press brick machine and the agitating clay feeder were returned to the machinery company. The dry pan still remained in the possession and use of the brick company.

On the 29th day of November, 1909, the machinery company filed its petition in the common pleas court of Lawrence county, Ohio, seeking to recover the value of the dry pan. The pleadings in the case are voluminous, consisting of petition, answer, and cross petition, reply to answer and answer to cross petition, reply to answer to the cross petition, amendment to petition, answer to petition and amendment thereto and cross petition, answer to cross petition and reply, and reply to the answer to the cross petition.

The plaintiff pleads a contract and full performance on its part, and an averment that the defendant failed, neglected, and refused to comply with the terms of the contract, and refused to accept the dry-press machine and the agitating clay feeder, and that at the request of the defendant it took back these two pieces of machinery and credited it with $1,600 on the contract price. The defendant denies that plaintiff complied with the contract on its behalf, and avers that plaintiff failed to deliver the goods within the time specified in the contract; denies that plaintiff ever did deliver to it the press-brick machine or agitating clay feeder; and denies that plaintiff took same back at the request of the defendant, or that it credited the contract price with $1,600, at the request of the defendant. By cross petition defendant asks $10,237 damages for breach of contract by the plaintiff in failing to ship this machinery within the time stipulated in the contract. In answer to this claim for damages, made by the defendant in its cross petition, the plaintiff pleads a waiver on the part of defendant as to the time of shipment. It also recites certain other provisions of the contract with reference to delays that might be occasioned by specific causes named therein, and avers that these causes did occasion the delay in shipment. It also pleads the provisions of the contract in reference to exemption from liability on the part of plaintiff for failure to ship within the time specified. The defendant denies any waiver of the terms of the contract on its part as to the time in which this machinery was to be shipped or as to damages resulting from failure to ship the same. It also avers that the dry pan is of no value to it without the other machinery, and not worth to exceed $700 in any event; that the contract was an entirety, and contemplated each piece of machinery fitting in and becoming an integral part of the other in operating the plant; and further avers that certain terms and provisions now appearing to have been printed in the contract were not known to the defendant at the time it signed the same; that the manager of the brick company, by reason of failing eyesight and not having his spectacles at hand, was unable to read it, and relied upon the reading by the agent of the machinery company; and that the contract, as read to him and as discussed and agreed upon by himself and the agent of plaintiff, contained no provision with reference to delay in shipment, no provisions releasing plaintiff from liability therefor, no provisions that the property should be insured against loss by fire, loss, if any, payable to plaintiff, and no agreement or understanding that the agent had no authority to contract for and on behalf of the company, and no provisions that the title to the machinery should remain in the plaintiff; and that it did not learn of such matters until recently, but avers that in any event the delays were not occasioned by any of the causes named in the contract, nor were they due to delay of the goods in transit, but were caused solely and alone by the neglect and default of the plaintiff.

The petition contains a second cause of action, in which it is sought to recover $24 for certain items of merchandise furnished to defendant, claimed not to be included in the contract. This is denied by the answer, but no controversy arises in this record now as to these items.

Upon the issue so joined the case was submitted to the court without the intervention of a jury, and the court found on all the issues joined for the plaintiff, rendering judgment for the full amount on both causes of action, and denied the defendant any damages on its cross petition. This judgment was affirmed by the circuit court, and error is now prosecuted in this court to reverse the judgment of the common pleas court and the judgment of the circuit court affirming the same.

Messrs. **A. R. Johnson** and **Dan C. Jones** for plaintiff in error.

Messrs. **Cooper & Russell** and **Finley & Gallinger**, for defendant in error:

Defendant cannot accept a beneficial part

of the property shipped to it after the expiration of the thirty days mentioned in the written contract, and at the same time claim a breach of the contract because the property was not shipped to it within the time provided by the contract.

Goldsmith v. Hand, 26 Ohio St. 101; Hayward v. Leonard, 7 Pick. 185, 19 Am. Dec. 268; Page, Contr. §§ 1509, 1510, 1907.

To permit defendant to retain and refuse payment of the dry pan, after it insisted on the shipment of the dry press and mixer which, when shipped, it refused to receive, would work a fraud and injury upon the plaintiff.

Thurston v. Ludwig, 6 Ohio St. 1, 67 Am. Dec. 328.

Defendant wrongfully terminated the contract, and recovery may be had by plaintiff.

Ralston v. Kohl, 30 Ohio St. 92; Wellston Coal Co. v. Franklin Paper Co. 57 Ohio St. 182, 48 N. E. 888.

When time of performance expired, defendant had the option of abandoning the contract on its part, or permit the party in default to go on and nevertheless perform the contract regardless of the time limit.

Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

Where one agrees to sell and another to buy articles at a specified price, and there is no other stipulation as to payment, it is presumed to be a cash sale, and the delivery of the goods and payment of the price are to be simultaneous and concurrent acts.

Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311.

Donahue, J., delivered the opinion of the court:

The evidence material to the issues joined in this case is the written contract and correspondence between the parties touching the subject-matter of the contract. This contract, in brief, provides that plaintiff shall furnish f. o. b. cars at Bucyrus, Ohio, or Willoughby, Ohio, or at factory where made, one two-mold dry-press brick machine, one 8-foot dry pan, and one No. 1 agitating clay feeder within thirty days, or sooner, if possible. For these three articles, to be delivered in the manner and at one of the places specified, the defendant was to pay $2,450. Six hundred dollars of this purchase price was to be paid in thirty days after arrival of machinery on the cars at Coal Grove, Ohio, and the balance in three equal payments, due in four, eight, and twelve months from date of the bill of lading. Bankable notes bearing legal rate of interest were to be given for deferred payments, these notes to be secured, if required by plaintiff, by personal or collateral security satisfactory to plaintiff. The contract further provided that deliveries should be made subject to delays caused by fires, strikes, accidents, and causes beyond the control of the plaintiff, and that plaintiff assumed no liability for delays in shipment or while goods are in transit, and that the receiving of the material and machinery by the defendant would operate as a waiver of all claims for damages by reason of any delay in delivery however caused. It further provided that the title to the material and machinery should remain in the plaintiff until the full purchase price was paid in cash, with full right of access thereto until such payment was made; that such machinery was to remain the personal property of plaintiff, and not be attached as a fixture, and, on payment of the full purchase price, plaintiff agreed to transfer title to defendant. It further provided that the defendant should keep this machinery insured against fire in an amount sufficient to protect the plaintiff, the policies to contain a clause making them payable to the plaintiff as its interests might appear at time of loss, and, in event such insurance was not obtained, then the defendant to assume and pay all loss sustained by the plaintiff by fire from any cause.

The claim made by the defendant in its cross petition, that it was not fully advised of all the terms of this contract when it signed the same, is not important at this time. Nor do we think it was error for the trial court to reject evidence in reference thereto. It appears from the record that a copy of this contract remained with the defendant during all the time it was insisting upon performance. If the manager of the defendant could not, for the reason assigned, read this contract at the time he executed the same on behalf of the defendant, he could have read it, and should have read it within a much shorter time thereafter than the date of the last demand by the defendant that plaintiff fully comply therewith.

In the absence of an action to reform for mutual mistake, or to rescind the contract for fraud on the part of plaintiff, the terms of this contract must fix the rights and liabilities of both parties thereto.

That this contract is indivisible except by subsequent agreement of the parties is too plain for dispute. The delivery of part of the merchandise agreed to be delivered by the plaintiff is not a compliance with the contract, and, nothing else appearing, would not authorize plaintiff to recover the value of any part of the merchandise furnished substantially less than named in the contract.

It is therefore important to determine: First, whether plaintiff performed the conditions and covenants of the contract on its part to be performed, or, if it did not, was its failure to do so justified by the conduct of the defendant? This machinery was to be furnished within a time certain named in the contract. It is claimed that this provision as to the time of shipment was waived by the defendant. Upon this question there is a conflict of evidence, and therefore the judgment of the common pleas court in that behalf will not be disturbed by this court. Upon the question of the delivery, however, the facts are not in dispute. On this subject there is no conflict in the evidence whatever, and it becomes solely a question of law whether delivery was made or tendered at any time before the bringing of this action to recover the purchase price.

The contract provides for the delivery f. o. b. cars Bucyrus or Willoughby, Ohio, or factory where made, for shipment to the defendant at Coal Grove, Lawrence county, Ohio. The dry pan that was shipped on the 8th day of May was not consigned to the brick company. The bill of lading was taken in the name of the machinery company, indorsed by it, and mailed to the brick company at Coal Grove, Ohio. This was not a serious departure from the provisions of the contract. It worked no inconvenience to the defendant. Even if it did, the purchaser accepted it without protest or complaint as to the manner of delivery. If the shipment of the dry-press machine and the agitating clay feeder had been so made, then, if the time of delivery was, in fact, waived, there would have been a substantial, if not a literal, compliance with the terms of the contract. When this second shipment was made, the bill of lading was taken in the name of the machinery company, but it was never indorsed, delivered, or tendered unconditionally to the brick company, as was done with the bill of lading for the dry pan. This merchandise was not delivered f. o. b. cars at Bucyrus or Willoughby, or factory where made, for shipment to the brick company at Coal Grove, but was delivered to the common carrier for shipment to the machinery company at Coal Grove. The delivery to the common carrier was not actual or constructive delivery to the purchaser. There was no time in the history of this transaction when the machinery company parted with the possession or right of possession of this machinery, nor was there a time when the brick company had a right to demand or require the common carrier to deliver this machinery to it.

The petition avers that the defendant company is a corporation, with its office and place of business located at Coal Grove, Lawrence county, Ohio. This contract does not provide for any conditions precedent to the delivery of this machinery, yet the defendant in error, instead of making delivery as contemplated in the contract, shipped the goods in its own name to Coal Grove, and sent the bill of lading with four unsigned promissory notes to evidence the purchase price thereof to the First National Bank of Ironton, Ohio, and notified the defendant, as a condition precedent to its receiving this bill of lading, that its officers must travel to Ironton, Ohio, and there execute these notes and deliver them to the bank at Ironton, and upon that condition, and not otherwise, the bank would deliver to the defendant the bill of lading. These facts appear from the evidence offered by the machinery company in support of the averment of its petition that it delivered the property to the purchaser. This was not a compliance with the terms of this contract. It was not the delivery contemplated in the contract. It was merely a conditional tender of delivery, and a condition that the machinery company had no right to impose. It was demanding payment in advance, while the fair construction of the contract is that the merchandise shall be delivered at one of the points named to a common carrier for shipment to the brick company, and that the brick company shall thereupon pay $600 thirty days after the arrival of the machinery on cars at Coal Grove, Ohio, and the balance in three equal payments, due in four, eight, and twelve months from date of bill of lading, bankable notes, bearing legal rate of interest, to be given for deferred payments, bearing the same date as bill of lading. Applying to this transaction the same rule that would apply to a cash sale, under the provisions of this contract, payment before delivery could not be demanded; nor could the purchaser be required to travel to Ironton and there make payment to the bank either before or after delivery. The fact that Ironton is not many miles distant from Coal Grove is not important. The petition avers that the purchaser's place of business is Coal Grove, Ohio. It follows that, if the seller could demand that payment be made at Ironton, it could have demanded that payment be made in Columbus, Cincinnati, or New York. The brick company had the full legal right to refuse any delivery other than the delivery provided for in the contract itself. The machinery company had no right to demand performance of any conditions precedent to delivery other than provided in the contract.

In answer to this contention made by counsel on behalf of the plaintiff in error, counsel for defendant in error call our attention to paragraph 6 of the contract, in which paragraph it is agreed that the title to the material and machinery furnished shall remain in the machinery company until the full purchase price is paid, and insist that it is of no importance whether the machinery was delivered to the common carrier consigned to the brick company or consigned to the machinery company, as the machinery company had by the terms of the contract reserved to itself the ownership of this property. But with this contention we cannot agree. The brick company was to have possession at least of this property, and the possession of the property was never delivered to it, either in the manner provided for in the contract or in any other manner. On the contrary, delivery of possession was tendered to the brick company at a place and under circumstances not contemplated in the contract, and upon its doing and performing certain things prior to the delivery that the contract did not require it to do.

It is also insisted that delivery was complete under the contract when the machinery was placed on cars at Bucyrus or Willoughby ready for shipment. That would have been true had the goods been consigned to the purchaser as the contract provided; but, even if that had been done, under no possible construction of this contract would the purchaser have been required to travel to Bucyrus or Willoughby to deliver these notes before or even at the time of the consignment. A fair construction of the contract is that the notes were to be delivered at Coal Grove, Ohio, or mailed from Coal Grove, Ohio, upon the arrival of the machinery there subject to purchaser's order, or at the very earliest, after they had been delivered to the common carrier unconditionally, consigned to the purchaser.

It is also urged that the brick company made no objection to the manner of shipment or to the demand that it should execute these notes and deliver them to the bank at Ironton and there receive the transfer of the bill of lading, but that defendant's objection was based solely upon a claim it made for damages, and which it insisted must be allowed before it would receive the property. We do not consider this of any importance whatever if plaintiff was not misled thereby. The burden is on the plaintiff to show compliance on its part. Defendant did refuse to execute and deliver these notes to the bank at Ironton. In its letter of August 22, 1906 in reply to the letter of the machinery company under date of August 21, 1906, it used this language:

"We decline to accept the machinery upon the terms you state, and you had just as well order the machinery back."

If there was any reason why it had a right to refuse to accept the terms of delivery then proposed by the machinery company, that reason is now available to it. If it were willing to comply with the conditions proposed by the machinery company upon the condition that certain allowances be made it, it had the right to make such a proposition, but there is nothing in all this correspondence or any of this evidence that shows any waiver as to the manner and method of delivery provided in the contract itself. The machinery company cannot claim that it was misled by the conduct of the defendant; for the account, dated August 31, 1906, was disapproved and returned to it. An explanation was demanded. The brick company answered:

"The reason your statement is not correct is that we never received the machinery up to this date and not according to contract."

It is very evident from the record that they were then dealing at arm's length, and there appears absolutely nothing to show that either was induced by the other to depart from the express terms of the contract itself.

Not only does it appear from this contract that the machinery company had no right to demand the execution and delivery of these notes prior to the delivery of this machinery to a common carrier consigned to the brick company, or at a place other than the defendant's place of business, but it also appears that by the terms of this contract the purchaser was not required to give a note for the first $600 payment to be made in thirty days. It is true that the contract provides that notes shall be given for deferred payments. It is also true that a payment to be made in thirty days is, in the absence of language expressing a contrary intention, a deferred payment; but it is very clear from the terms of the contract that it was not so considered by the parties, and not intended to be evidenced by any promissory note whatever, but was, in fact, reckoned as a cash payment, and those payments that were to be deferred for four, eight, and twelve months were considered the deferred payments within the meaning and intent of the contract. This is made to appear from the fact that this $600 was to be paid in thirty days after the arrival of machinery on cars at Coal Grove, Ohio, while the notes that were to be given for the deferred payments should bear the same date as the bill of lading, even though the goods were delayed

a fortnight in transit. If the payment of the $600 that was to be made in thirty days was intended to be included as one of the deferred payments, for which a note was to be given, then that note would be required under the language of the contract to bear the date of the bill of lading, notwithstanding the further terms of the contract provided for the reckoning of this thirty days from the date of the arrival of the machinery on cars at Coal Grove. A note for thirty days bearing the same date as the bill of lading would not allow the purchaser thirty days in which to pay the same after the arrival of the machinery on cars at Coal Grove. In fact, under some circumstances of extraordinary delay occasioned by disastrous floods or other destructive agencies, the larger portion or the whole of the thirty days might expire between the date of the bill of lading and the arrival of the shipment as its place of destination. It is clear that this contract distinguishes between this $600 to be paid in thirty days after delivery and these payments to be made in four, eight, and twelve months after date of bill of lading, and it is equally evident that it was not intended that any note should be given for the $600, or that this amount should bear any interest whatever; otherwise the contract would not have fixed a different date from which to reckon the time of payment of this particular sum. Upon this construction of the contract the machinery company had no right to demand a note for this $600 prior to or after the delivery of the machinery sold.

It is averred in the petition that the plaintiff took back this dry-press brick machine and agitating clay feeder from defendant at its request, and credited the defendant with the sum of $1,600 on the full contract price. There is no evidence whatever in support of this averment except the refusal of the defendant to accept delivery and to comply with the conditions precedent imposed by the plaintiff to a delivery of this machinery. Under the terms of this contract the plaintiff, upon default in payment, was entitled to take this machinery, but it was not entitled to take part and leave part. In the absence of an agreement to that effect, it was not authorized to divide this contract and leave the dry pan with the defendant at a price fixed by it and retake the dry-press brick machine and agitating clay feeder, crediting an amount, also fixed by plaintiff, as the value of these two articles.

By the express terms of this contract defendant in error is still the owner of this dry pan. If it had fully performed the conditions of this contract, it would have the right to sue for the contract price, notwithstanding the provisions of the contract that it is to remain the owner of this property until the purchase price is fully paid; but a court can afford no relief to a plaintiff in a suit to recover upon a contract, when it appears that the plaintiff did not substantially perform the terms of the contract on his part to be performed.

In the absence of a subsequent agreement waiving the actual delivery of the balance of these goods, or authorizing the defendant to retake them after delivery and credit the contract price with the value of the goods so retaken, the rights of the defendant in error as owner of this dry pan must be asserted in some other way than by an action predicated upon the contract to recover the portion of the contract price represented by its value.

The judgment of the Circuit Court affirming the judgment of the Common Pleas Court on the first cause of action is reversed, and the judgment of the Common Pleas Court on the first cause of action is reversed, and judgment here rendered for plaintiff in error on the first cause of action. The judgment of the Circuit Court affirming the judgment of the Common Pleas Court on the second cause of action is affirmed.

Nichols, Ch. J., and **Shauck**, **Newman**, and **Wilkin**, JJ., concur.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

AMERICAN NATIONAL BANK et al., Plffs. in Err.,
v.
E. W. ADAMS & COMPANY.

(— Okla. —, 143 Pac. 508.)

Bank — act of cashier — effect.

1. A national bank is not bound by the acts of its cashier, when such cashier has acted beyond the scope of his authority as such officer.

Headnotes by HARRISON, C.

Note. — Power of officer or employee to bind bank by agreement for bailment other than one conceded to be a special deposit.

It is assumed for the purposes of the question under consideration that if the agreement is *ultra vires*, that is available as a defense.

That a bank has power to receive one particular kind of bailments,—special deposits,—and is bound by the contract express or implied, is now settled, at least in the United States. While this as a distinct question is not within the scope of the present note, it should be observed that after a

Same — special deposits — acts of cashier.

2. A national bank may receive special deposits, such as notes, stocks, bonds, securities, bills of exchange, etc., the handling of which in their very nature comes within the regular line of banking business, and the acts of the cashier in receiving such deposits are binding on the bank.

Same — storing merchandise.

3. Allowing a stock of shoes in which a bank has no interest to be stored in the back end of the bank is not a transaction coming within the general line of banking business, and is not within the general scope and meaning of the term "special deposit."

Same — consent by cashier — liability of bank.

4. Where a cashier agrees with two contracting parties that a stock of shoes may be stored in the back end of a bank, and guarantees to such parties that same will be delivered to the proper party upon compliance with certain stipulations entered into between the parties, upon his failure to deliver such goods according to such guaranty, the bank will not be bound by the cashier's contract of guaranty, but the cashier may be held personally liable as bailee for a breach of his guaranty.

(September 22, 1914.)

ERROR to the County Court for Atoka County to review a judgment in plaintiff's favor in an action brought to recover possession of a stock of shoes alleged to have been unlawfully detained by defendants. Modified.

The facts are stated in the Commissioner's opinion.

Mr. Winfield S. Farmer, for plaintiffs in error:

The defendant bank could not be held liable or made to respond in damages for the acts of the cashier.

Bank of Metropolis v. Jones, 8 Pet. 12, 8 L. ed. 850; First Nat. Bank v. Marshall & I. Bank, 28 C. C. A. 44, 54 U. S. App. 510,

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few decisions to the contrary (Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122; Whitney v. First Nat. Bank, 50 Vt. 388, 28 Am. Rep. 503), and other cases supporting the rule (Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582, and others), the question was definitely settled in favor of the rule, in First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588, on the ground that the Federal banking act declares that after a bank has failed, the bank shall transact no banking business except to receive and safely keep moneys belonging to it, "and to deliver special deposits," thus implying that it has the power to receive special deposits. And in Pattison v. Syracuse Nat. Bank, supra, it was held that receiving special deposits is incident to the banking business, as shown by the custom of banks from an early period, thus including state banks within the rule. It is apparent, from the reason for the rule, that the rule cannot be extended to cover contracts for bailments other than special deposits; hence the attempt was made in AMERICAN NAT. BANK v. E. W. ADAMS & CO. to convince the court that a stock of shoes stored in the rear room of the bank building was a special deposit. This is the novel feature of the case. In Pattison v. Syracuse Nat. Bank, supra, the court said: "The definition of the business of banks of deposit in the encyclopedias embraces the receiving of the money or valuables of others to keep until called for by the depositors. 1 Encyclopædia Americana, 'Bank,' 543; 1 English Encyclopædia of Arts & Sciences, 833, 837, 841." But AMERICAN NAT. BANK v. E. W. ADAMS & CO. appears to be a case of first impression on the question as to what is not included in the term "valuables." In the Pattison Case the court also said: "When the attributes of a particular calling come in question, they can only be ascertained by showing what has been the general usage and practice of persons engaged in that calling, and what business has been generally transacted by them, and understood to appertain to such calling. Thus only can it be ascertained what transactions are within or without the scope of such calling. A reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, to be specifically returned to the depositor; that such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and that the same business was done by the goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done." The reason for the rule as stated, supra, justifies the statement that a "special deposit" may consist of anything that banks generally have been accustomed to receive for safe-keeping to be returned to the depositor. Custom seems to have included money, stocks, bonds, and other securities, etc., and has somewhat arbitrarily included "bullion, plate," etc., but has never included anything that would tend to convert the bank into a "pawn shop, a cold storage plant, or a warehouse." The decision in AMERICAN NAT. BANK v. E. W. ADAMS & CO. appears, therefore, to be based upon sound reasoning. The decisive question is, What has been the custom of banks generally in regard to accepting the particular "valuable" as a special deposit?

As to distinction between a special deposit and a general one, see note to Frogg v. Tyler, 39 L.R.A.(N.S.) 847, supplementing note to Mutual Acci. Asso. v. Jacobs, 16 L.R.A. 516; and as to care required of bank in keeping special deposit, see note to Gray v. Merriam, 32 L.R.A. 769.

J. W. M.

83 Fed. 725; Spyker v. Spence, 8 Ala. 340; Albuquerque Nat. Bank v. Stewart, 3 Ariz. 300, 30 Pac. 303; Thompson v. McKee, 5 Dak. 178, 37 N. W. 367; Asher v. Sutton, 31 Kan. 289, 1 Pac. 535; Leppoc v. National Union Bank, 32 Md. 146; Delta Lumber Co. v. Williams, 73 Mich. 95, 40 N. W. 940; Cochecho Nat. Bank v. Haskell, 51 N. H. 121, 12 Am. Rep. 68; Norton v. Derry Nat. Bank, 61 N. H. 593, 60 Am. Rep. 335; Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. 541; First Nat. Bank v. Tisdale, 18 Hun, 152; Root v. Olcott, 42 Hun, 539; First Nat. Bank v. Tisdale, 84 N. Y. 655; Custar v. Titusville Gas & Water Co. 63 Pa. 385; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Eq. Cas. 243; Hodge v. First Nat. Bank, 22 Gratt. 61; Bank of United States v. Dunn, 6 Pet. 51, 8 L. ed. 316; Potts v. Wallace, 146 U. S. 705, 36 L. ed. 1141, 13 Sup. Ct. Rep. 196; Anderson v. Kissam, 35 Fed. 705; Flannagan v. California Nat. Bank, 23 L.R.A. 838, 56 Fed. 962; Cox v. Robinson, 27 C. C. A. 128, 48 U. S. App. 388, 82 Fed. 285; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 615, 54 U. S. App. 462, 83 Fed. 571; McKnight v. United States, 54 C. C. A. 372, 115 Fed. 986; North Star Boot & Shoe Co. v. Stebbins, 2 S. D. 81, 48 N. W. 833; Merchants' Bank v. Rudolf, 5 Neb. 536; United States v. City Bank, 21 How. 364, 16 L. ed. 133; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 672, 19 L. ed. 1027, 3 Cliff. 207, Fed. Cas. No. 9,449; Martin v. Webb, 110 U. S. 14, 28 L. ed. 52, 3 Sup. Ct. Rep. 428; Morse v. Massachusetts Nat. Bank, Holmes, 211, Fed. Cas. No. 9,857; Mott v. Semmes, 24 Ga. 557; Hadden v. Linville, 86 Md. 233, 38 Atl. 37, 900; Mahone v. Manchester & L. R. Corp. 111 Mass. 72, 15 Am. Rep. 9; Winsor v. Lafayette County Bank, 18 Mo. App. 673.

The act of the cashier in attempting to bind the bank by guarantying the performance of the stipulation was *ultra vires*, and not binding on the bank, and it could not be held liable.

California Nat. Bank v. Kennedy, 167 U. S. 362, 366, 42 L. ed. 198, 200, 17 Sup. Ct. Rep. 831; Seattle Gas & Electric Co. v. Citizens' Light & P. Co. 123 Fed. 592; Cumberland Teleph. & Teleg. Co. v. Evansville, 127 Fed. 190; Western Nat. Bank v. Armstrong, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572; Aldrich v. Chemical Nat. Bank, 176 U. S. 622, 44 L. ed. 613, 20 Sup. Ct. Rep. 498; City Nat. Bank v. Chemical Nat. Bank, 26 C. C. A. 197, 52 U. S. App. 209, 80 Fed. 861; Nebraska v. First Nat. Bank, 88 Fed. 949; Murphy v. Gumaer, 12 Colo. App. 483, 55 Pac. 951; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 335, 79 N. W. 68; Logan County Nat. Bank L.R.A.1915B.

v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; Scott v. Deweese, 181 U. S. 211, 45 L. ed. 827, 21 Sup. Ct. Rep. 585; Cooper v. Hill, 36 C. C. A. 407, 94 Fed. 586; Hepburn v. Kincannon, 74 Miss. 693, 21 So. 569; Hanson v. Heard, 69 N. H. 191, 38 Atl. 788; Commercial Nat. Bank v. Pirie, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Bowen v. Needles Nat. Bank, 36 C. C. A. 556, 94 Fed. 925; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

Messrs. **Linebaugh Bros. & Pinson**, for defendant in error:

The defense of *ultra vires* is unavailable and inapplicable.

Dahl v. Montana Copper Co. 132 U. S. 264, 33 L. ed. 325, 10 Sup. Ct. Rep. 97; Pullman's Palace Car Co. v. Central Transp. Co. 139 U. S. 62, 35 L. ed. 69, 11 Sup. Ct. Rep. 489; 10 Cyc. 1156, 1207; St. Louis Drug Co. v. Robinson, 81 Mo. 18, 10 Mo. App. 588; 10 Cyc. 1165; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; San Antonio v. Mehaffy, 96 U. S. 312, 24 L. ed. 816; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588.

The contract was one of special deposit, and not *ultra vires*.

Koetting v. State, 88 Wis. 502, 60 N. W. 822; Bank of Blackwell v. Dean, 9 Okla. 626, 60 Pac. 226; Hale, Bailm. & Carr. 47; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

If the bank has authority to receive such a special deposit, the cashier, and no other person or officer, would be the person who could, as the chief executive officer of the bank, bind the bank by an agreement to receive the same.

Case v. Citizens' Bank, 100 U. S. 446, 25 L. ed. 695; 4 Thomp. Corp. § 4765.

Defendant F. E. Adams is personally liable.

4 Thomp. Corp. 3751; 10 Cyc. 1037.

Harrison, C., filed the following opinion:

This action was instituted by E. W. Adams & Company against the American National Bank and F. E. Adams, the cashier, for possession of a stock of shoes of the alleged value of $493.49. E. W. Adams & Company had at some time previous thereto been in the mercantile business in Kansas. They left Kansas and opened up a store in Oklahoma. Soon thereafter the stock of shoes in question was attached by

the Elliot-Kendall Shoe Company, the shoes being of the Elliot-Kendall brand, and having been purchased from such company by the Adams Company. When the order of attachment was served, Adams & Company and the Elliot-Kendall Shoe Company, and their attorneys, entered into a stipulation wherein it was agreed that the stock of shoes should be stored in the back end of the American National Bank, to be turned over to the Elliot-Kendall Shoe Company on or before a certain date, provided such shoe company delivered to E. W. Adams & Company a warranty deed to certain lots or tracts of land situated in Hamilton county, Kansas; but, in the event such deed was not furnished within the time specified, then the stock of shoes should be turned back to E. W. Adams & Company. The bank, through its cashier, F. E. Adams, accepted an indemnity bond from the Elliot-Kendall Shoe Company, and agreed to permit the stock of shoes to be stored in the back end of the bank, and guaranteed that delivery of same should be made to the party entitled thereto according to the terms in the stipulation signed by the Elliot-Kendall Shoe Company and by E. W. Adams & Company. A deed to the land in question was received through the mail by the American National Bank in due time, and the parties and their attorneys notified of the receipt of same, pursuant to which notice E. W. Adams & Company and the attorney for the Elliot-Kendall Shoe Company appeared at the bank, examined the deed, and held a conference as to what should be done in the premises in reference to the acceptance of the deed by Adams & Company and the turning over the stock of shoes to the Elliot-Kendall Company.

It is claimed by the bank, and so testified to by the cashier, Adams, and some of the other bank employees, that the deed was turned over to Adams & Company and was accepted by it and retained possession of by such company. On the other hand, it is claimed by Adams & Company that such deed was unsatisfactory and not according to the stipulations, being a quitclaim instead of a warranty deed, and was not accepted, but was left in the bank. Pursuant to such conference, however, the stock of shoes was turned over to J. M. Humphreys, attorney for the Elliot-Kendall Shoe Company. Subsequently E. W. Adams & Company, claiming to have rejected the deed on the ground that it was not according to stipulations, and on the ground that they had left same with said bank, or the cashier thereof, demanded return of the stock of shoes. This being refused, suit was brought against the bank and F. E. Adams, the cashier, for possession of the shoes, or the value thereof. The cause was tried, resulting in a verdict and judgment in favor of E. W. Adams & Company for the return of the stock of shoes, or the value thereof, and from such judgment the bank and F. E. Adams appeal to this court for review.

A number of assignments are urged for reversal, the decisive one being that the guaranty that the stock of shoes would be turned over to the proper party according to the stipulation between the parties was signed by the cashier of the bank; that such a contract of guaranty was out of the line of the bank's regular business under its charter, and outside of the line of authority of the cashier, and therefore *ultra vires*, and not binding on the bank.

A great number of authorities are cited by plaintiffs in error in support of the contention that a corporation cannot be bound by acts of its officers outside of their scope of authority. The authorities cited seem to be well in point and to overwhelmingly support this contention. We have examined them, but find that none of them pass on the exact question whether the bank, in accepting the stock of shoes as a special deposit under the circumstances of this case, was exceeding the powers contemplated in the national banking act, or whether it was acting within the margin allowed to a national bank under the provisions of its charter and the provisions of the national banking act in carrying on its regular business.

On the other hand, it is contended by defendant in error that this was in the nature of a special deposit, and as such came within the line of the bank's regular business, at least, within the scope allowed banks in carrying on their regular business, and, being a special deposit in line with the bank's regular business, its cashier had authority to accept such as a special deposit, and that the bank was bound by his acts. The rule that a bank is bound by the acts of its cashier in accepting deposits which come within the scope and meaning of the term "special deposits" has become so well settled as to admit of but little question. See Case v. Citizens' Bank, 100 U. S. 446, 25 L. ed. 695; 4 Thomp. Corp. § 4765. But the exact question in the case at bar is whether an agreement that a stock of goods should be stored in the back end of a bank building is such a transaction as comes within the general scope and meaning of the term "special deposits." A number of very strong and able decisions are cited by defendant in error in support of the contention that this was a special deposit. But from an exam-

ination of the authorities cited, and of many others touching upon the question, we find that in each case the courts were dealing with, and had in contemplation, such deposits as notes, stocks bonds, securities, etc., the handling of which, in their very nature, comes, at least partially, within the regular line of banking business. One of the strongest cases cited is the case of First Nat. Bank v. Graham, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588, in which the court said: "The 46th section of the banking act of 1864," which authorizes "a national bank . . . to deliver special deposits, . . . implies clearly that a national bank, as a part of its legitimate business, may receive such 'special deposits.'" "Conceding for the moment that the contract was illegal and void, for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side,—certainly none on the part of the depositor. She was entitled, at any time, to reclaim the securities. The bank was bound in good faith and in law to return them, or to keep them without gross negligence, until they were called for."

This language might be taken to mean that, though the contract between the bank and the depositor was illegal, yet the bank would be held liable for negligence in the loss of the deposits. But here again it must be borne in mind that the question of whether the act of receiving the deposit was the act of the bank, or the mere act of the cashier, was not involved in the case at bar, and the court had in mind such special deposits as ordinarily come within the course of the banking business, and did not have in contemplation the character of transaction involved in the case at bar. The court concludes its opinion as follows: "It would, undoubtedly, be competent for a national bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly. We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider."

In the case at bar the stock of shoes was permitted to be stored in the back end of the bank, doubtless in an empty room not used by the bank in the regular course of its banking business, and under the circumstances we view the transaction as more in line with the business of warehousemen receiving goods for storage, than in line with transactions ordinarily carried on through banks. It is intimated in First Nat. Bank v. Graham, supra, that "a bank could not convert itself into a pawnbroker's shop," and we believe the reason is equally strong for holding that it could not convert itself into a cold storage establishment or a company of warehousemen. We do not believe the transaction in question comes within the scope of banking business, nor that the cashier had authority to bind the bank by his acts in such transaction. It is apparent from the record, however, that the defendant in error entered into this agreement in good faith. As stated in the body of the opinion in First Nat. Bank v. Graham, supra: "There was no moral turpitude on either side, and certainly none on the part of the depositor."

In the case at bar, E. W. Adams & Company in good faith contracted with Elliot-Kendall Shoe Company that, upon receipt of a warranty deed to the certain tracts of land in Kansas, the stock of shoes should be turned over to such shoe company, and, in the event such warranty deed was not executed to them, that they should receive the stock of goods themselves, and both parties agreed with the cashier of the bank, in good faith, that the cashier would see that the terms of the contract were faithfully carried out. It appears from the record that, instead of the warranty deed as contracted for, a kind of release and quitclaim deed was sent to the bank, and that such instrument was not accepted by E. W. Adams & Company. It is true that there was a conflict in testimony as to whether Adams & Company accepted the deed, or whether they refused it and left it in the bank; but this was merely an issue of fact, which was submitted to the jury and found in favor of E. W. Adams & Company, and we do not feel authorized to disturb the jury's finding in this regard. Hence, in view of the fact that a warranty deed was contracted for, that a quitclaim deed was sent instead, and in view of the jury's finding that such quitclaim deed was not accepted by E. W. Adams & Company, and the further fact that said Adams & Company entered into the agreement in good faith with F. E. Adams, the cashier of the bank, as a voluntary bailee, to see that the stock of shoes was delivered according to stipulation between the parties, and in view of the further fact that the said cashier upon his own authority turned such stock over to the Elliot-Kendall Shoe Company, we believe that said cashier, F. E. Adams, should be held personally liable to E. W. Adams & Company for the return of the shoes, or the value thereof.

The judgment of the trial court should therefore be modified, so as to render F. E.

Adams liable for the return of the stock of shoes in question, or the value thereof.

Per Curiam.
Adopted in whole.

Petition for rehearing denied October 20, 1914.

WASHINGTON SUPREME COURT.
(In Banc.)

D. D. DAY et al., Appts.,
v.
TACOMA RAILWAY & POWER COMPANY et al., Respts.

(80 Wash. 161, 141 Pac. 347.)

Street railways — authority to consent to discontinuance.

1. Authority to county commissioners to grant permission for the construction, maintenance, and operation of electric railways upon public roads, and prescribe the terms and conditions on which these privileges may be enjoyed, does not include power to consent to the discontinuance of a railway which has been put into operation.

Railroad — who may compel operation.

2. A resident along the line of an interurban electric railway cannot maintain an action to prevent abandonment of the line, on the theory that he is dependent on it for service, if another line closely parallel to it affords him service, although it may be less convenient.

Public service corporation — compelling operation to preserve competition.

3. Persons living along an interurban electric road cannot compel its continued operation to preserve competition, if a parallel road furnishes adequate service and the public service commission law requires all rates to be just and reasonable and service adequate and sufficient.

Railroads — consolidation — who may question.

4. Individuals cannot raise the question of the violation by railroad companies of a constitutional provision prohibiting their consolidation.

(June 25, 1914.)

APPEAL by plaintiffs from a judgment of the Superior Court for Pierce County in defendants' favor in an action to enjoin them from perfecting a consolidation of competing railway lines, from tearing up tracks, and from ceasing to operate a line of railway according to the terms of the charter. Affirmed.

The facts are stated in the opinion.

Messrs. **B. S. Grosscup** and **W. C. Morrow**, for appellants:

When once the company accepts the charter and constructs its road, it then becomes mandatory upon it to maintain and operate the same.

Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 5 Atl. 695; State v. Hartford & N. H. R. Co. 29 Conn. 538; State ex rel. Bridgeton v. Bridgeton & M. Traction Co. 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719; Wyman, Public Service Corp. § 305; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; Potwin Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Elizabethtown v. Chesapeake, O. & S. W. R. Co. 94 Ky. 377, 22 S. W. 609; Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 114 Am. St. Rep. 790, 95 S. W. 881; State v. Sioux City & P. R. Co. 7 Neb. 357; Brooklyn & R. B. R. Co. v. Long Island R. Co. 72 App. Div. 497, 76 N. Y. Supp. 777; Erie & N. E. R. Co. v. Casey, 26 Pa. 287.

Mr. **John A. Shackleford**, for respondents:

No duty to continue operation is imposed by the articles of incorporation of the Tacoma & Steilacoom Railway Company.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; San Antonio Street R. Co. v. State, 90 Tex. 520, 35 L.R.A. 662, 59 Am. St. Rep. 834, 39 S. W. 926; State ex rel. Knight v. Helena Power & Light Co. 22 Mont. 391, 44 L.R.A. 692, 56 Pac. 685; Amesbury v. Citizens' Electric Street R. Co. (Stiles v. Citizens' Electric Street R. Co.) 199 Mass. 394, 19 L.R.A.(N.S.) 865, 85 N. E. 419; Asher v. Hutchinson Water, Light & P. Co. 66 Kan. 496, 61 L.R.A. 52, 71 Pac. 813; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 26 L.R.A.(N.S.) 92, 90 N. E. 40, 18 Ann. Cas. 332; People ex rel. Schaumleffel v. Illinois C. R. Co. 241 Ill. 471, 89 N. E. 744; Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Sherwood v. Atlantic & D. R. Co. 94 Va. 291, 26 S. E. 943; People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369; Jack v. Williams, 113 Fed. 823; Com. v. Fitchburg R. Co. 12 Gray, 180; Wood v. Seattle, 23 Wash. 1, 52 L.R.A. 369, 62 Pac. 135; McQuillin, Mun. Corp. § 1660; Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518.

If the purposes for which a conditional grant is made are fulfilled by performance

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Note. — For right of railroad to abandon operation of its road, see note to State v. Old Colony Trust Co. L.R.A.1915A, 549.

As to the right of a street railway company to discontinue its line in the absence of statutory or contractual provision to the contrary, see note to Stiles v. Citizens' Electric Street R. Co. 19 L.R.A.(N.S.) 865. L.R.A.1915B.

for a considerable period of time, a discontinuance thereafter is not a breach. A substantial compliance extending over a long period of time is sufficient.

Maddox v. Adair, — Tex. Civ. App. —, 66 S. W. 811; Jeffersonville, M. & I. R. Co. v. Barbour, 89 Ind. 375; Higbee v. Rodeman, 129 Ind. 244, 28 N. E. 442; Sumner v. Darnell, 128 Ind. 38, 13 L.R.A. 173, 27 N. E. 162; Taylor v. Campbell, 50 Ind. App. 515, 98 N. E. 657.

To enjoin the suspension of operation, something more should be shown than inconvenience to a few individuals.

Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; Sherwood v. Atlantic & D. R. Co. 94 Va. 291, 26 S. E. 943; San Antonio Street R. Co. v. State, — Tex. Civ. App. —, 38 S. W. 54.

To compel a railroad company to maintain its main stem on the old location forever is to render it impossible for the corporation to ever make, in conformity with its own needs and the public's interest, any change in its transportation route.

Whalen v. Baltimore & O. R. Co. 108 Md. 11, 17 L.R.A.(N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390; People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369; People ex rel. Schaumleffel v. Illinois C. R. Co. 241 Ill. 471, 89 N. E. 745; State ex rel. Whitehouse v. Northern P. R. Co. 53 Wash. 378, 102 Pac. 24.

Gose, J., delivered the opinion of the court:

This case is before us upon an appeal from a judgment entered after demurrers to the complaint had been sustained, upon the plaintiffs declining to plead further. The complaint is too lengthy to be set forth in full. In substance it alleges that the respondents, Tacoma Railway & Power Company, Puget Sound Electric Company, and Pacific Traction Company, are foreign corporations, and that they have severally qualified themselves to do business in this state; that in the year 1888 the city of Tacoma granted to one Thompson and his associates "the right, power, and authority" to construct, maintain, and operate a line of electric railway, beginning at K street, thence running westerly to what is now known as Proctor street, thence westerly to the city limits; that on the 2d day of May, 1890, Thompson and T. O. Abbott incorporated the Tacoma & Steilacoom Railway Company under the laws of this state; that its articles recite that the objects for which the corporation is formed are "to build, equip, and operate" a narrow or standard gauge railway according to the route described in the franchise granted to Thompson and his associates, thence following a fixed course to and through Steilacoom city; that it acquired the rights granted in the Thompson franchise, and acquired by purchase and gift the right of way for an electric line between Tacoma and Steilacoom, constructed the line in the years '890 and 1891, and put the same in operation as an electric railway doing a general freight and passenger business between the town of Steilacoom and the initial point in the city of Tacoma; that the line has ever since been "maintained and operated;" that in 1899 "said line" was acquired by the respondent Tacoma Railway & Power Company as a part of its general system of railways in the city of Tacoma and suburbs thereof; that certain rights of way outside of the city limits were donated by the owners in consideration of the building and operation of the road. It also alleges that in 1905 the Pacific Traction Company constructed a line of railway from South Seventh street in the city of Tacoma through intervening streets to Proctor street, and thence to the north side of American lake, and about the year 1907 constructed a branch line from a point near the south city limits of the city of Tacoma to the state hospital for the insane, "a short distance from the line constructed by the Tacoma & Steilacoom Railway Company;" that the Pacific Traction Company was proposing at said time to continue its line to the town of Steilacoom; that the branch line from the town of Steilacoom to the city of Tacoma is a competing line with the line constructed by the Tacoma & Steilacoom company; that in December, 1912, the power company applied to and secured from the county commissioners of Pierce county, a franchise to extend the line of the traction company from the state hospital for the insane about a mile and a half northerly to the town of Steilacoom, which franchise was granted by the commissioners "upon condition that the Tacoma Railway & Power Company would abandon its Steilacoom line between Lemon's Beach station and Chambers creek, and grant all its rights in and to said right of way to said county for highway purposes," which franchise and conditions the power company has accepted, and that it is now threatening to tear up its line between such points; that the appellants all own land adjacent to the line between Lemon's Beach and Chambers creek, and are dependent upon said line for railway service "both to the village of Steilacoom and to the city of Tacoma, and that there are" many other residents similarly situated; that all persons who are situated so that they can use the lines of both companies will be deprived of competitive serv-

ice; that the abandoning of the line will greatly and irreparably depreciate the value of the property of all the appellants and render the same practically useless for residence purposes; and that the appellants would not have purchased their land, and those who reside thereon would not have constructed their residences, had it not been for the operation of the adjacent railway.

It is further alleged that, in the year 1910, the Puget Sound Electric Railway, having theretofore acquired all the stock of the Tacoma Railway & Power Company, acquired the stock of the Pacific Traction Company, and that it has since, in virtue of its ownership of stock, in various and sundry ways, sought to effect a consolidation of the two competing lines; that the tearing up of the line between Lemon's Beach and Chambers creek will consummate a consolidation of the two competing lines; that the Puget Sound Electric Railway has caused certain portions of the line of the Pacific Traction Company in the city of Tacoma "to be torn up and destroyed;" that the Tacoma Railway & Power Company enjoys valuable franchises between K street in the city of Tacoma and Lemon's Beach station, and between Chambers Creek and the town of Steilacoom, all of which were acquired as a part of one continuous line, which it purposes to retain. It is further alleged that the public service commission of the state has not authorized the abandonment of the Steilacoom line or any portion thereof; and that it has at no time approved or authorized any of the acts which the appellants seek to enjoin. The prayer is: (a) That the Tacoma Railway & Power Company and the Pacific Traction Company be enjoined from further perfecting the consolidation of the competing lines; (b) that the Tacoma Railway & Power Company be enjoined from tearing up its tracks and discontinuing the operation of its line of railway between the city of Tacoma and the town of Steilacoom; and that it be enjoined from ceasing to operate such line.

The respondents severally demurred to the complaint upon all the statutory grounds, but the record does not advise us as to the ground upon which they were sustained. We assume, however, that the court was of the opinion that the complaint does not state facts sufficient to constitute a cause of action.

The question presented is, Does the complaint charge a violation of a public duty which the appellants, as private litigants owning property adjacent to the part of the road proposed to be discontinued, may enjoin? In State ex rel. Grinsfelder v. Spokane Street R. Co. 19 Wash. 518, 41 L.R.A. 515, 67 Am. St. Rep. 739, 53 Pac. 719, it was held that the defendant, having acquired the street railway line, could be required to resume operation of a part of the line known as Minnehaha Park line, which it had operated for a time and then ceased such operation. There were about forty families, including the relator, living adjacent to the discontinued line, who availed themselves of the facilities for travel which it afforded. It carried 80 to 120 people daily. It was also held that the relator was a proper party to enforce a duty "due to the public." The court said that the defendant, having undertaken to operate the line, owed an implied duty to the public to continue the operation, a duty which it could not abandon without the consent of the granting power, meaning the state or its proper representative acting in pursuance of law.

The board of county commissioners had no legal authority to consent to an abandonment of any public duty imposed upon or assumed by the respondents as common carriers. The Code, Rem. & Bal. Code, § 9080 (P. C. 405, § 327), does not, either expressly or by reasonable implication, confer such power upon county commissioners. It merely empowers them to grant authority for the construction, maintenance, and operation of such railway systems upon public roads outside of the limits of incorporated cities and towns, and to prescribe "the terms and conditions" on which these privileges may be enjoyed. In Wood v. Seattle, 23 Wash. 1, 52 L.R.A. 369, 62 Pac. 135, cited by the respondents in support of the action of the commissioners, the city charter empowered the city council "to provide for the alteration, change of grade, or removal" of any railroad in any street of the city. It was held that this language vested in the city council the power to represent the public interest in respect to railways within the city.

Under the rule announced in the Grinsfelder Case, neither the grantee nor its successor in interest, having exercised the privileges conferred under a permissive franchise, can, against the will of the state, abandon the enterprise if the abandonment works a prejudice to the public interest. This rule has abundant support in other jurisdictions. Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 5 Atl. 695; State v. Hartford & N. H. R. Co. 29 Conn. 538; State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 650, 13 L.R.A.(N.S.) 320, 44 So. 213, 12 Ann. Cas. 359. And this duty survives a transfer of the property to other companies. State ex rel. Bridgeton v. Bridgeton & M. Traction Co. 62 N. J. L. 592, 45 L.R.A. 837, 43 Atl. 715; Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137; Pot-

win Place v. Topeka R. Co. 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309; Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 114 Am. St. Rep. 790, 95 S. W. 881; State v. Sioux City & P. R. Co. 7 Neb. 357; Brooklyn & R. B. R. Co. v. Long Island R. Co. 72 App. Div. 496, 76 N. Y. Supp. 777. The rule has its basis in the principle that the sovereign powers are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 5 Atl. 695.

The theory of the complaint seems to be that the road cannot be abandoned: (1) Because the appellants and "many other residents" similarly situated are dependent upon the line for railway services; (2) because all persons so situated that they can use the line of both companies will be deprived of competitive service; and (3) because the Puget Sound Electric Railway is using its corespondents as instruments to accomplish an unlawful consolidation.

The first proposition is, we think, without merit. Public service companies, as the name implies, are created to perform a public function. As we said in State ex rel. Whitehouse v. Northern P. R. Co. 53 Wash. 370, 102 Pac. 24, roads may be straightened, and curves and grades may be reduced, and changes made to meet the demands of commerce and competition. What we conceive to be the correct rule is aptly stated in Asher v. Hutchinson Water, Light & P. Co. 66 Kan. 496, 61 L.R.A. 52, 71 Pac. 813, where the court said: "An individual can acquire no vested right, as against the public, in the continued service of a public utility. Such a doctrine once admitted would destroy the convenience as a public utility; it would then become hampered and subject to the control of the individual, and made to subserve such interests, to the detriment of the public welfare."

In Whalen v. Baltimore & O. R. Co. 108 Md. 11, 17 L.R.A.(N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390, it was held that, where the public interest as well as the pecuniary advantage of the railway company is promoted by shortening and straightening the line of road, a private individual cannot require the company to maintain a train service over the abandoned road, although it had contracted with his predecessor in title to construct and maintain a turnout and siding upon his premises, and to taken on and let off persons going to and from his farm, and to leave at the siding for unloading any car containing a fixed amount of freight. The reason for the holding is thus stated: "We think there is a manifest distinction to be made between covenants to establish and maintain stations for the public convenience, and those to establish and maintain sidings, turnouts, crossings, and the like, for private use merely."

In Northern P. R. Co. v. Washington Territory, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283, the court refused to require the railroad company to erect and maintain a station at Yakima city, and to stop its trains there to receive and deliver freight, and to receive and let off passengers. The decision was put upon the ground that "the court will never order a railroad station to be built or maintained contrary to the public interests."

The complaint is silent as to the approximate number of people patronizing the Steilacoom line who are too remote from the other line to avail themselves of its service. Nor does it advise us as to the extent that they patronize the Steilacoom line. The fact that the appellants and "many other residents . . . similarly situated" patronize it at all is left to inference. Those facts were shown in the Grinsfelder Case. It does appear, however, that the lines lie closely parallel. This being true, the complaint as an entirety negatives the view that the appellants are dependent upon the Steilacoom line for service. It only affords them a more convenient service.

The more difficult question is: Can the respondents be enjoined from abandoning that part of the road between the stations named, when such abandonment will necessarily result in depriving all persons to whom both roads are accessible of competitive service, there having been no legal consent to such abandonment? The real question is: Will such abandonment be a violation of a public duty which ought to be enjoined? The allegation is that the roads are near each other. It is not alleged that one road is inadequate to handle the business. If it were necessary it might be judicially noticed that one road is ample to serve all the needs of the public between the town of Steilacoom and the city of Tacoma. The public will still be adequately served after the abandonment. Under the public service commission law (Laws 1911, p. 538, 3 Rem. & Bal. Code, §§ 8626–1 et seq.), all charges for transportation of persons or property shall be "just, fair, reasonable, and sufficient," and every common carrier must render adequate and sufficient service and facilities to enable it to promptly and expeditiously take care of the public business without discrimination. The whole theory of the public service commission law is opposed to the idea that the public will be better served with two lines of road lying closely parallel, situated as these roads

are situated, where one road will amply suffice. The purpose of this law is to require adequate and safe service at a reasonable price and without discrimination. When the public is afforded such a service, its needs are satisfied, and no citizen can justly complain. Sherwood v. Atlantic & D. R. Co. 94 Va. 291, 26 S. E. 943. There mandamus was denied, where it was sought to require the company to resume operation of that part of its line which it was not required by its charter to construct or operate, but which it had operated for a time. It was held that, in respect to assumed duties, the court will consider all the circumstances of the case, and grant or deny the relief according as the duties demanded may or may not promote the public interest. People v. Rome, W. & O. R. Co. 103 N. Y. 95, 8 N. E. 369, holds that, where a railroad company owns two lines of road and can substantially accommodate the people of the state by operating one line between the same points, and can abandon the other line without any serious detriment "to any considerable number of people," it cannot be required by mandamus to operate both lines at a great sacrifice.

Finally, it is contended that the complaint shows an attempt to bring about a consolidation of two competing roads, in violation of § 16, art. 12, of the Constitution, and § 1, p. 698, Laws 1909. The former provides: "No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a competing line."

The latter provides: "That no railroad or transportation corporation shall consolidate its stock, property, or franchises with any other railroad or transportation corporation owning a competing line, or purchase, either directly or indirectly, any stock or interest in a railroad or transportation corporation owning or operating a competing line." Rem. & Bal. Code, § 8665 (P. C. 433, § 17).

There is no allegation either that the Puget Sound Electric Railway has consolidated its stock, property, or franchises with either of the other respondent companies, or that it owns a competing line. The allegation is that it owns all the stock of the other companies; they being competing lines. If it has violated either the constitutional provision or the statute, we think that question cannot be raised by private litigants, but should be left open to the state for such action as it deems wise.

Affirmed.

Crow, Ch. J., and **Mount, Main, Parker, Morris, Fullerton**, and **Ellis**, JJ., concur.

L.R.A.1915B.

Chadwick, J., concurring:

Under our present laws no citizen has a right to insist that two public utilities be maintained in order to preserve competition. Competition between those engaged in public service is a condition which may have been real; but, in the light of modern industrial development and a more enlightened understanding of such problems, it has become an item of lesser consequence, if indeed it may be considered at all. The legislature of this state, in the exercise of its legislative functions, has written the law upon a different theory, a theory foreseen by the framers of the Constitution, art. 12, § 1.

The people long since abandoned the hope of relief from unjust rates and inadequate service from competing lines or interests. The history of public service corporations is such that it can be asserted as a fact that reliance upon competition has been a vain hope, and in the greater number of cases, perhaps in all cases, it has been defeated by secret compacts and understandings. The people therefore determined to regulate and control, to fix rates and prescribe schedules, to the end that the public shall have an adequate service at a fair cost.

The use by the legislature of the two words "reasonable" and "sufficient" establishes this point. That body plainly intended that companies covering the same field should not hereafter be permitted to resort to the old methods of cutting rates and by this means drive the weaker competitor out of the field, to the end that the survivor might exploit the public at will. Indeed, two companies furnishing the same service are, under our law, an imposition upon the taxpayer, unwarranted and unjustifiable. It is only necessary to refer to the dual system of telephones that have been maintained in some of the cities of this state to prove this premise. Instead of cheaper and better service, the system has resulted in a double burden of expense, and oftentimes in utter confusion of service. The statute implies that it is better to have one service controlled in all its workings by the agents of the state. Under our public utilities law, we have all the advantages with none of the disadvantages of public ownership, and the commissioners of Pierce county would have failed to do their whole duty had they acted otherwise than they did in the case at bar.

Inasmuch as the supposed right to insist upon the pretense of competition is the only plausible ground urged by appellants, it follows that the decree of the lower court should be affirmed.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.
(Department No. 2.)

CHARLES E. CORCORAN and Wife, Respts.,
v.
POSTAL TELEGRAPH-CABLE COMPANY, Appt.

(80 Wash. 570, 142 Pac. 29.)

Damages — mental suffering — delay in telegram.

Damages cannot be recovered for mental suffering due to negligent delay in the delivery of a telegram announcing illness, in the absence of any physical injury; and the loss of the amount paid for transmission of the message is not sufficient to sustain such recovery.

(July 23, 1914.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover damages for mental suffering alleged to have been caused by defendant's negligent failure promptly to deliver a telegram. Reversed.

The facts are stated in the opinion.

Mr. W. W. Cook, with Messrs. **Hughes, McMicken, Dovell, & Ramsey** and **Otto B. Rupp**, for appellant:

Damages for mental suffering alone are not recoverable.

Allsop v. Allsop, 5 Hurlst. & N. 534, 29 L. J. Exch. N. S. 315, 6 Jur. N. S. 433, 2 L. T. N. S. 290, 8 Week. Rep. 449; Lynch v. Knight, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382; Western U. Teleg. Co. v. Chouteau, 28 Okla. 604, 49 L.R.A.(N.S.) 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 3 N. C. C. A. 406; Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Morse v. Duncan, 14 Fed. 396; Cole v. Gray, 70 Kan. 705, 79 Pac. 654; Sappington v. Atlanta & W. P. R. Co. 127 Ga. 178, 56 S. E. 311; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, 57 L. J. P. C. N. S. 69, 58 L. T. N. S. 390, 37 Week. Rep. 129, 52 J. P. 580, 8 Eng. Rul. Cas. 405; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; Bovee v. Danville, 53 Vt. 183; Webb v. Denver & R. G. W. Ry. Co. 7 Utah, 17, 24 Pac. 616; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; Texarkana & Ft. S. R. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A 666, 30 Am. St. Rep. 709, 23 Atl. 340; Munro v. Pacific Coast Dredging & Reclamation Co. 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Morgan v. Southern P. Co. 95 Cal. 510, 17 L.R.A. 71, 29 Am. St. Rep. 143, 30 Pac. 603; Indianapolis Street R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978; Kalen v. Terra Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; Ward v. West Jersey & S. R. Co. 65 N. J. L. 383, 47 Atl. 561; St. Louis, I. M. & S. R. Co. v. Taylor, 84 Ark. 42, 13 L.R.A. (N.S.) 159, 104 S. W. 551; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Spohn v. Missouri P. R. Co. 116 Mo. 617, 22 S. W. 690, 4 Am. Neg. Cas. 718; Crutcher v. Big Four, 132 Mo. App. 311, 111 S. W. 891; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 305; Dorrah v. Illinois C. R. Co. 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. 36; Miller v. Baltimore & O. S. W. R. Co. 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; Reed v. Ford, 129 Ky. 471, 19 L.R.A.(N.S.) 225, 112 S. W. 600; McGee v. Vanover, 148 Ky. 737, 147 S. W. 742, Ann. Cas. 1913E, 500; Hess v. American Pipe Mfg. Co. 221 Pa. 67, 70 Atl. 294; Rock v. Denis, Montreal L. Rep. 4 S. C. 356, affirmed in 16 Rev. Leg. 569; Jeannotte v. Couillard, Rap. Jud. Quebec, 3 B. R. 461; Rea v. Ferry Co. 17 New South Wales, 92; Kester v. Western U. Teleg. Co. 55 Fed. 603; Rowan v. Western U. Teleg. Co. 149 Fed. 550; McBride v. Sunset Teleph. Co. 96 Fed. 81; Gahan v. Western U. Teleg. Co. 59 Fed. 433; Western U. Teleg. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Tyler v. Western U. Teleg. Co. 54 Fed. 634; Chase v. Western U. Teleg. Co. 10 L.R.A. 464, 44 Fed. 554; Crawson v. Western U. Teleg. Co. 47 Fed. 544; Stansell v. Western U. Teleg. Co. 107 Fed. 668; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Western U. Teleg. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, 1080; Kagy v. Western U. Teleg. Co. 37 Ind. App. 73, 117

Note. — As to right to recover for mental anguish, see note to Western U. Teleg. Co. v. Chouteau, 49 L.R.A.(N.S.) 206, and see later case Mackay Teleg.-Cable Co. v. Vaughan, 51 L.R.A.(N.S.) 404.

Am. St. Rep. 278, 76 N. E. 792; Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; Johnson v. Bradstreet Co. 87 Ga. 79, 13 S. E. 250; Giddens v. Western U. Teleg. Co. 111 Ga. 824, 35 S. E. 638; Green v. Southern R. Co. 9 Ga. App. 751, 72 S. E. 190; Southern Bell Teleph. & Teleg. Co. v. Glawson, 140 Ga. 507, 79 S. E. 136; Connell v. Western U. Teleg. Co. 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; Morton v. Western U. Teleg. Co. 53 Ohio St. 431, 32 L.R.A. 735, 53 Am. St. Rep. 648, 41 N. E. 689; Connelly v. Western U. Teleg. Co. 100 Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618; Francis v. Western U. Teleg. Co. 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; Duncan v. Western U. Teleg. Co. 93 Miss. 500, 47 So. 552; Butner v. Western U. Teleg. Co. 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; Thomas v. Western U. Teleg. Co. 30 Okla. 63, 118 Pac. 370; Western U. Teleg. Co. v. Foy, 32 Okla. 801, 49 L.R.A.(N.S.) 343, 124 Pac. 305, 3 N. C. C. A. 367; Western U. Teleg. Co. v. Haltom, 71 Ill. App. 63; Curtin v. Western U. Teleg. Co. 13 App. Div. 253, 3 N. Y. Anno. Cas. 286, 42 N. Y. Supp. 1109, 1 Am. Neg. Rep. 127; Thomas v. Western U. Teleg. Co. 33 Pittsb. L. J. N. S. 211; Allen v. W. U. Tel. Co. (1903) C. P. Erie County; Linn v. Duquesne, 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49, 61 Atl. 1022; Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026; International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973; Russell v. Western U. Teleg. Co. 3 Dak. 315, 19 N. W. 408; West v. Western U. Teleg. Co. 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Cole v. Gray, 70 Kan. 705, 79 Pac. 654; Lonergan v. Small, 81 Kan. 48, 25 L.R.A.(N.S.) 976, 105 Pac. 27; Peay v. Western U. Teleg. Co. 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; Southern Teleph. Co. v. King, 103 Ark. 160, 39 L.R.A.(N.S.) 402, 146 S. W. 489, Ann. Cas. 1914B, 780; Lewis v. Western U. Teleg. Co. 57 S. C. 325, 35 S. E. 556; Taylor v. Atlantic Coast Line R. Co. 78 S. C. 552, 59 S. E. 641.

There can be no recovery in this case in any event.

Western U. Teleg. Co. v. Wright, 169 Ala. 104, 53 So. 95; Western U. Teleg. Co. v. Stone, — Tex. Civ. App. —, 27 S. W. 144; Western U. Teleg. Co. v. Motley, 87 Tex. 38, 27 S. W. 52; Western U. Teleg. Co. v. White, — Tex. Civ. App. —, 149 S. W. 790; I. R.A.1915B. Western U. Teleg. Co. v. Brown, 71 Tex. 723, 2 L.R.A. 766, 10 S. W. 323; Western U. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70; Western U. Teleg. Co. v. McKenzie, 96 Ark. 218, 49 L.R.A.(N.S.) 296, 131 S. W. 684; Western U. Teleg. Co. v. Luck, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; Western U. Teleg. Co. v. Arnold, 96 Tex. 493, 73 S. W. 1043; Rowell v. Western U. Teleg. Co. 75 Tex. 26, 12 S. W. 534; Western U. Teleg. Co. v. Bass, 28 Tex. Civ. App. 418, 67 S. W. 515; Western U. Teleg. Co. v. Oastler, 90 Ark. 268, 49 L.R.A.(N.S.) 325, 119 S. W. 285; Western U. Teleg. Co. v. Young, — Tex. Civ. App. —, 130 S. W. 257; Hart v. Western U. Teleg. Co. 53 Tex. Civ. App. 275, 115 S. W. 638; Morrison v. Western U. Teleg, Co. 24 Tex. Civ. App. 347, 59 S. W. 1127; McAllen v. Western U. Teleg. Co. 70 Tex. 243, 7 S. W. 715; McCarthy v. Western U. Teleg. Co. — Tex. Civ. App. —, 56 S. W. 568; Akard v. Western U. Teleg. Co. — Tex. Civ. App. —, 44 S. W. 538.

Mr. M. J. Costello, with Messrs. McCafferty, Robinson, & Godfrey, for respondents:

Plaintiff can recover damages for mental suffering.

Glenn v. Western U. Teleg. Co. 1 Ga. App. 821, 58 S. E. 83; Gillespie v. Brooklyn Heights R. Co. 178 N. Y. 347, 66 L.R.A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, 16 Am. Neg. Rep. 181; Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172; Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238; McClure v. Campbell, 42 Wash. 252, 84 Pac. 825; Ott v. Press Pub. Co. 40 Wash. 308, 82 Pac. 403; Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436.

Parker, J., delivered the opinion of the court:

The plaintiffs seek recovery of damages for mental suffering alone, independent of any physical injury or financial loss, which they allege was caused by the defendant's negligent failure to promptly deliver a telegram sent over its lines by the plaintiff Mabel Corcoran, from Seattle, to the plaintiff Charles E. Corcoran, at St. Paul, Minnesota, informing him of the serious illness of their child. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs for the sum of $500, from which the defendant has appealed.

The controlling facts are not in dispute, and may be summarized as follows: Respondents live in Seattle. On September 3, 1910, Mrs. Corcoran caused a telegram to be delivered to appellant at Seattle, for transmission to her husband, then absent on

a visit to his parents, in St. Paul, Minnesota, reading as follows:

Mr. Chas. Corcoran, 690 Rice Str. St. Paul, Minn.:
Baby very low. [Signed] Mabel.

The usual toll of 75 cents was then paid to appellant for the transmission of the message. 690 Rice Street, St. Paul, was the address of the home of Mr. Corcoran's parents, where he was then staying. By some error of appellant's servants, occurring in the transmission of the message, the "6" became changed to "4," so that, when it reached St. Paul, the address read "490" instead of "690" Rice street. This caused a delay in the delivery of the message to Mr. Corcoran; it being finally received by him at Seattle through the mail from his parents in St. Paul. He left St. Paul for his home in Seattle on September 8, 1910, without having received the message or any word from his wife touching the child's condition, and, upon his arrival at home in Seattle on September 11th, found that his child had died and been buried a few days previous; the funeral having been delayed as long as possible. No communication passed between Mr. and Mrs. Corcoran from the time she sent the message on September 3d to the time of his arrival at home in Seattle on September 11th. The mental suffering of Mr. and Mrs. Corcoran claimed to have resulted to them from the delay in the delivery of this message is the sole ground of their claim of damages in this action, except the amount of the toll paid for the transmission of the message.

There is here presented the problem: Does mental suffering, independent of injury and financial loss, resulting from mere negligent delay in the transmission and delivery of a telegram, render the company accepting such telegram for transmission and receiving pay therefor liable in damages, measurable in money, to the sender and receiver whose mental suffering results from such negligent delay? Counsel for appellant contend that there is no such liability in this state, in view of the common law, which is in force here, in the absence of controlling statutory law. We have no statute in this state relating to damages of this nature. Since the beginning of civil government in the territory now occupied by our state, the common law has been the rule of decision in our courts, except where other rules are prescribed by the Constitution or statutes. It has been so declared by legislative enactment. Rem. & Bal. Code, § 143. Indeed, it would necessarily be so, even in the absence of legislative declarations, because of the source of our civilization and institutions. We have, it is true, adapted the common law and its reason to new conditions as they arose, and thereby occasionally worked what may be regarded as innovations therein, when viewed superficially, but the spirit and reason of the common law have, as understood by our courts, always been their source of guidance when statute and Constitution were silent touching the problem in hand. What, then, are the respective rights of the parties to this controversy, measured by the rule and reason of the common law as it exists here?

That mental suffering, independent of physical injury, does not, at common law, render a person who merely negligently causes such suffering, answerable in damages therefor, is settled by the decisions of the great majority of the states of the Union and by an unbroken line of decisions of the Federal courts. This court indicated its adherence to this doctrine in Turner v. Great Northern R. Co. 15 Wash. 213, 221, 55 Am. St. Rep. 883, 46 Pac. 243, though the application of the rule to the situation here involved was not there under examination. Nor has the application of the rule to claimed damages for mental suffering resulting from mere negligence flowing from delay in the delivery of a telegraph message ever been the subject of inquiry in this court. In Wyman v. Leavitt, 71 Me. 227, 229, 36 Am. Rep. 303, Justice Virgin, speaking for the court, said: "In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475; Wadsworth v. Treat, 43 Me. 163. Or for an assault alone when maliciously done, though no actual personal injury be inflicted. Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 391, 8 Am. Neg. Cas. 316; Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373; Com. v. White, 110 Mass. 407, 2 Greene, Crim. L. Rep. 269. So, in various other torts to property alone when the tort feasor is actuated by wantonness or malice, or a wilful disregard of others' rights therein, injury to the feelings of the plaintiff resulting from such conduct of the defendant may properly be considered by the jury in fixing the amount of their verdict. But we have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. On the contrary, it has been

held that a verdict founded upon fright and mental suffering caused by risk and peril would, in the absence of personal injury, be contrary to law. Canning v. Williamstown, 1 Cush. 451. So, it is said (in Lynch v. Knight, 9 H. L. Cas. 577, 598, 8 Eng. Rul. Cas. 382) that 'mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone.' Again, in Johnson v. Wells, F. & Co. 6 Nev. 224, 3 Am. Rep. 245, after a very elaborate examination, it was held that pain of mind, aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but everyone that was frightened by a collision or by the trains leaving the track, could maintain an action against the company."

That decision was rendered in 1880, and we deem it safe to assert that up to that time no court of any common-law state or county had ever expressed a view of the common law at variance with this. We quote from this decision as authority for this doctrine as then universally recognized, not only because of its clear statement thereof, but also because, in 1881, the year following, the law was, for the first time, thought to be otherwise in telegraph cases by the supreme court of Texas, as expressed by its decision in So Relle v. Western U. Teleg. Co. 55 Tex. 308, 40 Am. Rep. 805, which later found a following in the courts of Kentucky, North Carolina, Alabama, and Tennessee. Chapman v. Western U. Teleg. Co. 90 Ky. 265, 13 S. W. 880; Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; Western U. Teleg. Co. v. Rowell, 153 Ala. 295, 319, 45 So. 73; Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574. In the case last cited, Justice Lurton, late of the Supreme Court of the United States, expressed views in harmony with the common-law rule in a vigorous dissenting opinion, concurred in by Justice Folkes. The Texas doctrine was, for a time, followed in Indiana. The Indiana court, however, has since then receded, and now adheres to the generally accepted common-law rule. The common-law rule has been applied and so thoroughly dealt with in telegraph cases involving delayed messages relating to sickness and death, that it is unnecessary to quote from or review others. In Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 756, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823, the court said: "Expressions used by the courts as argument or illustration in those cases in which damages for mental suffering are recoverable, because such suffering is declared to be inseparable from physical pain and injury, have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages. Damages for mental suffering have been very generally allowed in three classes of cases: (1) Where, by the merely negligent act of the defendant, physical injury has been sustained, and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for breach of contract of marriage. (3) In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party. The decisions in Texas, Tennessee, Kentucky, Indiana, and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not, in our opinion, sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in no one of them is there a citation of a single case, decided prior to the case of So Relle, in which in an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that, prior to the So Relle Case, the bar had not entertained the view that an action therefor could be maintained, but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident resulting from negligence, by which bodily injury was sustained, was properly considered by the jury in awarding damages. Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 Conn. 293; Cooper v. Mullins, 30 Ga. 146, 76 Am. Dec. 638, 14 Am. Neg. Cas. 114; Canning v. Williamstown, 1 Cush. 451. But, where there is no bodily injury, damages for fright should

not be given. Canning v. Williamstown, supra; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, 57 L. J. P. C. N. S. 69, 58 L. T. N. S. 390, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Lynch v. Knight, 9 H. L. Cas. 577, 598, 8 Jur. N. S. 724, 5 L. T. N. S. 291, 8 Eng. Rul. Cas. 382. In Flemington v. Smithers, 2 Car. & P. 292, the plaintiff sued to recover for injuries inflicted upon his minor son and servant by the negligence of the defendant, and claimed compensation for the injury to his parental feelings; but the claim was rejected. We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of supplying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. 'Mental pain and anxiety, the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone.' Lynch v. Knight, 9 H. L. Cas. 577, 8 Eng. Rul. Cas. 382."

In Chapman v. Western U. Teleg. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901, some very pertinent observations are made by Justice Lumpkin, speaking for the court, touching this doctrine and the seeming, but not real, exceptions thereto, as follows: "Some of the cases rest on breach of contract, of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. . . . This view grapples with the big question: How can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See Walsh v. Chicago, M. & St. P. R. Co. 42 Wis. 23, 24 Am. Rep. 376. The answer given is that the subject-matter of the contract is feeling, and the damage to feeling by noncompliance was plainly in contemplation of the parties making the contract. The breach of many a contract which the injured party desires performed brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort or breach of common-law or statutory duty; the contract serving merely to create the relation of duty between the parties. . . . Regarding the nature of the damages, the majority opinion in this class of decisions is that they are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is wilful, wanton, or malicious. . . . It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than the first Texas decision in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But, in every one of these, it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury. See Western U. Teleg. Co. v. Rogers, supra. In slander and libel, where the action is founded on words not actionable *per se*, there must be proof of special damage. And where the words are actionable *per se*, they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss might occur, else the action could not be maintained. Thus, a brother, not standing *in loco parentis*, however great his anguish, and however keenly he may have felt the disgrace and mortification caused by the wrongdoer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these authorities to be given wholly for mental suffering. Yet it may be that, the injury being essentially wilful, substantial damages are given by way of punishing or making an example of the wrongdoer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. In actions for breach of promise, the plaintiff's financial loss plays a conspicuous part. Evidence showing the defendant's station and reputed wealth is admissible. At common law, the husband on marriage assumed the wife's debts and responsibility for her torts and for support appropriate to their station.

He took a large share of her property by that event, and she acquired some rights in his property. This suffices to show that the breach of marriage promise involved important pecuniary consequences. In actions for physical injuries, the great consideration is the loss of time and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So, in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered."

In Peay v. Western U. Teleg. Co. 64 Ark. 538, 544, 39 L.R.A. 463, 43 S. W. 965, Justice Hughes, speaking for the court, observes: "It will be borne in mind that the damages claimed in this case are alleged to have been caused by a breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance, and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that, for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone can be measured by any practical or just rule. It is asked: What difference can there be between allowing damages for mental pain and anguish unattended with physical injury, and allowing damages for pain and anguish resulting from physical injury? There is this difference with us: That damages for mental pain and anguish caused by physical injury have always been allowed by law, while damages for mental pain and anguish unattended with physical injury have been allowed by law only since the decision of the So Relle Case, in 1881, when the Texas court departed from the doctrine of the common law, which we think sound, and announced a new doctrine unsupported by the authority, as we believe, of any well-considered case before it. While we do not want to be understood as clinging to ideas and doctrines that are ancient, because they are ancient merely, if they are contrary to reason and right, yet we have great respect for the conservatism of the law, and will not depart from its long and well settled doctrines, supported by eminent authority, and founded in reason and justice. Even if the difference in principle between allowing damages for mental pain and anguish, the result of physical injury, and disallowing damages for such pain and anguish unaccompanied by physical injury, be such as not to be defined,—merely chimerical,—this is no reason why we should say that damages for mental anguish, independent of physical injury, should be allowed. No statute allows them in such case; the common law does not allow them; and, in our opinion, the weight of adjudication is against the right of recovery in such cases. In determining a principle in the law which, in its application, at least, seems to be new and but recently thought of, it is highly important to consider precedents, and is legitimate, in our view, to look to consequences that will follow, as certainly as night follows the day, from the recognition of a doctrine that will affect most seriously the welfare of the people. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of an ordinary imagination."

In Connelly v. Western U. Teleg. Co. 100 Va. 51, 55, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618, it is said: "It is conceded in nearly all of the decided cases in this country, and by the text writers, that the general rule which has come down to us from England is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis of an action for damages."

In Francis v. Western U. Teleg. Co. 58 Minn. 252, 261, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, Justice Mitchell, speaking for the court in his usual vigorous and convincing manner, touching the common-law rule and its reason, said: "The law has always been exceedingly cautious in allowing damages for mental suffering for the manifest reasons, among others, that such damages are more sentimental than substantial, depending largely upon temperament and physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another, and, there being no possible standard by which such an injury can be even approximately measured, they are subject to many, if not most, of the objections to speculative damages, which are universally excluded. In no case will an action for damages lie for mental suffering caused by an act which, however wrongful, infringes no legal right of the party. In actions for a tort resulting in physical injuries, of which mental suffering forms a component part, the latter is permitted to be taken into account in the assessment of damages: and where the tort is wilful, and of a character as naturally and necessarily

to injure the feelings, damages for such injuries are sometimes allowed, although there was no physical injury or pecuniary loss. Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, perhaps goes as far in that direction as any case to be found in the books. In this latter class of cases such damages are often but another name for punitive damages. But we are not concerned here with the question when such damages may be recovered in actions of tort. We think we are warranted in asserting that the doctrine that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law, unless 'telegraph cases' are to be made an exception."

In the following decisions involving claims of damages resting upon mental suffering flowing from negligence in delivery of telegrams relating to sickness and death, the holdings are in strict harmony with the views indicated by the decisions above quoted: Russell v. Western U. Teleg. Co. 3 Dak. 315, 19 N. W. 408; International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; Western U. Teleg. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, 1080; West v. Western U. Teleg. Co. 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Connell v. Western U. Teleg. Co. 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026; Summerfield v. Western U. Teleg. Co. 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973; Lewis v. Western U. Teleg. Co. 57 S. C. 325, 35 S. E. 556; Western U. Teleg. Co. v. Choutcau, 28 Okla. 664, 49 L.R.A.(N.S.) 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 3 N. C. C. A. 406. See also 37 Cyc. 1775, and cases cited.

Turning now to the views of the Federal courts, we find the common-law doctrine, as understood and universally recognized prior to 1881, adhered to without dissent in its application to claims for damages for mental suffering flowing from negligent delay in delivery of telegrams. In Kester v. Western U. Teleg. Co. (C. C.) 55 Fed. 603, Ex-President Taft, then circuit judge, touching the rule and its reason, said: "The difficulty of estimating a pecuniary compensation for mental anguish is itself a sufficient reason for the common-law rule in preventing a recovery for mental anguish in actions for simple negligence or breach of contract. The amount of litigation which would grow out of the adoption of such rule would be intolerable. The measure of damages to be adopted would be so indefinite and so indefinable as to subject the defendant in such cases to the possibility of great oppression. The difficulty of securing evidence as to the actual mental suffering is another reason why it could not be made the sole basis of an action. It has generally been allowed to be considered as an element in fixing damages in two classes of cases. The first is where there has been a physical injury and physical suffering of such a character that it would be difficult to distinguish between the mental and physical suffering; and the second class of cases is where the injury complained of contains an element of malice, and the damages for mental suffering are left to the jury to be fixed as a kind of punitive or exemplary damages. This case, of course, comes under neither head. In slander and libel, the action cannot be founded solely on mental suffering. There must be some other damage alleged before a cause of action is stated."

In Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471, Judge Pardee, presiding justice, speaking for the court of appeals for the fifth circuit, said: "The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of the general law prior to the So Relle Case, 55 Tex. 308, 40 Am. Rep. 805, in 1881, and by the uniform decision of the Federal courts. . . . We have carefully considered the question presented, having been aided by able counsel orally and with elaborate briefs, and our conclusion is that upon principle and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message, as the same are too uncertain, remote, and speculative."

In the following Federal cases, all involving claims of damages of the nature here involved, the courts adhere to these views: Chase v. Western U. Teleg. Co, (C. C.) 10 L.R.A. 464, 44 Fed. 554; Crawson v. Western U. Teleg. Co. (C. C.) 47 Fed. 544; Tyler v. Western U. Teleg. Co. (C. C.) 54 Fed. 634; Gahan v. Western U. Teleg. Co. (C. C.) 59 Fed. 433; Stansell v. Western U. Teleg. Co. (C. C.) 107 Fed. 668; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Rowan v. Western U. Teleg. Co. (C. C.) 149 Fed. 550; Western U. Teleg. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92. The following decisions touching claims of damage for mental suffering unaccompanied by physical injury or wilful wrong, in other than telegraph cases, are equally illustrative of the common-law rule and its

reason: Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Cole v. Gray, 70 Kan. 705, 79 Pac. 654; Sappington v. Atlanta & W. P. R. Co. 127 Ga. 178, 56 S. E. 311; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Miller v. Baltimore & O. S. W. R. Co. 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A.(N.S.) 49, 61 Atl. 1022; Southern Teleph. Co. v. King, 103 Ark. 160, 39 L.R.A. (N.S.) 402, 146 S. W. 489, Ann. Cas. 1914B, 780; Morse v. Duncan (C. C.) 14 Fed. 396; Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613.

Are we correct in assuming that this court has not, in any of its decisions, expressed views at variance with the common-law rule as understood and applied by the great majority of the courts as above indicated? Let us notice our own decisions relied upon by counsel for respondents. In Willson v. Northern P. R. Co. 5 Wash. 621, 32 Pac. 468, 34 Pac. 146, damages were claimed for injury to feelings and mental suffering flowing from the expulsion of a passenger from a car, unaccompanied by physical force or violence. Damages were allowed in that case to the passenger, but upon the theory that the act complained of was wilful and was accompanied by duress. There was in law a physical wrong committed against the person. In Gray v. Washington Water Power Co. 30 Wash. 665, 71 Pac. 206, the plaintiff was awarded compensation for mental suffering on account of personal disfigurement resulting from a physical injury caused by the defendant. Manifestly the mental suffering was inseparable from the physical. This is an example of one of the most common class of cases wherein mental suffering enters into the measurement of damages. In Davis v. Tacoma R. & P. Co. 35 Wash. 203, 66 L.R.A. 802, 77 Pac. 209, 16 Am. Neg. Rep. 621, damages were allowed the plaintiff because of the defendant's wilful expulsion of her from a public park where she had a right to be. Here, again, is an example of a wilful wrong accompanied by duress. In Ott v. Press Pub. Co. 40 Wash. 308, 82 Pac. 403, damages were claimed by plaintiff because of his mental suffering flowing from the publishing of a libel against him. This, also, was a wilful wrong; the libelous words being actionable *per se* and tending to degrade and work financial loss to the plaintiff. In McClure v. Campbell, 42 Wash. 252, 84 Pac. 835, damages were allowed the plaintiff for mental suffering flowing from his wrongful eviction from premises. Here, again, the action was wilful and accompanied by duress. In Nordgren v. Lawrence, 74 Wash. 305, 133 Pac. 436, damages were allowed for mental suffering flowing from a wrongful entry upon the plaintiff's premises, though no physical injury was inflicted upon her, but this also was a wilful wrong inflicted upon the plaintiff by the invasion of the sacred precincts of her home. The wrongful act was a physical invasion of the plaintiff's personal rights. In Wright v. Beardsley, 46 Wash. 16, 89 Pac. 172, the plaintiffs were allowed damages for mental suffering unaccompanied by physical injury, flowing from the wrongful and improper burial of their infant child by the defendant. This decision we regard as the extreme proper application of the rules of law allowing damages for mental suffering alone, and we are constrained not to extend the doctrine beyond the application of the particular facts there involved. The acts were regarded by the court as wilful, and the wrong consisted in the violation of the rights of the parents to have decent interment for their infant child. It was also a physical invasion of the plaintiff's rights. That decision rests largely upon Larson v. Chase, 47 Minn. 307, 14 L.R.A. 85, 28 Am. St. Rep. 370, 50 N. W. 238, and Burney v. Children's Hospital, 169 Mass. 57, 38 L.R.A. 413, 61 Am. St. Rep. 273, 47 N. E. 401, in which states the courts recognize the full force of the common-law rule as opposed to what we may term the Texas rule. In none of our own decisions have damages ever been allowed for mental suffering alone flowing from an act of mere negligence. The record of this case plainly shows that the failure of delivery of the message here involved was the result of negligence alone, which cannot be properly characterized as even gross. Nor was the wrong attended in the slightest degree by wilfulness on the part of appellant or its servants.

The problem here involved is in no sense one calling for the application of the common law or its reason to new conditions, as seems to be suggested by learned counsel for respondents. There is nothing new about mental suffering, or the bringing it about by the actions of persons other than the sufferer himself. The negligent delay in conveying messages from one person to another, resulting in mental suffering, is no different in principle whether such message be conveyed by telegraph or other means

which may have been in existence for hundreds of years. To attempt to fix a monetary value as damages for such suffering would be to enter the realm of speculation as much to-day as it would have been fifty or a hundred years ago. The only possible ground upon which such damages could be allowed would be the ground upon which punitive damages are allowed. This thought is expressed in some degree in some of the decisions we have noticed, but it is worthy of note in this connection that punitive damages are not recoverable in this state even when the injury upon which the claim is rested flows from gross negligence or wilful wrong, except when expressly allowed by statute. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072; Woodhouse v. Powles, 43 Wash. 617, 8 L.R.A.(N.S.) 783, 117 Am. St. Rep. 1079, 86 Pac. 1063, 11 Ann. Cas. 54; McGill v. Fuller, 45 Wash. 615, 618, 88 Pac. 1038.

Touching the application of the rules of the common law to new conditions, Justice Baker, speaking for the court in Western U. Teleg. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, said: "Though courts should and do extend the application of the rules of the common law to the new conditions of advancing civilization, they may not rightfully create a new principle unknown to the common law nor abrogate a known one. If new conditions cannot properly be met by the application of existing laws, the supplying of needful new laws is the province of the legislative, not the judicial, department. The 'mental anguish' law, so called, was first announced in So Relle v. Western U. Teleg. Co. 55 Tex. 308, 40 Am. Rep. 805, decided in 1881. Telegraphy was then a comparatively new element in society; but mental anguish antedated the beginnings of the common law."

In McBride v. Sunset Teleph. Co. (C. C.) 96 Fed. 81, observations of like import were made by the court as follows: "The only cases in which courts may legitimately take advanced grounds is when new conditions present new problems to be solved, but even then the object should be to merely accomplish the adjustment of individual rights affected by new conditions consistently with the existing laws, and leave to the legislature the task of changing, amending, or creating laws."

And in Rowan v. Western U. Teleg. Co. (C. C.) 149 Fed. 550, 553, the court said: "To permit of the recovery of damages for mental suffering alone is not the application of old principles to new conditions, but is the creation of a new right of recovery unknown to the common law, as clearly as is the creation of a right of recovery for the killing of a human being. Such right, if it is to be created, is the province of the legislature, and not of the courts."

This court has, on many occasions, felt constrained to take somewhat advanced views in adapting the common law and its reason to new conditions, but it has never felt, and does not now feel free to, change the law or its application to problems and conditions which are in no sense new. We are bound by the rules of the common law when clearly applicable to a problem in hand, and the Constitution and statutes are silent. It seems clear to us that that law and its reason call for a reversal of this case in so far as respondents were awarded damages for their mental suffering alone.

We have not lost sight of the fact, which seems to be apparent from the record, that respondents were damaged in the sum of 75 cents, the sum they paid to appellant for the transmission of this message, resulting from appellant's negligence. It is suggested, but the suggestion is presented to us without citation of authority, and practically without argument, that this damage is so connected with respondents' mental suffering as to allow the award in this case to be enhanced by the mental suffering in addition to respondents' loss of the 75 cents paid for the transmission of the message. We are quite unable to agree with this view. Respondents' actual monetary loss is measured here, with absolute certainty, by the amount they paid for the transmission of the message. That is wholly separable from the damage they suffered, if any, from mental distress. This view finds support in International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148. We are of the opinion that respondents' mental suffering cannot be taken into consideration because of the fact that they also suffered this specific determinable money loss.

We conclude that the judgment must be reversed, and a new judgment entered, awarding to respondents damages in the sum of 75 cents only, together with their costs incurred in the trial court. Appellant will recover its costs upon appeal in this court.

The cause is remanded to the trial court, with directions to proceed accordingly.

Crow, Ch. J., and **Mount**, **Morris**, and **Fullerton**, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WALTER T. CHANDLER
v.
NELLIE J. FRENCH et al.
and
JAMES D. LOWRY, Appt.

(— W. Va. —, 81 S. E. 825.)

Landlord and tenant — lease of mining right — title of lessee.

1. A mining lease for a term of ninety-nine years, in consideration of $1 and the payment to the lessor of 3 cents per ton of coal and other minerals mined and shipped, containing no covenant by the lessee to commence mining at any certain time, does not vest title in the lessee to the mineral in place.

Same — duty to mine — abandonment.

2. In such lease there is an implied covenant by the lessee to begin mining within a reasonable time, and if he does not do so he will be presumed to have abandoned his right, and a court of equity will, at the suit of the lessor, cancel the lease as constituting a cloud on his title.

Same — lack of transportation facilities — effect.

3. The fact that the lease is upon land so remote from a railroad that shipment of the coal is impracticable at the date of the lease does not affect the question of the reasonableness of the time, when it does not appear that the parties contracted with reference to some particular railroad which

Headnotes by WILLIAMS, J.

Note. — Implied duty to develop premises under mining lease reserving a royalty on product, where lease contains no provision for payment of minimum royalties or forfeiture for delay.

In general.

In the consideration of this question a distinction should be noted between leases of land for mining purposes where the consideration for the lease is a royalty upon the amount of mineral produced, and similar leases where the consideration is a valuable one, paid at the time of the execution of the lease, and hence not in anyway dependent upon the amount of mineral produced. Cases of the latter class are not included herein. It may be of interest as emphasizing the distinction, however, to refer to a case involving such a lease, which holds that where a lease of land for the development and production of oil is based upon a full consideration received in advance, and the lease does not expressly require the lessee to begin operations in any specified time within the terms of the lease (fifty years), the lease is not forfeited by the failure of the lessee to develop and extract oil. Under these circumstances, the court said that cases of implied covenant to develop, where the consideration of the lease is a share of the product, will not apply. Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094. And as sustaining the same point, see Breyfogle v. Wood, 15 Ky. L. Rep. 782.

The question of the forfeiture of mining leases for failure to mine or develop the leased premises, where the lease contains a provision for the payment of a minimum royalty or an annual rental in the event of delay in developing, is considered in notes in 11 L.R.A.(N.S.) 417, and 30 L.R.A.(N.S.) 176. The rule adopted by the cases referred to in these notes should govern the question now under consideration, for it is obvious that if, as shown in those notes, there is an implied obligation resting upon the lessee to develop the leased premises within a reasonable time, where the lease is for mining purposes in consideration of a royalty on the product mined, and this obligation is not impaired by a stipulation in the lease for the payment of a small royalty or an annual rental in event of delay on the part of the lessee in developing the premises, then this obligation rests in full force upon the lessee in a lease of this character, which does not contain such a provision. And this is the holding of the cases passing upon the question as to leases of land for mining purposes, where the consideration is a royalty upon the product mined, without a provision for payment either of rental or a royalty for delay in development. In such case the reservation of a royalty by the lessor and the agreement by the lessee to pay the same are construed to indicate the intention of the parties to be that the lessee shall develop the leased premises for minerals to the mutual profit of himself and the lessor, and from this presumed intention, there springs the implied obligation, constituting a condition, imposing upon the lessee the duty to develop the premises and mine the product within a reasonable time.

Forfeiture — exploration and development.

Where the sole compensation for a lease of lands for mining purposes is the royalties the lessor may receive, the plain object of the lease is that there shall be a search made on the leased premises for minerals, and if discovered a diligent production thereof. Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S. W. 837.

So, where the consideration of a lease of land for oil and gas is a share of the oil produced and a certain sum of money to be paid from the lessee's profits, and the only provision for the termination of the lease is that it shall continue as long as oil or gas is found in paying quantities, it is implied that the lessee shall use reasonable diligence in developing the property, and this implication is as effective as if in words it had been incorporated in the lease. Logan Natural Gas & Fuel Co.

would afford shipping facilities, the building of which was then contemplated and has since been completed.

(February 10, 1914.)

APPEAL by defendant Lowry from a decree of the Circuit Court for Wyoming County in plaintiff's favor in a suit for the cancelation of a mining lease. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Campbell and Edward W. Knight, for appellant:

The grant in question is a grant of the corpus of the coal, to be taken out at any time within the express term, ninety-nine years.

Higgins v. Round Bottom Coal & Coke Co. 63 W. Va. 219, 59 S. E. 1064; List v. Cotts, 4 W. Va. 543; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, 3 Mor. Min. Rep. 238; 2 Gray, Cases on Property, 8, 10, note 1; Wilkinson v. Proud, 11 Mees. & W. 33, 12 L. J. Exch. N. S. 227, 7 Jur. 284, 12 Mor. Min. Rep. 269; W. Va. Code, 1906, §§ 3020, 3024, 3438; Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 6 L.R.A. (N.S.) 628, 53 S. E. 928; Comley v. Ford, 65 W. Va. 429, 64 S. E. 447; McMullen v. Blecker, 64 W. Va. 88, 131 Am. St. Rep. 894, 60 S. E. 1093; Barringer & A. Mines & Mining, 36; Williamson v. Jones, 39 W. Va. 231, 25 L.R.A. 222, 19 S. E. 436; Wilson v. Youst (Wilson v. Hughes) 43 W. Va. 826, 39 L.R.A. 292, 28 S. E. 781; South Penn Oil Co. v. McIntire, 44 W. Va. 296,

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v. Great Southern Gas & Oil Co. 61 C. C. A. 359, 126 Fed. 623.

This implied obligation is such an essential part of the contract as to amount to a condition annexed to the grant, and the nature and purpose of the contract, and the difficulty of applying any measure of damages for a breach of the condition, make the remedy by forfeiture applicable. J. M. Guffey Petroleum Co. v. Oliver, — Tex. Civ. App. —, 79 S. W. 884.

And where a lease imposes on the lessee the duty of paying the lessor a certain per cent of the net proceeds derived from the product mined, should the lessee successfully develop the premises, although the lease purports to tie up the lands for a long period of years without obligating the lessee to prospect for mineral, nevertheless the lessee forfeits whatever rights he has under the lease by his failure diligently to prospect for minerals, where he offers no reasonable explanation for his failure so to do. Davis v. Riddle, 25 Colo. App. 162, 136 Pac. 551.

Indiana Oil, Gas, & Development Co. v. McCrory, — Okla. —, 140 Pac. 610, asserts that a lease of land for mining purposes may be canceled in equity for negligence and delay by the lessee in developing the land, where the consideration for the lease is a royalty on the product of the mines or wells, although there is no express forfeiture provision. This doctrine, however, was not applied in this case.

And in Loveland v. Longhenry, 145 Wis. 60, 140 Am. St. Rep. 1068, 129 N. W. 650, this doctrine was applied to a lease very similar to the ones referred to, except there was a provision by the lessee to commence operations upon the premises on or before a certain date and thereafter to prospect the lands and work, develop, and operate the mines discovered, in a good, reasonable, and workmanlike manner. This clause, however, the court apparently considered to apply only in the event of the discovery of mines, and the cancelation of the lease was based upon the implied covenant to develop within a reasonable time.

In Island Coal Co. v. Combs, 152 Ind. L.R.A.1915B.

379, 53 N. E. 452, although the lease under consideration contained an express provision for forfeiture for failure to develop, the court, referring to the general rule in the absence of such a provision, said that in leases of minerals lands, where the lessee agrees to pay to the lessor a royalty or rent which depends on the amount of the product mined, the lessee thereby obligates himself to begin the development of the land and the mining of the mineral within a reasonable time after the execution of the lease, and it is not within his option or discretion to postpone the development and operation of the mines for an indefinite or unreasonable time. For the failure upon his part for an unreasonable length of time, to carry into effect the purposes of the lease by opening and working the mines underlying the leased premises, operates as a forfeiture of his rights.

Under a lease of land the consideration of which is its development for minerals, the lease containing a provision that it shall cease and be null and void unless the lessee within a certain time begins work prospecting and developing the leased premises, or other land within 4 miles thereof, the fact that the lessee complies with this requirement by boring wells on other lands within the prescribed distance does not relieve him from the forfeiture of the lease and its cancelation in equity, where thereafter for several years he made no effort to develop the leased lands, and refused to do so, since his action in this regard was in violation of his implied covenant to search for, and if found to obtain, minerals from the land. Mansfield Gas Co. v. Alexander, supra, followed in Mansfield Gas Co. v. Parkhill, — Ark. —, 169 S. W. 957, a case involving very similar facts, except that no demand was made upon the lessee to develop the land before commencing proceedings to cancel the lease. The court said that this failure to make a demand did not distinguish the case or take it out of the rule applied in the Alexander Case.

In Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846, it is held that where a lease

28 S. E. 922; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533; Lazarus's Estate, 145 Pa. 1, 23 Atl. 372; Dorr v. Reynolds, 26 Pa. Super Ct. 139; Hosack v. Crill, 204 Pa. 97, 53 Atl. 640; Harlan v. Lehigh Coal & Nav. Co. 35 Pa. 287, 8 Mor. Min. Rep. 496; Kingsley v. Hillside Coal & I. Co. 144 Pa. 613, 23 Atl. 250; Hope's Appeal, 29 W. N. C. 365; Fairchild v. Fairchild, 6 Sadler (Pa.) 231, 9 Atl. 255; Timlin v. Brown, 158 Pa. 600, 28 Atl. 236; Sanderson v. Scranton, 105 Pa. 469; Palmer v. Edwards, 1 Dougl. K. B. 187, note; 2 Bl. Com. 317; Gowan v. Christie, L. R. 2 H. L. Sc. App. Cas. 273, 5 Moak, Eng. Rep. 114; Gould, Waters, 3d ed. § 291; Blanchard & W. Mines & Minerals, 31; Plummer v. Hillside Coal & I. Co. 43 C. C. A. 490, 104 Fed. 208, 160 Pa. 483, 28 Atl. 853; Edwards v. McClurg, 39 Ohio St. 41; Herrington v. Wood, 6 Ohio C. C. 326, 3 Ohio C. D. 475; Chester Emery Co. v. Lucas, 112 Mass. 424, 3 Mor. Min. Rep. 343; Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Suffern v. Butler, 19 N. J. Eq. 202.

Such a deed as that from Bailey to French, in 1881, needs no consideration to support it.

1 Gray, Cases on Property, 538, note; 1 Hayes, Conveyancing, 5th ed. 102; Perry, Tr. 5th ed. § 162; Goodwin v. White, 59 Md. 503; Fouty v. Fouty, 34 Ind. 433.

Even if a royalty is reserved as consideration, a failure for many years to mine coal will not (in the absence of express stipulations in the lease as to time of

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of lands for mining purposes contains no express covenant or stipulation for diligence in the matter of exploration, or any requirement as to the amount of work to be done or the number of wells to be drilled within any stated period of time, or at all, but the consideration for the lease is a royalty to be paid to the lessor on the product of the mines or wells developed, there is an implied covenant that the work of prosepcting and development should be prosecuted with reasonable diligence. The court, however, expresses doubt in this case as to whether or not a breach of this implied covenant will warrant the court in decreeing a forfeiture, when the lease expressly provides that it may be forfeited in whole or in part for another cause therein specifically stated. The latter point, however, was not decided.

—after discovery of oil or minerals—in general.

In connection with this subject reference is made to notes in 28 L.R.A.(N.S.) 959, and 38 L.R.A.(N.S.) 134, as to the right to declare the forfeiture of an oil and gas lease for failure of the lessee to market the product after completing a well or wells.

Where the right to mine is granted in consideration of a share of the mineral produced, the law implies that the lessee shall exercise reasonable diligence in working the mine, if mineral can be produced at a profit. Cleopatra Min. Co. v. Dickinson, 28 Wash. 211, 68 Pac. 456.

And where the consideration for a lease of land for mining purposes is an agreement by the lessee to pay the lessor a certain part of the net proceeds of all minerals taken from the land, although there is no stipulation that the failure to open and work the mines shall cause a forfeiture of the lease, nevertheless the law places upon such contracts the same construction as if such a stipulation had been expressly written therein, and a failure upon the part of the lessee to work the mines developed upon the leased premises, for a

period of five years, will entitle the lessor to a forfeiture of the lease. Maxwell v. Todd, 112 N. C. 677, 16 S. E. 926.

To the same effect is Conrad v. Morehead, 89 N. C. 31, wherein the rule is asserted and applied that where the lessee in the lease of land for mining purposes expressly covenants to pay the lessor a certain part of all the minerals that may be procured from the land, and to account for the same quarterly, although there is no express covenant that the lessee shall work the mine continuously, nor in any particular way, or at all, nevertheless there is manifestly an implied covenant on his part that he will work it as such mines are usually worked, and with ordinary diligence. And it is said that "it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold or other metals. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice."

A stipulation in a lease of land for mining purposes to operate the mine in a workmanlike manner, together with the obligation implied by law by reason of royalties to be paid on the product mined, imposes upon the lessee the duty of reasonable effort and diligence in the operation of the mine, and delay in this regard may constitute an abandonment of the lease. Price v. Black, 126 Iowa, 304, 101 N. W. 1056.

In Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296, it is held that where the only consideration for a lease of land for mining purposes was the royalty which the lessor was to receive, and which could be obtained only through diligent operation of the wells, where the lessee had ceased to operate the wells developed on the premises, and all the appliances with

mining) cause the mining rights to revest in the grantor.

Plummer v. Hillside Coal & I. Co. 160 Pa. 483, 28 Atl. 853; Arnold v. Stevens, 24 Pick. 106, 35 Am. Dec. 305, 1 Mor. Min. Rep. 176.

The deed is an absolute and executed grant, and contains no conditions authorizing forfeiture or reconveyance.

2 Washb. Real Prop. 6th ed. §§ 938, 942, 950; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Ward v. Lewis, 4 Pick. 518; Browning v. Haskell, 22 Pick. 310.

The deed from Bailey to French, in 1881, was a grant of an interest in land, and cannot be taken away from the grantee except by deed or by adverse possession under the statute of limitations.

Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 6 L.R.A.(N.S.) 628, 53 S. E. 928.

Even if the deed had contained a promise that mining operations should be begun within a reasonable time (and obviously the deed contains no such promise), yet that fact would not authorize the court to decree a forfeiture or a reconveyance or a cancelation of the deed. The only remedy would be an action at law for damages.

Core v. New York Petroleum Co. 52 W. Va. 276, 43 S. E. 128; Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124; Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157; McKnight v. Kreutz, 51 Pa. 232, 6 Mor. Min. Rep. 305; Blair v. Peck, 1 Pennyp. 247; Ammons v.

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which they were operated were allowed to be sold under execution on a judgment against the lessee, including oil stored in tanks subject to royalties, and the leasehold interest was likewise permitted to be sold and the purchaser to take possession under it, exclude the lessee, and operate the wells, the lessor properly took possession of the leasehold premises for a condition broken. In this lease there was an express provision that if default be made in the payment of the royalties or in the keeping of the covenants or agreements to be performed by the lessee, then the lessor shall have the right to re-enter upon and take possession of the premises, and at his option terminate the lease. It seems, however, that the court did not base the right of the lessor to terminate the lease upon this provision, for it is also asserted that the implied covenant diligently to mine the leased premises stands upon the same footing as if it were expressly stated in the lease, and that the lessor was warranted, if the condition was not performed, in re-entering and taking possession of the premises and terminating the lease.

But the lessee's failure to operate a mine for two years after its development does not constitute an abandonment, where explained by showing that the delay was due to difficulties in its operation, which during this time the lessee, at great expense, was endeavoring to overcome to the knowledge, and with the apparent acquiescence, of the lessee, who also received during this time coal from the mine for domestic purposes, as provided by the lease. Price v. Black, supra.

—extent of development.

It is an implied condition of every lease of land for the production of oil therefrom, that when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both himself and the lessor, but the advisability of drilling additional wells involves the business judg-

L.R.A.1915B.

ment of the lessee, for he is not bound to work unprofitably to himself for the benefit of the lessor, and it is sufficient if he acts in good faith and makes no manifestly fraudulent use of his opportunities. Adams v. Stage, 18 Pa. Super. Ct. 308.

The effect of these implied covenants is to impose upon the lessee a duty to drill as many wells on the leased premises as are necessary to obtain therefrom all the oil and gas that it is reasonably and fairly profitable to extract and market. Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124.

Whether, after the discovery of oil or gas by means of an initial or experimental well, there is a duty to sink additional wells, depends upon the probability arising from circumstances surrounding the property, that an additional well or wells will be profitable to the lessee. He is under no duty to operate at a loss to himself, to make the premises profitable to his lessor. It is only under circumstances indicative of mutual profit that the duty to operate exists. Ibid.

After successfully developing land under a mining lease, the mere fact that the lessee abandoned wells it no longer paid to pump, while he continued developing and operating new wells, does not constitute a ground for forfeiture. Burgan v. South Penn Oil Co. 243 Pa. 128, 89 Atl. 823.

And the lessee in an oil and mining lease is not guilty of delay justifying a forfeiture of the lease, where he has brought into operation several valuable wells, and the lessor by his conduct has waived objections he might otherwise have made to the conduct of the lessee in developing the land. Indiana Oil, Gas, & Development Co. v. McCrory, — Okla. —, 140 Pac. 610.

So, where the lessees under a mining and oil lease, the consideration for which is a royalty to be paid on the amount produced, commence operation within the time required by the lease, and within less than one year therefrom they have drilled two wells to considerable depth, and at the time the suit to cancel the lease for failure to develop was commenced, they were at

South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; Harness v. Eastern Oil Co. 49 W. Va. 232, 38 S. E. 662; Colgan v. Forest Oil Co. 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119, 20 Mor. Min. Rep. 338; Young v. Forest Oil Co. 194 Pa. 243, 45 Atl. 121, 20 Mor. Min. Rep. 345; Galveston, H. & S. A. R. Co. v. Pfeuffer, 56 Tex. 66; Lake v. Gray, 35 Iowa, 459; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Mor. Min. Rep. 169; Downing v. Rademacher, 6 Cal. Unrep. 582, 62 Pac. 1055; Boyd v. Stone, 11 Mass. 342; Brand v. Power, 110 Ga. 522, 36 S. E. 53; Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102; Henderson v. Carbondale Coal & Coke Co. 140 U. S. 25, 27, 33, 35 L. ed. 332, 333, 335, 11 Sup. Ct. Rep. 691.

Messrs. **M. O. Litz and Harold A. Ritz,** for appellee:

The lease contract is a mere option agreement, as it gives the lessee the exclusive right to mine within ninety-nine years without any obligation to do so for any period of time. Hence, such an agreement is voidable at the option of either party.

Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Cowan v. Radford Iron Co. 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453; Brown v. Wilmore Coal Co. 82 C. C. A. 295, 153 Fed. 143; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Collins v.

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work, and had made preparations to sink the second well to a much greater depth, the evidence does not show a failure to exercise a reasonable diligence in the work of prospecting and drilling for oil and gas on the leased premises. Phillips v. Hamilton, 17 Wyo. 41, 95 Pac. 846. To the same effect is Douglass Oil Fields v. Hamilton, 17 Wyo. 54, 95 Pac. 849.

Provision in lease to "farm" for minerals.

The acceptance by the lessee of a lease of land to be "farmed" for minerals, the consideration of which is a share of the minerals produced, amounts to an agreement on his part to mine the minerals to be found on the property within a reasonable time, and equity will cancel the lease where the lessee delays development for an unreasonable length of time. Shenandoah Land & A. Coal Co. v. Hise, 92 Va. 238, 23 S. E. 303.

And under a lease of lands to farm for minerals, the lease to run for ninety-nine years, the lessee must begin development of the land for minerals within a reasonable time, otherwise the lessor will be entitled to have the lease canceled in equity. The provision "to farm" excludes any inference that the lessee had the whole term to decide on the commencement of operations, although there is no time fixed for the farming of the minerals to commence, for in such case the law declares that it must be within a reasonable time. Price v. Nicholas, 4 Hughes, 616, Fed. Cas. No. 11,415.

Abandonment.

As already seen, a mining lease of the character under consideration may be terminated or forfeited for the neglect or failure of the lessee within a reasonable time to develop the leased lands, or operate mines or wells discovered through such development. These leases may also be terminated or forfeited on the ground of abandonment by the lessee. The doctrine of abandonment seems to have received more recognition, and to have been more frequently applied by the courts of West Virginia than by the courts of any other state. There is a distinction between failure or neglect of the lessee to develop the leased premises or to operate the mines or wells discovered, and the abandonment by him of the enterprise, although in many cases this distinction is perhaps obscure. It is not the purpose of this note to point out the various distinctions between these different grounds for terminating oil and gas leases, since there are not enough cases within the scope of this note to enable the question to be developed. An important distinction, however, which may be suggested, is that, since abandonment is a question of intention, the acts of the lessee may indicate his intention to abandon the enterprise he has undertaken under the lease, when these acts would not be sufficient to show a neglect or failure to develop or produce sufficient to entitle the lessor to a forfeiture of the lease.

The question of abandonment of a lease of land for mining purposes is one of intention, the determination of which, however, does not depend on any intention of the lessee either to abandon or retain the mineral right, but rather upon his intention to abandon the contemplated enterprise. Brown v. Wilmore Coal Co. 82 C. C. A. 295, 153 Fed. 143, writ of certiorari denied in 209 U. S. 546, 52 L. ed. 920, 28 Sup. Ct. Rep. 758.

It has been held that, although a lease of land for mining purposes, the consideration of which is a royalty to be paid upon the product, is to continue for ninety-nine years, and there is no express provision for diligent development, nevertheless the law contemplates that operations shall commence in a reasonable time, in order that the lessor may enjoy his royalty, otherwise the presumption arises that the lessee has abandoned his rights under the lease. Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493.

What constitutes unreasonable delay.

A lease of land for mining purposes is properly canceled by a court of equity as

Abel, 151 Ala. 207, 125 Am. St. Rep. 24, 44 So. 109.

The consideration moving the lessor being the payment of royalties at the time of mining, operation must begin within a reasonable time, else the right is lost.

Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Shenandoah Land & A. Coal Co. v. Hise, 92 Va. 238, 23 S. E. 303; 20 Am. & Eng. Enc. Law, 2d ed. 780; 27 Cyc. 705; Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493; Brown v. Wilmore Coal Co. 82 C. C. A. 295, 153 Fed. 143; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Harris v. Michael, 70 W. Va. 356, 73 S. E. 934.

The lease has become forfeited for failure of the lessee to begin mining and the payment of royalties.

Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179.

Without regard to the forfeiture, an abandonment is presumed under the conduct of the lessee.

Lowther Oil Co. v. Miller-Sibley Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; Starn v. Huffman, supra; Harris v. Michael, 70 W. Va. 356, 73 S. E. 934.

Williams, J., delivered the opinion of the court:

Plaintiff and defendant James D. Lowry both claim the mineral underlying a tract of 375 acres of land situate in Wyoming county, mediately, under separate deeds from John P. Bailey as a common source of title; the plaintiff claiming under a deed made to Grigsby and Gooch on the 26th of September, 1885, and defendant under a mineral lease made to W. A. French on the 23d of July, 1881, for a term of ninety-nine years. Claiming that the deed to French was only an option, or at most a mining lease, and that it had been forfeited or abandoned by him, plaintiff brought this suit to have it, and its subsequent assignments, declared null and void, on the ground that recent assertions of title to the mineral, by the claimants under French, constituted a cloud upon his title. From a decree granting relief to plaintiff, James D. Lowry, one of the defendants, has appealed.

The facts are not disputed. The lease to French was prior to the deed to Grigsby and Gooch, and was duly recorded. The case depends upon two questions, *viz.:* (1) Was the deed to French only a mining lease, or did it vest him with title to the mineral for a term of ninety-nine years? (2) If

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a cloud on the title of a subsequent lessee of the land for the same purpose, where the consideration of the first lease was a royalty to be paid upon the amount of ore mined, and the lessee never attempted to develop the property, and never intended to mine any ore, and in this regard he had failed to fulfil the obligations impliedly imposed upon him by the lease. Brown v. Wilmore Coal Co. supra.

Where the lessee of mineral rights in certain lands agrees in consideration of a lease to pay the lessor a certain royalty upon the products mined, although there is no stipulation as to the time of development, and the lease is for a term of thirty years, nevertheless, where the lessee makes no effort to develop the land, and by a contract effectually precludes himself from so doing for a period of years, the lease will be canceled at the instance of the lessor or those claiming under him. Oliver v. Goetz, 125 Mo. 370, 28 S. W. 441.

A delay of over one year to commence development has been held to be unreasonable where not sufficiently excused. Loveland v. Longhenry, 145 Wis. 63, 140 Am. St. Rep. 1068, 129 N. W. 650.

The delay of a year and a half to operate under a lease of land for mining purposes, the consideration of which is a royalty to be paid the lessor upon the mineral produced, is such a decided failure on the part of the lessee to comply with his contract as warrants the lessor in rescinding the same, giving notice of the termination thereof, and having it canceled. McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517. In the foregoing case the lease contained a provision that the payment of the royalty specified should begin on or before six months from the date of the lease, and as the land was not developed, no royalties were ever paid.

Where neither the lessee nor its assigns were ever in possession or took any steps toward the exploration of or operating upon the leased premises for oil or gas, for more than four years after the lease was made, although frequently urged to do so by the lessor, the delay was unreasonable. Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co. 61 C. C. A. 359, 126 Fed. 623.

The suspension of operations and the abandonment of the search for oil and gas and the relinquishment of the premises for nine years, after drilling one well which was a failure, constitute an unqualified surrender by the lessee of whatever rights he had to perfect his inchoate title under his lease. It was his announcement to the lessor that he was done, and that the former could give exploring privileges to others. Calhoon v. Neely, 201 Pa. 97, 50 Atl. 967, 21 Mor. Min. Rep. 754.

A delay on the part of the lessee for over twenty years, to take steps to develop land leased for mining purposes, is unreasonable within the rule under consideration. Shenandoah Land & A. Coal Co. v. Hise, 92 Va. 238, 23 S. E. 303. A. G. S.

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only a mining lease, have the lessee's rights thereunder been forfeited or abandoned?

Counsel for appellant strenuously insist that the lease to French operated to vest in him an estate in the mineral for a term of ninety-nine years, and that it could not be devested by abandonment, or forfeited for failure to begin mining operations within the term. They cite decisions from the court of appeals of Pennsylvania, and of one or two other states, supporting their contention. The briefs, both pro and con, show an unusual amount of care, research, and labor, as well as ability, in their preparation. There are, however, many propositions discussed by counsel for appellant which need not be considered, for the reason that we hold that the lease did not vest in French title to the mineral in place. Much of the brief is devoted to a discussion of the manner of devesting of estates, which does not apply to a mining lease, which may be abandoned or surrendered by the lessee at any time. The lease in question reads as follows, *viz.:*

This deed, made this 23d day of July, 1881, between John P. Bailey, of the one part, and W. A. French, witnesseth: That the said John P. Bailey doth hereby demise and lease unto the said W. A. French, his personal representatives, successors, and assigns, all coal and mineral rights and privileges whatsoever contained on, in, and beneath the surface of all and every part, portion, and acre of his, the said John P. Bailey's, farm, lands, grounds, property, and possessions, lying and being in the county of Wyoming, West Virginia, on the waters of Guyandotte river, adjoining the lands of Addison Milam and others, and containing 375 acres, be the same more or less. To have and to hold the same from the date of the signing and concluding of these presents, for the term, period, and space of ninety-nine (99) years, hence ensuing. The said W. A. French, his personal representatives, successors, and assigns, shall and will truly pay, or cause to be paid, to the said John P. Bailey, the lessor thereof, during the said term, period, and space mentioned, for and in consideration of said demise and lease, a rent of 3 cents per ton of 2,240 lbs. for each and every ton of coal and other minerals mined and shipped therefrom; and the said W. A. French, his personal representatives, successors, and assigns, may and shall have and enjoy free and full access, ingress, and egress into, on, under. over, and beneath said lands, for the purpose of opening, mining, and shipping the coal and other minerals thereon and therein, and to build and erect the necessary buildings and machinery, to operate and work the same with undisturbed right of way for all necessary roadways to and from their or his said mines and works; and for the further consideration of $1 to me, the said John P. Bailey, in hand paid by the said W. A. French, the receipt whereof is hereby acknowledged by the said John P. Bailey to be binding upon him, his heirs, administrators, successors, and assigns, the said parties have hereunto signed their names and affixed their seals the day and date above written.

John P. Bailey. [Seal.]
Wm. A. French. [Seal.]

No mining operations were ever begun by French or those claiming under him, nor did he or they cause the mineral to be separately charged to him or them on the land books of Wyoming county for taxation. Both surface and mineral continued to be assessed together, in the name of Bailey, until his conveyance of the mineral to Grigsby and Gooch in 1885, after which it was charged to them, and has continued to be charged to them, and to those claiming under them, down to the time this suit was brought.

The lease did not vest in French an estate in the coal and other minerals in place. It does not in terms purport to convey title to the mineral. Counsel for appellant insist, however, that, properly construed, the writing does vest in the lessee an estate in the mineral for a term of ninety-nine years. In one sense such a lease is a sale of the mineral substance, because it authorizes the lessee to extract it and then dispose of it as he pleases. But, until he does so, the title thereto remains in the lessor, subject to the right of the lessee to sever it from the other part of the realty. That French was vested with no present title to the coal in place is borne out by the following authorities: Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Smith v. Root, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; and Harris v. Michael, 70 W. Va. 357, 73 S. E. 934. There is a clear legal distinction between an absolute conveyance of the mineral in place, and the grant of a mining right to enter upon the land and convert the mineral into personalty and dispose of it. In one case there is a severance of the title to the realty; in the other there is not, although the mining right entitles the lessee to extract every particle of the mineral. The grant is not of the mineral in place, but of "all coal and mineral rights and privileges." The consideration to the lessor is not a definite sum of money, paid, or to be paid at a certain future time, but "a rent of 3 cents per

ton of 2,240 lbs. for each and every ton of coal and other minerals mined and shipped therefrom," which was to be paid "during the said term;" that is, continuously throughout the term, or as long as coal is mined. The contract contains no provision for payment of minimum royalties in the event of failure to mine; mining had to be begun before the lessor could demand any of the consideration for the lease. It cannot be conceived, therefore, that the contract was made merely to enable the lessee to speculate wholly for his own profit, or that the lessor intended to encumber his property for a period of ninety-nine years with a lease from which he might derive no benefit whatever until near the end of the term. The purpose in view was development of the property, and the parties evidently contemplated that mining operations should be begun within a reasonable time after the making of the agreement.

True, the lessee did not expressly covenant to begin mining at any certain time, nor does the lease contain any clause forfeiting it for failure to mine within a reasonable time. But the law, as it has been understood and applied by this court, implies such a covenant in every mining lease reserving to the lessor, as a consideration therefor, a royalty measured by the amount of mineral produced. Smith v. Root, 66 W. Va. 633, and cases cited in opinion at page 639. The consideration for the lease was 3 cents per ton of coal, and it had to be mined before the consideration could be ascertained or demanded. Mining leases are usually made for long terms; but, unless expressly so provided, it is not optional with the lessee throughout the term when he will begin operations. The length of term is intended to enable the lessee to complete mining operations after they have been commenced, and not to make it optional when he will begin. What is a reasonable time in any given case depends largely upon its circumstances, and whether the lessee has been diligent in his efforts to develop.

At the date of this lease there was no railroad within many miles of the land, and consequently no shipping facilities. But within a few years thereafter the Norfolk & Western Railroad was built within some 10 or 12 miles of it; and, within recent years, the Virginia Railroad has been built much nearer to the property. Counsel for defendant insist that, as the lease contemplated shipment of the mineral to market, and there was then no means of shipping it, the parties must have contemplated that fact, and must have intended that mining was not to commence until a railroad was built near to the property, and that delay to mine until such time is reasonable. They insist that it was not feasible or practicable to ship the coal to market until the Virginian Railroad was built. Evidently the parties knew that the property was then too remote from a railroad to make the mining of coal profitable. But is it not fair to presume that they contemplated that a railroad would be shortly thereafter built through the territory in which the land lay, and that, if one was not shortly built, the lease should terminate? The record discloses that, about the time the contract was made, there was neighborhood talk that the Norfolk & Western Railroad might be built near to the property. May it not be presumed that they contracted in anticipation that it would run near enough to the land to make the mining of the coal feasible, and that, if it did not, the lease was to terminate? It is certainly more reasonable to suppose that such was their understanding than that they intended to tie up the property without development, possibly for a period of ninety-nine years, waiting for the building of some railroad then unheard of, and probably not even conceived in the mind of any man.

In view of the extremely low rate of royalty, it is not unreasonable to suppose that the lessor executed the lease with the hope and the expectation that the lessee might, by acquiring leases on enough other land, unduce the building of a railroad to the property. It does not follow, because there was no railroad near when the lease was taken, that the parties intended that it should remain in force indefinitely, until one should be built. The lease was executed more than twenty-five years before this suit was brought, and no mining operations were begun. That is an unreasonable time to wait for development. In respect to the lessee's duty to develop there is no distinction between an oil and gas lease and a coal lease. The difference in the nature of the minerals with respect to which the right is given furnishes no basis for applying to the two kinds of leases different rules of construction. That the existence of one is known and the other unknown is no reason why the lessee should not be as diligent to develop in the one case as in the other. In Urpman v. Lowther Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656, the fact that there were no pipe lines nearer than 10 miles was held not to be an excuse for failure to develop. See opinion of Judge Brannon at page 507.

Being vested only with a right to mine and dispose of the product, and not with title to the mineral in place, it is well

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settled that such right may be lost by abandonment, and that failure to begin mining in a reasonable time evinces intention of lessee to abandon his right. By their failure for more than twenty-five years to mine the coal, the intention of French, and those claiming under him, to abandon their right, is clearly established. After a lapse of a reasonable time the lease became a mere option, which either party could terminate at his election. That the lessor chose to terminate it is shown by his conveyance of the coal to Grigsby and Gooch, in 1885.

Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220, was a suit involving the rights of parties to an oil and gas lease giving the lessee the right to produce oil and gas for twenty years, or as long thereafter as they were found in paying quantities, and containing a covenant to drill a well within a specified time, which was only a few months after the date of the lease, and the court there held that the failure to drill for seven years raised a presumption of abandonment, and justified the lessor in suing to cancel the lease. There is no substantial difference between that case and the one now before us. Both are founded upon a breach of covenant to mine with reasonable diligence. That the broken covenant was expressed in the lease in that case, and is only implied in this, can make no difference. A covenant is no less binding because implied. No time is stated for the payment of the royalty, nor is there any provision compensating the lessor for failure to mine. It was never contemplated that payment of the consideration might be postponed for an unreasonable time, merely at the will of the lessee. So far only as it relates to vesting of rights the contract was executed; but, concerning the thing to be done under it, it remained executory. It was a working contract; and in order to continue it in life it was necessary that the thing agreed to be done should have been begun within a reasonable time and prosecuted with reasonable diligence.

In Cowan v. Radford Iron Co. 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453, there was involved a mining lease similar to the one in this case, in that it fixed no time for the commencement of operations, and dissimilar, in that it had no limit to its duration. No development had been begun within five years, and the lessor sued to cancel the lease on the ground that there had been an abandonment of it for failure to operate, and was granted relief.

In Shenandoah Land & A. Coal Co. v. Hise, 92 Va. 238, 23 S. E. 303, the mining lease was also very similar to the one we are now considering. It was for a term of ninety-nine years, and gave the lessee the right to mine all minerals of whatsoever description found in the lessor's land, in consideration of his receiving one fourth of all the profits that might be obtained therefrom. The court held that it was the lessee's duty to exercise his right "in a reasonable time and in a manner calculated to benefit the lessor as well as himself," and canceled the lease for failure of the lessee to keep his implied covenant. Similar rulings were made by the United States circuit court of appeals in the following cases: Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377, and Brown v. Wilmore Coal Co. 82 C. C. A. 295, 153 Fed. 143. The first-mentioned case involved a West Virginia oil lease, and the second a Pennsylvania mineral lease.

Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493, is also very like the present case in many respects. It was a case of a coal mining lease for a term of ninety-nine years, given for a consideration of a per ton royalty. The lessee was also given the right to cut, manufacture, and dispose of merchantable timber on the land, at the price of 50 cents a thousand feet, or 25 cents per tree at his discretion, but no time was stipulated for commencing to mine. Sixteen or seventeen years after the lease, the lessor began cutting and marketing the timber himself, and the lessee sought to enjoin him; and the court held that the lessee's right to the timber was subordinate to, and dependent upon, the mining right, and that, by his failure to begin mining operations for seventeen years, he had abandoned all rights under the lease.

We affirm the decree.

Petition for rehearing denied May 21, 1914.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX REL. HARRY W. BOLENS
v.
JAMES A. FREAR, Secretary of State.

ARTHUR WINDING et al., Appts.,
v.
SAME.

(148 Wis. 456, 134 N. W. 673.)

Courts — jurisdiction of supreme court — taxpayers' action — enjoining expenditure of public money.

1. A taxpayer may, under a constitution-

Note. — Constitutionality of income tax.

This question was discussed in the note

al provision empowering the supreme court to issue, *inter alia*, writs of injunction and other original and remedial writs, and to hear and determine the same, maintain in that court a suit as relator in the name of the state to enjoin the expenditure of money by state officials in the enforcement of an unconstitutional statute, if he in fact represents the state, and not merely his fellow taxpayers, and the defiance of the constitutional demands is flagrant and patent.

Same — injunction against system of taxation.

2. The supreme court may, under its power to issue, *inter alia*, writs of injunction and other original and remedial writs, and to hear and determine the same, entertain a suit by a taxpayer as relator in the name of the state to prevent the putting into force of a new system of taxation which is alleged to be unconstitutional, and which will affect every taxing district in the state.

Tax — real estate and income — equal protection of laws.

3. Taxing real estate and also the income therefrom does not deny the owner the equal protection of the laws within the prohibition of the Federal Constitution.

Same — progressive tax on incomes — validity.

4. Imposing a progressive tax on incomes does not deny taxpayers the equal protection of the laws within the prohibition of the Federal Constitution.

Statute — constitutionality — failure to consider — separate provisions.

5. The constitutionality of that portion of a tax law affecting nonresidents will not be considered by the court where the rights of nonresidents are not directly involved, if the invalidity of such provision will not nullify the entire statute, because it can be separated from the balance thereof.

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to Alderman v. Wells, 27 L.R.A.(N.S.) 864. The purpose of the present note is to supplement that note as regards some of the more specific constitutional objections that have been urged against particular provisions in these statutes, especially those involving discriminations.

Considerable of the dispute over the validity of income taxes has arisen over provisions in particular acts. The question of exemption has been considered very frequently.

An income tax law which exempted $2,000 of incomes under $4,000, but made no exemptions of any sum in case of incomes over $4,000, was held violative of a constitutional provision requiring each member of society to bear his proportional share of the expenses of government, in Campbell v. Shaw, 11 Haw. 112.

But an exemption of incomes up to and not in excess of $4,000 was sustained in Moore v. Miller, 5 App. D. C. 413.

An exemption to individuals of $1,000 was sustained as within the discretion of the legislature, in Robertson v. Pratt, 13 Haw. 590.

An income tax is not unconstitutional because it provides for a tax on the income of individuals over and above $1,000, while it provides for a tax upon the net income of corporations without authorizing such a deduction. Ibid. It is the theory of this case that the net income of a corporation is different in character from the net income of an individual; that corporations not only have no personal or family expenses, but by the act they are allowed to deduct the cost of labor employed in earning their income, while individuals are allowed to deduct only the cost of hired labor without any allowance for their own time or labor. See also Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, approving 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, cited in earlier notes. In view of the difference in character between the income of a corporation and that of an individual, the difference in classification in the act was sustained.

A provision that only one exemption be allowed from the annual aggregate income of all members of one family composed of one or both parents and one or more minor children, and that guardians shall be allowed to make a deduction in favor of each and every ward except where two or more wards are confused in one family, in which case the aggregate deduction shall not exceed $1,000, was sustained against the objection that it discriminated between large and small families, in Robertson v. Pratt, supra.

A provision which, in estimating incomes, authorizes the exclusion from personal property of any part consumed by a person or his family, does not discriminate in favor of farmers or agriculturists. Ibid.

An exemption of insurance companies which were taxed under the authority of another act was sustained in Ibid.

The fact that the income of aliens residing in the United States is taxed does not render the act unconstitutional as against a citizen of the United States. Moore v. Miller, supra.

Incomes received prior to the going into effect of the law may be taxed. Ibid.

The act of July 14, 1870, referred to in the earlier note, was held to be not a direct tax, and therefore not unconstitutional because not laid as direct taxes are required to be laid, in Smedberg v. Bentley, Fed. Cas. No. 12,964, and the act of June 30, 1864, was sustained in Clark v. Sickel, Fed. Cas. No. 2,862.

The power of the legislature to impose an income tax independently of any constitutional authority was not denied in Com. v. Werth, — Va. —, 82 S. E. 695, where the Virginia act was considered.

A state tax on income derived from United States securities is void. Opinion of Justices, 53 N. H. 634. W. A. E.

Tax — raising nonresident's assessments without notice — constitutional right.

6. Providing for increasing the assessment against a nonresident taxpayer without notice does not deprive him of any privileges or immunities guaranteed by the Federal Constitution.

Officer — election — income tax assessor.

7. The office of assessor of incomes is neither a county, city, town, nor village office within the meaning of a constitutional provision that incumbents of such offices shall be elected by local electors.

Same — creation of office — appointment of incumbent.

8. The office of collector created by a statute inaugurating a new system of taxation upon incomes falls within a constitutional provision that the legislature may provide for the appointment of officers whose offices are thereafter created by law.

Legislature — delegation of power — appointment of tax assessors.

9. There is no delegation of legislative power investing in the state tax commission the power of appointing assessors of incomes and fixing their salaries.

Tax — discrimination — individuals and partnerships.

10. There is no unconstitutional discrimination in allowing exemptions in the taxation of the income of individuals, while denying them in case of incomes of partnerships.

Same — life insurance — exemption.

11. An exemption from income tax of life insurance to the amount of $10,000, in favor of persons legally dependent on insured, is not unreasonable.

Same — personal property — exemption.

12. Allowing a deduction from an income tax of taxes paid within the year upon personal property is not an unjust discrimination.

Same — rental value of residence.

13. The legislature may provide that the rental value of residence property occupied by the owner shall be considered in determining the amount of his income for the purposes of taxation.

Same — aggregate family income.

14. The legislature may require the incomes of husband and wife living together, and their children under eighteen years of age living with them, to be added together in determining the taxable income of the husband.

Same — retroactive effect.

15. An income tax is not void because it includes all incomes from the beginning of the year in which it is passed, and from the sale of real estate purchased within three years previously.

Same — incomes of individuals and corporation — discrimination.

16. The legislature may provide for the taxing of the incomes of individuals and of corporations at different rates.

Same — failure to specify exemptions — effect.

17. An income tax law is not unconstitutional because not specifically exempting national banks, or naming the officers whose salaries shall be exempt.

Courts — jurisdiction of circuit court — enjoining state officer.

18. Where the power resides in the supreme court, a circuit court cannot entertain a taxpayers' action to enjoin the auditing and disbursing officers of the state from making expenditures for the enforcement of a statute which is alleged to be unconstitutional.

(Marshall, J., dissents from propositions 5 and 18; Timlin, J., dissents from propositions 1 and 2.)

(January 9, 1912.)

ON DEMURRER to a complaint in an original proceeding instituted to enjoin state officers from expending money in the enforcement of the income tax law which was alleged to be unconstitutional. Sustained.

APPEAL by complainants from a judgment of the Circuit Court for Dane County sustaining a demurrer to a complaint filed to enjoin defendants from expending money in the enforcement of the income tax law which was alleged to be unconstitutional. Affirmed.

The facts are stated in the opinions.

Messrs. **Carpenter & Poss**, for relator:

This court has jurisdiction.

State ex rel. Lamb v. Cunningham, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Re Court of Honor, 109 Wis. 625, 85 N. W. 497; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067.

If the provisions imposing the tax are invalid, the whole act must fail.

Gilbert-Arnold Land Co. v. Superior, 91 Wis. 353; State ex rel. LaValle v. Sauk County, 62 Wis. 376, 22 N. W. 572; State ex rel. Cornish v. Tuttle, 53 Wis. 45, 9 N. W. 791; Dells v. Kennedy, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692; Slinger v. Henneman, 38 Wis. 504; Atkins v. Fraker, 32 Wis. 510; State ex rel. Walsh v. Dousman, 28 Wis. 541; Lynch v. The Economy, 27 Wis. 69; Slauson v. Racine, 13 Wis. 398.

To tax the income of land is to tax the land itself.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 580, 581, 39 L. ed. 759, 818,

819, 15 Sup. Ct. Rep. 673; Brown v. Maryland, 12 Wheat. 419, 444, 6 L. ed. 678, 688; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Kennard v. Manchester, 68 N. H. 61, 36 Atl. 553.

The statute therefore provides for double taxation.

Second Ward Sav. Bank v. Milwaukee, 94 Wis. 587, 69 N. W. 359; Kingsley v. Merrill, 122 Wis. 185, 67 L.R.A. 200, 99 N. W. 1044, 2 Ann. Cas. 748.

The act regulates interstate commerce so far as it taxes the profits of nonresidents upon goods delivered free on board cars in Wisconsin, and the profits of residents upon goods delivered free on board cars outside the state.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The statute violates the rule of uniformity.

A bachelor has an exemption of $800, and so has a spinster; but husband and wife living together have an exemption of only $1,200 between them. The father receives an exemption of $200 for each child, and the child's income is to be considered a part of his income.

The graduated tax mounts more steeply with a man whose wife and children have separate estates than with one whose wife and children have not.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Plummer v. Coler, 178 U. S. 122, 44 L. ed. 1003, 20 Sup. Ct. Rep. 829; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79.

Nonresidents are to have no exemptions whatever. This violates article 4, § 2, of the Constitution of the United States, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

Re Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389.

The state must tax the property of corporations as it taxes property of individuals.

Huber v. Martin, 127 Wis. 412, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 Ann. Cas. 400; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Slauson v. Racine, 13 Wis. 398.

If one corporation earns but 1 per cent on the assessed value of its property, while another corporation earns 6 per cent, the first pays only ¼ of 1 per cent of its income, while the second pays 3 per cent of its entire income.

This violates all rules of classification.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Kochersperger v. Drake, 167 Ill. 122, 41 L.R.A. 446, 47 N. E. 321; Plummer v. Coler, 178 U. S. 122, 44 L. ed. 1003, 20 Sup. Ct. Rep. 829; Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79.

The act is a direct grant to the courts of legislative power.

Slinger v. Henneman, 38 Wis. 504; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; Ex parte Blanchard, 9 Nev. 101; Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394, 5 Mor. Min. Rep. 424; Greenough v. Greenough, 11 Pa. 494, 51 Am. Dec. 567; Reiser v. William Tell Sav. Fund Asso. 39 Pa. 137; State ex rel. Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720; State ex rel. Clyatt v. Hocker, 39 Fla. 477, 63 Am. St. Rep. 174, 22 So. 721; United States ex rel. Boyd v. Lockwood, 1 Pinney (Wis.) 359; State v. Pederson, 135 Wis. 31, 114 N. W. 828; Rockwell v. Fillmore County, 47 Minn 219, 49 N. W. 690; Adams v. Beloit, 105 Wis. 363, 47 L.R.A. 441, 81 N. W. 869; State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; Milwaukee County v. Hackett, 21 Wis. 613.

The act is a violation of local self-government.

O'Connor v. Fond du Lac, 109 Wis. 253, 53 L.R.A. 831, 85 N. W. 327; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; 8 Cyc. 779 et seq.; State ex rel. Williams v. Samuelson, 131 Wis. 499, 111 N. W. 712.

The state of Wisconsin may not tax extraterritorial income.

State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Metropolitan L. Ins. Co. v. New Or-

leans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499.

The state may not tax nonresidents upon incomes received and held outside the state, though the income be derived from sources within the state.

M'Culloch v. Maryland, 4 Wheat. 316, 418, 428, 429, 4 L. ed. 579, 604, 606, 607; Buck v. Beach, 206 U. S. 392, 400, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; State Tax on Foreign-held Bonds, 15 Wall. 300, 319, 21 L. ed. 179, 186; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 50 L. ed. 150, 152, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The 14th Amendment forbids graduated or progressive features in taxation of property.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The people of Wisconsin cannot, by declaring that in Wisconsin a tax on the income is not a tax on the property, thereby evade the 14th Amendment.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Almy v. California, 24 How. 169, 16 L. ed. 644; Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; People ex rel. Edison Electric Illuminating Co. v. Board of Assessors, 156 N. Y. 417, 42 L.R.A. 290, 51 N. E. 269.

Assessment of husband and father for income of wife and child is invalid.

Hamilton v. Fond du Lac, 25 Wis. 490; Siegel v. Outagamie County, 26 Wis. 70; Whittaker v. Janesville, 33 Wis. 76; Massing v. Ames, 37 Wis. 645; Towne v. Salentine, 92 Wis. 404, 66 N. W. 395.

The act impairs the obligation of contracts.

Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; United States ex rel. Foote v. County Ct. 1 McCrary, 218, 2 Fed. 1; Scotland County Ct. v. United States, 140 U. S. 41, 35 L. ed. 351, 11 Sup. Ct. Rep. 697; McKie v. Rose, 140 Fed. 145; Sutherland-Innes Co. v. Evart, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 113.

Mr. J. E. Dodge, for the State:

Relator cannot maintain this action.

L.R.A.1915B.

Duluth Log Co. v. Hawthorne, 139 Wis. 170, 120 N. W. 864; Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Prentis v. Atlantic Coast Line Co. 211 U. S. 231, 53 L. ed. 160, 29 Sup. Ct. Rep. 67; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654.

Apportioning to individual taxpayers and collecting from them an income tax by a body of state officers is not in derogation of any policy of home rule or local self-government.

State ex rel. Gubbins v. Anson, 132 Wis. 467, 112 N. W. 475; People ex rel. Wood v. Draper, 15 N. Y. 532; State ex rel. Ellis v. Thorne, 112 Wis. 81, 55 L.R.A. 956, 87 N. W. 797; State ex rel. Hessey v. Daniels, 143 Wis. 649, 128 N. W. 565; 2 Lewis's Sutherland, Stat. Constr. §§ 508, 511, 512; Re Revisor of Statutes, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176; Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905; State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832; 23 Am. & Eng. Enc. Law, 342 et seq.; People ex rel. Woods v. Crissey, 91 N. Y. 616; Cricket v. State, 18 Ohio St. 9; People ex rel. Waterman v. Freeman, 13 Am. St. Rep. 122, note; Gibbs v. Morgan, 39 N. J. Eq. 126; Somers v. State, 5 S. D. 321, 58 N. W. 804.

The state may localize incomes within its borders for purposes of taxation.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 356, 55 L. ed. 762, 768, 31 Sup. Ct. Rep. 550; Chicago & N. W. R. Co. v. State, 128 Wis. 553, 108 N. W. 557; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 427, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; Society for Sav. v. Coite, 6 Wall. 607, 18 L. ed. 902; Kidd v. Alabama, 188 U. S. 730, 733, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Blackstone v.

Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National dEscompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. ed. 762, 31 Sup. Ct. Rep. 550; Orient Ins. Co. v. Board of Assessors, 221 U. S. 358, 55 L. ed. 769, 31 Sup. Ct. Rep. 554; Wilcox v. Middlesex County, 103 Mass. 544.

There is no rational distinction, for purposes of jurisdiction, between the rights to collect and to receive and enjoy income, and the rights, whether law given or inherent, to enforce and receive inheritances as to which the jurisdiction to tax may be in two states at once.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Beals v. State, 139 Wis. 544, 121 N. W. 347.

The very nature of income taxes and the history of their administration establishes the impossibility of their restraint by the same conception of either situs or uniformity which control the taxation of property.

Cooley, Taxn. 3d ed. 387 et seq.; Wilcox v. Middlesex County, 103 Mass. 544; Glasgow v. Rowse, 43 Mo. 479; St. Joseph v. Ernst, 95 Mo. 367, 8 S. W. 558; Alderman v. Wells, 85 S. C. 507, 27 L.R.A.(N.S.) 864, 67 S. E. 781, 21 Ann. Cas. 193; Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 772; Drexel v. Com. 46 Pa. 31; Waring v. Savannah, 60 Ga. 93.

If it is beyond legislative power to lay the burden on national banks, then it will be presumed they were not included.

Sutherland, Stat. Constr. § 336; Opinion of Justices, 41 N. H. 553; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 772; State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832; Chicago Title & T. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Loverin & B. Co. v. Travis, 135 Wis. 322, 115 N. W. 829; Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; State ex rel. Williams v. Sawyer County, 140 Wis. 634, 123 N. W. 248; McDermott v. State, 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315; Duluth Log Co. v. Hawthorne, 139 Wis. 170, 120 N. W. 864.

The right to form a partnership is a ground for classification.

State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Kiley v. L.R.A.1915B.

Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394, 142 Wis. 154, 125 N. W. 464; Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 343, Ann. Cas. 1912B, 1312; State ex rel. Durner v. Huegin, 110 Wis. 189, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Randall v. Lonstorf, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371; White v. White, 132 Wis. 121, 111 N. W. 1116; Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Thayer v. Humphrey, 91 Wis. 276, 30 L.R.A. 549, 51 Am. St. Rep. 887, 64 N. W. 1007; Shearer v. Browne, 102 Wis. 585, 78 N. W. 744; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742; State v. Evans, 130 Wis. 381, 110 N. W. 241; State ex rel. Winkler v. Benzenberg, 101 Wis. 172, 76 N. W. 345.

Messrs. **L. H. Bancroft**, Attorney General, **Russell Jackson**, Assistant Attorney General, and **George C. Greene**, also for the State.

Messrs. **Flanders, Bottum, Fawsett, & Bottum**, for appellants:

Taxpayers may invoke the jurisdiction of the court to restrain the unauthorized expenditure or diversion of public funds.

State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894; Allen v. Milwaukee, 128 Wis. 687, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 Ann. Cas. 392; Cawker v. Milwaukee, 133 Wis. 35, 113 N. W. 417; McGowan v. Paul, 141 Wis. 393, 123 N. W. 253; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851; State ex rel. Smythe v. Milwaukee Independent Teleph. Co. 133 Wis. 588, 114 N. W. 108, 315; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Raymond v. Chicago Union Traction Co. 207 U. S. 38, 52 L. ed. 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

The rate of taxation upon all property that is taxed at all must be uniform.

Chicago & N. W. R. Co. v. State, 128 Wis. 553, 108 N. W. 557; Beals v. State, 139 Wis. 544, 121 N. W. 347; Dwarris, Stat. 742, 749; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Lynch v. Union Trust Co. 90 C. C. A. 147, 164 Fed. 161; 37 Cyc. 811; Wisconsin C. R. Co. v. Taylor County, 52 Wis. 87, 8 N. W.

833; Knowlton v. Moore, 178 U. S. 41, 82, 44 L. ed. 969, 986, 20 Sup. Ct. Rep. 747; Allen v. Allen, 114 Wis. 615, 91 N. W. 218.

Exemptions allowed to individuals, including sole traders, are not allowed to partnerships, and the act is therefore invalid.

State ex rel. Winkler v. Benzenberg, 101 Wis. 172, 76 N. W. 345; Essex County Park Commission v. West Orange, 77 N. J. L. 575, 73 Atl. 511; Black v. State, 113 Wis. 218, 90 Am. St. Rep. 853, 89 N. W. 522; State v. Whitcom, 122 Wis. 110, 99 N. W. 468; State ex rel. Risch v. Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954; Phipps v. Wisconsin C. R. Co. 133 Wis. 153, 113 N. W. 456.

The corporation cannot be compelled to pay the tax and take the risk of reserving or collecting it from its bondholders at the expense of litigation.

South Nashville Street R. Co. v. Morrow, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348; Oliver v. Washington Mills, 11 Allen, 268.

The tax imposed upon the income received by nonresidents of the state is invalid.

Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Sprague v. Fletcher, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239; Re Stanford, — Cal. —, 54 Pac. 259; Oliver v. Washington Mills, 11 Allen, 268.

The unequal and progressive rate provided for in the act renders it obnoxious to the 14th Amendment.

Russell v. Croy, 164 Mo. 69, 63 S. W. 849; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558, 559, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Blackstone v. Miller, 188 U. S. 189, 207, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 600, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Smyth v. Ames, 169 U. S. 466, 526, 42 L. ed. 819, 842, 18 Sup. Ct. Rep. 418; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 160, 41 L. ed. 666, 669, 670, 17 Sup. Ct. Rep. 255; Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 772; Northern P. R. Co. v. Walker, 47 Fed. 681; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 120, 121, 30 L. ed. 342, 347, 7 Sup. Ct. Rep. 108; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 722; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Nunnemacher v. State, 129 Wis. 223, 9 L.R.A. (N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

A progressive tax law is the very antithesis of an equal law.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461; McCulloch, Taxn. 141 et seq.; United States v. Cruikshank, 92 U. S. 552, 554, 23 L. ed. 591, 592; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546.

Mr. **George D. Van Dyke**, also for appellants:

A state law imposing a graduated or progressive rate of taxation on property, based on a classification according to wealth, is invalid.

Cope's Estate, 191 Pa. 1, 45 L.R.A. 316, 71 Am. St. Rep. 749, 43 Atl. 79; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; State ex rel. Schwartz v. Ferris, 53 Ohio St. 314, 30 L.R.A. 218, 41 N. E. 579; Nunnemacher v. State, 129 Wis. 232, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Judson, Taxn. § 451; State ex rel. Nettleton v. Case, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554.

The act attempts to tax the income of a nonresident of the state derived from sources within the state; but denies to the nonresident the benefit of any of the exemptions allowed to residents.

This discrimination is unlawful.

Judson, Taxn. §§ 310, 455, 458; U. S. Rev. Stat. § 1977, Comp. Stat. 1913, § 3925; Travellers' Ins. Co. v. Connecticut, 188 U. S. 364, 366, 46 L. ed. 949, 950, 22 Sup. Ct. Rep. 673; Re Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389.

The income tax law violates the principles of local self-government guaranteed by art. 13, subdiv. 9, of the Constitution of this state.

State ex rel. Brown County v. Myers, 52 Wis. 628, 9 N. W. 777; State ex rel. Ellis v. Thorne, 112 Wis. 81, 55 L.R.A. 956, 87 N. W. 797; State ex rel. Hessey v. Daniels, 143 Wis. 649, 128 N. W. 565; People v. Raymond, 37 N. Y. 428; State ex rel. Williams v. Samuelson, 131 Wis. 499, 111 N. W. 712; State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475; Rathbone v. Wirth, 6 App. Div. 277, 40 N. Y. Supp. 535, affirmed in 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; 8 Cyc. 779–787; State

ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175; State v. Redmon, 134 Wis. 101, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408.

The state of Wisconsin has no power to impose an income tax on a resident of the state of Wisconsin in respect to income derived from sources outside of the state of Wisconsin, which income is at no time brought within the state of Wisconsin.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 Sup. Ct. Rep. 533; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 54 L. ed. 482, 30 Sup. Ct. Rep. 326; Kirtland v. Hotchkiss, 100 U. S. 491–498, 25 L. ed. 558–562; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; State Assessors v. Comptoir National d'Escompte, 191 U. S. 403, 48 L. ed. 238, 24 Sup. Ct. Rep. 109; Bristol v. Washington County, 177 U. S. 145, 44 L. ed. 707, 20 Sup. Ct. Rep. 585; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Bristol v. Washington County, 177 U. S. 145, 44 L. ed. 707, 20 Sup. Ct. Rep. 585; Judson, Taxn. § 395; Parker v. Stoughton Mill Co. 91 Wis. 180, 51 Am. St. Rep. 881, 64 N. W. 751; Renier v. Hurlbut, 81 Wis. 24, 14 L.R.A. 562, 29 Am. St. Rep. 850, 50 N. W. 783.

The state of Wisconsin has no power to impose an income tax on nonresidents in respect of income, the source of which is within the state of Wisconsin.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Selliger v. Kentucky, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Board of Assessors v. New York L. Ins. Co. 216 U. S. 517, 54 L. ed. 597, 30 Sup. Ct. Rep. 385; South Nashville Street R. Co. v. Morrow, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348.

The income tax law attempts to fix the situs of income derived from bonds of a Wisconsin corporation, for purposes of taxation, at the place where the corporation is located, irrespective of where the bonds are owned and held, and irrespective of where the interest coupons are payable; this is *ultra vires*.

South Nashville Street R. Co. v. Morrow, supra; United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Hartman v. Greenhow, 102 U. S. 672, 684, 26 L. ed. 271, 276; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 239, 33 L. ed. 895, 10 Sup. Ct. Rep. 533.

The state of Wisconsin has no power to impose an income tax on a national bank.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; State v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 955, Ann. Cas. 1912D, 22; Re Mahoney, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389.

Nor can this state impose an income tax on the income of shareholders in a national bank derived from dividends on their shares.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Opinion of Justices, 53 N. H. 634; Dyer v. Melrose, 197 Mass. 99, 34 L.R.A.(N.S.) 1215, 125 Am. St. Rep. 330, 83 N. E. 6, affirmed in 215 U. S. 594, 54 L. ed. 341, 30 Sup. Ct. Rep. 410.

Mr. **Oscar M. Fritz**, *amicus curiæ:*

There is an unjustifiable discrimination against every resident of Wisconsin whose income is subject to taxation.

State v. Whitcom, 122 Wis. 110, 99 N. W. 468; Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 772; Pollock v. Farmers' Loan & T. Co. 157 U. S. 599, 600, 39 L. ed. 825, 826, 15 Sup. Ct. Rep. 673.

Messrs. **Miller, Mack, & Fairchild**, *amici curiæ:*

The tax is levied directly upon receipts from interstate and foreign commerce, and is therefore a regulation of interstate and foreign commerce, in violation of the Constitution of the United States.

Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co. 114 Ind. 155, 1 Inters. Com. Rep.

798, 15 N. E. 814; Northern P. R. Co. v. Raymond, 5 Dak. 356, 1 L.R.A. 732, 2 Inters. Com. Rep. 321, 40 N. W. 538; Vermont & C. R. Co. v. Vermont C. R. Co. 63 Vt. 1, 10 L.R.A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; Delaware & H. Canal Co. v. Com. 1 Monaghan (Pa.) 36, 17 Atl. 175; People ex rel. Connecting Terminal R. Co. v. Miller, 178 N. Y. 194, 70 N. E. 472.

The word "income," as used in the act, means practically gross receipts, not profits.

People ex rel. McMaster v. Niagara, 4 Hill, 20; Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; Reg. v. Southampton, L. R. 4 H. L. 470, 39 L. J. Q. B. N. S. 253, 23 L. T. N. S. 111; Jones v. Ogle, L. R. 8 Ch. 196, 42 L. J. Ch. N. S. 334, 28 L. T. N. S. 245, 21 Week. Rep. 239, 3 Eng. Rul. Cas. 282; Re West Riding of Yorkshire Permanent Ben. Bldg. Soc. L. R. 43 Ch. Div. 415, 59 L. J. Ch. N. S. 197, 62 L. T. N. S. 486, 38 Week. Rep. 376.

Messrs. **David S. Wegg, Lines, Spooner, Ellis & Quarles** and **F. C. Winkler** also *amici curiæ*.

Winslow, Ch. J., delivered the opinion of the court:

These are actions in equity brought for the purpose of enjoining the secretary of state and other state officers, including the tax commission, from paying out any state moneys, or doing any other administrative acts, in the enforcement of the newly passed income tax law of this state, known as chapter 658, Laws of 1911, on the ground that said act is unconstitutional.

The Bolens action is an action sought to be brought within the original jurisdiction of this court, after refusal by the attorney general to bring it. This court, upon application for leave to bring the action upon the relation of Bolens (a taxpayer), granted such leave, but expressly provided in the order that the question whether such action was an action properly within the original jurisdiction of this court should be reserved and argued with the demurrer upon the merits.

The Winding Case is an action originally brought in the circuit court for Dane county by various persons and corporations who claim that they will be injuriously affected in various different ways by the provisions of the law. A demurrer on the three grounds of want of jurisdiction, want of legal capacity to sue, and insufficiency of facts having been sustained by the circuit court, the plaintiffs appealed to this court, and all the cases were argued together; briefs being also filed by several members of the bar as *amici curiæ*.

The law which is attacked in these actions adds thirty sections to the statutes, and also makes very substantial changes by amendment and repeal in §§ 1036 and 1038 of the existing statutes, relating to the taxation of personal property. The first section of the law is numbered 1087m—1, and provides generally for the taxation of all incomes received during the year 1911, and annually thereafter.

Section 1087m—2 provides:

(1) That the term "person," as used in the act, shall include "any individual, firm, copartnership, and every corporation, joint-stock company, or association organized for profit and having a capital stock represented by shares," unless otherwise stated.

(2) That the term "income" shall include:

a. All rent of real estate, including estimated rental of residence property occupied by the owner.

b. Interest on loans or evidences of debt of any kind.

c. Wages, salaries, or fees derived from services, provided that salaries of public officers are not to be included in those cases where the taxation thereof would be repugnant to the Constitution.

d. All dividends or profits from stock, or from the purchase and sale of any property acquired within three years previously, or from any business whatever.

e. Royalties derived from the possession or use of franchises or legalized privileges of any kind.

f. All other income from any source, except such as is exempted by the act.

(3) That "the tax shall be assessed, levied, and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities, or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities, or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of § 1770b, as far as applicable."

Section 1087m—3 provides, in substance, for the following deductions by corporations and joint-stock companies:

a. Sums paid within the year for personal services of all officers and employees

actually employed in the production of the income.

b. Other ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property, including reasonable depreciation of the property from which the income is derived. All bonds issued by a corporation shall be deemed an interest in the property and business of the corporation, and so much of the interest on the bonds as is represented by the ratio of the total property located and business transacted in the state to the whole property and business of the corporation as provided in subdivision 3 of 1087m—2 shall be subject to taxation at the same rate as the income, and shall be assessed to the bondholders under the general designation of "the bondholders of" the particular corporation on the property of the corporation prior to other liens, and, unless paid by the bondholders, shall be enforced against the corporation, which may deduct the amount of the tax from the next interest payment on the bonds.

c. Losses sustained during the year not compensated for by insurance or otherwise.

d. Sums paid within the year for taxes imposed by any other state upon the source from which the income taxed by this act is derived.

e. Dividends or income received during the year from stocks or interest in any firm, corporation, or joint-stock company, the income of which has been assessed under this act.

f. Interest received from bonds or securities exempt from taxation under United States laws.

By § 1087m—4 it is provided, in substance, that persons other than corporations and joint-stock companies shall be allowed the following deductions:

a. Ordinary and necessary expenses actually paid in carrying on the business from which the income is derived, including a reasonable allowance for depreciation in the property from which the income is derived.

b. Losses during the year not compensated by insurance or otherwise.

c. Dividends or incomes from stocks or interest in any firm or corporation, the income of which has been assessed under this act.

d. Interest paid during the year on existing indebtedness.

e. Interest on bonds or securities exempt under United States laws.

f. Salaries received from the United States by United States officials.

g. Pensions received from the United States.

h. Taxes (other than inheritance taxes) paid during the year on the property or business from which the income is derived.

i. Devises, bequests, or inheritances received during the year upon which an inheritance tax has been paid.

j. Life insurance to the amount of $10,000 received by persons legally dependent on the decedent.

Section 1087m—5 provides in substance for the following exemptions:

(1) a. To an individual, $800.

b. To husband and wife, $1,200.

c. For each child under eighteen years, $200.

d. For each additional person legally and wholly dependent on the taxpayer for support, $200.

e. These exemptions do not apply to nonresidents, nor to firms, corporations, or joint-stock companies. In computing such exemptions and the amounts of taxes payable under § 1087m—7, the income of a wife living with her husband shall be added to the husband's, and the income of each child living with its parent or parents shall be added to the parents' income.

(2) Income of mutual, savings, or loan and building associations, and of any religious, scientific, educational, benevolent, or other association not organized or conducted for pecuniary profit.

(3) Income from property and privileges by persons now required to pay taxes or license fees into the state treasury in lieu of taxes. Such persons shall continue to pay taxes and license fees as heretofore.

(4) Income received by the United States, the state, and all counties, cities, villages, school districts, or other political units of the state.

Section 1087m—6 provides, in substance, that the tax, after making such deductions and exemptions, shall be computed at the following rates:

(1)	a.	On first, $1,000 or part thereof,		1 %
	b.	" second	"	1½%
	c.	" third	"	1½%
	d.	" fourth	"	1¾%
	e.	" fifth	"	2 %
	f.	" sixth	"	2½%
	g.	" seventh	"	3 %
	h.	" eighth	"	3½%
	i.	" ninth	"	4 %
	j.	" tenth	"	4½%
	k.	" eleventh	"	5 %
	l.	" twelfth	"	5½%
	On any sum exceeding $12,000,			6 %

(2) Provided that the tax on corporations and joint-stock companies (after deductions) shall be computed as follows:

a. If the income equals 1 per cent or less of assessed value of property used in

acquiring the income, the rate shall be ½ of 1 per cent of such income.

b. If the income equals more than 1 but not more than 3 per cent of such value, 1 per cent of the income.

c. If more than 2, but not more than 3, per cent, 1½ per cent of the income.

d. If more than 3, but not more than 4, per cent, 2 per cent of the income.

e. If more than 4, but not more than 5, per cent, 2½ per cent of the income.

f. If more than 5, but not more than 6, per cent, 3 per cent of the income.

g. In like manner the tax shall increase at the rate of ½ of 1 per cent for each additional 1 per cent or fraction thereof which the taxable income bears to the property employed in the acquisition of the income, until the rate of profits equals 12 per cent of property employed in the acquisition of the income, when such rate shall continue as a proportional rate of 6 per cent of such taxable income.

Section 1087m—7 provides as follows: "The legislature intends subs. 2 of § 1087m—6 of this act to be a separable part thereof, so that said subsection may fail or be declared invalid without adversely affecting any other part of the act; provided that, in event of its failing or being declared invalid, the incomes of corporations, joint-stock companies, and associations shall be subject and shall be construed to have been subject to taxation at the rates specified in subs. 1 of § 1087m—6, and said incomes shall be reassessed by the tax commission and taxed for the years for which the rates provided in subs. 2 of § 1087m—6 shall have failed."

The next fourteen sections of the act are administrative purely. By their terms the enforcement of the act is placed in the hands of the state tax commission, which is authorized and required to divide the state into taxing districts, and appoint an assessor of incomes in each district. The manner in which incomes are to be assessed and the taxes are to be collected is fully provided for, but it is not necessary to insert the provisions here, as no question is raised upon the details of these provisions.

Section 1087m—22 provides, in substance, that the place at which the income tax shall be assessed, levied, and collected shall be determined as follows:

(1) Persons deriving income from within and without the state, or from two or more political subdivisions of the state, shall report the parts so separately derived in separate accounts in such form as the tax commission may prescribe.

(2) The entire taxable income of a resident of the state shall be combined for purpose of determining exemptions and rate of tax, but the taxes shall be paid to the several towns, cities, and villages in proportion to the income derived from each, counting the income derived from without the state as derived from the town or city of the taxpayer's residence.

(3) The income of nonresidents derived from sources within the state shall be separately assessed and taxed in the town, city, or village from which it is derived.

(4) All laws not in conflict with this act, regulating time, place, and manner of collecting unpaid personal property taxes, shall apply to the income tax.

Section 1087m—23 provides that the revenue derived from the income tax shall be divided 10 per cent to the state, 20 per cent to the county, and 70 per cent to the town, city, or village in which it is assessed, levied, and collected.

Section 1087m—25 abolishes the office of county supervisor of assessment on and after the first Monday in January, 1912, and provides that the county supervisor of incomes shall, after that date, perform all the duties imposed by law upon the county supervisor of assessment.

Section 1087m—26 provides that any person paying a tax on personal property during any year may present his receipt therefor, and have the same accepted by the tax collector to its full amount in payment of income tax during said year, and that any bank paying taxes upon the shares of its individual stockholders may present the receipt therefor, and have the same accepted in payment of taxes upon the income of the bank during that year.

Section 1087m—27 provides that nothing in the act shall affect in any way the taxes for the year 1911 or the collection or enforcement thereof.

By the amendment to § 1036 of the Statutes of 1898 there is taken out of the items of personal property subject to taxation "all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, or whether such debts are due or to become due," also "moneys," and by the amendment to subdivision 10 of § 1038, Stat. 1898, the following property is made exempt from taxation: "All moneys, all debts due or to become due to any person, and all stocks and bonds not otherwise specially provided for."

By the concluding sections of the act certain other changes are made in exemptions from taxation, which have the effect of somewhat enlarging such exemptions, especially in the line of personal ornaments and belongings and agricultural implements, but the details of these changes are not necessary to be stated.

At the inception of the Bolens Case, the question of jurisdiction is sharply raised; and it is very strongly argued, especially in a brief filed by General F. C. Winkler, that this is not a case properly within the original jurisdiction of this court, as that jurisdiction has been defined and limited by the cases commencing with the Railroad Cases in 35 Wis. 425.

The argument, in brief, is that the action is nothing more nor less than a taxpayer's action; that such actions may properly be entertained in the case of illegal expenditures by cities, counties, villages, or other municipalities, but cannot properly be brought against state officers, because, in effect, they are actions against the state, and the state cannot be sued without its consent. This objection might perhaps be summarily disposed of by a brief reference to the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133, where a case of similar character, brought on the relation of a taxpayer, was entertained and decided upon the merits against objection to the jurisdiction, and by further reference to the cases of State ex rel. Garrett v. Froehlich, 118 Wis. 129, at page 143, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894, and Re Filer & S. Co. 146 Wis. 629, 132 N. W. 584, in each of which cases the right to maintain similar actions in this court is either impliedly or expressly asserted.

We do not feel, however, that we ought to dispose of this very important question without thoroughly examining it for several quite persuasive reasons. Reference to the cases just cited will show that the question never has been discussed in any opinion. In the Raymer Case, which is the first of the series and which was a case brought on the relation of a taxpayer to enjoin the payment of money to the state superintendent of public instruction, under a law which violated an express constitutional prohibition, it was said, in substance, that it was held in the case of State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724, that such an action was within the original jurisdiction of this court, and would be entertained. It is very clear that the Cunningham Case was not such a case, and involved very different considerations. The Cunningham Case was an action brought on the relation of the attorney general to enjoin the secretary of state from giving election notices under an apportionment law which was held to deprive a very large number of the voters of the state of political rights guaranteed to them by the Constitution. This was held to be an invasion of the liberties of the people, and hence the case came clearly within the original jurisdiction of this court as laid down in the Railroad Cases. No question of the wrongful expenditure of state funds, nor of a taxpayer's right to invoke the original jurisdiction of this court to prevent such expenditure, was involved or mentioned in the case.

No discussion of the question appears in the other cases cited, so it seems clear that the court has not yet taken up and considered the question as an original one.

It has been spoken of as a very important question, and advisedly so spoken of. Laws which are framed to meet and correct some existing situation deemed by the legislature to be undesirable will generally, or at least frequently, involve the expenditure of some money in their enforcement. If, whenever such a law is passed, it is within the power of any taxpayer, however paltry his contribution to the public funds, to come into this court and invoke its original jurisdiction, and compel it to pass upon the validity of the law, it is not difficult to forecast the result. Every important law will be adverse to the interests of some taxpayers, and with such a principle established this court stands in great danger of becoming to all intents and purposes a third chamber of the legislature not named in the Constitution, but exercising a veto power over the other houses when invoked by any taxpayer. The power to pass upon the constitutionality of laws when the question arises in the course of ordinary litigation is a great power, one to be exercised with the greatest possible caution and wisdom, but the power to take up and pass upon a law involving the expenditure of any state funds as soon as it is passed at the suggestion of any taxpayer, and place a judicial veto upon its execution, is a still greater one. No higher power than this can well be conceived in a government such as ours, certainly no power will demand greater wisdom in its exercise, if it exist.

This court has unquestionably taken the position in a number of well-considered cases that the courts can and will restrain public officers from enforcing an unconstitutional law which invades private or public rights. State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724; State ex rel. Lamb v. Cunningham, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779. But this court has clearly recognized that this power is a delicate one, and to be used only with a wise discretion. It was said in the last case

cited that "it will not do to make of the courts, by equitable interference, a sort of a superior upper house to consider and pass, in general and particular as well, upon legislative enactments."

Concerning this power, Judge Dodge very rightly observes in his brief in the present case: "No higher power can be conceived than that of the judiciary to stay the action of the co-ordinate executive or legislature from an act or policy which the latter conscientiously believe to be constitutional and for public welfare. As the power is transcendent, its exercise must be with caution and moderation; albeit with courage. The frequency of the attempts by individuals to invoke this power of veto invites the anxious consideration of the wisdom and propriety of its exercise in each case."

The question now before us is whether this court has consciously and advisedly held that it is sufficient to call for the exercise of this extreme power that a taxpayer come into court and demand that the public treasury be protected from the expenditure of funds under a law concerning whose constitutionality there may be doubt.

The consideration of this question has prompted us to make a re-examination of the entire question of the original jurisdiction of this court, and to make an attempt to classify the significant decisions upon the subject, in the hope that thereby the scope and purpose of that jurisdiction, as the court has endeavored to define and limit it, may be better understood. The results of this re-examination are now to be stated as briefly as may be.

The constitutional grant of jurisdiction to the supreme court (§ 3, art. 7, Wis. Const.), after providing that it shall have appellate jurisdiction coextensive with the state, provides that it "shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same."

Since the decision of the Railroad Cases, 35 Wis. 425, it has been very well understood that by this section of the Constitution three distinct and independent grants of power or jurisdiction were made to this court, *viz.:* (1) The appellate power; (2) the power of superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of the writs named in the section. We are only concerned here with the grant of original jurisdiction.

It will be at once noticed that this grant is practically unlimited in extent, except as it may be said to be limited by the scope of the writs named, and it is for this reason probably that (with the exception of the Blossom Case, 1 Wis. 317, to be referred to later) practically no attempt was made, prior to the decision in the Railroad Cases, to discuss the purpose or limits of the original jurisdiction. It was very frequently exercised, but plainly with no clear or logical idea of the purposes for which it was given to the court, unless possibly it may be said that there was the idea that the wrong to be redressed or prevented must be a wrong affecting the public, or some part of the public of a given locality or class, as distinguished from a wrong affecting individuals only.

Habeas corpus was so frequently used that the citation of the cases would be mere surplusage. Mandamus to compel official action by local or municipal officers was also very frequent. Thus the court entertained and decided upon the merits actions of mandamus to compel town assessors to reduce an assessment of personal property (State ex rel. Ward v. Assessors, 1 Wis. 345); to compel a circuit judge to hold court in a new county (State ex rel. Powers v. Larrabee, 1 Wis. 200); to compel county supervisors to strike property from the assessment roll (State ex rel. Beebe v. La Fayette County, 3 Wis. 816); to compel highway commissioners to act (State ex rel. Doxtador v. Bailey, 6 Wis. 291); to compel a school district clerk to make an official report to the town clerk (State ex rel. School Dist. v. Eaton, 11 Wis. 29); to compel county officers to locate their offices at a certain place as a means of testing the validity of county-seat elections (Atty. Gen. v. Fitzpatrick, 2 Wis. 542; State ex rel. Cothren v. Lean, 9 Wis. 279; State ex rel. Spaulding v. Elwood, 11 Wis. 17; State ex rel. Field v. Saxton, 11 Wis. 27; State ex rel. Gates v. Fetter, 12 Wis. 566); to compel town supervisors to audit damages allowed in laying out a highway (State ex rel. Van Vliet v. Wilson, 17 Wis. 687); to compel a city council to levy and collect a tax to pay a judgment or pay the expense of work done for the city (State ex rel. Soutter v. Madison, 15 Wis. 30; State ex rel. Christopher v. Portage, 12 Wis. 562, s. c. 14 Wis. 550; State ex rel. Carpenter v. Beloit, 20 Wis. 79; State ex rel. Hasbrouck v. Milwaukee, 25 Wis. 122); to compel a county board to admit one duly elected as a member to sit and act as such (State ex rel. Gill v. Milwaukee County, 21 Wis. 443); to compel the mayor of a city to appoint certain officers (State ex rel. Atty. Gen. O'Neill, 24 Wis. 149); to compel a city treasurer to deliver certain books to the county clerk (State ex rel. Saar v. Hundhausen, 26 Wis.

432); to compel the transfer of prisoners from the Milwaukee jail to the house of correction (State ex rel. Kennedy v. Brunst, 26 Wis. 412, 7 Am. Rep. 84); to compel county supervisors to erect county buildings (State ex rel. Park v. Portage County 24 Wis. 49); to compel county supervisors to provide certain officials with office rooms (State ex rel. Keenan v. Milwaukee County, 25 Wis. 339); to compel the Milwaukee Chamber of Commerce to restore a member to his rights and franchises as a member (State ex rel. Graham v. Milwaukee Chamber of Commerce, 20 Wis. 63), and doubtless other cases may be found.

It should be noted in this connection that in one case (State ex rel. Board of Education v. Haben, 22 Wis. 101) the court declined to entertain an action of mandamus against the treasurer of a city to compel him to pay over the school moneys in his hands to the school board, giving as a reason that the remedy in the circuit court was ample. Judge Cole there states that the practice of applying to the supreme court for writs of mandamus against local officers was becoming very common, and that, in view of the increasing duties of the court, and in pursuance of a rule of court then recently adopted, it would be held in the future that "wherever there is anything in the application which shows that it would be unavailing if made at the proper circuit, or where from the nature of the questions involved it would seem necessary and proper that the suit be commenced in the supreme court, jurisdiction will be entertained; otherwise it will not be, but parties will be required to make their application to the circuit court." This rule seems, however, to have been more honored in the breach than in the observance, as the cases just cited, which came up after the Haben Case, abundantly testify.

Quo warranto cases to try the title to public office, from that of governor down to school director, were very frequent. Thus the writ was used to try the title to the office of governor in State ex rel. Bashford v. Barstow, 4 Wis. 567; of district attorney in Atty. Gen. ex rel. Carpenter v. Ely, 4 Wis. 420; of treasurer of a city in State ex rel. Tesch v. Von Baumbach, 12 Wis. 310; of school director in State ex rel. Law v. Perkins, 13 Wis. 411; of circuit judge in State ex rel. Atty. Gen. v. Messmore, 14 Wis. 115; of sheriff in State ex rel. Peacock v. Orvis, 20 Wis. 235; of justice of the peace in State ex rel. Holden v. Tierney, 23 Wis. 430; of supervisor in State ex rel. Peck v. Riordan, 24 Wis. 484; of superintendent of the poor in State ex rel. Grundt v. Abert, 32 Wis. 403; of treasurer of an incorporated church benevolent association in State ex rel. Atty. Gen. v. Conklin, 34 Wis. 21; and there are numerous similar cases. As tending to explain the large number of these cases involving only small local offices, it should be noticed that by chapter 23 of the Session Laws of 1855 any person claiming to be entitled to hold "any public office" usurped by another was given the right to file in the supreme court an information in the nature of a quo warranto with or without the consent of the attorney general. While the Code of Pleading and Practice which was passed the following year (Laws 1866, chap. 120) entirely revised the practice in such cases, and contains no such sweeping provision, still resort seems to have been had to the supreme court in practically all cases of disputed title to office until the decision in the Railroad Cases.

Quo warranto to forfeit corporate charters for abuse or nonuse of franchises was also brought in State v. Milwaukee Gaslight Co. 29 Wis. 454, 9 Am. Rep. 598, and in State v. West Wisconsin R. Co. 34 Wis. 197.

The foregoing citations by no means cover all of the cases in which the original jurisdiction was used prior to the Railroad Cases, but it is believed that they cover all that are of any significance, except the Blossom Case (which is to be soon considered), and it is also believed that they conclusively demonstrate that there was in the judicial mind during that period no serious thought that the original jurisdiction given to this court was intended to be or ought to be limited by excluding any particular class of cases therefrom, except probably cases involving mere individual wrongs, with which the public was in no manner concerned.

Relating to this subject, Judge Dixon might well say, as he did in his brief in the case of Atty. Gen. v. Eau Claire, 37 Wis. 400, at page 411: "It is not surprising that the court looked in vain to the bar for assistance in the argument of the Railway Cases when we reflect that both court and bar had been wandering in utter darkness for a period of more than twenty-five years." It is very evident that Judge Dixon knew whereof he spoke when he wrote these words. During fifteen years of the twenty-five he had been the leader of the wanderers.

It is quite plain, we think, that, however valuable the cases which we have thus briefly reviewed may be as authorities on the general propositions of law involved in them (and many of them are very valuable in this respect), they have absolutely no value on the question of the extent of the original jurisdiction of the court, for

that question was never discussed or considered in any of them, and they have been gathered together here for the simple purpose of demonstrating their worthlessness as precedents upon that question, and to prevent either bench or bar from placing reliance upon them so far as that question is concerned in the future.

The case of Atty. Gen. v. Blossom, 1 Wis. 317, has not been included in the foregoing list, because in that case, which was the first case where the original jurisdiction was challenged, there was an illuminating discussion in the opinion of Justice Smith, not only of the existence of any original jurisdiction in this court, but also of the purposes which were intended to be accomplished by the exercise of that jurisdiction. After meeting the contention that the court had only appellate jurisdiction, and demonstrating that the armory of common-law writs with which the Constitution endowed the court in the last clause of the section quoted were original in their functions, and necessarily implied the exercise of original jurisdiction, he used these pregnant words, remarkable in their strength and wisdom now, and vastly more remarkable when it is reflected that they were written nearly sixty years ago: "And, why was original jurisdiction given to the supreme court, of these high prerogative writs? Because these are the very armor of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation. The convention might well apprehend that it would never do to dissipate and scatter these elements of the state sovereignty among five, ten, twenty, or forty inferior tribunals, and wait their tardy progress through them to the supreme tribunal, upon whose decision must finally depend their efficacy. To preserve the liberties of the people, and to secure the rights of its citizens, the state must have the means of protecting itself." Here was clearly expressed the great idea that the original jurisdiction was given to this court in order that the state might use it to protect itself and its sovereignty and the liberties of the people at large.

Strange, indeed, it seems that this idea so forcibly expressed in 1853 should have been completely ignored and forgotten for more than twenty years thereafter, notwithstanding the fact that applications for the exercise of that jurisdiction were increasing in number year by year. When, however, in 1874, the state, through its chief law officer, essayed to use the original jurisdiction for the purpose of curbing the great railroad companies of the state and compelling them to obey an act fixing rates of carriage for freight and passengers, the question of the extent of the jurisdiction was again sharply brought to the mind of the court, and it was philosophically discussed by Chief Justice Ryan in words which have ever since that time been regarded as authoritatively determining the attitude of this court upon the question. They have been often quoted and applied since that time, and are very familiar. In brief the principle there decided was that, in order to put in motion the original jurisdiction of this court, the question must not only be *publici juris*,—*i. e.*, a question of public right,—but it must be a question "affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of its people." Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425.

In the case of Atty. Gen. v. Eau Claire, immediately following the Railroad Cases, 37 Wis. 400, where the attorney general invoked the original jurisdiction to restrain the alleged illegal obstruction of a navigable river flowing into the Mississippi, the same doctrine was announced and somewhat elaborated upon, especially with regard to the term *publici juris*. In this opinion it was said: "Of course, every question of municipal taxation is *publici juris;* but it is equally so whether it be raised by a taxpayer, or by the municipality, or by the state. It is not enough to put in motion the original jurisdiction of this court that the question is *publici juris*. It should be a question *quod ad statum reipublicæ pertinet*. . . . And, though the question did not arise in this case, it is quite evident from all that has any bearing on it in Atty. Gen. v. Chicago & N. W. R. Co. that, to bring a case properly within the original jurisdiction of this court, it should involve in some way the general interest of the state at large. It is very true that the whole state has an interest in the good administration of every municipality; so it has in the well-doing of every citizen. Cases may arise, to apply the words of Ch. J. Stow, geographically local, political not local; local in conditions, but directly affecting the state at large. Cases may occur in which the good government of a public corporation, or the proper exercise of the franchise of a private corporation, or the security of an individual, may concern the prerogative of the state. The state lends the aid of its prerogative writs to public and private corporations and to citizens in all proper cases. But it would be straining and distorting the notion of prerogative ju-

risdiction to apply it to every case of personal, corporate, or local right, where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote, peculiar perhaps to some subdivision of the state, but affecting the state at large in some of its prerogatives, raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency in each case for itself. For all else, though raising questions *publici juris*, ordinary remedies and ordinary jurisdictions are adequate. And only when, for some peculiar cause, these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights. . . . It was suggested that we should establish general rules governing our original jurisdiction. That would be too bold an undertaking to venture on. Rules will arise, as cases come here, far more safely and properly than they could be prescribed in advance. We can now only declare the views which influence us in passing upon this motion. It is sufficient here to hold that proceedings to restrain municipal undertakings or municipal taxation in ordinary cases belong appropriately to the original jurisdiction of the circuit, and not of this court. These are questions *publici juris*, as are title to local public office, performance of local official duty, use of local highways, maintenance of local public buildings, abuse of local power or franchise, and kindred local matters. But these are not generally questions directly involving the sovereign prerogative or the interest of the state at large, so as to call for the prerogative jurisdiction of this court. As a rule, no extraordinary jurisdiction is necessary or proper for them; the ordinary jurisdiction of the circuit court being ample. Practically it would be impossible to take jurisdiction of them all here; and we intend to assume jurisdiction of none of them which are not taken out of the rule by some exceptional cause. When they are governed by some peculiarity which brings them within the spirit and object of the original jurisdiction of this court, we will entertain them. Otherwise they will be left to the circuit courts. And this we understand to be the true spirit and order of the constitutional grant of jurisdiction." In this case also was laid down the general principle that, while jurisdiction would never be assumed to enforce a mere private right, still jurisdiction would not be refused because there might be a private relator in the case who possessed a private interest bound up with the public interest, if in fact there was the necessary public interest before defined; and that the court in rendering judgment in such a case would not ignore the private interest of the relator, but administer full relief; but, on the other hand, if the private right of a relator and the public right of the state met in the same litigation, the private right of the relator might entirely disappear, and the relator drop out, but the court would still proceed and vindicate the public right, if there be a public right separable and distinct from the private right. This doctrine was more fully elaborated and stated in State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, which will be referred to later in this opinion.

The Railroad Cases and the Eau Claire Case, taken together, harmoniously following and more fully developing the great idea first announced in general terms by Judge Smith in the Blossom Case, may be truly said to have established the fundamental reason for the existence of the original jurisdiction of this court, and the limits within which, in view of that reason, the court would endeavor to confine its exercise. No attempt was made in either case to mark out or define in advance the particular questions or kinds of questions which would be considered as affecting the "sovereignty of the state, its franchises, or prerogatives, or the liberties of its people." Such an attempt would manifestly have been as unwise as it would have been futile. Human prescience is not equal to such a task. So the court wisely contended itself with announcing the general principle, leaving itself free to judge in each case whether the contingency which justified and required the use of the jurisdiction had arisen. Since the decision of those cases this court has faithfully endeavored to follow the general rules laid down in them. Numerous applications for the exercise of the original jurisdiction have been made, and of these many have been granted and some have been refused. The question of the application of the general rules aforesaid has arisen and been discussed and decided in a number of cases presenting widely different problems. Sufficient time has now elapsed so that it should be possible to draw from these decisions some general conclusions as to the limits of the jurisdiction as the court has administered it. If this can be done, it certainly ought to be helpful in the future administration of the jurisdiction, not because it will or can put up the bars so that no future case can be brought within the jurisdiction unless it has its prototype in the past, but because every discussion and

ruling upon the question as a new case is presented should be helpful in developing some philosophical and orderly rules for the application of the general abstract principles laid down in the two cases last named to concrete cases as they arise in the future.

With this idea in mind, a brief review of the significant cases decided since the decision in the Railroad Cases will now be undertaken, and an attempt will be made to classify them.

I. The most numerous cases probably are the habeas corpus cases, and they may well be first disposed of. The first of these cases where the question of the jurisdiction was discussed was the Pierce Case, 44 Wis. 411, where, in spite of the vigorous protest of Chief Justice Ryan, it was held that the state had so vital an interest in the liberty of every one of its citizens that the question whether a citizen was unlawfully deprived of that liberty involved the interest of the public at large. The reasoning by which the unlawful imprisonment of a single citizen is held to involve the interests of the public at large, so as to justify the use of the original jurisdiction of the supreme court, may seem somewhat strained, but the decision has been followed without question in numerous cases since that time, and, furthermore, it is to be noticed that the legislation of the state from the earliest days of the state had provided for the issuance of the writ by any justice of the supreme court, and by chapter 45 of the Laws of 1864 had further provided that all applications for the writ on behalf of a person confined in the state prison must be made to the supreme court, or one of the justices thereof. This latter provision has remained upon the statute book ever since (§ 3409, Stat. Wis. 1898), and this court has held that it applies to applications made by persons confined upon conviction for felony in the Milwaukee House of Correction as well. State ex rel. Heiden v. Ryan, 99 Wis. 123, 74 N. W. 544. It does not seem necessary or useful to cite the numerous habeas corpus cases which have been entertained by this court since the Pierce Case.

II. Next may be considered the quo warranto cases, and of these we have found but five cases which seem of any significance; namely, State ex rel. Wood v. Baker, 38 Wis. 71; Atty. Gen. v. West Wisconsin R. Co. 36 Wis. 467; State ex rel. Atty. Gen. v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579; State ex rel. Radl v. Shaughnessey, 86 Wis. 647, 57 N. W. 1105; Re Holland, 107 Wis. 178, 83 N. W. 319.

The first of these cases was brought to try the title to the office of county clerk, and it was held that contests concerning the title to county offices were not within the jurisdiction marked out for itself by the court in the Railroad Cases, but that because the title of the judge of the circuit court to the office of congressman depended on the same votes which were questioned in the case, and hence he could not with propriety sit. The case came within the exception suggested in the Eau Claire Case, namely, cases where the ordinary jurisdiction of the circuit is entirely inadequate. The evident meaning of this case is that contests over local offices will not be entertained unless the situation be such that the remedies in local courts are absolutely inadequate. It may well be doubted whether such a case as the Wood Case would now be entertained, in view of the ease with which, under present laws, another judge can be at once called in to try a case where the circuit judge is disqualified or declines to sit. The second and third cases named were actions brought to forfeit corporate charters granted by the state to railroad companies because of breach of duty on the part of the companies. They unquestionably fall within the jurisdiction as defined in the Railroad Cases, for in such an action the state is suing to punish the abuse or misuse of franchises granted by it in its sovereign capacity. In this connection it is pertinent to note that the legislature, by §§ 3240 et seq. of the statutes (Rev. Stat. 1878 and Stat. 1898), has for many years provided for actions in the name of the state to vacate corporate charters, which may be brought either in the supreme or circuit court, as this court may direct. See State ex rel. Lederer v. International Invest. Co. 88 Wis. 512, 43 Am. St. Rep. 920, 60 N. W. 796. In the Shaughnessey Case it was sought to use the original jurisdiction of this court to try the title to the office of justice of the peace, and jurisdiction was declined on the ground that it was a local matter purely, which did not affect the state at large. For the same reason jurisdiction was declined in the Holland Case, in which it was sought to test the validity of the incorporation of a village.

III. Next may well be classed the two great cases of Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425, and Atty. Gen. v. Eau Claire, 37 Wis. 400, in the first of which the state sued to prevent the great public service corporations of the state from systematically violating and defying laws regulating their rates in the interest of the whole people, which laws were in effect amendments to the corporate charters of the companies; and in the second of which the state sued to prevent a purpresture in one of the great navigable rivers of

the state connecting with the Mississippi river, which the state is bound to keep open as a common highway to the people of this state and of the United States. Upon the same general ground this court later entertained an action on the relation of the attorney general to prevent the tearing up of a railroad; the idea being that a railroad operated under a franchise granted by the state is a state highway whose destruction affects the interests of the state at large. State ex rel. Atty-Gen. v. Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915. The great public interests involved in these cases are so apparent as to obviate the necessity of comment upon them. In the case of State v. St. Croix Boom Corp. 60 Wis. 565, 19 N. W. 396, however, the court declined jurisdiction of a case very similar to the Eau Claire Case, because the St. Croix river was a river on the boundary of the state, as to which the state was under no trust to keep it open.

IV. In the next class may be placed the cases where it has been sought, by mandamus or mandatory injunction, to compel a state officer to perform a ministerial duty. Under this head, the cases involving performance of important duties imposed on state officers by the general election laws form a striking group, the first of these cases being the case of State ex rel. McDill v. State Canvassers, 36 Wis. 498, where mandamus was sought to compel the state board of canvassers to declare a certain result from the returns of a congressional election, and the court deemed the case one wherein the original jurisdiction should be exercised, although the office in issue was in a sense local, because the circuit judge himself was the opposing candidate, and could not act judicially upon such a question, hence the remedy in the circuit court was utterly inadequate. It is instructive to note that after this decision, by chapter 231 of the Session Laws of 1880, the legislature passed an act regulating the procedure in mandamus cases brought in the supreme court against any board of canvassers to compel the delivery of a certificate of election to either of the offices of member of the legislature, congressman, or presidential elector; thus apparently giving the legislative sanction to the idea that controversies concerning the canvass of votes at general elections for either of such offices so far affected the prerogatives of the state, or the liberties of the people, or both, as to come fairly within the original jurisdiction of the court. The substance of this provision has ever since remained a part of the mandamus statute. Wis. Stat. 1898, § 3452. Other cases where the original jurisdiction has been invoked to compel the performance of official duty imposed by general election laws are the cases of State ex rel. Kustermann v. State Canvassers, 145 Wis. 294, 130 N. W. 489; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; State ex rel. Bancroft v. Frear, 144 Wis. 79, 140 Am. St. Rep. 992, 128 N. W. 1068, and State ex rel. Rinder v. Golf, 129 Wis. 668, 9 L.R.A.(N.S.) 916, 109 N. W. 628. The first of these last-named actions was practically the same as the McDill Case, the second and third were cases involving the duty of the secretary of the state, under general election laws, to place the names of certain persons upon the official ballot as nominees of a great political party for state offices, and the Rinder Case was a very good example of the exceptional cases where, though the office in issue was purely local, jurisdiction was assumed because of the absolute inadequacy of the remedy in the lower courts, and the abstract question involved was a question affecting the interests of the entire public.

Another group of significant cases under the fourth head are the mandamus actions brought to compel payment of funds from the state treasury to the persons or corporations alleged to be entitled thereto by law. In this group fall State ex rel. Bell v. Harshaw, 76 Wis. 230, 45 N. W. 308, brought to compel the state treasurer to pay over certain moneys in the state treasury to certain counties; State ex rel. New Richmond v. Davidson, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067, brought to compel the state treasurer to pay over to the city of New Richmond an appropriation made by the legislature on account of damages suffered by the city in a cyclone; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50, brought to compel auditing of claims against the state for the Keeley treatment of drunkards at private sanitariums; State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832, brought to compel auditing of salaries of the civil service commission and its employees; and State ex rel. Bashford v. Frear, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019, brought to compel auditing of the salary of a justice of this court.

Under this head, also, naturally fall the cases involving the issuance or revocation of licenses and patents, and of these the case of State ex rel. Drake v. Doyle, 40 Wis. 175, 186, 22 Am. Rep. 692, is the most significant. Here mandamus was invoked against the secretary of state upon the mere relation of a private individual in order to compel that officer to revoke the license of a foreign insurance company, because it had committed an act which,

under the state law, worked a forfeiture of its license. In this case the attorney general appeared for the secretary of state, and suggested that the relator's personal grievance had been settled. Nevertheless the action went on as the suit of the state to vindicate and preserve "the prerogatives of the state in its sovereign character," and a peremptory mandamus was awarded.

Other cases of this general nature are State ex rel. Anderson v. Timme, 60 Wis. 344, 18 N. W. 837, brought to compel the issuance of a patent by the commissioners of public lands; State ex rel. Abbot v. McFetridge, 64 Wis. 139, 24 N. W. 140, to compel issuance of a license to a railroad company to do business, on the allegation that it had fully paid the legal license fees; also, the case of State ex rel. Covenant Mut. Ben. Asso. v. Root, 83 Wis. 667, 19 L.R.A. 271, 54 N. W. 33, brought to compel the state insurance commissioner to issue a license to a foreign insurance company which had fully complied with the law. This last case, however, was directly overruled in the case of Re Court of Honor, 109 Wis. 625, 85 N. W. 497, where this court refused to entertain an exactly similar action, on the ground that the primary right sought to be vindicated was private and the public right, if involved at all, was only incidentally affected, and hence the circuit court was the appropriate tribunal to pass on the question in the first instance. Whether this ruling does not in effect negative jurisdiction in the Timme and McFetridge Cases just cited may be a question of some doubt, but it is not necessary to determine it here. The case of State ex rel. Guenther v. Miles, 52 Wis. 488, 9 N. W. 403, where the original jurisdiction was used on the relation of the state treasurer to compel a county treasurer to make an official return, is not significant, as the question of jurisdiction was not raised.

V. In the last class fall the cases where it is sought to restrain a state officer (and in exceptional cases a county officer) from committing an unlawful act which will affect the prerogatives or sovereignty of the state, or the liberties of the people. The most conspicuous examples in this class of cases are the so-called "Gerrymander Cases," State ex rel. Atty. Gen. v. Cunningham, 81 Wis. 440, 15 L.R.A. 561, 51 N. W. 724, and State ex rel. Lamb v. Cunningham, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35,—the first of which was brought by the attorney general himself, and the second by a private relator on leave of the court, after the attorney general had refused to act. In these cases it was sought to enjoin the secretary of state from carrying out the terms of an apportionment law, on the ground that the law violated the commands of the Constitution, and was void. Here, for the first time, this court held that it could and would, on the relation of a private citizen, prevent a state officer from enforcing an unconstitutional law which injuriously affected the liberties of the people as an unfair and unconstitutional division of the legislative election districts of the state must necessarily do. In neither of these cases was jurisdiction sustained, because of the alleged unlawful expenditure of public funds, nor because of the fact that the relator was a taxpayer, but in both the ground was that an injury to the people of the state was about to be committed by depriving many voters of their just and constitutional rights in the election of the legislative bodies of the state under the form of a law which violated the express command of the Constitution. The evident idea was that the relator was in no sense the plaintiff. He simply brought the matter to the attention of the court, and, when he had performed this function, he ceased to be of importance. The suit became from its inception the suit of the state to vindicate the liberties of its people generally.

Following these cases at a considerable distance in time, but practically identical in principle, are the so-called "Twenty Per Cent Cases,"—State ex rel. McGrael v. Phelps, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, and State ex rel. Hanna v. Frear, 144 Wis. 58, 128 N. W. 1061,—where, on the relation of private individuals, state and county officers were sought to be enjoined from enforcing a law requiring that, in order to be represented on the official ballot, a political party must cast at the primary 20 per cent of its vote for governor at the last preceding general election. The ground taken was that this provision was an unreasonable, unconstitutional restriction or infringement on the freedom of the ballot, and hence it affected the liberties of the people. Although objection to the jurisdiction was formally taken in these cases, it was not pressed, it was not discussed, and the court simply said that it saw no reason why jurisdiction should not be exercised.

In this class, if anywhere, must naturally fall the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 51 N. W. 1133, which has been previously cited, brought on the relation of a taxpayer to prevent the payment of salary to a state officer over and above the amount limited by the Constitution. As has been before said in this opinion, the jurisdiction in that case was sustained by brief reference to the first Gerrymander Case, which is quite plainly

a different case. Unquestionably the real ground was that the legislature was by express command of the Constitution prohibited from paying to the state superintendent out of the state funds any sum exceeding $1,200 per annum. Hence the law attacked in that case, which directed payment of a greater sum every year, was absolutely void, and the state itself was entitled to the intervention of the extraordinary jurisdiction of this court to protect itself from unconstitutional and unlawful depletion of its treasury by its own officers.

In both the Rosenhein Case, 138 Wis. 173, 119 N. W. 894, and the Filer & S. Case, 146 Wis. 629, 132 N. W. 584, the applications to bring actions on the relation of taxpayers were denied, because it was considered in each case that no unlawful expenditure of funds by state officers was threatened, but in the first-named case it was expressly said, and in the second it was assumed, that, in order to prevent illegitimate expenditure of state funds, an equitable action on the initiative of a taxpayer, after refusal by the attorney general, would be properly within the original jurisdiction of this court. There are several other cases which have more or less bearing on the general question which will be briefly mentioned. In the case of Re Hartung, 98 Wis. 140, 73 N. W. 988, it was sought to use the original jurisdiction of this court by way of injunction to put an end to a public nuisance in the town of Wauwatosa, consisting of the depositing of garbage on the surface of land to the discomfort of a very large neighborhood; but it was held that such a wrong, though public, was not a wrong affecting the sovereignty, franchises, or prerogatives of the state, or the liberties of the people at large, and that the remedy was in the local courts. This seems to be an entirely logical application of the general principle laid down in the Railroad Cases that, even though a question be *publici juris*, it will not call for the use of the original jurisdiction if it be merely local in its effect. The sequel to this case, which appears by reference to State ex rel. Hartung v. Milwaukee, 102 Wis. 509, 78 N. W. 756, is also instructive. After the decision in Re Hartung, supra, the relator went to the circuit court, and, after refusal by the attorney general, was allowed to bring an action in the circuit court in the name of the state to enjoin the further continuance of the alleged public nuisance. The case was tried on the merits and an injunction refused, and on appeal to this court it was held that the circuit court was not given the writ of injunction for prerogative purposes, as this court was, and that hence the action below was never in fact an action by the state, notwithstanding its title, but was an action by a private party.

In view of this last-named decision, the recent case of State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633, becomes interesting, if not important. This case was an action brought in the circuit court in the name of the state, after refusal to act by the attorney general, upon the relation of a taxpayer; the object being to enjoin the secretary of state and state treasurer from carrying out the provisions of the primary election law, and especially from auditing or paying claims or bills for expenses arising under the law, on the ground of unconstitutionality of the law. The jurisdiction of the circuit court in this case was not challenged by demurrer, nor was it raised or considered either in the lower court or in this court, yet it seems quite manifest that it was a case where injunction was used in the circuit court for prerogative purposes contrary to the principle laid down in the case of State ex rel. Hartung v. Milwaukee, just cited. However, as the question of jurisdiction passed *sub silentio*, the case is not significant.

Before proceeding to draw general conclusions from these decisions as to the field of the original jurisdiction, so far as any field has been marked out by the decisions, it may be well, in order to avoid misapprehension, to notice the fact that the legislature by § 3200, Stat. 1898, has consented that the state may be sued in the supreme court by any person having a just claim which has been disallowed by the legislature. Actions brought under this section are, of course, brought by virtue of the consent of the state, without which the sovereign itself cannot be sued. Nothing said in this opinion is to be construed as having any bearing on this section or the actions brought under it.

The affirmative result of the significant cases since the Railroad Cases is, as it seems to us, that the original jurisdiction of this court may be rightly invoked when there is a showing made either that (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused, or forfeited; (4) a law regulating public-service corporations in the interest of the people is systematically disobeyed and set at naught; (5) a navigable river, which the state is bound to keep open as a highway for all, is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty,

in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; or (8) the situation is such in a matter *publici juris* that the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied. It is not meant by this attempted classification that no cases which do not fall within one or the other of the classes can ever call for the exercise of the original jurisdiction, but simply that cases falling within these general classes have been held to be properly within the original jurisdiction.

In addition to these eight affirmative propositions, the decided cases justify the statement of several negative propositions which are also helpful upon the general question. These are: (1) A case, although involving a question *publici juris*, will not come within the jurisdiction if it be only local in its effect, subject only to the exception named in the eighth class. (2) A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained. (3) A case will not be dismissed, however, because there is a private interest involved with the public interest, provided that private interest be incidental merely, and the vindication of the public right be the primary purpose of the action. (4) An action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists. (5) The Constitution has not given the circuit court the power to use the writ of injunction as a prerogative jurisdictional writ, as it has been given to the supreme court, hence the circuit court has not the power in an action not brought by the attorney general, but on the relation of a private citizen only, to use the writ for prerogative purposes.

It seems to us now that the real fundamental philosophy of the original jurisdiction and its use has not been at all times fully apprehended by the court, even since the elaborate discussion in the Railroad and Eau Claire Cases, but, after this review of the authorities, it seems quite simple, and it really comes down to a few propositions which, when thoroughly understood, solve many difficulties.

This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people. The state uses it to punish or prevent wrongs to itself or to the whole people. The state is always the plaintiff, and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit. He is a mere incident. He brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right. The fact that in many cases, as, for example, cases of unlawful imprisonment, the private wrong and the public wrong are so closely identified that the ending of the private wrong necessarily puts an end to the public wrong, makes no difference with the principle.

These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a taxpayer's action (as that action is known in the circuit courts) brought in the supreme court within the original jurisdiction. The philosophy of the taxpayer's action in the circuit court is that the taxpayer is a member of a municipal corporation, who, by virtue of his contributions to the funds of the municipality, has an interest in its funds and property of the same general quality as the interest of a stockholder in the funds of a business corporation, and hence, when corporate officers are about to illegally use or squander its funds or property, he may appeal to a court of equity on behalf of himself and his fellow stockholders (*i. e.*, taxpayers) to conserve and protect the corporate interests and property from spoliation by its own officers.

The taxpayer himself is the actual party to the litigation, and represents not the whole public, nor the state, nor even all the inhabitants of his municipality, but a comparatively limited class; namely, the citizens who pay taxes. In short, he sues for a class.

No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction the state is the plaintiff, and sues to vindicate the rights of the whole people.

The Bolens Case cannot, therefore, be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action.

This conclusion, however, by no means leads to the result that the original juris-

diction may not properly be used at the instance and upon the relation of a private individual to stay, by appropriate writ, the expenditure of the state's funds for purposes expressly or by necessary implication forbidden by the Constitution. Such use of funds by a state officer is certainly as much a breach of duty and an injury to the state as the refusal to pay out funds which have been lawfully appropriated, or the failure to obey the provisions of general election laws; but in such case the action is the action of the state as truly as if brought by the attorney general, not the action of the taxpaying relator.

If this be true, we can see no logical escape from the conclusion that, where state officials are about to spend the state's money in executing an unconstitutional law, the state may prevent the threatened misapplication of its funds by the same means. This seems to us the only logical basis upon which the case of State ex rel. Raymer v. Cunningham, 82 Wis. 39, 59 N. W. 1133, can rest.

But it must be recognized that such a power is extreme. To arrest the hand of a state officer as he is about to carry out the command of the legislature is indeed a serious step, one not to be taken summarily, or without profound consideration. As the power is great, it should be exercised with a wisdom and discretion commensurate with its greatness. No trivial grounds should impel the court to permit its exercise. This court will certainly not feel obliged, in every case where there is a threatened expenditure of state funds under a law of doubtful constitutionality, to allow an action of this nature to be brought in the name of the state, but will feel entirely free to leave the question of constitutionality to be settled as it may arise in ordinary litigation. The defiance of express or implied constitutional commands may be so flagrant and patent as to make the exercise of this great power appear justifiable, if not absolutely necessary, and in such case it will be exercised courageously. This court will, however, judge of the exigency in each case as it arises, and will endeavor to guard the great power from being used in trifling cases or to accomplish ulterior purposes.

In the present case we go no further than to state these general principles. We do not find it necessary to decide whether the alleged illegal expenditure of funds alone presents a case of such exigency as to justify the use of the original jurisdiction of this court to prevent such expenditure. There are other and more important features in the present case which, in our judgment, present a proper case for the exercise of the original jurisdiction.

The law which is attacked here, if it be valid, makes a radical change in the present system of taxation over the whole state.

Since the days when Hampden refused to pay the ship money, unjust taxation has been deemed, by English speaking nations, at least, to vitally concern, if not to destroy, the liberties of the people. Such taxation has been deemed to justify armed resistance, and, if need be, revolution. Insistence upon it cost Charles I. his life and England an Empire. If this law in its essential provisions violates constitutional provisions, and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected. It makes in terms a very sweeping change in the methods of taxation in every taxing district of the state, and shifts the burdens of taxation so that many will pay more than under the old system, while many will pay less. If it should go into operation for a year or two and then be held unconstitutional in some actual case, the confusion created in the financial affairs of the state and of every municipality would unquestionably be great. We cannot but regard any serious question as to the constitutionality of such a law as a question seriously affecting the prerogatives of the state, as well as the liberties of the people; hence we conclude that the case presented is one justly calling for the exercise of the original jurisdiction of this court.

Many provisions of the law are attacked as offending against either the Federal or the state Constitutions. We shall only treat the contentions which might, from some point of view, be considered as going to the validity of the whole act. As to those minor provisions, which are properly to be regarded as matters of detail, we shall express no opinion. This is in accord with our well-established custom in cases of this nature. Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779; State ex rel. Buell v. Frear, 146 Wis. 291, 34 L.R.A.(N.S.) 480, 131 N. W. 832; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 2 N. C. C. A. 834. A few general observations may not be out of place before taking up for consideration the specific claims of unconstitutionality which are urged upon our attention.

The law in question, if valid, works a very important change in the general taxation policy of the state. Ever since the foundation of the state government it has been the policy of the state to levy its general taxes upon property, either real or

personal, with the exception of the inheritance taxes and the license taxes first levied on railroads and latterly upon other public-service corporations. The Constitution of the state, though not forbidding excise taxation, as determined in the inheritance tax case (Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711), contained only one brief section on the general subject of taxation; namely, § 1 of article 8, reading as follows: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Under this section property taxation has been the rule, with the exceptions just noted, until the passage of the present law. This law, however, is but the concrete embodiment of a popular sentiment which has been abroad for sometime. The legislatures of 1905 and 1907 (Laws 1907, chap. 661) passed a resolution recommending the amendment of the section of the Constitution quoted, by the addition of the following words: "Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated, and progressive and reasonable exemptions may be provided." This change was ratified by the people at the general election held in November, 1908, and thus was clearly expressed, by both legislature and people, the idea that some form of general taxation in addition to, or in place of, property taxation, might well be adopted. The attempt has now been made to carry out this idea, and we have the result before us in the present law. With the political or economic policy or expediency of the law, we have nothing to do. If it be within constitutional lines, it represents and embodies public policy, because it is enacted by that branch of the government which determines public policy.

It may be well to note, however, that income taxation is no new and untried experiment in the field of taxation. It has been in use in various forms, and generally with the progressive feature, by many of the civilized governments of the world for decades, which in some instances run into centuries. It has been used at various times by nearly or quite twenty of our own states, and is now in use in several of them. It was used for a brief period by the government of the United States, and is now in successful operation in practically all of the great nations of the civilized world, except the United States. The fundamental idea upon which its champions rest their argument in its favor is that taxation should logically be imposed according to ability to pay, rather than upon the mere possession of property, which for various reasons may produce no revenue to the owner.

It is argued that there should be as nearly as practicable equality of sacrifice among the various taxpayers, and that a tax levied at a uniform or proportional rate can rarely, if ever, produce equality of sacrifice; that 1 per cent of a small income, which just suffices to support its owner, is a far larger relative contribution to the public treasury than 1 per cent of an income so large that it cannot be exhausted by its owner, except by means of lavish and extravagant expenditures.

We are not to be understood by these remarks to be advancing arguments in support of the policy or expediency of the law, but simply as showing that in passing the law the legislature is only adopting a scheme of taxation which has been approved for many years by many of the most enlightened governments of the world, and has the sanction of many thoughtful economists.

By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas; namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value.

We pass from these general observations to consideration of the specific grounds of unconstitutionality alleged.

I. It is first claimed with much earnestness and ability that the act violates the provisions of the 14th Amendment to the Federal Constitution. One of the contentions under this head is that the progressive features of the act are discriminatory, if not absolutely confiscatory. Another contention is that the act provides for double

taxation, and for both reasons it is claimed that it denies to citizens the "equal protection of the laws." It is said in support of this contention that the United States Supreme Court in the Pollock Case. 157 U. S. 429, 39 L. ed. 759, 15 Sup. St. Rep. 673, has held that taxation of income derived from land is in fact taxation of the land itself, hence that the act provides for double taxation; first, of the land in specie, and next, of the income therefrom. It seems that this claim may be very easily met. The question in the Pollock Case was whether the taxation of rentals of land was direct taxation within the meaning of that term as used in the Constitution of the United States; and it was held to be the same, in substance, as a tax on the land itself, and hence a direct tax. This may be admitted for the purposes of the case, but it does not appear to, in any way, decide the question here at issue, or even to be very persuasive. The question there was of the power of Congress under that clause of the Federal Constitution which forbids any direct Federal tax, except one levied in proportion to the population. The question here is primarily of the power of the legislature of Wisconsin under its Constitution to levy an income tax in addition to a real estate tax; and, secondarily, whether such a tax denies to anyone the equal protection of the laws.

The inapplicability of the rule of the Pollock Case to the case here presented seems so plain as to require little comment. There can be no doubt of the proposition that income taxation of a progressive character, in addition to taxation of property, is directly authorized by the Constitution of Wisconsin as amended in 1908. Words could hardly be plainer to express that idea than the words used. From them it clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state Constitution. Both may be levied, and lawfully levied, because the Constitution says so. However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that "property" means one thing, and "income" means another; in other words, that income taxation is not property taxation, as the words are used in the Constitution of Wisconsin.

That they may say so, and lawfully say so, there is no doubt, unless some restriction in the Federal Constitution is thereby violated; and we are pointed to none, save the clause guarantying "equal protection of the laws." That this clause does not apply to the case seems very well settled by the language of the Supreme Court of the United States itself in the great case of Michigan C. R. Co. v. Powers, 201 U. S. 245, at pages 292, 293, 50 L. ed. 744, 761, 762, 26 Sup. Ct. Rep. 459, 462, where it is said: "There is no general supervision on the part of the nation over state taxation; and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the circuit court in this case (Michigan R. Tax Cases [C. C.] 138 Fed. 232): 'There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the 14th Amendment to the Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.'" This doctrine has been stated and restated in many forms, but with substantially the same meaning in many Federal cases, beginning with the case of Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533, nearly all of which are cited in the Powers Case at the close of the clauses above quoted. It seems unnecessary to quote or descant upon them. The sum and substance of it is that the 14th Amendment never was intended to lay upon the states an unbending rule of equal taxation. The states may make exemptions, levy different rates upon different classes, tax such property as they choose, and make such deductions as they choose, and, so long as they obey their own Constitutions and proceed within reasonable limits and general usage, there is no power to say them nay.

With regard to the progressive feature, it is aptly said in Knowlton v. Moore, 178 U. S. 41, at page 109, 44 L. ed. 969, 996, 20 Sup. Ct. Rep. 747, 774, by the present chief justice, that "taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial." No more

need be said as to the progressive feature. Expressly permitted as it is by our own Constitution, and clearly not within the inhibitions of the 14th Amendment, the progressive feature is in no respect objectionable. It was suggested in the Knowlton Case, supra, that possibly the case might arise where exactions so arbitrary and confiscatory might be imposed under the guise of progressive taxation that the question would arise whether judicial power should not afford relief under inherent and fundamental principles of justice, but, as there is plainly no ground for such a contention here, there is no need of considering the question.

II. It is argued that the provisions which deny to nonresidents the exemptions which are allowed to residents, and which allow the board of review to increase the assessment of a nonresident without notice, while requiring notice to be given to a resident, violate § 2 of article 4 of the Federal Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The question as to the validity of the provision allowing exemptions to residents of the state and denying them to nonresidents is raised, and receives some attention in the briefs, but was not mentioned in the oral arguments. We regard it as a question involved in considerable doubt, and one not necessary to be passed upon now.

It cannot be imagined for a moment that the legislature would have failed to pass the act had it not contained this provision, and we prefer to wait until the question is presented in a concrete case, at which time there will be opportunity to fully consider it after comprehensive briefs and arguments. It seems that the Supreme Court of the United States decided in Ward v. Maryland, 12 Wall. 418, at page 430, 20 L. ed. 449, 452, that one of the privileges and immunities protected by the section quoted is the right "to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." Other decisions relied on upon the same side are Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462, and Sprague v. Fletcher, 69 Vt. 69, 37 L.R.A. 840, 37 Atl. 239, and the cases cited in the latter case. On the other side reliance is placed on the analogy of the laws providing for exemptions from execution seizure, which confine their benefits to residents, and upon Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

So far as the provision allowing the increasing of an assessment against a nonresident without notice is concerned, this would seem to be almost a necessity if power to increase the assessment of a nonresident is to be given to the board at all, otherwise the nonresident would only need to stay out of the state to prevent the possibility of an increase of his assessment. We do not consider that this latter provision affects in any way the privileges or immunities which are covered by the constitutional provision cited.

III. The claim is made that the law violates the constitutional guaranties of local self-government by placing the power of appointment of the various assessors of incomes in the state tax commission. These guaranties in substance are (1) that all county officers, except judicial officers, shall be chosen by the electors of the county every two years (Wis. Const. art. 6, § 4); (2) that all county officers whose election or appointment is not provided for by the Constitution itself shall be elected by the electors or appointed by the proper county authorities, as the legislature shall direct; (3) that all city, town, and village officers, whose election or appointment is not provided for by the Constitution, shall be elected by the electors of the proper municipality or appointed by such municipal authorities as the legislature shall designate; (4) that all other officers whose election or appointment is not provided for by the Constitution and all officers whose offices may thereafter be created by law shall be elected by the people, or appointed as the legislature may direct. Wis. Const. art. 13, § 9. These provisions have been quite fully considered and expounded by this court in several cases, and it seems unnecessary to add to the quite complete discussions of the subject to be found in O'Connor v. Fond du Lac, 109 Wis. 253, 53 L.R.A. 831, 85 N. W. 327, and State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475. It is sufficient to say that we do not regard the office of assessor of incomes, as provided for by this act, as either a county, city, town, or village office; nor do we regard it as an office existing in substance at the time of the adoption of the Constitution, or essential to the existence or efficiency of either of said municipal divisions of the state, but rather an entirely new office within the fourth class above named, whose election or appointment may be provided for in any way that the legislature may in its discretion direct.

The further contention is made that it is a delegation of legislative power to vest in the state tax commission the power of appointing assessors of incomes and fixing their salaries. This objection is met and fully answered in State ex rel. Gubbins v.

Anson, supra, and in Revisor's Case, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176.

IV. A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well-known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish. Further than this, however, there is another consideration. If the partner have individual income from other sources than the partnership business (as many do), his exemptions will be allowed to him out of the individual income, and thus, if he were also allowed exemptions from the partnership income, he would be allowed double exemptions. Altogether there seems to be ample reason for the classification. The exemptions themselves do not seem to be seriously attacked, nor do we see any reason why they should be. The most striking exemption is that of life insurance to the amount of $10,000 in favor of one legally dependent on the deceased; but, while this is somewhat large, we cannot say that it is unreasonable, nor that there is not ample ground for classifying legally dependent persons, and extending an exemption to them which is denied to others.

Attack is made upon the provision which directs that a taxpayer who has paid a personal property tax for the year shall be entitled to have the amount so paid credited upon his income tax. There is said to be no just ground for this distinction, but it seems quite clear to us that there is. In fact, it seems to be rather a means of equalizing the burden of the new form of taxation, than to be really an exemption. It was evidently done with the idea of accomplishing, without too violent a shock to taxing machinery, the substantial elimination of personal property taxation, and the substitution thereof of "ability" taxation. The practical result is that the taxpayer who has taxable personal property and the taxpayer who has none, each pays taxes according to his ability as evidenced by his income.

In this connection, though not perhaps in its logical order, may be considered the objection to that provision of the act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly it must be money or that which is convertible into money. The Century Dictionary defines it as that which "comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital," etc. The clause was doubtless inserted in an effort to equalize the situation of two men each possessed of a house of equal rental value, one of whom rents his house to a tenant, while the other occupies his house himself. Under the clause in question, the two men with like property are placed upon an equal footing, and in no other way apparently can that be done. Under the English income tax laws, it has been held that where a man has a residence or right of residence which he can turn into money if he chooses, and he occupies the residence himself, the annual value of the rental forms part of his income. Corke v. Fry, 32 Scott. L. R. 341. We discover no objection to the provision in question.

Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there clearly is such a difference in this: That experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestionably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately.

One further objection we overrule here without comment, for the reason that it seems very unsubstantial; namely, the ob-

jection that the law is retroactive and void, because assessed on incomes received during the entire year 1911, while it did not go into effect until July 15th of that year, and also because it includes profits derived from the sale of property purchased at any time within three years previously.

V. A strong argument is made attacking the validity of § 1087 m—22, which provides, in substance, that the income of a resident derived from different political subdivisions of the state shall be combined for the purpose of determining the exemptions and the rate, while the income of a nonresident is to be separately assessed and taxed in each of the municipalities from which it is derived. A table is submitted showing that under this rule if A, a resident, derived $1,000 from each of thirteen different towns or cities, he will be required to pay a tax of $367, because his income is aggregated, and consequently becomes in large part subject to the higher rates, while if B, a nonresident, receives the same income from the same sources, he will only pay the smallest rate; *i. e.*, 1 per cent of each $1,000, amounting to only $130. This, it is said, is unjust discrimination against the residents of the state, and deprives them of the privileges and immunities which are granted to the citizens of other states in violation of the Federal Constitution. This presents the question whether such a discrimination can be made between residents and nonresidents, only this time the discrimination seems to be against the resident and in favor of the nonresident. This question, also, we deem one not necessary to be decided now, and we intimate no opinion upon it. It does not seem that the case will frequently arise, but, if it does, it can be then treated. We do not regard it as in any respect important in considering the validity of the act as a whole.

VI. Much complaint is made of that part of § 1087m—6 which provides a different rate of taxation for the income of corporations from the rate prescribed for individuals, and this also is said to be unjust discrimination. Again, the question is whether there be substantial differences of situation between individuals and corporations which suggest and justify this difference in treatment, and again it seems that the answer must be, "Yes." The corporation is an artificial creation of the state, endowed with franchises and privileges of many kinds which the individual has not. It might be said with truth that the clause could be justified on the ground that it is an amendment to every corporate charter, which the legislature has the undoubted right to make, but it is not necessary to rely on that proposition. The corporate privileges, which are exclusively held by corporations, and the real differences between the situation of a corporation and an individual, among which may be mentioned the fact that the corporation never is obliged to pay an inheritance tax, plainly justify a difference of treatment in the levying of the income tax. Were the income tax a tax upon property, there could be no difference in rate, for taxation of property must still be on a uniform rule; but, as has been heretofore noted, it is not a tax upon property within the meaning of our Constitution.

VII. The minor objections that the law in terms includes all corporations, and does not specifically except national banks, nor name the officers whose salaries cannot be constitutionally taxed, are very easily disposed of. If national banks or any public officers cannot constitutionally be subjected to the tax, the law will be construed as not applying in such cases, just as § 1770b, Stat. (Laws 1907, chap. 562), although in general terms covering all business, has been held not to apply to interstate business.

VIII. We come now to certain serious objections which are made to the provisions of § 1087m—2, subdiv. 3 and 1087m—3 (b). The first of these sections provides, in substance, that a resident shall be taxed upon all of his income arising from rentals, stocks, bonds, securities, or evidences of debt, whether the same be derived from sources within or without the state, but that the nonresident shall only be taxed on income derived from sources within the state, or within its jurisdiction, but that any person doing business both within and without the state shall, as respects that part of his income not derived from rentals, stocks, bonds, and securities, be taxed only on that proportion thereof which is derived from business transacted and property located within the state, to be determined in the manner specified in subdivision "e" of § 1770b, Stat. (Laws 1907, chap. 562), as far as applicable. The general purpose of the section is quite evident, namely, to tax a resident upon his whole income, and a nonresident only upon his income plainly derived from sources within the territorial jurisdiction of the state, and to provide that, where either person is engaged in a business interstate in its character, he shall only be taxed on that portion of the income derived from business transacted and property located within the state, according to the rule prescribed in § 1770b for determining that proportion of capital stock of a foreign corporation doing business in this state, which must be reported to the secretary of state. The rule so imported into the statute is an arbitrary

rule, and need not be stated at length in the view we now take of our duty with regard to this contention.

Two fundamental objections are made to this section: First, that the state cannot tax the incomes of nonresidents, no matter from what source derived; and, second, that the attempt to tax a part of the profits derived from an interstate business, under the rule adopted, must necessarily result in a taxation of the receipts of interstate commerce, and hence a regulation thereof, which is in violation of that clause of the Federal Constitution which gives to Congress the power to regulate commerce between the states.

We shall decide neither of these questions now. If the section be open to either or both of these objections, or any others, we cannot regard that fact as fatal to the act. The legislature evidently intended to avoid both of the objections made. They had a difficult and delicate subject to deal with. Had they been authoritatively informed that they could not constitutionally tax a nonresident's income at all, and could not divide the income derived partially from state and partially from interstate business, we have no idea that they would on that account have abandoned their purpose to pass the law. Again, if they provided an improper rule for the division (conceding that a division can be made at all), there seems no reason why the rule may not be rejected and the proper rule, which will carry out the fundamental purpose of the provision, be used. In any event, we are fully satisfied that the rejection of any or all of the provisions objected to in this section cannot reasonably be held to invalidate the whole act.

When these questions are presented to us in a case actually arising, we shall be able to give them far more critical examination in the light of arguments and briefs directed exclusively to them. For the present, therefore, we leave the various objections to the validity of those parts of this section which are attacked, without answer.

For the same reasons we decline at the present time to pass upon the objections to the second section referred to under this head. That section provides generally that a proportion of the interest on corporate bonds (to be ascertained in the same manner as the proportionate taxable income is ascertained in the preceding section) shall be taxed against the bondholders and paid by the corporation, and deducted from the next interest payment on the bonds. Many serious objections on behalf of foreign bondholders are made to this provision, from the fundamental objection that there is no power to levy such a tax at all, to the minor objection that the rule for ascertaining the proportion is incorrect. As we do not deem it necessary to pass upon any of these objections, we need not make particular statement concerning them now. The subject will be entirely open for discussion when an actual case arises necessitating a decision upon this section.

We have reviewed all of the objections made to the law which we deem of sufficient importance to require specific mention or treatment. As a whole, we regard the law constitutional. If there be provisions which will not stand the test, they are not provisions of such a nature that they must be considered as the inducement to or as the compensation for the balance of the law. They may drop out, and leave the law intact in its fundamental and essential features.

As to the Winding Case commenced in the circuit court, a few words should be said. This was an action brought by a number of persons and corporations who alleged that they were taxpayers, and that they and their fellow taxpayers would be unlawfully taxed, and compelled to pay large sums under the alleged unconstitutional law, thus causing a multiplicity of suits; and praying that the officers of the state be enjoined from executing the law, and from paying any moneys out of the public treasury in its execution.

This seems to be a taxpayers' action pure and simple, brought in the circuit court to stay the hands of state officers from paying moneys out of the state treasury. We have already held in this opinion that no taxpayers' action can be maintained in the supreme court against the auditing or disbursing officers of the state. If such relief is sought, it must be in an action by the state itself, either brought by the attorney general, or, in case of his refusal, by authority of the court itself, upon the relation of a private citizen. It would seem, *a fortiori*, that no taxpayers' action should be entertained in the circuit court, where the purpose is to halt the auditing and disbursing officers of the state. We regard this as the better administration. It is enough that this court has the power to authorize such an action if the exigency demands. To divide up that power, and scatter it among the trial courts of the state, and allow every such court to judge of the exigency, might well lead to the bringing of many improvident actions. It is fitting that such an extreme power be vested in this court alone.

The result is that in the Bolens action the demurrer to the complaint must be sustained upon the merits, and judgment ordered dismissing the complaint, without

costs; in the Winding Case the order sustaining the demurrers must be affirmed, and the action remanded, with directions to dismiss the complaint for lack of jurisdiction.

It is so ordered.

Kerwin and **Barnes**, JJ., took no part in the decision of the question of jurisdiction.

Timlin, J., dissenting in part:

Chapter 658, Laws of 1911, relating to the taxation of incomes and making an appropriation for salaries of officers and other expenses of executing and administering the statute, was enacted by the legislature, approved by the governor, and published July 15, 1911. The act went into effect as law from and after its passage and publication, and officers were appointed to administer this law, but no assessment or levy of tax had been made, and the time for enforcing the provisions of this act had not arrived when these suits were begun. I shall consider these suits separately, taking up first that begun in the circuit court by Arthur Winding and F. W. Gezelschap individually and as copartners, the Wisconsin Trust Company a corporation, several other natural persons, a national bank, and the Milwaukee Coke & Gas Company, a corporation. These plaintiffs, evidently selected because of diversity of relations to the act in question, affected differently by different sections of the act, but all desirous of escaping payment of the tax, hence interested in the question of the constitutionality of the statute, join in a taxpayers' suit in their own behalf and in behalf of all the other income taxpayers of the state, against three members of the state tax commission, the secretary of state, and the state treasurer. The cause of action alleged is that the act above referred to is null and void because in violation of the Constitution of the state of Wisconsin and of the Constitution of the United States, and that the members of the state tax commission will, unless restrained by injunction through their subordinate appointees acting under said statute, exact and collect large sums of money from many residents and citizens of Wisconsin, which collections will lead to a multiplicity of suits to recover back the moneys so collected, or to a multiplicity of suits by the state to collect the fines and penalties provided in and by said act to be enforced against those persons who refuse to comply with the act. On these grounds they pray for an injunction restraining the state tax commissioners and their subordinate administrative officers from attempting to enforce the act, and restraining the secretary of state, who is by the state Constitution auditor, from auditing, and the state treasurer, who is also a constitutional officer, from paying salaries, bills, or expenses of any kind incurred under or payable by the terms of the act in question. This act carries in it a legislative appropriation for such purpose. This is therefore a bill by taxpayers to enjoin the enforcement of a statute levying taxes upon incomes, on the ground that the statute is unconstitutional, which bill is sought to be upheld upon the equitable ground that it takes the place of a multiplicity of suits or actions, but, so far as the secretary of state and the state treasurer are concerned, it is a bill to restrain the payment of moneys out of the state treasury for the purpose of administering or enforcing a law claimed to be invalid. As to the latter defendants, who have no part in executing or enforcing the act except auditing and paying bills, salaries, and expenses under the legislative appropriation, the bill is maintainable only upon the ground that each individual taxpayer in the state has a proprietary interest cognizable in equity in the funds of the state treasury in analogy to the shareholder in a private corporation or the taxpayer in a municipal corporation. Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 256, 69 Am. St. Rep. 915, 75 N. W. 964, op. and cases.

The circuit court sustained a demurrer to this complaint, and from that order the plaintiffs appealed to this court. This demurrer went expressly to the point that the circuit court had no jurisdiction of the action, and also to the point that the complaint did not state facts sufficient to constitute a cause of action; so that both these questions are before us on this appeal. Generally speaking, the law does not give a private remedy for the redress of a public wrong. One damaged or threatened by an unlawful act which affected him only as it affected that section of the public holding the same legal relation to such act could not, at common law or in equity, maintain an action against the doer of such act. And it mattered not that his damages were greater. If they were of the same nature, and differed only in degree, the wrong was still a public wrong. The rule has been applied in a great variety of cases in this court. Enos v. Hamilton, 27 Wis. 256; Cohn v. Wausau Boom Co. 47 Wis. 314, 2 N. W. 546; Baier v. Schermerhorn, 96 Wis. 372, 71 N. W. 600; Stedman v. Berlin, 97 Wis. 505, 73 N. W. 57; Liermann v. Milwaukee, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 65; Linden Land Co. v. Milwaukee Electric R. & Light Co. 107 Wis. 493, 83 N. W. 851; Pedrick v. Ripon, 73 Wis. 622, 3 L.R.A. 269, 41 N. W. 705; Bell

v. Platteville, 71 Wis. 139, 36 N. W. 831; Stone v. Oconomowoc, 71 Wis. 155, 36 N. W. 829; Gilkey v. Merrill, 67 Wis. 459, 30 N. W. 733, and cases cited; Sage v. Fifield, 68 Wis. 546, 32 N. W. 629; Harley v. Lindemann, 129 Wis. 514, 8 L.R.A.(N.S.) 124, 109 N. W. 570; Foster v. Rowe, 132 Wis. 268, 111 N. W. 688; Carstens v. Fond du Lac, 137 Wis. 465, 119 N. W. 117; Nast v. Eden, 89 Wis. 610, 62 N. W. 409.

It has been sometimes said by law writers and courts that this rule rested upon the consideration that, if one suit could be maintained in such case, each person affected might also bring suit, and thus the defendant be ruined by litigation. This consideration has special significance and force in a state where the law permits suits to be brought by private persons against administrative officers charged with the duty of enforcing the law. Few officers would attempt an efficient administration at such risk, and the ultimate result must be either injustice or inefficiency. But there is another reason for the rule, which lies deeper and upon a broader foundation of governmental policy. That is the policy which places the prosecution of public wrongs in the hands of the public prosecutors and out of the hands of those who may be actuated by private revenge or gain, malice, or political intrigue. Biemel v. State, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556. If the state, as a sovereign, is to have its proper and lawful recognition in our jurisprudence, it is, in the absence of statute, subject to no defense of laches, no limitation of time, and no liability to suit; and it must also be regarded as the repository of governmental policy and political discretion. When and how it will assert and enforce its sovereign prerogatives is often a political question, a matter of state policy; and to leave these great questions in the hands of every private litigant has a tendency to create confusion in jurisprudence, lack of wisdom in state policy, and contempt for authority. In the great case of Atty. Gen. v. Chicago, M. & St. P. R. Co. 35 Wis. 425, Chief Justice Ryan said at page 529: "Relief against public wrong is confined to informations by the attorney general." See further for illustration Saylor v. Pennsylvania Canal Co. 183 Pa. 167, 63 Am. St. Rep. 749, 38 Atl. 598. The victim of robbery, battery, or arson may have a private action for damages against the wrongdoer, suspended, according to some, until the pending public or state prosecution is at an end, and not concluded by the result of the public prosecution. But there there is coincident and cotemporaneous with the public wrong a private wrong suffered by the victim, distinct and different from that suffered by any other member of the public. Where all are affected alike by the wrongful act, the language of the cases and many of the actual adjudications indicate that there is no private actionable wrong, not merely a lack of remedy. Cases infra and supra. An exception to these general rules was recognized in the case of taxpayers, first in this state, I think, in Peck v. School Dist. 21 Wis. 516; and this doctrine received the approval of the Supreme Court of the United States in Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070. Since then the scope of the taxpayers' action so-called has been greatly extended by this court, and its decisions have not always been consistent.

In Peck v. School Dist. supra, the action was brought by certain taxpayers whose personal property had been levied upon and advertised for sale, to restrain local administrative officers from action taken contrary to statute and consequently outside of their jurisdiction, to the private injury of plaintiffs. Their remedy for this conceded private wrong would ordinarily be at law. But the contract which formed the basis for the tax was found to be fraudulent, thus arousing the jurisdiction of equity, and the injunction against the enforcement of the tax sustained upon the ground that, the jurisdiction of equity having once rightfully attached, it should be made effectual for the purposes of complete relief. The decision of the court was written by Chief Justice Dixon. When the question was presented about four years later in a suit by taxpayers, involving no recognized ground of equity jurisdiction, but showing the plaintiffs to be taxpayers threatened with the enforcement of an illegal tax, precisely as it is presented by the complaint in the instant case, except that there it was averred the local administrative officers acted without their statutory jurisdiction, while here it is averred that the legislature of the state acted without its constitutional jurisdiction, the same distinguished jurist, denying the injunction, said, among other things: "The general principle that equity possesses no power to revise, control, or correct the action of public political or executive officers or bodies is, of course, well understood. It never does so at the suit of a private person, except as incidental and subsidiary to the protection of some private right or the prevention of some private wrong, and then only when the case falls within some acknowledged and well-defined head of equity jurisprudence. It is upon this principle that bills to restrain the collection of a tax have in general been dismissed [citing cases]. But there are other reasons why equity will refuse its aid in a case like this, and which are most ably pointed out

in the opinions in Doolittle v. Broome County, 18 N. Y. 155, and in Sparhawk v. Union Pass. R. Co. 54 Pa. 401. The grounds are too remote, intangible, and uncertain, and the public inconvenience which would ensue from exercise of the jurisdiction would be enormous. It would lie in the power of every taxpayer to arrest all proceedings on the part of the public officers and political bodies in the discharge of their official duties, and assuming to be the champion of the community, to challenge them in its behalf to meet him in the courts of justice to defend and establish the correctness of their proposed official acts before proceeding to the performance of them. A pretense more inconsistent with the due execution of public trusts and the performance of official duties could hardly be imagined." Judd v. Fox Lake, 28 Wis. 583. This case has been cited and followed many times: In Gilkey v. Merrill, 67 Wis. 459, 30 N. W. 733, wherein it was expressly adjudicated that an action will not lie in behalf of a taxpayer to set aside the taxes of a city or other municipality generally, Judd v. Fox Lake is cited to support the rule that there must be some distinct principle of equity jurisprudence under which the case is brought, other than the mere illegality of the general taxes and its necessary and usual consequences; in Pedrick v. Ripon, 73 Wis. 622, 3 L.R.A. 269, 41 N. W. 705, to the effect that the mere passage of a resolution and intent to enforce it are not sufficient to support a taxpayers' suit: in Sage v. Fifield, 68 Wis. 546, 32 N. W. 629, to the same effect; in Foster v. Rowe, 132 Wis. 268, 111 N. W. 688, to the effect that no action will lie by a taxpayer in his own behalf and in behalf of other taxpayers to restrain the levy and collection of the taxes of a municipality generally. See also Harley v. Lindemann, 129 Wis. 514, 8 L.R.A.(N.S.) 124, 109 N. W. 570. If the equitable ground of the prevention of a multiplicity of suits could be invoked to support such a taxpayers' action, for the reason that the collection of an invalid tax will breed a multitude of suits at law to recover back the taxes, or on the ground that it will require a multitude of suits or proceedings in the nature of suits by the state to collect the taxes, then manifestly the foregoing cases were incorrectly decided, for all invalid tax levies give rise to suits to recover back the taxes, and generally the nonpayment of taxes is followed by penalties of some kind. Such suits are also forbidden by the rule which prohibits the courts to entertain suits by a private citizen to vindicate a public right, or that which prohibits a court of equity from employing its preventive remedies so as to interfere in a wholesale way with the collection of the public revenues. But I think they were correctly decided upon either ground. See Bell v. Platteville, 71 Wis. 139, 36 N. W. 831, and reasons there given for refusing to entertain the taxpayers' suit; Stone v. Oconomowoc, 71 Wis. 155, 36 N. W. 829; Harley v. Lindemann, 129 Wis. 514, 8 L.R.A.(N.S.) 124, 109 N. W. 570; Carstens v. Fond du Lac, 137 Wis. 465, 119 N. W. 117. In the latter case the right of a taxpayer to sue in behalf of other taxpayers is denied where the plaintiff merely seeks to relieve his property of a tax which he claims to be void. In Giblin v. North Wisconsin Lumber Co. 131 Wis. 261, 120 Am. St. Rep. 1040, 111 N. W. 499, the cases are cited which hold that a decree in a taxpayers' suit is binding upon all the taxpayers and citizens of the municipality concerned in the litigation. The taxpayers' suit, as both created and limited by judicial decisions in this state, has been productive of very beneficial results in preventing municipal maladministration, conserving municipal funds and property, and keeping fraudulent or erring municipal officers within their jurisdiction. But the fact that it has cured some ills does not prove it a panacea. It has its limitations, as above shown, founded upon sound policy even with respect to subordinate municipal officers. For stronger reasons, those limitations must be applied when the suit is state wide in its operation, and is, in effect, a suit against the state to prevent the entire state levy and collection of a tax, on the averment that the law sought to be enforced is unconstitutional. The state as such has immunity from actions except where expressly authorized by statute, and here no such statute exists covering the instant case. The state officers in the execution of a law have a wider latitude of discretion than municipal officers. Taxpayers' suits against the latter are brought to vindicate some law, here to annul a statute. The taxpayer here attempts to represent a larger constituency, and the arrest by injunction of all the taxes of the state surely implies a wider scope of power, larger interference with administrative officers, and multiplication of the serious consequences mentioned in the quotation from Judd v. Fox Lake, supra.

It seems apparent that, under the decisions of this court, the first action cannot be supported as a taxpayers' action based upon the avoidance of a multiplicity of actions at law or suits in equity. The other ground averred in support of the complaint is, as said, based upon the claim that each taxpayer of the state has an equitable proprietary interest in the funds in the state treasury or an interest of such a nature that equity will recognize it, and protect it by injunction against the constitutional

fiscal officers of the state, to prevent them from paying out of such treasury funds for the execution or administration of an unconstitutional law under the rule applied to municipalities in Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, at page 256 op., 69 Am. St. Rep. 915, 75 N. W. 964; Cole's Estate, 102 Wis. 1, 72 Am. St. Rep. 854, 78 N. W. 402, and other cases in this court. But the situations are not analogous. The state is not to be put upon the level of a private or of a municipal corporation. The former is the sovereign; the latter the subjects. The courts have jurisdiction in an action against a municipality as against a natural person. They have no jurisdiction of actions against the state except with the consent of the state expressed by the legislative branch of the government and approved by the executive. Unlike the Federal Constitution and the Constitutions of most of the states, the Constitution of this state creates and recognizes not three, but four, branches of government—legislative, executive, administrative, and judicial. Administration is logically, and in most cases legally, recognized as an exercise of the executive power. The heads of the great administrative departments of the United States government derive their power from the grant of executive power in the Federal Constitution, and their lawful acts are treated as acts of the chief executive; and in some instances an injunction against them to prevent the enforcement of law challenged as unconstitutional was put upon the same level as a like injunction against the President. Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721, and cases in Rose's Notes. The administrative officers named in article 6 of our state Constitution are secretary of state, treasurer, and attorney general for the state, and sheriffs, coroners, registers of deeds, and district attorneys for the counties. Among the duties of the secretary of state prescribed by the Constitution is that "he shall be *ex officio* state auditor." There is no general grant of the whole administrative power to any one of or to all these officers, and doubtless this and § 4 of article 5, which requires of the governor that "he shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed," is sufficient authority for the legislature to impose upon the governor and upon subordinate administrative officers, like the state tax commissioners, all necessary administrative powers not by the Constitution vested in the administrative officers therein mentioned. There is also found in our state Constitution some express limitations upon the power of the legislature over the funds in the state treasury, and some restrictions of that power by necessary implication. Instance, § 18 of article 1, which provides that no money shall be drawn from the treasury for the benefit of religious societies or religious or theological seminaries; also § 2, art. 8, which forbids an appropriation for the payment of any claim (except claims of the United States and judgments) not filed within six years after the claim accrued; and there are others. State ex rel. New Richmond v. Davidson, 114 Wis. 563, op. of Dodge, J., at page 580, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067. There are restrictions by necessary implication, as § 1, art. 10, which provides that the compensation of the superintendent of public instruction shall not exceed the sum of $1,200 annually. State ex rel. Raymer v. Cunningham, 82 Wis. 39, 50, 51 N. W. 1133. But these only accentuate the application, to all other treasury disbursements, of the rule fundamental in popular representative governments, that the popular branch of the state legislature, or the legislative branch of the government, shall control the public purse. *Expressio unius est exclusio alterius.* In no system is the judiciary the guardian of the public treasury except as the Constitution, by restrictions upon legislative power in this direction, may have so provided that a judicial controversy not involving political discretion may arise. The manner in which appropriations of money must be made is regulated, and there is a general provision, recognizing the authority of the legislative branch of the government over the public funds, to the effect that no money shall be paid out of the treasury except in pursuance of an appropriation made by law. There is in the instant case an appropriation made by law, but it is contended that this appropriation, being made for the purpose of administering or carrying into effect an unconstitutional law, is itself unconstitutional. What provision of the Constitution does it conflict with if we suppose the premises correct? The state legislature is not expected to find a grant of power to it in the state Constitution. Where there is no restriction, it possesses the power. Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224. There is no such restriction upon the power of the legislature over the public funds. On the contrary, it may well be within the duty, at least it is within the discretion, of the legislature that all laws, even invalid laws, be enforced, and thus brought to the test before the courts in the ancient well-understood and lawful way. But, in any event, the courts have no authority to interfere by injunction, and thus forestall attempts to

enforce the law. This because the taxpayer has no interest in the funds in the public treasury to restrain these officers, and because the court has no power to create such an interest in the taxpayer, and because the court does not possess the power where no constitutional interdict intervenes to control the disbursements of public funds as against the legislative branch of the government. But of this hereafter.

It further seems to me obvious that a suit by a taxpayer against such fiscal officers of the state, based upon the claim that a statute is unconstitutional, is a suit by a private person against the state not going upon any apprehended destruction or confiscation of his property or clouding his title, as we say in legal phrase not *quia timet*, but ostensibly as champion of the public interests and in self-assumed protection of public funds, but really to avoid payment of the tax by arresting the power of the state in its attempt to execute the law by furnishing the funds for that purpose. That this is a suit against the state is settled by authority here and elsewhere. It falls within the rule of State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, sixth paragraph of opinion and the cases there selected for approval. Stephens v. Texas & P. R. Co. 100 Tex. 177, 97 S. W. 309, Lord & P. Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, State ex rel. Hart v. Burke, 33 La. Ann. 498, Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, and cases in Rose's Notes, and Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, are in point, and other cases can be found. Quoting from the last cited case: "If because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." See also Ex parte Young, 209 U. S. 157, 52 L. ed. 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, et seq. op.

But there emerges here what is perhaps a larger question. To say that the courts have jurisdiction to review statutes at the suit of any taxpayer of the state who seeks to enjoin the payment of moneys out of the state treasury for the administration or enforcement of those statutes is to establish a general revisory jurisdiction in the courts over all legislation before any actual judicial or justiciable controversy has otherwise arisen. I may safely say that no statute is received with unanimous approval. A taxpayer may always be found. It is no answer to say that the court has a discretion as to when it will recognize this right of the taxpayer or issue its injunction. That only changes the principle which it is sought to ingraft upon our form of government, to the extent that we are to modify the statement of it by saying: "The courts have the power in their discretion to review all legislation," etc. To my mind it is an obvious fallacy to say that this power or this discretion extends only to the review of unconstitutional statutes. As well might one say that courts had jurisdiction to try only guilty persons charged with crime. The inquiry proposed is whether or not the act in question is unconstitutional, and it is to entertain such inquiry and decide it for or against the validity of the statute that the jurisdiction exists if it exist at all. To recognize a power resident in the courts by which that branch of the government could supervise legislation in this way would be to create a radical change in our plan of government as heretofore understood. This must be quite apparent to those who have extended their legal studies beyond the minutiæ of adjudged cases and the rules of private right, and have acquired some knowledge of the principles of government. All revenue measures and most other statutes involve some charge upon the public treasury for their administration. All acts of the legislature involve the expenditure from the state treasury of at least printing and publishing. Therefore all statutes would at this preliminary stage be subject to judicial review. In reply to a suggestion of this kind from the bench, one of the learned counsel for plaintiffs suggested that this expense was so small that a suit would not be entertained because *de minimis non curat lex*. But this answer overlooked the cases of Mueller v. Eau Claire County, 108 Wis. 304, 84 N. W. 430, and Chippewa Bridge Co. v. Durand, 122 Wis. 85, 108 op., 106 Am. St. Rep. 931, 99 N. W. 603, wherein it was held that the court will not inquire into the amount or extent of the taxpayer's interest so long as

he is a taxpayer. Besides, it overlooked the consideration that in a Republic founded upon the equality of its citizens before the law, it would be quite inconsistent with fundamentals to rest the jurisdiction to review legislative acts at this preliminary stage of their existence upon the wealth of the taxpayer who comes in to represent himself and the public. Nor can the amount of the charge which the law imposes on the state treasury affect this question, which is one of jurisdiction. No statute gives the taxpayer an interest in the funds in the state treasury. The courts must invent that species of property right if it is to have recognition in the courts. The courts also have considerable discretion in granting or withholding injunctions. This inevitably leads to the conclusion that the court is asked to create or recognize a right not given by common law or statute, and then exercise its discretion to issue an injunction to prevent threatened invasion of this right, and all for the purpose of making an occasion or an opportunity to review the constitutionality of a statute at the preliminary stage of its existence before its enforcement is attempted, and before any controversy otherwise justiciable has arisen. To do so would conflict with the notion of constitutional law and the powers of the judicial branch of the government with reference to declaring laws unconstitutional announced in Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60, and many cases since. It has been said that courts never declare a statute unconstitutional, but being confronted with a judicial question which it may not evade, and with a Constitution which commands one thing and a statute which commands the opposite, they reluctantly and unavoidably obey the paramount, not the subordinate, command. The result of the grave duty thus forced upon the court is unconstitutionality of the statute, because it is incapable of enforcement in the courts which speak last. But here we are asked, not only to compare the statute with the Constitution, but to make the occasion for so doing, and to hold for the purpose of enabling us to do so by legislation, legal fiction, or unprecedented judicial decision, that every taxpayer has a proprietary interest in the funds in the state treasury. The controversy at this stage concerning the constitutionality of a statute is the same which was or might have been presented to the judiciary committees of the legislature, or to the legislature in session, the same as that waged before the governor to induce him to veto the act. It is in the nature of an appeal from the legislative and executive branches of the government to the judicial.

"The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by any one individual against another, there is presented a question involving the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400. See also Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437. An injunction will not issue to restrain the execution of an unconstitutional law merely on the ground that it is unconstitutional. Thompson v. Canal Fund, 2 Abb. Pr. 248; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37; People ex rel. Alexander v. District Ct. 29 Colo. 182, 68 Pac. 242. I am convinced that the decision below was correct, and should be affirmed.

In the second suit a private citizen who is also a taxpayer seeks as relator to begin in this court an action by and in the name of the state against the secretary of state and state treasurer for the purpose of enjoining them from paying out funds from the state treasury for salaries and other expenses of administering this law, and also against the members of the state tax commission, enjoining the latter from exercising the duties and powers conferred upon them by the act in question, all upon the ground that this act is unconstitutional. As against the secretary of state and state treasurer, the ostensible purpose of the bill is to protect the state treasury. As against the state tax commission the real purpose of relator, to avoid paying income tax is disclosed. No steps have been taken to enforce the law, and the time for its enforcement has not arrived. Application was by relator made to the attorney general to begin and prosecute this suit. That official refused, and the relator on this showing with

the usual averments of irreparable injury, etc., seeks to arouse the original jurisdiction of this court to entertain the suit to put his private counsel in the place of the attorney general to prosecute it, and to have the state at this stage of existence of the statute enjoin its own officers from collecting its own revenue upon the averments that the statute is unconstitutional. The constitutional grant of power to this court is that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and justices of the peace." Art. 7, § 2. "The supreme court, except in cases otherwise provided in this Constitution, shall have appellate jurisdiction only which, shall be coextensive with the state. . . . The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same." Art. 7, § 3. That portion of the last above quoted section giving power to issue the writs mentioned and to hear and determine the same was construed to confer upon this court original jurisdiction of all judicial controversies within the scope of and instituted by the issuance of such writs at common law, but it was said that the court would only exercise the power thus granted in controversies affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. It was also decided that the writ of injunction found in this section, associated with the so-called prerogative writs, might also, for this reason, be employed to assert the prerogatives of sovereignty. Cases collected in State ex rel. Lamb v. Cunningham, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35. Rules regulating the exercise of the original jurisdiction as distinguished from the appellate jurisdiction of this court, while appropriate and desirable to facilitate our work, are not fundamental. Power is derived from the Constitution, not from such rules which only operate to regulate the manner of its exercise. They merely serve to indicate when the parties litigant should approach this court in the first instance, and when reach this court by appeal or writ of error. There is, I think, a marked inconsistency between such cases as State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, Re Hartung, 98 Wis. 140, 73 N. W. 988, and State ex rel. Stengl v. Cary, 132 Wis. 501, 112 N. W. 428, and other cases found in our reports and referred to in the opinion written by Chief Justice Winslow herein. I am quite satisfied with the opinion of the court in this respect, but fear it will meet the usual fate of mere judicial warnings, and be again disregarded when a new exigency arises. The Constitution vests in this court only judicial power, thus excluding by implication political, administrative, and legislative power. The power to institute a suit by and in the name of the state cannot logically be said to be an exercise of judicial power. It is rather executive or administrative. The attorney general, district attorneys, the governor, and other officers possess this power, although they exercise no judicial power. It is only by historical associations of the words "judicial power," as distinguished from scientific definition, that the act of instituting a suit in court in the name of the state can be called an exercise of judicial power. Assuming it to be settled by precedent that the judicial power mentioned in our Constitution is that power formerly exercised by the court of King's bench and the chancery courts in England, still that power fell short of authorizing an attack, by suit, upon the acts of coordinate departments of government, by any writ, before any legal controversy had arisen by the attempted execution of such acts. How, then, did this court acquire jurisdiction to authorize the institution of and then to entertain such a suit? Neither logical analysis of the term "judicial power," nor historical association, warrants the exercise. The restriction of suits against the state is quite impotent if every taxpayer of the state, while he cannot make the state a defendant in his suit, may nevertheless make the state a plaintiff in a civil action against the same state officers to fight his battle for him. If these state officers represent the state in an action against them to restrain them from enforcing the law, they occupy the same legal position, and make the same claims when this form of making the state plaintiff is complete. We can hardly say that the controversy has become a suit by the state against the state, for that would be absurd. We cannot liken the state to a trustee seeking the advice and direction of the court, for that presupposes a supervisory jurisdiction over the trust and in the court, and begs the question. We cannot find an analogy in the governments of those states like Massachusetts, where the governor or the legislature may call upon the court for an opinion in advance of enactment and of litigation, because there it is conceded that the courts in giving such opinions act not in a judicial, but in a political, capacity. Opinion of Justices, 126 Mass. 557, 566. Turn this as we will, we are always confronted with the fact that, whether the taxpayer is plaintiff or the

state plaintiff, the suit involves a claim on the part of this court of power to revise and review acts of the legislature with reference to their constitutionality, before any judicial controversy has arisen other than a controversy nursed into life and existence by this court for the purpose of such revision.

All that I have said and quoted with reference to the action in the name of the taxpayer on this point applies to this action. Of the two I would prefer the taxpayers' suit, because this is subject to the same weakness and also savors of subterfuge. Sovereignty is one and indivisible. But in the exercise of sovereign power all the great departments of government must concur. The manner of this concurrence is regulated by the division of governmental powers in the Constitution, and the limitations placed upon each department arising from this division or from express or necessarily implied restrictions found in the organic law. This sometimes impairs efficiency, but it promotes liberty. The most promptly efficient government is a despotism. It is the wisdom of the spendthrift which sacrifices future advantage for immediate gratification. The statesmen who founded the American Republic understood these things, and made deliberate choice between a government of liberty and one of temporary and prompt efficiency. The result thus far has justified their judgment. In the prevailing plan of government the guardianship of the funds in the public treasury, except when otherwise specially provided, is committed to the legislative branch of the government, which is responsible to the people. The judicial branch of the government is to take no part in political questions. In consummation of the exercise of the sovereign power, it is to act last, and to act only when aroused by an actual judicial controversy. Until it comes before the court incidentally in such controversy, the question of the constitutionality of a statute is a political, not a judicial, question. There is therefore no jurisdiction resident in the courts, as there is in the legislature and the governor, to declare an act unconstitutional in advance of a judicial controversy which necessarily involves that question. The court, therefore, has no jurisdiction to create such controversy by authorizing what is, to my mind, a fictitious suit in behalf of the state against its own officers, where the ground for such a suit is that these officers are about to collect taxes under a general tax law. That is merely a statement of the rule that what cannot constitutionally be directly done cannot be done by indirection. The latter breaks down the American republican form of government as well as the former.

Examining from another viewpoint. In a case where a bounty was granted to manufacturers of sugar by Congress, and the disbursing officer of the treasury refused payment under the belief that the act of Congress was unconstitutional and the statute authorized a suit against the United States, an actual justiciable controversy thus arose. But even here and under a Constitution carrying delegated power, only the Supreme Court of the United States decided as set forth in the second paragraph of the syllabus: "It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice: and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government." United States v. Realty Co. 163 U. S. 427, 41 L. ed. 215, 16 Sup. Ct. Rep. 1120, approved in Allen v. Smith, 173 U. S. 389, 43 L. ed. 741, 19 Sup. Ct. Rep. 446, cited in State ex rel. Garrett v. Froehlich, 118 Wis. 143, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50. If we compare the instant case with the above, we will find that here no justiciable controversy has arisen, but the court is asked to make one by authorizing a suit in the name of the state upon the petition of a taxpayer, and that here we are asked to decide in such suit that the legislature which possesses all power not forbidden had no power or discretion to make an appropriation of public moneys for the purpose of enforcing a statute passed by its legislature and approved by its executive. I think this court has no jurisdiction so to do. For the court to decide before its judicial power is aroused by a legal controversy is to assume a jurisdiction not given to it by law. I think the assumption of such jurisdiction changes the form of government as heretofore established and understood, and therefore we are justified in disregarding or overruling precedents in this court which might, by mere logical inference, seem to support this suit. I think we should have the courage to stop before taking this last step fraught with such consequences.

In this connection, I wish to mention the case of State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894, which was a motion for leave to bring suit in the name of the state. When that motion was presented, it will be remembered by those present that I protested vigorously from the bench against countenancing any such pro-

ceeding. I thought then, and I still think, that the suit there suggested was preposterous. If the legislature of Wisconsin had not been a body of rather feeble temper, it might not be entirely discreet for judicial officers to assert the right to launch and determine such a suit. But the motion was denied, and I regret to say that I gave no careful attention to the language of the opinion denying the motion, and neglected to dissent therefrom. I do not think either that the complaint states a cause of action in favor of the state and against its officers. The mere fact that taxes will be collected from a large number of its citizens by the state authorities for the state creates no actionable wrong against the state. All general laws affect all the people of the state, and all police regulations curtail their rights or liberties to some extent. But this gives no right of action to the state. Neither can a general tax law, be it ever so new. The notion that the state has a right of action to test such laws is, to say the least, very novel. Nor does the fact that a law which appears on its statute books and is about to be enforced at some expense upon the state treasury do so. It is the legal and constitutional way in which to handle a law whether that law be valid or invalid. It is the proper mode of getting that law before the courts. It merely amounts to saying that the officers of the state are about to enforce the state statutes in such manner as to create justiciable controversies which will thus come before the court in the ancient established and orderly way. Surely such attempt is not actionable. If the statute is valid, it is their duty to enforce it; and it is, in any event, their duty to obey it until it is held to be invalid by the judicial branch of the government in a judicial controversy of which the latter branch has jurisdiction. If the legislature has discretion to recognize merely moral obligations and appropriate money for their payment, it surely may appropriate money for enforcing even a void act, and thus bringing it to the judicial test in an actual controversy. It may be that in the march of progress and the evolution of governments the change in the plan of our government created or confirmed by the decision herein is inevitable. But I mistrust, and I think not through timidity, the steady progress of this court always in the direction of grasping more power. This will establish the judiciary as a political branch of the government, and displace it from that place of dignified impartiality which it has so long and so successfully filled. This extension of power is the progress which has always resulted in the wreck of human institutions. I have now made my protest against it in Re Revisor, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176, in State ex rel. Kustermann v. Board of Canvassers, 145 Wis. 294, 130 N. W. 489, in State ex rel. Rosenhein v. Frear, 138 Wis. 173, 119 N. W. 894, in Lawler v. Brennan, 150 Wis. 115, 134 N. W. 154, 136 N. W. 1058, and in the instant case, and so discharged what I conceive to be my duty. In any view of the case, even that taken in the majority opinion, it seems to me the second action should be dismissed for want of jurisdiction as against the secretary of state and the state treasurer. But I consider that this court has, under the Constitution of this state, no jurisdiction to review the statute at this stage of its existence and in this way in either case. The assumption of the jurisdiction so to do cannot be justified upon the comparative futility of such review demonstrated by the result in this case.

Marshall, J., dissenting in part:

I concur in the decision and in the stated general character of this court's original jurisdiction, *viz.*, that it is wholly of a prerogative character, to be exercised in the name of the sovereign,—the state, standing for the people as an entirety.

I concur that prerogative judicial jurisdiction under the Constitution is reserved wholly to this court, and that an ordinary taxpayers' action to vindicate private rights is entirely outside of that field.

I do not concur in the view that the circuit courts have no jurisdiction of taxpayers' actions to enjoin illegal disbursements or waste of state money under the guise of an unconstitutional legislative enactment. The jurisdiction of such circuit courts is as boundless under the Constitution, as to all ordinary matters, as can be the violations of legal or equitable rights. It was lodged there by the people in the beginning. It cannot be given, taken away, or modified, legitimately, by any fiat of this court or in any way except in the manner pointed out in the fundamental law, without invading the field of usurpation.

The historical treatment of this court's administration of its original jurisdiction is not to be taken, I apprehend, as intended to indicate that its power is fenced about by mere precedents, or at all, except by the broad prerogative purposes of the grant. So far as the classification of precedents illustrates the general nature of the jurisdiction respecting what is and what is not within the field of prerogative purpose, it is very valuable, but should be regarded, I think, in that light only. Any situation calling for remedial activity which falls within the prerogative field falls within the original jurisdiction of this court, regard-

less of whether there is any precedent to fit the case; but whether such jurisdiction should be exercised or not in any given case must necessarily rest, more or less, in judicial discretion.

I do not concur in the restrictive character of the decision. I think the court should meet now and decide now, plainly and permanently, each of the important questions discussed by counsel, which, obviously, must be decided by this court sooner or later, and the earlier the better for all concerned. Any delay, I think, should be avoided, if possible, thus obviating the occurrence of a period of uncertainty characterized by expensive litigation and business disturbance attributable to failure by this court to grapple now, after the full argument had, efficiently with the matters referred to. Judicial progress along that line is the correct judicial policy. It is wholly within the court's power to so progress. It is the need of the times. The whole people of the state, as it were, are before this court in this case, invoking it to make a full decision. It is due to them to respond as effectually as practicable.

At some future time I will substitute for this brief memorandum an opinion in support of the suggestions made.

Marshall, J., filed the following additional opinion March 15, 1912 (148 Wis. 542, 135 N. W. 164):

I fully determined to write, at length, in substitution for the above. On further reflection it seems to do so might give unwarranted dignity to some suggestions voiced in these cases which were, as is supposed, effectually foreclosed more than a century ago, and so are not, generally, and should not, efficiently, be deemed open for discussion.

After the uniform holdings here, through many important adjudications, that public money in the public treasury is a subject of trust for all the people for public purposes, and disbursable only pursuant to valid legislation, and that every taxpayer is a *cestui que trust*, having sufficient interest in preventing abuse of the trust to be recognized in the field of this court's prerogative jurisdiction as a relator in proceedings to set sovereign authority in motion by action in the name of the state for prevention or redress, any suggestions to the contrary, however well supported as an original proposition, might well have but a passing notice. The same is true of the question of whether an action against a state officer to prevent disbursement of public money in the enforcement of an invalid act of the legislature is against the state in any proper sense. It has been held over and over again, in terms or in effect, that such an action is to be regarded as against the person in his individual, not his official, capacity, and so not against the state,—so held very recently most significantly by the Supreme Court of the United States in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, followed here in Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885.

It is essential to strictly maintain here the foregoing stated principles. Only by so doing can this court fully perform its great function as the supreme efficient conservator, defender, and preserver of the inherent and guaranteed rights of the people. The court will not swerve from the proper course for which it was given independent status, "through fear, favor, affection, or hope of reward." I know every member of it is firm in that. No unreasonable impatience elsewhere, if such exists, will be permitted to interfere with the sturdy performance of constitutional duty here. While paying due deference to co-ordinate departments, it must expect that deference in return. There must be no hesitation through fear of censure or thought of tuning the judicial harpstrings to harmonize with temporary conditions, as we here advocated outside at times. In that there is no division of sentiment here.

I have too much respect for the law-making power to indulge the idea that there is any dominating thought there hostile to the willing performance of duty here to test enactments by constitutional restraints on all proper occasions, and put the stamp of judicial disapproval thereon when manifestly required, because of the enactment being evidently not law in fact, though law in form; and too much respect for the average legislative sentiment not to see through the vista of momentary impatience, —sometimes exhibited, at the failure of legislative effort,—to the considerate judgment of afterreflection, which may always be depended upon to approve and honor full performance of judicial duty, to appreciate that when there is a conflict between an act and the Constitution, as seems to the court created to view the matter, it must decide between them, and "as the Constitution is superior to any ordinary act of the legislature, the Constitution, and not the ordinary act, must govern the case to which they both apply." Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60. On the other hand, I have too high regard for the great trust reposed in the instrumentalities chosen for now to give vitality to the judicial function, to think that, if there be any considerable sentiment momentarily elsewhere inimical

to full performance of duty here, it can exert efficient influence in that regard. Generally speaking, I apprehend the sentiment of the public is in favor of a prompt, thorough treatment of constitutional questions as they arise. The people want to know, and have a right to know, and legislative instrumentalities desire to have them know, at the earliest practical moment, just where they stand with reference to important new, far-reaching enactments.

The fundamental law, as it has been construed, and the function of this court as to applying the rule of the Constitution to legislative enactments and using its prerogative power against anyone assuming to act for the state who would otherwise interfere with guaranteed rights under the guise of an invalid enactment, must be maintained. No one can win enduring fame by failing to appreciate that and be ready to vigorously vindicate it.

The court, with practical unanimity, reached the conclusion that all constitutional questions presented and argued in the cases, in some one of them, were within the court's power to consider and decide; but to what extent to respond was within its discretion. That left much to judicial propriety, convenience, exigency, and expediency, resulting in the court going only so far as was vital to the existence of the commission, with power to enforce the dominating features of the law. Not to go that far was thought would be well nigh, if not quite, abuse of discretion; not doubting competency to go further and decide all important questions so ably discussed. Obviously there is left a broad field for very much and very perplexing litigation, to the probable great prejudice of public and private welfare. The field so left untouched was as fully covered by eminent counsel as it is liable to ever be. The whole crop of legitimate controversies was fully ripe for the judicial harvest. All interests called loudly for the chosen instrumentality for the work to grapple with the proffered task. In my opinion, the waste of energy and expense attributable to failure to do so might well have been avoided. It was according to precedent to take the course adopted, I confess. But should precedent efficiently bar the wheels of progress toward a more full response to such an appeal for judicial determination? It seems not.

This court can well view with satisfaction its progressive course as to meeting judicial controversies squarely, casting aside the ancient method of dilatory, fencing, mere piecemeal decision, delaying the finality by technical dispositions, depleting to public and private resources, and disappointing and exhausting to those resorting to the courts for redress and prevention of wrongs. There is room for further progress. Impatience with the law's delays, sometimes significantly manifested, will disappear without any change in the law of procedure, by changes of method within the province of the court to make of its own motion, demonstrating that the fault supposed to exist is, in the main, in the administration of the law, rather than in the law itself.

Seeming opportunity for worth-while progress is most inviting in cases like those before us. Where a new law which is questioned as to its meaning and its legitimacy in many important minor features as well as the dominant one,—a law of far-reaching character, materially affecting the people generally and bristling with complications, each presenting, from some reasonable standpoint, serious difficulty, is brought early here for examination in all such aspects,—brought by the exercise of prerogative power, so that all the people, as it were, are represented at the bar to the end that the enactment, so far as valid, may be vigorously enforced and cheerfully submitted to, and the mischiefs ordinarily flowing from such a course for a time and the law then being found full of infirmities, may be avoided, why should not the earliest opportunity afforded be willingly taken to carry the whole mass of things to the consultation room and patiently and finally solve the uncertainties, thus promptly affording peace to the state and its people in respect to the matter? The power exists to do it. Universal acclaim is in favor thereof. We are here to vitalize the power intrusted to us to do it. We have time therefor. We are as able now for the task as we probably ever will be. If we have not had as efficient help as we are likely to have at any future time, the power is ample to call for and obtain further assistance from eminent advocates of opposing theories. Then why hesitate? Is there any good reason for it?

I cannot perceive any satisfactory answer in the affirmative to the foregoing. Hesitation is largely from judicial custom to delay grappling with questions so long as possible, with the thought that time will either render doing it unnecessary, or a decision may perhaps be later made under more favorable circumstances, and habit to minimize judicial labor where practicable without affecting the grade of it, to the end that each of the controversies brought here may have its due proportion of attention. I

confess the court's burdens are heavy, and that the easiest way of escape from danger, if any exists, of which I must say I am not conscious, of its being unduly so, is by limiting decisions to actual necessities of cases as they arise. That was for a time given as a sufficient justification for limiting activity of prerogative jurisdiction to a very narrow field and limiting it therein to the essentials of each particular situation. State ex rel. Board of Education v. Haben, 22 Wis. 101; Re Court of Honor, 109 Wis. 625, 85 N. W. 497.

While the scope of the prerogative power was early definitely stated, and it has thus been maintained, if the burden of work here was ever a legitimate excuse for r exercising jurisdiction, within such scope, to make a full decision in a case thought to be of a character to warrant the court in stepping aside from its ordinary labor to entertain it at all, that ended long since. When such doctrine took root there were but three members of the court and the equipment for labor was very crude compared to that now afforded. There is certainly no longer need for leaving anything undone which might properly be done, because of the burden of work.

So, again, the inquiry is suggested, why should not the court, in all cases of great public interest, make the fullest practicable decision instead of leaving as much ground uncovered as practicable? In such a situation as this it seems that the court should not cease its labors till the whole subject in all important details shall have been exhausted. If any such shall not have been fully presented, or been overlooked, opportunity should be given, if help can be reasonably expected thereby, for further discussion at the bar, so in the end that the court may furnish executive officers and the people a plain, certain guide to go by. I urged that at first and again on the motion for rehearing. There are many important questions left undecided. Each may furnish ground for expensive litigation. To settle all in detail will require large public and private expenditure which must be charged to waste. Conservation of time and money and peace, avoiding all such waste, can be effected by just a few days' more time now, which could well be spared to devote to the matter.

Motion for a rehearing denied March 12, 1912.

Application for writ of certiorari dismissed by the Supreme Court of the United States, January 5, 1914. 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272.

L.R.A.1915B.

WYOMING SUPREME COURT.

UNION PACIFIC RAILROAD COMPANY, Plff. in Err.,
v.
ROBERT N. GRACE.

(— Wyo. —, 143 Pac. 353.)

Carrier — loss of hand baggage — care required.

1. No negligence sufficient to hold a railroad company liable for loss of hand baggage of a passenger is shown by the fact that the porter took it, with that of other passengers, to remove it from the car at destination, and placed it in the vestibule, and that when the owner, who was among the last to leave the car, reached the vestibule, it was gone.

Evidence — immaterial — remarks of porter.

2. The admission in an action to hold a carrier liable for loss of hand baggage of evidence of remarks made by the porter to whom it was delivered, when the loss was discovered, that he saw someone who might have taken it, and would see if he could see him, and upon his return after searching for the man, that he could not find him, is harmless, since the evidence is immaterial.

(October 10, 1914.)

ERROR to the District Court for Laramie County to review a judgment in plaintiff's favor in an action brought to recover the value of hand baggage alleged to have been lost through defendant's negligence. Reversed.

The facts are stated in the opinion.

Note. — Carriers: liability of carrier for loss of hand baggage or other effects in the custody or control of passenger.

I. Railroad and street railways.
- a. In general, 609.
- b. Money and valuables, 611.
- c. Burden of proving negligence, 611.
- d. Limitation of liability, 612.
- e. Contributory negligence of passenger, 612.

II. Steamship companies.
- a. Liability where articles are in stateroom, 613.
- b. Liability where articles are not in stateroom, 617.
- c. What amounts to negligence on part of carrier, 618.
- d. Duty as to watch, 618.
- e. Contributory negligence of passenger, 619.
- f. Liability for money or valuables, 620.
- g. Notice to deposit, 621.
- h. Duty to declare character or value of effects, 621.

This note is intended to cover the liability of railroad companies (with the excep-

Messrs. Herbert V. Lacey and John W. Lacey, for plaintiff in error:

Statements made by the porter were inadmissible as evidence against defendant.

1 Greenl. Ev. § 113; Northwestern Union Packet Co. v. Clough, 20 Wall. 540, 22 L. ed. 408, 7 Am. Neg. Cas. 317; Story, Agency, § 134; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 103, 30 L. ed. 299, 300, 7 Sup. Ct. Rep. 118; Kyner v. Portland Gold Min. Co. 106 C. C. A. 245, 184 Fed. 43; Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282; Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790; Union P. R. Co. v. Fray, 35 Kan. 700, 12 Pac. 98; Silveira v. Iverson, 128 Cal. 187, 60 Pac. 687; Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002.

There was no liability under the evidence.

Tompkins v. Saltmarsh, 14 Serg. & R. 275, 1 Am. Neg. Cas. 814; Hibernia Bldg. Asso. v. McGrath, 154 Pa. 296, 35 Am. St. Rep. 828, 26 Atl. 377; Minor v. Chicago & N. W. R. Co. 19 Wis. 40, 88 Am. Dec. 670; 3 Am. & Eng. Enc. Law, 2d ed. 745; Fulton v. Alexander, 21 Tex. 148, 1 Am. Neg. Cas. 836; Texas C. R. Co. v. Flanary, — Tex. Civ. App. —, 50 S. W. 726; Whitney v. Lee, 8 Met. 91, 1 Am. Neg. Cas. 789; American S. S. Co. v. Bryan, 83 Pa. 446; Gleason v. Goodrich Transp. Co. 32 Wis. 85, 14 Am. Rep. 716; The R. E. Lee,

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tion of sleeping car cases) and steamship companies for the loss of baggage or other effects which a passenger retains in his own custody and control.

As to duty of sleeping car company as to baggage or personal effects of passenger, see notes to Pullman Co. v. Schaffner, 9 L.R.A.(N.S.) 407; Myers v. Pullman Co. 41 L.R.A.(N.S.) 799, and Robinson v. Southern R. Co. post, 621.

I. Railroad and street railways.

a. In general.

The general rule seems to be that railroad companies are not liable as insurers of baggage retained in the custody of passengers, and so are not liable for loss of such baggage in the absence of a showing of negligence on their part.

Thus, in the absence of a showing of negligence, the railway company was held not liable in Whicher v. Boston & A. R. Co. 176 Mass. 275, 79 Am. St. Rep. 314, 57 N. E. 601, 8 Am. Neg. Rep. 48, for the loss of a handbag which was taken from the passenger's section during his absence in the smoking compartment of the car.

And a bag is not delivered into the sole custody of a carrier, but its custody is only temporary, because of the fact that a servant carries the bag into the car, where the passenger renews his custody and control over it. Ibid.

In Tower v. Utica & S. R. Co. 7 Hill, 47, 42 Am. Dec. 36, the railroad company was held not liable for the loss of an overcoat which the passenger had taken into the car, and which, upon leaving the car, he had forgotten, the decision being predicated upon the nonliability of the carrier as a common carrier for articles retained in the control of the passenger, and also upon the contributory negligence of the passenger in forgetting to take the overcoat with him.

And where a passenger having a ticket entitling him to a seat in a parlor car requests the porter of the car to take his overcoat and place it in his seat, and the passenger then goes into another car, and during his absence the coat is stolen, the company will not, in the absence of a showing of negligence, be liable for the loss, the coat not being left in the care or custody of defendant's servant, but being placed by the passenger's own order on a chair which he had engaged in said car. Weingart v. Pullman Co. 58 Misc. 187, 108 N. Y. Supp. 972.

So, also, in Kerr v. Grand Trunk R. Co. 24 U. C. C. P. 209, a passenger, fifteen minutes before time for the train to start, went into a coach, put his valise in the seat, and went out, and on his return found the valise gone; there was no evidence that any employee of the company was in charge of the train, or that any other passenger was occupying the coach; it was held that there was insufficient evidence of delivery in charge of carrier, and so the carrier was not liable for the loss.

And in Sperry v. Consolidated R. Co. 79 Conn. 565, 10 L.R.A.(N.S.) 907, 118 Am. St. Rep. 169, 65 Atl. 962, 9 Ann. Cas. 199, the railway company was held not liable for the theft of a passenger's valise, which was carried by the conductor of one of the cars into another of its cars, and deposited on the floor beside the passenger; the court holding that a street railway company does not, in the absence of a general undertaking or liability as common carrier of baggage, or of special contract, assume such liability because its conductor takes a valise of a passenger who enters the car, and deposits it near the seat occupied by the passenger.

Nor was negligence on the part of a street car conductor shown by his failure to notify the conductor relieving him that the baggage belonged to the passenger; nor was it negligence on the part of the latter to permit the baggage to be taken from the car by a man of ordinarily respectable appearance, who was sitting near it. Ibid.

In Talley v. Great Western R. Co. L. R. 6 C. P. 44, 40 L. J. C. P. N. S. 9, 23 L. T. N. S. 415, 19 Week. Rep. 154, a passenger who had taken his portmanteau into a carriage with him got out at an intermediate station for the purpose of getting refreshments, time being allowed for that purpose, and on his return was unable to find the carriage, and so took another to his destination. When he arrived at the

2 Abb. (U. S.) 50, Fed. Cas. No. 11,690; Whicher v. Boston & A. R. Co. 176 Mass. 275, 79 Am. St. Rep. 314, 57 N. E. 601, 8 Am. Neg. Rep. 48; Springer v. Pullman Co. 234 Pa. 172, 83 Atl. 98; Sperry v. Consolidated R. Co. 79 Conn. 565, 10 L.R.A.(N.S.) 907, 118 Am. St. Rep. 169, 65 Atl. 962, 9 Ann. Cas. 199; Whitney v. Pullman's Palace Car Co. 143 Mass. 243, 9 N. E. 619; Barrott v. Pullman's Palace Car Co. 51 Fed. 796.

Mr. **William B. Ross** for defendant in error.

Beard, J., delivered the opinion of the court:

Action by defendant in error against plaintiff in error to recover the value of a suit case alleged to have been lost through the carelessness of defendant. Judgment for plaintiff, and defendant brings error.

Plaintiff below alleged in his petition (so far as necessary to here state): "That on or about the 12th day of January, 1910, plaintiff purchased for himself and for his wife first-class passenger tickets from the Union Pacific Railroad Company, a common carrier, which tickets entitled plaintiff and his wife, with their baggage, to be conveyed from Denver, Colorado, to Cheyenne, Wyoming, over the railroad of the defendant. That on said date, in consideration of the sum then paid to it by plaintiff, the plaintiff and his wife were received by the defendant as passengers for the purpose of being carried, with their baggage,

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end of his journey, his portmanteau was returned to him, but some of the contents were missing; and it was held that, no negligence on the part of the railroad company being shown, it was not liable for the loss. In this case the court found that the passenger was negligent in not getting back into the carriage in which he had placed his portmanteau.

And in Bergheim v. Great Eastern R. Co. L. R. 3 C. P. Div. 221, 47 L. J. C. P. N. S. 318, 38 L. T. N. S. 160, 26 Week. Rep. 301, 5 Eng. Rul. Cas. 564, it was held that negligence on the part of the carrier not being shown, it was not liable as common carrier for the loss of baggage placed in the carriage at the request of the passenger, and which, during his absence in order to get refreshments, and while the carriage was locked, was stolen.

But in Gamble v. Great Western R. Co. 24 U. C. Q. B. 407, the railroad company was held liable for the loss of a passenger's valise, which was taken from his seat while he was getting refreshments in the dining room of the station. Hagarty, J., stated that if the railroad company ordinarily permits passengers to take articles of luggage into the cars with them, making no objection, and not requiring them to surrender it to their servant's special charge, it is not easy to see why they should not be responsible; and further, that the passenger, in leaving his valise in the seat while in the dining room, did only what was permitted by the company, or, at least, not objected to by it.

On the other hand, a railroad company will be liable for the loss of personal baggage retained by the passenger where the loss is attributable to the negligence of the company's employee.

And so in Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200, the company was held liable for the loss of the passenger's hand bag, where it was shown that upon going into the diner, he asked an employee of the company whether his baggage would be safe if left in the seat, and was told that it would be; upon returning to the car he found it locked, and his baggage placed in another car, with the exception of a hand bag, which was lost.

And in Missouri, K. & T. R. Co. v. Kirkpatrick, — Tex. Civ. App. —, 165 S. W. 500, a passenger who had a parlor car ticket went into the smoking car to smoke; when the train arrived at the junction point of two of the company's lines, he inquired as to whether the parlor car, in which he had left his baggage, would go on with the train, and remained in the smoking car upon being informed that it would, when, as a matter of fact, it was taken off and sent over another road, and his baggage was lost. It was held that this misinformation as to the intention to detach the car containing his baggage was sufficient to support a judgment for the value of the lost property, since such information appeared to have been the direct and proximate cause of the loss.

And in Hasbrouck v. New York C. & H. R. R. Co. 202 N. Y. 363, 35 L.R.A.(N.S.) 537, 95 N. E. 808, Ann. Cas. 1912D, 1150, the company was held liable for loss of articles from a hand bag which had been delivered to a trainman by a passenger upon requesting that he assist her from a train. This case, which is nearly identical in facts with UNION P. R. Co. v. GRACE, is distinguished in that case as being a case where the defendant offered no evidence, and so how the loss occurred was in no way explained, nor was it shown what care was taken of the suit case by the trainman, while in the GRACE CASE there was no evidence showing or tending to show that the care taken of the suit case by the trainman was not such as is usually and ordinarily taken of such property under similar circumstances.

And a railroad company has been held liable for loss by theft of its employees.

Thus, in Bonner v. De Mendoza, 4 Tex. App. Civ. Cas. (Willson) 392, 16 S. W. 976, a passenger, upon arriving at his destination, was requested by the trainman to hurry up in leaving the car, and, in the excitement of getting himself and family off the car, he left a valise containing money and other valuables in the seat, and upon

on the railroad in a certain train from Denver to Cheyenne. That plaintiff and his wife boarded said train at Denver, at said time, with his baggage, consisting of a suit case and contents thereof [describing the same and values], and placed said suit case and contents thereof in a car of said train in which plaintiff and his wife were located, as aforesaid, for the purpose of conveying said baggage from Denver to Cheyenne. That upon the arrival of the train in Cheyenne, the defendant, by its said agent and employee, took plaintiff's said baggage from plaintiff and carried it out of the said car, and plaintiff and his wife got off of said car, but the defendant, through its said servant and agent, negligently and carelessly lost or retained said baggage, and did not deliver said baggage to this plaintiff when plaintiff got off of said train, or within a reasonable time thereafter, or at all, although plaintiff was then and there ready and willing to receive said baggage, and demanded the same from defendant. That on account of the negligence and carelessness of the defendant, through its said employee, as above set forth, plaintiff's baggage has been wholly and totally lost, and plaintiff has not been reimbursed for the value of the same."

The answer of defendant was a general denial. The case was tried to the court, without a jury, and there was a general finding in favor of plaintiff. The only witness on behalf of plaintiff was the plaintiff himself.

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its return to him a few hours later the contents of the valise were gone, there being every presumption that the employees of the railroad company had stolen the same. It was held that the company was liable for the loss, and this although the passenger had arrived at the end of his journey, and also though he might have been negligent in having disclosed the contents of the valise to employees of the train.

And in Southern P. Co. v. Maloney, 69 C. C. A. 83, 136 Fed. 171, a porter of a company, who offered to show a passenger to her train, took her satchel and conducted her to another car. He departed, taking with him the satchel, which contained a purse with her money and ticket. The satchel was later recovered and the money was found on the porter, but not returned; the purse and ticket were not recovered. It was held that such evidence entitled the passenger to recover from the company the value of the property lost.

b. Money and valuables.

A railroad company is liable for the reasonable value of jewelry lost from the suit case of a passenger while in possession of its trainman, to be carried from the train, if it was intended for use at the end of the journey, and was adapted to the tastes, habits, and standing of the owner. Hasbrouck v. New York C. & H. R. R. Co. supra.

But bank notes, to the amount of $4,000, carried by a passenger as special messenger for a bank, and without notice to the company, cannot be regarded as part of the passenger's baggage, nor as money intended to defray the expenses of the journey, and so a railroad company is not liable for their loss as the result of the car plunging through a bridge, the stove overturning, setting fire to the car, consuming the body of such passenger and the package of money; and this although such loss was occasioned by the negligence of the railroad company's servant. First Nat. Bank v. Marietta & C. R. Co. 20 Ohio St. 259, 5 Am. Rep. 655.

And in Levins v. New York, N. H. & H. R. Co. 183 Mass. 175, 97 Am. St. Rep. 434, 66 N. E. 803, 13 Am. Neg. Rep. 533, a passenger in a parlor car left her purse, containing $410, on the window sill of the toilet room, and upon going back to look for it could not find it there; and it was held that the money not being intended exclusively for traveling expenses, as testified to by the passenger, and not being intrusted to the carrier, there was no liability either as common carrier or as bailee. And it was further held that, assuming the money to have been stolen by the porter of the car, the carrier would not be liable, as such act was not within the scope of his employment.

So, also, in Whitcomb v. New York, N. H. & H. R. R. Co. 215 Mass. 440, 102 N. E. 663, the railroad company was held not liable for a passenger's money lost as a result of a collision, the money having been carried in a hand bag, and not having been shown to be necessary for traveling expenses.

And although a carrier may be negligent in performing its duty to protect a passenger from violence, it will not be liable for loss by robbery by others than employees to an amount beyond what he could, in his ordinary relation of passenger of the company, bear upon his person at its risk and under its duty as a carrier to protect him and his necessary, convenient, and ornamental reasonable personal chattels and money, and so it will not be liable for the robbery of securities worth over $16,000, which were carried on the passenger's person without notice to or knowledge of the carrier. Weeks v. New York, N. H. & H. R. Co. 72 N. Y. 50, 28 Am. Rep. 104.

c. Burden of proving negligence.

The burden of proof is upon the passenger to show that the loss of baggage was the result of the carrier's negligence. Missouri, K. & T. R. Co. v. Kirkpatrick, — Tex. Civ. App. —, 165 S. W. 500.

But, in the absence of explanation of the loss of valuables from a suit case delivered to a trainman to be conveyed from a train,

He testified, in substance: That he did not check the suit case, but had it in his possession on the floor near his seat in the parlor car in which he was riding until the train arrived in Cheyenne. That he paid extra fare for riding in the parlor car, and though he paid it to the train conductor. That he did not remember of seeing any Pullman conductor. That there was a person on the parlor car he supposed was a porter because he looked after the people on the car, and was the only person on there to look after people. That "he [said porter] carried our suit cases in, and he served meals and lunches on the car, and waited on us in general as porters do on trains." That he did the cooking, and plaintiff and wife had dinner served by him, and when the train arrived at Cheyenne, he took off the suit cases. "He come to me along about the last, and I says, 'I'll carry it out,' and he said, 'I'll take it out.' I had been sick, and I supposed he saw I was sick and wanted to carry it out for me, so I let him take it. He took the suit case out of my hand and started toward the door with it." Witness did not remember seeing him any more until he got off the train. Did not see where he placed the suit cases of passengers, including plaintiff's, when he car-

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the jury may infer that the loss was due to his negligence. Hasbrouck v. New York C. & H. R. R. Co. supra.

And a carrier to whose trainman a suit case is delivered, to be carried from the train, is bound to explain the loss of articles therefrom while in his possession, or answer for their value; and it cannot escape liability by showing that they were taken by the trainman himself. Ibid.

d. Limitation of liability.

The limitation of liability for value of baggage lost, contained on a railroad ticket, does not apply to hand baggage retained in possession of the owner, except as it may be temporarily delivered to a railroad employee to be carried on or off the train. Hasbrouck v. New York C. & H. R. R. Co. supra.

And a rule of a public service commission, fixing the maximum sum for which a railroad company shall be liable in case of loss of baggage, does not apply to losses occurring in other states. Ibid.

But in Le Conteur v. London & S. W. R. Co. L. R. 1 Q. B. 54, 12 Jur. N. S. 266, 35 L. J. Q. B. N. S. 40, 13 L. T. N. S. 325, 14 Week. Rep. 80, 6 Best & S. 941, an action to recover for loss of a chronometer which was placed in a carriage at the request of a passenger, and stolen during his temporary absence therefrom, while there was a general discussion as to liability of the carrier for such a loss, the decision of nonliability turned on the fact that under a statute providing, "no carrier by land shall be liable for loss or injury of certain articles above the value of £10 unless the value is declared and increased charge paid," the carrier was not liable, as the chronometer was above the value of £10 and its value had not been declared; and this though the contract for carriage was partly by land and partly by water, the court holding that the contract was divisible, and so the carrier was brought within the protection of the act.

e. Contributory negligence of passenger.

A passenger who, upon leaving the car for a few minutes, leaves a hand bag on the window sill, where it can be easily reached from the outside, is guilty of contributory negligence, and cannot hold the company liable for the loss. Whitney v. Pullman's Palace Car Co. 143 Mass. 243, 9 N. E. 619.

But the owner of a suit case which she has delivered into the hands of a trainman to be carried from the train, upon his announcement that the train is approaching her station, is not negligent in failing to seek him out and take it from his possession when ten or fifteen minutes elapse before the train stops, so as to relieve the railroad company from liability for loss of articles therefrom. Hasbrouck v. New York C. & H. R. R. Co. 202 N. Y. 363, 35 L.R.A. (N.S.) 537, 95 N. E. 808, Ann. Cas. 1912D, 1150.

And that a passenger was negligent in delivering an unfastened suit case containing valuables into the possession of a trainman, to be carried from the train, is immaterial to the question of the carrier's liability for their loss, in the absence of any explanation on its part as to how the loss occurred. Ibid.

So, also, the fact that a passenger takes off his coat and places it on the seat is not such negligence as would preclude him from recovery for the value of the contents of a pocketbook which was lost from the pocket of the coat as a result of the coach overturning into a stream of water, the coat being thrown out of the window, the overturning of the coach being the result of the negligence of the company's employees. Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010. The case was reversed, however, because there was no evidence that the passenger made any efforts to find the pocketbook, or made any inquiry for it, or that he notified the servants of the company that he had lost it, or in any way called upon them to recover it for him. That, so far as the record shows, they knew nothing of the fact that he had lost or even ever had the money. The court stated that, notwithstanding the negligence of the company, it was still the passenger's duty to act as a reasonably prudent person would ordinarily act under like circumstances, and if, by so doing, he could have prevented the final loss of his property, he ought not to recover; that this principle would require that

ried them toward the door, nor did he see other passengers take their suit cases from the vestibule of the car when he got off. That he was about the last one, if not the last one out, and when he asked this porter, who was standing where he got off, for his suit case, it was gone. Over the objection of defendant, the witness was permitted to testify that when he got off the car and asked for his suit case and it was not there, the porter remarked in words to the effect "that he saw somebody that might have taken the suit case, and that he would run and see if he could see him." That he returned in three or four minutes and said "he could not find the man he referred to."

On the trial, to avoid a continuance applied for by defendant, the plaintiff admitted that if Mayweather, the person mentioned by plaintiff in his testimony as the porter, were present, he would testify that he (Mayweather) was employed on the parlor car in which plaintiff was riding, as cook; that his only duty was to cook any meals which passengers might order from him; that it was no part of his duty to receive any baggage for and on behalf of the defendant; that he did not at any time receive the suit case from plaintiff for and on be-

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one situated as he was should make such reasonable efforts to redeem his property as the situation allowed; and it would certainly require that he at least give notice of his loss to those whom he proposed to charge with responsibility, in order that they might protect both himself and themselves, if possible, by the recovery of the money; that, if the circumstances were such that none of these things could have been done, or such as would have rendered ineffectual any efforts to find the money, that should have been shown.

II. Steamship companies.

a. Liability where articles are in stateroom.

Where a steamship passenger occupies a stateroom, there is a decided conflict in the authorities as to the nature of the steamship company's liability for loss of articles from the stateroom. While a majority of jurisdictions hold that there is no liability in the absence of negligence, thus applying to steamship companies the rule applied in case of railroad companies, yet there are well-considered cases which hold them to the liability of innkeepers.

That an ocean steamship company is responsible for the loss of a passenger's baggage which he takes with him into his stateroom only on the showing of negligence which results in the loss was held in American S. S. Co. v. Bryan, 83 Pa. 446; The Humboldt. 97 Fed. 656; The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11.690; The Crystal Palace v. Vanderpool, 16 B. Mon. 302; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; Williams v. Keokuk Northern Line Packet Co. 3 Cent. L. J. 400.

And the liability of an innkeeper does not extend to a steamship owner. The Humboldt, 97 Fed. 656; The Crystal Palace v. Vanderpool, 16 B. Mon. 302; Clark v. Burns, 118 Mass. 275. 19 Am. Rep. 456; American S. S. Co. v. Bryan, supra.

So, a steamboat company is not liable for the value of a valise stolen from a passenger's stateroom, the loss not having been occasioned by some particular breach of duty, or by negligence on the part of the carrier's servant. The Humboldt, 97 Fed. 656.

Nor for jewelry and money stolen from a stateroom during the night. The Crystal Palace v. Vanderpool, 16 B. Mon. 302.

Nor for the loss of a valise and its contents from a passenger's stateroom, where the valise is taken to the stateroom by the passenger himself, or at his request, with the intent on his part to retain the custody, control, and charge thereof, unless negligence be shown on the part of the carrier. Williams v. Keokuk Northern Line Packet Co. supra.

Nor for the theft from a passenger's stateroom of his gold watch during the night. Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456.

The court in The Crystal Palace v. Vanderpool, supra, stated that steamboat owners are regarded as common carriers, and are subject to the well-established principles governing their responsibilities; and that it was not aware of any principle by which common carriers could be held responsible for the wearing apparel of the passenger, or his money which he carries upon his person, and which is under his own immedate care and control. The court in this case refused to apply to the steamboat owners the liability of innkeepers.

And in The Humboldt, supra, it was stated that the steamship company is not permitted to choose whom it will serve, but must afford accommodation to all who pay fares; that it necessarily is accessible to all classes of travelers, and is so far a public place that it is unreasonable to impose upon the owners the burden of liability for theft of private baggage of passengers, unless the baggage has been delivered to and left in the exclusive control of the carrier's officers or servants.

In Gleason v. Goodrich Transp. Co. 32 Wis. 85, 14 Am. Rep. 716, a passenger took passage on one of defendant's boats, and asked for and had assigned to him a stateroom. He asked for a key, and was informed that no key was given out; whereupon he said he did not care, that he only wanted a safe place to leave his bag while he went to get his trunk checked. He then went to his room and deposited his valise or hand bag, and told the saloon boy

half of defendant; that when the train reached Cheyenne, he gratuitously assisted the passengers, at their request in carrying their hand baggage from their respective seats into the vestibule of the car, at the end of the car from which all passengers made their exit; that he assisted plaintiff by carrying his suit case into the vestibule, and deposited it there with the hand baggage of other passengers, and having done so, went back into the car to assist other passengers in like manner; that he did not steal the suit case; that if it was stolen, it was while he was attending to other duties as cook in said car; that plaintiff followed him to the vestibule when he had said suit case and other hand baggage, and saw him deposit it there, and saw him return into the car; that he does not now, nor ever did, know what became of it after he deposited it in the vestibule; that he never thought he saw somebody other than plaintiff with it; that he did not run off to see if he could get someone, or come back and say he did not see the fellow; that he never asked plaintiff to place the suit case in his charge; and that the train left Denver about 4 o'clock P. M. and arrived in Cheyenne about 8 o'clock the same evening. The foregoing is, we think, a fair summary of all the evidence in the case.

There are two reasons apparent from the pleadings and the evidence in this case why the railroad company cannot be held liable as a common carrier. The plaintiff alleged in his petition that the contract

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that he had left it, and asked if it would be safe, and was told that it would be. It was held that as the stateroom door was provided with no lock, which fact was known to the plaintiff when he left the baggage there, the steamboat company was not liable for the loss, the notice to the saloon or dining boy, and his statement that the baggage would be safe, not being sufficient to characterize the leaving of the baggage in the stateroom as being done with the knowledge or consent of some officer of the boat, or agent of the company, authorized to give direction that it be so left. The court distinguished. The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690; Mudgett v. Bay State S. B. Co. 1 Daly, 151; and Gore v. Norwich & N. Y. Transp. Co. 2 Daly, 254, as being cases where the stateroom door was provided with a lock, of which the key was delivered to the passenger; so they are of doubtful authority in a case similar to the Gleason Case.

In McKee v. Owen, 15 Mich. 115, the money of a passenger who occupied a stateroom with a stranger, assigned to the room by the company's officer, was stolen from the place where the passenger had put it in an upper berth, the evidence tending to the presumption that it was taken by someone from the outside, through a broken window which had been called to the stewardess's attention. The court being equally divided, judgment for the defendant was affirmed Christiancy, J., and Cooley, J., considered that the owners of the steamboat should be held liable the same as an innkeeper would be for a similar loss by his guest at his inn. Judges Campbell and Martin denied that the liability of an innkeeper should be extended to a carrier.

In delivering the opinion in Cohen v. Frost, 2 Duer, 341, the court said that the case of a traveler by steamboat is not to be distinguished from that of a guest at an inn, who, when he takes his luggage to his own chamber, of which he keeps the key, discharges the innkeeper; stating that this is the law, citing as authority, Burgess v. Clements, 4 Maule & S. 310; Holt, 211, note; 1 Starkie, 251, note; 16 Revised Rep. 473. This statement as to the nonliability of an innkeeper was criticized in McKee v. Owen, and Mudgett v. Bay State S. B. Co. supra, the court in the latter case stating that "the learned judge who delivered the opinion in Cohen v. Frost must have confounded Burgess v. Clements with some other case, because the King's bench did not declare any such rule. The plaintiff was defeated because his goods were not received *causa hospitandi*. He had asked for and obtained a room in which to show his merchandise for sale, not as a guest, but as a vendor, and his property was, under the circumstances, held not to have been within the rule which required the innkeeper to protect it. The opinion, therefore, in Cohen v. Frost, is not sustained by the authority on which it is based, so far as it relates to the legal effect of the innkeeper's giving the key to his guest."

On the other hand, that the same rule of responsibility of a steamship company in regard to a passenger who engages a stateroom governs as in the case of an innkeeper was held in Hart v. North German Lloyd S. S. Co. 108 App. Div. 279, 95 N. Y. Supp. 733, 19 Am. Neg. Rep. 452; Mudgett v. Bay State S. B. Co. and Gore v. Norwich & N. Y. Transp. Co. supra; Crozier v. Boston, N. Y. & N. S. B. Co. 43 How. Pr. 466; Macklin v. New Jersey S. B. Co. 7 Abb. Pr. N. S. 229; Adams v. New Jersey S. B. Co. 151 N. Y. 163, 34 L.R.A. 682, 56 Am. St. Rep. 616, 45 N. E. 369, 1 Am. Neg. Rep. 123.

A traveler who pays for his passage and engages a room in one of the modern floating palaces that cross the sea or navigate the interior waters of the country establishes legal relations with the carrier that cannot well be distinguished from those that exist between a hotel keeper and his guest. The carrier undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned a guest of a hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. Adams v. New Jersey S. B. Co. supra.

When a passenger pays in addition for a

entitled himself and wife, with their baggage, to be conveyed from Denver to Cheyenne, "and were conveyed on said train from Denver to Cheyenne," thus alleging full performance by the company of its contract. In the second place, both the petition and the evidence negative a delivery of the suit case to the company for transportation, but discloses that if delivered to it at all it was for the special purpose of assisting the plaintiff to remove his baggage from the car. Numerous cases bearing upon the question involved have been cited by respective counsel, but one more nearly in accord with the facts of this case than any of those cited is the recent case of Hasbrouck v. New York C. & H. R. R. Co. 202 N. Y. 363, 35 L.R.A.(N.S.) 537, 95 N. E. 808, Ann. Cas. 1912D, 1150. In that case a lady passenger requested the conductor to send someone to take her suit case off the train at Rochester, where she was to take another train. About ten minutes later a trainman, wearing the usual badge of his position on his cap, came to her and asked if she was the lady who had made the request of the conductor, and if she was through with her suit case, when she asked, "Is this Rochester?" he said, "Yes, if you are through with your suit case, I will take it." Believing the train was about to stop at Rochester, she allowed him to take her suit case, which he carried to the rear of the car, as she was facing toward the front. Soon after she saw him pass through to the front of the

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separate or private room, or, as it is called, a stateroom, he does so to get greater and better accommodation and for the privacy and security which it affords. If he has simply with him a valise, a small portable article coming under the denomination of light baggage, as it may be carried in the hand, and which from its limited size, usually admits of little else than the clothing and toilet articles required for present use, he has the right, where such is the general character of its contents, to take it with him into the chamber provided for him, and where he is to pass the night; and having placed it there and locked the door, the obligation is upon the carrier to see that his property is not purloined or stolen. Any regulation, the effect of which would be to prevent him from doing this, would be unreasonable. It is essential to the traveler's convenience and comfort, and the law could not descend into the particularity of insisting that he should open the valise, and, taking out of it exactly what was requisite for the night, lock it up, and then take it and deposit it in the baggage room for safe-keeping. Macklin v. New Jersey S. B. Co. 7 Abb. Pr. N. S. 229.

And in distinguishing the case of a passenger occupying a stateroom on a steamboat from that of a passenger by stage, railroad car, or on steamboat, but without stateroom, the court, in Crozier v. Boston, N. Y. & N. S. B. Co. 43 How. Pr. 466, said that in the case of a passenger by steamboat, occupying a stateroom, "the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake, and to intrust his person, and whatever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward for the comfort thus afforded, will themselves exercise. Certainly, few persons would dare trust themselves to sleep in a stateroom on board a steamboat unless they supposed those in charge of it were under an obligation to exercise the utmost vigilance. If it were supposed that thieves and robbers were at liberty to ply their vocation at night in such a place, and that those who alone had the power to furnish protection against them were under no obligation to furnish it, slumber would be unknown, unless the sleeper had taken the precaution to hire a special watchman. Nor can it be in the contemplation of either carrier or passenger that the latter should make a special deposit of his pocket money or articles usually carried about the person before retiring to rest. As well might we suppose that it was in contemplation that the passenger should deliver the clothes he takes off unto the special custody of the carrier. Nothing like this was, in my judgment, contemplated by the printed notice which was proved to have been posted in the staterooms.

"It seems to me that when, in such cases, the passenger retires to his room, takes the precautions, in the way of latching and bolting the doors and windows, which it is intended by the provision made therefor that he should take, devests himself of such portions of his clothing as comfort may suggest, and retires to rest, the situation is precisely what is contemplated by both parties; and I perceive in it all the elements of that form of liability which, under circumstances quite analogous, attaches to an innkeeper.

"The rule of law applicable to such a case, I think to be this: that if any of the articles or money which the passenger probably has with him in the stateroom is stolen, the presumption is that the theft was in consequence of the default of the carrier; and that this presumption can be repelled only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God, or of the public enemy. . . . All the considerations of public policy which have operated to fix upon innkeepers the rigorous liability above indicated apply, as it seems to me, with increased force to the case of carriers of passengers under these circumstances."

So, theft of money from the clothing of a

car, lock the door to the toilet room, and walk back again to the rear. During this time the train was in motion, and ten or fifteen minutes elapsed between the delivery of the suit case and the arrival of the train at Rochester. When the train stopped the trainman stood at the foot of the step at the rear of the car, which was not a Pullman, but an ordinary coach. In the case here the car was a parlor car, but was running in the daytime as a day car. It was not a sleeping car. Whicher v. Boston & A. R. Co. 176 Mass. 275, 79 Am. St. Rep. 314, 57 N. E. 601, 8 Am. Neg. Rep. 48. He did not help her off, but, handing her the suit case, said: "Here's your grip." The suit case was not locked. A little later she found it had been rifled of part of its contents. The plaintiff introduced in evidence certain rules of the company and other evidence as to the duties of the trainmen. The court in its opinion said: "The conclusion of the trial court that the trainman was acting within the line of his duty when he took the suit case of the plaintiff in order to help her off the train was warranted by the evidence. . . . In furnishing the assistance which he assumed to afford to the passenger, he was obliged only to discharge that duty so as not to conflict with a similar obligation to other passengers; and if for that reason he could not have given the suit case undivided attention, and it had been rifled without any negligence on his part, the defendant would not have been liable; but

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steamer passenger during the night while he is occupying a stateroom with door locked and windows fastened renders the carrier liable for the loss as an insurer without any proof of negligence, if the sum lost was reasonable and proper for the passenger to carry on his person to defray the expenses of his journey. Adams v. New Jersey S. B. Co. supra.

And it was said in Holmes v. North German Lloyd S. S. Co. 184 N. Y. 280, 5 L.R.A.(N.S.) 650, 77 N. E. 21, 20 Am. Neg. Rep. 141, that the principle laid down in Adams v. New Jersey S. B. Co. would equally control a loss of any other property of the passenger, stolen from his stateroom.

And a steamboat company is liable for a passenger's watch chain and pocketbook and other articles stolen from a stateroom during the night. Crozier v. Boston, N. Y. & N. S. B. Co. supra.

And in Mudgett v. Bay State S. B. Co. 1 Daly, 151, a steamboat company was held to be liable for the value of a valise containing a passenger's wearing apparel, which was taken from the stateroom during the temporary absence of the passenger, the door of the stateroom being locked.

The mere circumstance of the carrier's delivering to a passenger the key to the stateroom, and the latter's acceptance thereof, is not sufficient to relieve the carrier from the duty to protect him against theft. Ibid.

The court in this case said: "So far as the adjudications which bear upon this question have been discovered, they sustain the rule that a mere supervision of one's baggage, or the means of entering the place of its deposit, is not sufficient to discharge the carrier. There must either exist the *animo custodiendi* on the part of the traveler, to the exclusion of the carrier, or he must be guilty of such negligence as discharges the latter from his general obligation. . . . It was not pretended in this case that the plaintiff was guilty of negligence, and so far as it may be necessary to consider the question whether the plaintiff retained the custody of his valise or not, it is only necessary to say that the finding of the justice is against the defendants upon that issue. I do not understand upon what process of reasoning it can be maintained that giving the key of a room on board of a vessel to a traveler, in which he is permitted to deposit his baggage, is not in fact an assumption of the possession of all that is therein placed. The whole vessel is in the possession, and subject to the control, of the owners. The custody of the vessel, and the general government of the room given the traveler, continue with them. The use of it is a convenience for which the traveler pays, and if its employment absolves the carrier from vigilance, the security of property succumbs to the ease or pleasure of the journey. Such cannot be the law. The defendants can protect themselves, if they wish, by notifying their patrons that no goods can be placed in the stateroom hired, except at the risk of the owner, and thus advise them of the consequences of the act. But as long as they permit a traveler thus to deposit his baggage without notice, the mere circumstance of his taking a key will not be considered sufficient to relieve them from their duty to protect him against theft."

And following as authority Mudgett v. Bay State S. B. Co. supra, it was held in Gore v. Norwich & N. Y. Transp. Co. 2 Daly, 254, that the transportation company was liable for a passenger's overcoat which was stolen from the stateroom during his temporary absence, the door being locked. The court stated: "The staterooms on board of the defendant's boat are similar to the rooms at an inn. They are not furnished, however, to the traveler on payment of the passage money, or payment of the general price for transportation. They are a specialty, to possess which an extra sum must be paid, and they enable the traveler to enjoy greater privacy and comfort during his transit, being provided in that mode with a place in which he may put his baggage, and employ both at pleasure, incurring only the obligation so to use the room, if he desire to hold the carrier responsible for any loss that may happen, that he be not guilty of negligence. Granting, for compensation,

in this case there is no explanation afforded whatever of how the loss occurred."

The trial court found that the defendant negligently cared for the suit case, and on that question the court said: "There is nothing to show what care the trainman bestowed upon the suit case, and in the absence of any proof on the subject the trial court or the jury would be allowed to infer that it had been occasioned by negligence. . . . As the trainman was acting within the scope of his employment when he took the suit case, in legal effect it was the same as if the defendant, personified, had taken it. Bunnell v. Stearn, 122 N. Y. 539, 543, 10 L.R.A. 481, 19 Am. St. Rep. 519, 25 N. E. 910, 1 Am. Neg. Cas. 864. Therefore the plaintiff's property was lawfully in the possession of the defendant, and the question arises, what was its duty in reference thereto? Its possession was not that of a carrier, because the suit case had not been checked as baggage, nor intrusted to it for the journey, but only for the special purpose of aiding a lady passenger in getting off the train, in accordance with a custom established by itself, and hence it was not liable as an insurer. Its possession was that of a bailee, and the law of bailments measures its obligation to the plaintiff in regard to her property."

In that case the defendant offered no evidence. How the loss occurred was in no way explained, nor was it shown what care was taken of the suit case by the trainman. In the case before us the plaintiff's suit case

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the use of a stateroom, in the absence of notice to the contrary, is a designation of the place in which the traveler may put his ordinary baggage, but not to the exclusion of the carrier, inasmuch as the whole vessel is in possession of the carriers, and subject to their control. If similarly deposited at an inn, it would be regarded as *infra hospetium*, and, as we have seen, the obligation and duties of carrier and innkeeper have been declared to resemble each other. The inn is subject to the control of the keeper, and the vessel in this case, as already stated, was under the management and control of the defendants. In providing thus for passengers, the carrier must be supposed to contract in regard to personal clothing with reference to its known use to be put on and taken off and changed to suit the comfort or whim of the owner. To hold that wearing an overcoat, when a passage was taken on board of the defendants' boat, and a stateroom was secured, imposed the obligation upon the plaintiff to hold that article of wearing apparel entirely in his possession, whether in or out of his stateroom, seems to be a legal conclusion that cannot reasonably be entertained. If the traveler, while using any article of dress, such use establishing the *animus custodiendi* for the time being, loses it, it is right that the carrier should be released from liability. But if, after it shall have been used temporarily, as in this case, it be restored to the locality provided for such things generally, or specially, as in this case, the use ceases, the *animus custodiendi* in fact and in law ceases, and the custody reverts to the carrier. A carrier of passengers for hire undertakes that duty with reference to the reasonable habits and customs of men, for the observance and gratification of which improvements are constantly being made, more particularly on steamboats such as used by the defendants, the appliances and conveniences of which assimilate closely to the comforts and conveniences to be found on the land. The result of these views must be that the plaintiff did not, by wearing his overcoat when he secured his passage, by that act, under the circumstances disclosed by this case, declare his intention expressly or impliedly to retain its custody to the exclusion of the defendants during his transit, and not having done so, he was entitled to recover in this action. Having secured and paid for his stateroom, he had a right to use it in the manner he did, and by putting his overcoat in it, not having been guilty of negligence, he placed it in the custody of the defendants, and threw upon them the obligation to protect it from thieves."

L.R.A.1915B.

b. Liability where articles are not in stateroom.

While there is undoubted reason in a rule that the steamship company should be held to stricter liability where the passenger occupies a stateroom, on the other hand, there is, no doubt, reason in the rule that a passenger who does not occupy a stateroom, or who retains his effects on his person while away from the stateroom, should not be entitled to recover for the value of articles stolen or lost except in case of loss or theft through the negligence of the steamship company.

So, a steerage passenger who took his trunk into the steerage, placed it under his bed, and fastened it with rope to his berth, was held, in Cohen v. Frost, 2 Duer, 335, not entitled to recover for its loss by theft. The ground of the decision being that the trunk was never placed in the charge or custody of the steamship company as a common carrier, but was in the exclusive possession and custody of the passenger himself when the voyage commenced, and so remained at the time of the loss.

And in Abbott v. Bradstreet, 55 Me. 530, the owner of a steamboat was held not liable for a sum of money stolen from a passenger's pocket during the night, there being no evidence that it was taken by employees. The decision seems to be based on the fact that the custody was in the passenger, and not on the fact that it was money. The evidence does not disclose just where the passenger slept, but the court, in The John Brooks, 1 Haskell, 439, Fed. Cas. No. 7,335,

was not delivered to the defendant for transportation as baggage, but was retained in the possession and under the control of plaintiff until the train arrived at Cheyenne; and the service offered by Mayweather, and accepted by plaintiff, was to assist him in removing his hand baggage from the car,—a service which, in the circumstances, the defendant was under no contractual obligation to render. Had Mayweather been requested by plaintiff to carry his suit case out of the car, and he had refused to do so, we think it quite clear that no action for damage for a breach of the contract alleged in the plaintiff's petition could be maintained. It was admitted on the trial that, if present, Mayweather would testify that he was not authorized to receive baggage for and on behalf of defendant, and that he did not receive the suit case as baggage for and on its behalf. The only evidence of his authority or of any custom established or permitted by defendant, authorizing him to do so, was the testimony of plaintiff that on this occasion he carried our suit cases in, and looked after the passengers in general as porters do on trains; that he was the only person on the car to look after the passengers; and that plaintiff supposed he was a porter. But assuming the evidence sufficient to establish the fact that he was a porter on the car, for whose acts in relation to passengers' hand baggage the defendant was responsible, the question still remains, was he negligent in doing what he did? When the

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stated that an examination of the records of that case discloses that at the time of the robbery the passenger was in a berth in the common cabin, and not in a private stateroom.

Also that a carrier will not, in the absence of negligence, be liable for the loss of a passenger's watch, money, and other effects, which were taken from under his pillow, the passenger having elected to occupy a berth in the main cabin instead of taking a stateroom, is the effect of the decision in Dunn v. New Haven S. B. Co. 58 Hun, 461, 12 N. Y. Supp. 406, the verdict for the defendant being reversed, however, on the ground that the charge of the court gave the jury to understand that the recovery by the passenger would be defeated even though the theft resulted from the carelessness and inattention of the company's employees.

But although a passenger who elects to keep a valise in his control, and stores it on deck, assumes the risk of its being washed overboard by the waves, or by its sliding into the seas as a consequence of the motion of the vessel, and may, perhaps, under the circumstances, relieve the steamship company from all responsibility for mere negligence in respect to the baggage, yet the company will be liable for the act of one of its officers, in ordering the valise to be thrown overboard. De Felice v. Compagnie Française De Navigation, 83 App. Div. 73, 82 N. Y. Supp. 552.

c. What amounts to negligence on part of carrier.

A steamboat company is negligent in not providing inside bolts on its stateroom doors, and it is a wholly unsatisfactory reason for not doing so, that it might embarrass the passengers in case of fire or such danger. The Western States, 86 C. C. A. 354, 159 Fed. 354 (writ of certiorari denied in 210 U. S. 433, 52 L. ed. 1136, 28 Sup. Ct. Rep. 762).

The loss by the officers of a steamship of hand baggage of a passenger which they have undertaken to place in his stateroom furnishes a prima facie case of negligence which, unexplained, will render the company liable for the loss. Holmes v. North German Lloyd S. S. Co. 184 N. Y. 280, 5 L.R.A. (N.S.) 650, 77 N. E. 21, 20 Am. Neg. Rep. 141. The court stated that the service thus rendered was not a voluntary one on the part of the employees, outside of the scope of their duty, for it is a common custom of the steward and other employees of an ocean steamer to carry the cabin baggage of the passenger on and off the boat.

But it is not negligence making a steamship company liable for theft of jewelry from a stateroom, for its officers to put a female passenger in the gentlemen's cabin, the ladies' cabin being overcrowded, and especially where this fact was known to the female passenger before she boarded the boat, and she accepted the stateroom offered, and expressed herself satisfied with it, and she is not placed in a situation more exposed to depredations than are other passengers. Del Valle v. The Richmond, 27 La. Ann. 90.

And whether or not a regulation of a steamship company requiring stateroom doors to be left unlocked is negligence as to a passenger who suffers a loss by theft from his stateroom is a question of fact for the jury. Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456.

d. Duty as to watch.

It is not required that a watch be placed so as to observe whosoever may enter a stateroom on a steamship. The John Brooks, 1 Haskell, 439, Fed. Cas. No. 7,335.

But a steamboat is negligent in providing but one man upon two decks on a large steamboat so cut up by staterooms that it is necessary to keep walking about in order to see them at all times. The Western States, supra.

And the fact that a thief has opportunity to enter a stateroom of a lady's cabin which is shown to be properly fastened exhibits a want of care and watchfulness which should always be observed in the police regulations of any boat engaged in the transportation of passengers. It is certainly not exacting

train arrived at Cheyenne he assisted the passengers, including plaintiff, by carrying their hand baggage from their respective seats in the car to the vestibule at the end of the car at which they made their exit, and placed the baggage there. It is apparent that he could not have given any particular piece of baggage his undivided attention; and it is probable that plaintiff's suit case was taken by someone else in passing through the vestibule on leaving the train. To hold the defendant liable for the loss of the suit case in this case would in effect be a holding that it was an insurer, which it was not. Ordinary care did not require the defendant to see to it that no passenger took from the car other baggage than his own. It was so held in Springer v. Pullman Co. 234 Pa. 172, 83 Atl. 98. "To so hold would be to impose on the company the duty of seeing that no passenger left the car with any baggage except his own, which again would be virtually making the carrier an insurer, besides subjecting the passengers to a scrutiny and surveillance which the ordinary traveler would have a right to resent. We cannot think that the ordinary care exacted of the carrier requires any such officious interference as this."

There is no evidence in the present case showing or tending to show that the care taken of the suit case by Mayweather was not such as is usually and ordinarily taken of such property under similar circumstances. It may be that, in the absence of any evidence as to the care taken of the prop-

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too much of those in charge of these common carriers to require of them that degree of vigilance which would effectually protect from all intrusions during the night, at least that portion of the boat which is appropriated for the security and convenience of helpless females. Walsh v. The H. M. Wright, Newberry Adm. 494, Fed. Cas. No. 17,115.

So, the boat was held liable for the contents of a valise, consisting of a gold watch, a pair of gold spectacles, $11 in money, and other small articles, which were taken from the stateroom during the night, it being held that there was no obligation, as contended, that the articles lost should have been deposited with a clerk for safe-keeping, and, further, that the articles fell within the term "baggage."

And in holding that there was sufficient evidence as to negligence in the manner of keeping watch on a steamship upon which to predicate responsibility for loss of articles from staterooms during the night, the court, in American S. S. Co. v. Bryan, 83 Pa. 446, said: "A watch was kept during the night in a saloon; but was it of such a character as to amount to the ordinary diligence which the company owed to their passengers? This surely was a question for the jury. It was not a watchman who, by taking his natural rest during the day, might be expected to be watchful at night. The stewards or waiters on board took their turns at this duty. As the means of securing their vigilance, they were required every hour to report to the officer on deck, and, of course, for this purpose had to leave their post. They might be expected to take some time to do this, to loiter on their way, to stop and have a few words with the officer about the weather and the speed of the vessel, and on the morning the larceny was committed it appeared that the steward on watch had stopped on his way at the cook's galley and drunk a cup of coffee. There was ample time in the interval, as the fact showed, for someone to enter the state rooms of the defendant and other passengers and carry off several valises. Was this ordinary and proper diligence? Could not some other mode have been adopted of watching the watchman, than this which might leave the saloon entirely unguarded at considerable intervals? In many of our public institutions a very simple electrical machine registers the rounds of the watchman during the night at the appointed times. We do not say that every passenger ship should have and use such a register, but we do say it was for the jury to determine whether this apparent deficiency in the mode of watching the saloon might not have been remedied. Even as a precaution against fire they might well argue that the continuity of the watch was essential. A fire might begin from accident or carelessness in one of the staterooms, and make such a headway in five minutes before discovered that the ship would be imperiled. On the whole, we are of opinion that there was evidence to go to the jury, and that the court committed no error in entering judgment in favor of the plaintiff below on the reserved point."

So, also, that a watchman on a steamboat was not vigilant may be inferred from the fact that an oiler could leave his quarters below, and traverse parts of the brilliantly lighted steamboat, where he had no right to be, accomplish a robbery, and get away without being seen. The Western States, supra.

e. Contributory negligence of passenger.

Where the door of a stateroom may be locked so as to prevent entrance from the outside, and the passenger neglects to lock his door, and by reason of such neglect someone enters and steals his baggage, the steamship company will not be liable. Williams v. Keokuk Northern Line Packet Co. 3 Cent. L. J. 400.

And a steamship passenger who, upon retiring to his stateroom at night, fails to secure his door by means of the bolt as well as the key, both being provided, is guilty of negligence which will prevent the recovery from the owners of the vessel for money stolen from the stateroom during the night. The John Brooks, 1 Haskell, 439,

erty while in the possession of a bailee, the proof of its loss creates an inference of negligence; but when it is made to appear what care was taken, and it is not shown that such care was not reasonable care, no such inference can be indulged in. We have not deemed it necessary to determine whether the defendant was a gratuitous or an ordinary bailee, as in our opinion the evidence is insufficient to warrant the conclusion that reasonable and ordinary care was not exercised in this instance.

As to the error assigned in admitting the remarks of Mayweather after the loss was discovered, we do not think the evidence was material. The first remark was the mere expression of an opinion as to how the loss might have occurred, and the other remark had no connection with the circumstances of the loss, and was evidently not considered at all important by the court, for in ruling on the objection the court remarked: "I cannot see that it is very material." There were no special findings of fact or conclusions of law made by the court, and we are not advised upon what theory the court based its judgment: whether it considered that the suit case was in the possession of defendant as a common carrier and therefore liable as an insurer, or that defendant had not exercised reasonable care. In either case we are of the opinion that the evidence is insufficient to support the judgment.

The judgment of the District Court is reversed and the cause remanded.

Scott, Ch. J., and Potter, J., concur.

Fed. Cas. No. 7,335. It may be stated that this is the only point decided in this case; the court, because of the negligence found, having refused to determine whether or not the owners of the vessel would, under other circumstances, have been accountable to the passenger for the money stolen.

Nor will the fact that the lock of a stateroom door is out of order, and this fact has been made known to a servant of the company, make the boat responsible for a loss by theft from a stateroom where the passenger chooses to retain the articles under his own care instead of delivering them into the care and custody of the officers, and especially where the conduct and declarations of the passenger are calculated to invite the depredations committed upon him. The Crystal Palace v. Vanderpool, 16 B. Mon. 302.

But a steamship passenger who has not retired for the night, and leaves the light in her stateroom burning, is not guilty of contributory negligence defeating recovery for valuables stolen from her stateroom, because she left her stateroom door partially opened, fastened only by a hook which was furnished by the carrier to accomplish the purpose for which it was furnished. The Minnetonka, 77 C. C. A. 217, 146 Fed. 509 (writ of certiorari denied in 203 U. S. 589, 51 L. ed. 330, 27 Sup. Ct. Rep. 777).

Also it is not negligence for a passenger to fail to summon the officers of a boat to examine partial defects in the lock which may well have existed for a long time, and so be presumed to be known to the officers. Crozier v. Boston, N. Y. & N. S. B. Co. 43 How. Pr. 466.

So, also, in Lincoln v. New York & C. Mail S. S. Co. 30 Misc. 752, 62 N. Y. Supp. 1085, it was held that a passenger was not negligent where, no key for the door of the stateroom assigned to him having been given him, he closed the door and went for a key, leaving in the stateroom $200 in money in a traveling bag which he locked, and on his return to his room found that the money had been stolen. The court stated that having placed the bag in the stateroom, locked the bag, and closed the door of the room, and then having gone for the key of the door, the plaintiff did all that could be reasonably expected of him. That what followed shows that it would have been better to have taken the money with him, but that this did not affect the question of negligence.

And assuming that a passenger is negligent in leaving his stateroom door unlocked and the porthole open, it is not such negligence as occasions a loss by theft of articles from his room, where, before the loss, the steward, in cleaning the room, noticed that the door was unlocked and porthole open, and neglected to close the porthole and lock the door upon leaving the room, it being his duty to take every precaution to protect a passenger's goods. Hart v. North German Lloyd S. S. Co. 108 App. Div. 279, 95 N. Y. Supp. 733, 19 Am. Neg. Rep. 452.

f. Liability for money or valuables.

In Del Valle v. The Richmond, 27 La. Ann. 90, the steamship company was held not liable for the value of jewels alleged to be worth over $6,000, which were stolen from the passenger's stateroom during the night. The decision being based on the nonliability of the company beyond the value of reasonable articles of apparel or convenience which are retained in the passenger's custody.

But in The Minnetonka, supra, the owners of the steamship were held liable for the loss of jewelry valued at over $5,000, stolen from a passenger's stateroom by the steward, whose duty it was to look after the stateroom.

And where a sum of money is a reasonable one for a passenger to have with him, in view of the journey he is taking, and it appears that it could not be conveniently carried on the person, the steamship company will be liable for its theft from the stateroom, on the ground that, having assigned the passenger to a stateroom, the company had taken entire charge of him as a passenger, and of his effects. Lincoln v. New York & C. Mail S. S. Co. 30 Misc. 752, 62 N. Y. Supp. 1085.

g. Notice to deposit.

To release a carrier from liability for loss of baggage because of alleged violation of a regulation, "Baggage not allowed in cabin or stateroom. This company will not be liable for baggage unless checked," notice should be given to the passenger of the regulation, or it should be shown expressly that he knew it, or that it had become by general usage so notorious and universal that he must or ought to have known it. Macklin v. New Jersey S. B. Co. 7 Abb. Pr. N. S. 229.

A steamship company which has posted a notice in the stateroom that a passenger's baggage must be deposited in the baggage room, which notice is read by the passenger, will be liable for its loss by theft, although retained in the controlling custody of the passenger, where such loss is through the negligence of the steamship company. Williams v. Keokuk Northern Line Packet Co. 3 Cent. L. J. 400.

h. Duty to declare character or value of effects.

Section 4281 of the United States Revised Statutes (Comp. Stat. 1913, § 8019), which provides that a shipper of jewelry shall give written notice of its character and value, and have the same entered on the bill of lading, otherwise the company will not be liable, does not apply to the case of a passenger whose jewelry was stolen from her stateroom by one of the ship's crew before she had an opportunity to deposit it with the proper officer for safe-keeping, she intending so to do, but the property being stolen before said officer was found. The Minnetonka, 77 C. C. A. 217, 146 Fed. 509 (writ of certiorari denied in 203 U. S. 589, 51 L. ed. 330, 27 Sup. Ct. Rep. 777).

A stipulation in a steamship ticket limiting liability for baggage to a certain amount unless the express value is declared and paid for does not apply to baggage intended to be taken by a passenger to a stateroom for use during the voyage. Holmes v. North German Lloyd S. S. Co. 184 N. Y. 280, 5 L.R.A.(N.S.) 650, 77 N. E. 21, 20 Am. Neg. Rep. 141. J. H. B.

DISTRICT OF COLUMBIA COURT OF APPEALS.

LEIGH ROBINSON, Appt.,
v.
SOUTHERN RAILWAY COMPANY et al.

(40 App. D. C. 549.)

Carriers — sleeping car company — duty to prevent theft.

1. To avoid liability for a theft of a passenger's property while he is asleep at night, a sleeping car company must keep a constant and active watch in the aisle of the car.

Same — liability of railroad company.

2. A railroad company carrying upon its train the cars of a sleeping car company is under the same liability as the latter company for the loss of property of passengers in the sleeping car by theft.

Evidence — burden of proof — theft in sleeping car — presumption.

3. Proof of theft from the berth of a passenger in a sleeping car in the night raises a presumption of negligence on the part of the company, and places upon it the burden of rebutting such presumption, failure to do which will justify a verdict holding it liable for the loss.

(June 2, 1913.)

APPEAL by plaintiff from a judgment of the Supreme Court in favor of defendants in an action brought to recover the value of property stolen from plaintiff's berth in defendant's sleeping car while plaintiff was asleep. Reversed.

The facts are stated in the opinion.

Mr. **Fulton Lewis**, for appellant:

Where it is proved that a passenger's effects have disappeared while he is asleep in a sleeping car the burden of proving the exercise of due care is on the railroad.

Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 331, 105 Am. St. Rep. 947, 78 S. W. 1055; Pullman Co. v. Schaffner, 126 Ga. 609, 9 L.R.A.(N.S.) 407, 55 S. E. 933; Pullman Co. v. Green, 128 Ga. 142, 119 Am. St. Rep. 368, 57 S. E. 233, 10 Ann. Cas. 893; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102;

Note. — Duty of sleeping car company as to baggage or personal effects of passenger.

Earlier cases covering the question under annotation will be found in notes to Mann-Boudoir Car Co. v. Dupre, 21 L.R.A. 289; Pullman Co. v. Schaffner, 9 L.R.A.(N.S.) 407; and Myers v. Pullman Co. 41 L.R.A.(N.S.) 799.

As will be seen, the later cases are in accord with the great weight of authority as evidenced by the cases cited in the earlier notes in holding that a sleeping car company is not bound to the responsibility of an innkeeper.

Thus, a sleeping car company does not assume the liability of insurer of a passenger's baggage nor the obligation of a common carrier or innkeeper, but its liability for loss must be predicated upon negligence. Goldstein v. Pullman Co. 161 App. Div. 756, 147 N. Y. Supp. 133; Dings v. Pullman Co. 171 Mo. App. 643, 154 S. W. 446; ROBINSON v. SOUTHERN R. Co.

In Goldstein v. Pullman Co. supra, where a passenger in a sleeping car, upon retiring for the night, left his handbag at the side of the berth where it had been placed by the porter when he carried it into the car, it being too large to go under the berth,

Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L.R.A. 759, 21 Am. St. Rep. 644, 26 N. E. 277; Pullman Palace Car Co. v. Hunter, 107 Ky. 519, 47 L.R.A. 286, 54 S. W. 845, 7 Am. Neg. Rep. 250; Bevis v. Baltimore & O. R. Co. 26 Mo. App. 19; Pullman Palace Car Co. v. Freudenstein, 3 Colo. App. 540, 34 Pac. 578; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 35 L. ed. 458, 11 Sup. Ct. Rep. 859; Cooney v. Pullman Palace Car Co. 121 Ala. 368, 53 L.R.A. 690, 25 So. 712, 6 Am. Neg. Rep. 1; Kates v. Pullman's Palace Car Co. 95 Ga. 810, 23 S. E. 186; Thomp. Neg. § 3608, note, 20.

A passenger on a sleeping car can recover damages for money and personal effects stolen from him through the negligence of the sleeping car company.

Hill v. Pullman Co. 188 Fed. 497; Pullman Palace Parlor Car Co. v. Adams, 120 Ala. 581, 45 L.R.A. 767, 74 Am. St. Rep. 53, 24 So. 921; Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L.R.A. 759, 21 Am. St. Rep. 644, 26 N. E. 277; Blum v. Southern Pullman Palace Car Co. 1 Flipp. 500, Fed. Cas. No. 1,574; Scaling v. Pullman's Palace Car Co. 24 Mo. App. 29; Pullman Co. v. Schaffner, 126 Ga. 609, 9 L.R.A. (N.S.) 407, 55 S. E. 933; Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 482, 43 Am. Rep. 102; Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 21 L.R.A. 298, 42 Am. St. Rep. 902, 23 S. W. 70.

The liability of the Southern Railway Company is that of an insurer.

Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 331, 105 Am. St. Rep. 947, 78 S. W. 1055; Lewis v. New York Sleeping Car Co. 143 Mass. 267, 58 Am. Rep. 135, 9 N. E. 615; Hutchinson, Carr. 1906 ed. §§ 1135, 1273; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44.

The acceptance by the passenger of the

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and upon awakening in the morning he found the bag gone, it was held that a prima facie case of negligence was made out, and so judgment dismissing the complaint was error.

But lack of reasonable precautions to keep a strict watch for the safety of the property of passengers in a sleeping car, so as to make the company liable for the loss of an overcoat stolen from the car during the passenger's absence in the dining room of the station at which the train had stopped, is not shown where there was evidence that the rear door of the car was locked and the windows closed, and that the conductor stood guard at the front door, the porter being absent from the car at supper in the dining room of the depot. Dings v. Pullman Co. 171 Mo. App. 643, 154 S. W. 446.

Where a passenger's effects are intrusted to the care of the sleeping car porter, on his offer to care for them, the sleeping car company will be liable for their loss, whether such loss is due to the negligence of the porter in watching them or because of his having stolen them. Sherman v. Pullman Co. 79 Misc. 52, 139 N. Y. Supp. 51. In this case it appears that a female passenger, when about to retire for the night, endeavered to put her hand bag containing her toilet articles and a small wooden jewelry box which contained a diamond necklace under the berth, but as her husband's dress-suit case had already been put under the berth there was no room; while she was so engaged the porter in charge of the car offered to care for the hand bag, and she delivered the bag to him; the next morning she found the bag in front of her berth, but the wooden jewelry box had been broken open and the necklace stolen. The court, in holding that upon this state of facts the company was properly held liable, said: "The bag was actually delivered to the porter, whose duty it was to aid passengers in handling their baggage, and to watch and care for it while the passenger was asleep. The failure of the defendant to return to the plaintiff the articles which she had delivered to it was prima facie evidence of negligence. The defendant having received the bag and its contents from the plaintiff, its duty was to return them, or to satisfactorily explain their loss. It did neither of these things. If the porter neglected to watch the bag, and thus allowed someone to steal its contents, the defendant was liable. If the porter stole the necklace, the defendant was also liable."

A delivery of baggage to the porter of a sleeping car company for the purpose merely of having the baggage carried into the car is not a delivery into the custody of the carrier, or a special assurance by the porter as to the safety of the baggage. Goldstein v. Pullman Co. supra.

Nor does mere proof of loss of luggage which was taken by a passenger into a sleeping car make out either an absolute or prima facie case of liability against the company. Dings v. Pullman Co. supra.

Effects for which recovery may be had.

A diamond necklace was held in Sherman v. Pullman Co. supra, to be a part of a passenger's baggage appropriate to the journey.

And the fact that the diamond necklace was not used by the passenger on the journey, but was contained in a wooden box and carried in the passenger's hand bag, will not preclude it from being considered as baggage. Ibid.

Generally as to liability of carrier for loss of hand baggage or other effects retained in custody of passenger, see note to Union P. R. Co. v. Grace, ante, 608.

J. H. B.

company's invitation to sleep constitutes a sufficient delivery by the passenger, into the custody of the company, of such effects as he may have with him, and which are reasonably necessary for the purposes of the journey.

Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102; Blum v. Southern Pullman Palace Car Co. 1 Flipp. 500, Fed. Cas. No. 1,574; Crozier v. Boston, N. Y. & N. S. B. Co. 43 How. Pr. 466.

Where personal property has been lost through negligence of the defendant, it is liable even though the passenger retained the article in his custody.

Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200; Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L.R.A. 759, 21 Am. St. Rep. 644, 26 N. E. 277.

Railroads and sleeping car companies are liable for stolen money or property only to such amount as it is reasonable for the passenger to carry for the purposes of his journey.

Williams v. Webb, 27 Misc. 508, 58 N. Y. Supp. 302.

Messrs. **H. Prescott Gatley, Barry Mohun, George E. Hamilton, John W. Yerkes,** and **John J. Hamilton** for appellees.

Van Orsdel, J., delivered the opinion of the court:

Appellant, Leigh Robinson, plaintiff below, was a passenger on a Pullman sleeping car attached to a train of the Southern Railway Company running between Asheville, North Carolina, and the city of Washington. Plaintiff alleges that while he was occupying a berth in the sleeping car, his pocketbook, containing not less than $40, was stolen. This suit was brought against defendant companies, the Southern Railway Company and the Pullman Company, for the value of the property lost.

The only evidence in the case is plaintiff's testimony. The material facts detailed by him are that, before retiring, about midnight, he went to the toilet room in the car, where he observed the Pullman porter blacking boots; that he returned to the berth, and, before retiring, rolled up his vest containing his watch, rolled up his coat containing his pocketbook, and laid them on the shelf provided in the berth for that purpose; that he was the first passenger in the car to arise in the morning; that he either put his coat and vest on before going to the toilet room, or carried them in his hand; that when he reached the toilet room he looked for his watch, and discovered that it was not in his vest, and upon examination, discovered that his pocketbook and money were also missing, and that he returned to the berth, where he found the watch lying on the shelf, also some papers that were in the pocketbook, but the pocketbook and money could not be found. From a verdict and judgment in favor of defendants the case is here on appeal.

Plaintiff's unchallenged testimony furnishes prima facie evidence that the pocketbook and money were stolen from the berth while he was asleep. Counsel for the Pullman Company indulged in considerable speculation, both at bar and in brief, to the effect that the pocketbook might have been dropped in the car between the berth and the toilet room, but the finding in the berth of the papers, which had been extracted from the pocketbook, forbids this presumption.

This decision, we think, can be turned upon the liability of defendants for the property alleged to have been stolen from the berth while plaintiff was asleep. The evidence is not sufficient to raise even a presumption of contributory negligence on the part of plaintiff. The whole case must, therefore, turn upon the question of defendants' general liability under circumstances of this kind, and whether the evidence is sufficient to create a presumption that they were guilty of negligence.

A sleeping car company is not an insurer of the personal property belonging to its passengers, but it is required at all times to exercise reasonable care for the protection of the property of its guests. The duty thus imposed varies with the circumstances. The degree of vigilance required is greater at night when the passenger is sleeping, than in the daytime when the passenger is charged with the duty of exercising reasonable diligence for the protection of his own possessions. The degree of care imposed is not absolute, as in the case of an innkeeper or common carrier of goods; hence, it follows that to render a railroad company or a sleeping car company liable for the value of the personal effects of a passenger, stolen from his berth while he is sleeping, it must appear that the company was guilty of negligence. When the Pullman Company furnished plaintiff a berth in which to sleep for the night, it impliedly agreed to watch over him while he slept and to protect his property from theft by unauthorized intruders or by occupants of the car. Woodruff Sleeping & Parlor Coach Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102.

The duty which a sleeping car company owes to a passenger to protect his person and property while the passenger is asleep in his berth, is well expressed in the lead-

ing case of Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L.R.A. 759, 21 Am. St. Rep. 644, 26 N. E. 277, as follows: "A corporation engaged in running sleeping coaches with sections separated from the aisle only by curtains is bound to have an employee charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers. Pullman Car Co. v. Gardner, 3 Pennyp. 78. These cars are used by both sexes of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers, and though such companies are not insurers they must exercise vigilance to protect their sleeping customers from robbery. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed. Considering the compensation received for such services and the hazards to which unguarded and sleeping travelers are exposed, the rule of diligence above declared is not too onerous."

We have not overlooked the conflict in the decisions of the courts as to the degree of care required of a sleeping car company to properly protect the effects of a sleeping passenger. The strict rule, which we think is the proper one to be applied to cases of this kind, and which is supported by the weight of authority, imposes upon the company the duty of keeping a constant and active watch in the aisles of its cars during the hours when its passengers are asleep, and, failing to do so, it will be liable for the theft of property from a passenger's berth. Hill v. Pullman Co. 188 Fed. 497; Pullman Palace Car Co. v. Adams, 120 Ala. 581, 45 L.R.A. 767, 74 Am. St. Rep. 53, 24 So. 921; Pullman Co. v. Schaffner, 126 Ga. 609, 9 L.R.A.(N.S.) 407, 55 S. E. 933.

In the other class of cases the duty is imposed upon a sleeping car company of keeping a reasonable watch over the safety of its sleeping passengers and their effects. In the note to Calder v. Southern R. Co. Ann. Cas. 1913A, 894, the distinction is stated as follows: "This difference in the statement of the two rules, one requiring a constant watch and the other a reasonable watch, may be explained by the fact that in most, if not all, of the cases stating the latter rule a more stringent statement was not required in order to render the sleeping car company liable for the loss complained of." This rule of vigilance imposed upon the employees in charge of a sleeping car L.R.A.1915B. measures the duty defendants owed to plaintiff, and for failure to perform it, they should be held liable. Blum v. Southern Pullman Palace Car Co. 1 Flipp. 500, Fed. Cas. No. 1,574.

The same liability has been imposed upon railroad companies as upon sleeping car companies for the theft of property belonging to passengers in sleeping cars used for the accommodation of passengers on their trains. Referring to such liability, Chief Justice Gray, in Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200, said: "Although a railroad corporation is not responsible as a common carrier for an article of personal baggage kept by a passenger exclusively within his own control, it is liable for the loss of such an article by the negligence of the corporation or its agents or servants, and without fault of the passenger." In that case the baggage of a passenger on a sleeping car was lost through the negligence of the employees of the sleeping car company.

In cases of this sort the liability of the railroad company and the Pullman Company is both joint and several. This rule of liability is based upon sound principles of public policy. It will not do to say that a passenger who takes a berth in a Pullman car releases the railroad company from any of its duties as a carrier. The Pullman car forms part of the railroad company's train. The railroad company requires the passenger to purchase a first-class ticket, the highest and most expensive contract, as a condition precedent of being permitted to avail himself of the accommodations of the sleeping car. The railroad company is required therefore to exercise reasonable care for the protection of the effects of its passengers in the daytime and those occupying day coaches, and, like the Pullman Company, it is obliged to exercise constant watchfulness over the passenger through the night while sleeping in his berth. A passenger is there by the joint invitation of the two companies, and it will not do to permit one to shift its responsibility to the other, or to indulge in technical distinctions as to their liability. As the court said in Campbell v. Seaboard Air Line R. Co. 83 S. C. 448, 23 L.R.A.(N.S.) 1056, 137 Am. St. Rep. 824, 65 S. E. 628: "When in pursuance of such invitation, the passenger takes the Pullman car, he is still entitled to the service of the railroad employees in all matters which relate to his safe and comfortable transportation to his destination. Obviously, the railroad company cannot lawfully withdraw its own employees from this service and substitute and rely upon the employees of another company to perform the service, as persons act-

ing apart from itself. On the contrary, it is quite plain that when it relies on such persons to perform its own public duties it adopts them as its agents, and is responsible for their failure to perform the service to which the passenger is entitled as a part of his contract of carriage."

Under this rule of liability, it has been held that the sleeping car company and its employees engaged in the operation of its cars are in law the servants and employees of the railroad company. In Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, the court said: "The law will conclusively presume that the conductor and porter, assigned by the Pullman Palace Car Company to the control of the interior arrangements of the sleeping car in which Roy was riding when injured, exercised such control with the assent of the railroad company. For the purposes of the contract under which the railroad company undertook to carry Roy over its line, and, in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping car company, its conductor and porter, were, in law, the servants and employees of the railroad company. Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company. The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

The present case belongs to that general class of cases where a presumption of negligence may arise from the mere happening of the event, when the explanation of the cause, if there be one, is peculiarly within the knowledge of the defendant. As was said by Mr. Justice Pitney, in Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416: "It is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence."

The rule as applied to a railroad company or sleeping car company in a case where the personal effects of a passenger had been stolen from his berth in a sleeping car is stated in Bevis v. Baltimore & O. R. Co. 26 Mo. App. 19: "There is another cogent reason for holding that evidence of a larceny, under such circumstances, is to be regarded as a prima facie case. . . . Applying that principle [*res ipsa loquitur*] to the plaintiff's evidence in the present case, it seems that the jury would be authorized to infer that the theft of his scarf pin and money would not, according to ordinary human experience, have probably taken place without detection, if the defendant's servants had been in the exercise of that reasonable care in keeping watch while the plaintiff slept, which, under the recent decision of this court in Sealing v. Pullman Palace Car Co. 24 Mo. App. 29, and other cases there cited, the law required of the defendant."

The presumption thus created is a legal one, arising from the evidence which impels its application. When such a presumption arises, an obligation is imposed upon the defendant of overcoming it by competent evidence. This does not mean that the general burden of proof shifts to the defendant, for it does not, or that the presumption creates such a prima facie case as would justify the direction of a verdict. This legal presumption might arise in a case where the plaintiff's evidence contains facts tending to rebut the legal presumption, or from which such an inference could be drawn. In such a case, in the absence of testimony on the part of defendant, an issue is presented for the jury upon the plaintiff's evidence alone. But in a case like this, where there is a conclusive legal presumption of defendant's negligence created from the evidence of plaintiff, not rebutted, that the pocketbook and money were stolen from the berth while he was sleeping, when the duty was imposed upon defendants to exercise that degree of care and diligence imposed upon them to prevent the theft, the prima facie evidence of negligence is sufficiently established to impose upon defendants the burden of rebutting that presumption by showing that the theft did not occur as a result of their negligence, and a failure to so rebut the presumption would, if the jury believe that the pocketbook and money were in fact stolen, entitle plaintiff to recover.

It is unnecessary to consider the assignments of error, since the case was submitted to the jury upon a total misapprehension of the law applicable to such cases. The instructions given by the court and at the request of counsel for defendants were

substantially to the effect that the defendants were only required to exercise reasonable care for the protection of the property of the plaintiff, and that "negligence cannot be presumed or inferred from the mere fact that the pocketbook was lost or stolen."

The judgment is reversed, with costs, and the cause remanded with instructions to grant a new trial. Reversed and remanded.

Petition for rehearing denied, October 7, 1913.

MICHIGAN SUPREME COURT.

WATERMAN-WATERBURY COMPANY, Plff. in Err.,
v.
SCHOOL DISTRICT NO. 2 OF THE TOWNSHIP OF WYOMING.

(— Mich. —, 148 N. W. 673.)

Evidence — breach of warranty — satisfactory operation of other apparatus.

1. One who installs a heating apparatus under a guaranty that it will heat the building if properly operated may show in support of his claim of improper operation, when breach of warranty is set up to defeat payment of the purchase price, that apparatus similar in character to that installed when properly operated satisfactorily heated the building in which it was placed.

Same — burden of proof — breach of warranty.

2. A purchaser of a heating apparatus, who resists payment of the purchase price because of alleged breach of warranty that it would heat the building to a certain degree if properly operated, has the burden of establishing proper operation and failure to furnish the required degree of heat.

(October 2, 1914.)

ERROR to the Circuit Court for Kent County to review a judgment in defendant's favor in an action brought to recover the purchase price of a heating plant sold by plaintiff to the defendant school district. Reversed.

The facts are stated in the opinion.

Messrs. Cummins, Nichols, & Rhoads, for plaintiff in error:

Testimony showing that other heating and

Note. — Admissibility upon question as to breach of warranty, of evidence as to success or failure of similar goods or apparatus.

I. Introductory, 626.
II. Evidence by comparison to show efficiency or excellence.
  a. Things in common use or simple in operation, 627.
  b. Things particularly affected by circumstances of use or operation.
    1. In general, 630.
    2. Where similarity is sufficient.
      (a) In general, 630.
      (b) The issue of plan or design, 631.
    3. Where similarity is insufficient, 634.
III. Evidence by comparison to show unfitness.
  a. Things in common use or simple in operation, 635.
  b. Things particularly affected by circumstances of use or operation, 636.
IV. Theory that evidence by comparison does not prove quality, 637.
V. Miscellaneous, 638.

I. Introductory.

Upon the issue of quality, whichever party brings the action, the seller claims that the thing sold is good, the buyer that it is bad. The "evidence by comparison" is in general on the part of the seller to show that other like things are good, and on that of the buyer that other like things are bad.

There is another method of proof which may be called "evidence by contrast," where the seller seeks to show that the thing sold is good by contrasting it with what is bad, and the buyer seeks to show that the thing bought is bad by contrasting it with what is good. It has not been sought in this note to collect cases of this character, but a few of them are cited infra, V.

In considering the general question whether "evidence by comparison" ought to be admitted to show quality, it is plain that often in the case of a simple thing, facts can be shown which create a strong probability of the similarity of the subjects of comparison. It cannot be denied that in such cases evidence by comparison has probative force. So, often in the case of a thing subject to various circumstances, it may be shown that other things from the same source have been subjected to like circumstances. In the case of machines and other apparatus, the question whether the thing sold is a success or failure often takes the form of the question whether the design or plan of the machine is effective or defective.

As to whether the doctrine of admissibility of such evidence is equally fair to both buyer and seller, it may at least be said that it does not seem to be logically unfair. If a buyer complains that the flour delivered to him at the mill is sour and unfit, and the miller shows that at about the same time he delivered to a dozen other customers flour of the same grade from the same bin, and they all testify that they

ventilating systems worked satisfactorily is admissible for the purpose of showing the proper management necessary.

Wigmore, Ev. § 13; Avery v. Burrall, 118 Mich. 672, 77 N. W. 272; 17 Cyc. 289; Beach v. Huntsman, — Ind. App. —, 83 N. E. 1036.

The burden of proof was upon the defendant to prove the breach of the guaranty and the damages therefrom.

Keystone Mfg. Co. v. Forsyth, 123 Mich. 628, 82 N. W. 521; Avery v. Burrall, 118 Mich. 672, 77 N. W. 272; 35 Cyc. 457.

Mr. Louis T. Herman, for defendant in error:

It would have been improper to permit testimony as to other heating and ventilating systems of a similar character in other buildings, for the purpose of showing the kind and character of management necessary in this particular instance.

Watkins v. Phelps, 165 Mich. 180, 130 N. W. 618; Second Nat. Bank v. Wheeler, 75 Mich. 549, 42 N. W. 963.

The mere fact that the vendee allowed the furnace to remain in the schoolhouse, and made repeated efforts to get it to work, does not constitute an acceptance.

Phelps v. Whitaker, 37 Mich. 72; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881.

In actions to recover the price or value of goods sold, the burden is on the plaintiff to prove that the goods delivered or tendered complied with the contract.

35 Cyc. 565.

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found it sound and sweet, it seems reasonably fair to say that the flour was probably good. But if, on the other hand, while the miller offers no evidence except that all his flour was of one grade, a dozen of his customers declare that the flour was bad, the badness of the flour is almost a certainty. If the maker of a harvester proves that he sold a hundred harvesters of the same pattern that season, and the buyers testify that these all worked well, this in the first place is positive proof that there is no defect in the design of the machine And does it not tend also to show that the machines in general are carefully made and carefully looked over before shipment? But if, on the other hand, while the seller offers no evidence, many purchasers of such harvesters testify that their machines will not work, this makes a strong probability of defect in design. These extreme illustrations, with evidence on a single side, would seem to indicate that the matter is practical rather than logical, except perhaps as to plan or design. Perhaps the seller at times may have the better chance to choose favorable witnesses. So, too, the buyer may not be able to come prepared to disprove the seller's evidence of instances of satisfied customers, nor the seller to disprove the evidence of other unsatisfied customers offered by the buyer.

"Evidence by comparison," while perhaps at first brushed aside as *res inter alios acta*, has made its way in the courts. And now, by the general weight of authority, proof of quality by comparison is admissible, provided the similarity of the subjects of comparison is reasonably sufficient to give the result of the comparison sound probative force. There are, however, some cases which hold that evidence by comparison does not prove quality.

When the thing sold is in common use, with no marked variety in the circumstances of its use, the question is in its simplest form and concerns the extent of similarity in the two objects. But the question becomes complex where the thing sold requires for its successful use or operation experience or skill, or where the results are particularly dependent on the different circumstances of the case.

This note attempts in a general way to treat separately the cases of simple things from those more complex in nature or in operation. This division is, of course, wholly arbitrary. Even things as simple as seeds or plants require similarity of soil and treatment to be valuable as subjects of comparison.

This note excludes comparison with the sample where goods are sold by sample, and generally cases where the warranty itself requires comparison, as, for example, where by the contract cotton is to be of the usual quality grown in the vicinity, or where the warranty is that the thing sold will be as good as any other on the market.

II. Evidence by comparison to show efficiency or excellence.

a. Things in common use or simple in operation.

Where similarity is sufficient.

In the case of things in common use or of those simple in operation, where the similarity is sufficient, the excellence of the article sold may be shown by proof of the excellence of another article.

Thus, it has been held that the seller may show the excellence of—

—shovel handles sold under a contract providing for many deliveries, by proof that, during the period of those deliveries which were complained of, he delivered handles of the same kind and quality to a third person, and that the handles so delivered to such third person were good, Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116;

—potatoes sold, by proof that about the time of delivery a witness saw the plaintiff digging and packing potatoes in good condition, there being evidence tending to show that the land was all of about the same quality and the potatoes all about the same, Yick Sung v. Herman, 2 Cal. App. 633, 83 Pac. 1089, 1091;

—sausages sold, alleged to be spoiled, by

Brooke, J., delivered the opinion of the court:

The parties entered into the following contract:

The Waterman-Waterbury Company, Lansing, Michigan.

Gentlemen:

Please install in our schoolhouse, in district No. 2, township of Wyoming, county Kent, state of Michigan, one Waterbury heating and ventilating system, style C, size 24, for which, on January 10, 1913, we agree to pay the sum of $120 or issue a school warrant on January 10, 1913, drawing 6 per cent interest. We agree to transfer the Waterbury system from the freight depot to the schoolhouse, to furnish a man to assist the regular setter in installing the Waterbury system, and to see that the doors, windows, ceilings, etc., are reasonably tight, when such repairs are found necessary to the proper heating and ventilating of the schoolroom. The Waterman-Waterbury Company guarantee that this system will be constructed of first-class material, the same as described in the catalogue, and manufactured in a careful, workmanlike manner, free from defective material. The Waterman system is further

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proof that the sausages in question and certain other sausages retained by the seller were all of the same lot, made at the same time, and that those so retained by him were in good condition, Luetgert v. Volker, 153 Ill. 385, 39 N. E. 113;

—a composition for sheep dipping, alleged to have poisoned and killed the buyer's sheep, by proof that the seller had sold enough of the composition to dye over 100,000 sheep and had never known of any injury from its use, Black v. Elliot, 1 Fost. & F. 595 (where, however, the jury found for the buyer);

—a safe as fireproof, by showing that other safes made by the makers of the safe in question upon the same plan and theory of construction had passed through fires with the contents properly and adequately protected, Barnett v. Hagan, 18 Idaho, 104, 108 Pac. 743 (holding it error to exclude the evidence).

Upon an action for the price of coal which the defendant claimed was worthless, it was held to be error to exclude the plaintiff's evidence that on a prior occasion the defendant had accepted from the plaintiff and paid for coal of the same quality, as it tended to disprove the contention that the coal was worthless. Corona Coal & I. Co. v. Copeland, 7 Ga. App. 481, 67 S. E. 203. Compare Bloom's Son Co. v. Haas, infra, next subdivision.

In Wilcox v. Henderson, 64 Ala. 535, it was held to be error to reject the offer of the seller of the guano in question to show that other neighboring planters had used guano bought by them from him at about the same time he sold to the defendant, and with good results and with a greatly increased yield of their crops, as this was not a case of proving the quality of one manufacturer's article by proof of the quality of another similar one; it was rather proving the quality of a compounded mass by showing the quality and usefulness of different parts of it. The court stated also that the buyer should be permitted to show that other planters bought and used the same guano in the same year without profit or with little profit.

In Webster v. Moore, 108 Md. 572, 71 Atl. 466, it seems to be held that it was proper for the seller of No 3 Standard (canned) tomatoes to show that he packed only this one grade and quality of goods that year: that the work was carefully done and supervised; that a disinterested and competent person examined samples from all the cases packed in addition to those delivered to the defendant and pronounced them all to be good No. 3 Standards, and that a certain other person bought from him certain cases of tomatoes which he found to be satisfactory, that is to say, "good quality of Standards;" but that it was error to permit the plaintiff to testify that part of the goods destined for the defendant, but not delivered, were sold to other parties "as Standard No. 3 tomatoes, and were accepted by them as such," and that the other goods packed in the same year were sold "for No. 3 Standards, and at No. 3 Standard prices" without complaint as to any; as to sell an article as of a certain grade is not proof that it is of such grade.

Where similarity is insufficient.

Conversely, in the case of things in common use or simple in operation, where the similarity to the object of comparison is insufficient, the excellence of the article sold may not be shown by proof of the excellence of such object of comparison.

Thus, it has been held that the seller may not show the excellence of—

—the quality of shoes sold, claimed to be inferior and unsuited to the buyer's retail trade, by proof that other persons had handled shoes of the same kind and grade without making any complaints to him on the subject, Hill v. Hanan, — Tex. Civ. App. —, 131 S. W. 245 (as conditions and circumstances should be identical or so similar that the evidence will reasonably tend to establish the truth);

—iron as not containing an excess of phosphorus, by showing the amount of phosphorus contained in iron made in the same way in the same furnace from the same mine in other years, as this was not sufficient proof that the iron was of the same kind as that in controversy, Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 30 L. ed. 982, 7 Sup. Ct. Rep. 958;

—the condition in which rice was de-

guaranteed, with proper care in operation, to heat the schoolroom to 70 degrees during the coldest weather, and to provide good ventilation during school hours.

Zack Van Dam, Director.
Peter Kelder, Moderator.
Henry Deker, Treasurer.

Date May 27, 1912.
Given at meeting of school board.

Under this contract the plaintiff installed a heater in the schoolhouse of defendant, being assisted in the installation by Henry Deker, defendant's treasurer. On July 31st, after installation, the job was accepted as follows:

Folio No. 1097. Co. Kent, Twp. Wyoming. Dist. No. 2. Director, Zack Van Dam. Address, Grand Rapids, No. 8 Tel. Treasurer, Henry Deker. Address, Grand Rapids, No. 8 Tel. Moderator, Peter Kelder. Address, Grand Rapids, No. 8 Tel. Director lives ¼ mile east of schoolhouse. Location of schoolhouse. Take Holland interurban to Wyoming park, then 1½ miles from station. On diagram show location of chimney, doors, teacher's desk, plant, and wall through which intake enters. Construction

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livered to the carrier for the buyer, by proof that at the time of such shipment the seller made other shipments to other parties out of the same lot of rice in bulk in his warehouse, and that these were paid for without contention; nor by proof that a few days earlier he had shipped the said buyer another lot of rice out of the same bulk in his warehouse, which said buyer had accepted and paid for without complaint, Bloom's Son Co. v. Haas, 130 Mo. App. 122, 108 S. W. 1078 (compare Corona Coal & I. Co. v. Copeland, supra, preceding subdivision);

—two mules as being sound in that they were free from lung fever, by testimony that none of the mules sold at the auction sale at which the said two mules were bought had lung fever, although one of the two mules had since died of lung fever, as no contention was made that the disease was contagious or infectious, Moulton v. Gibbs, 105 Ill. App. 104 (compare, as to contagious disease, Bradley v. Rea, infra, V.);

—wood sold, a portion of which was claimed to be unmerchantable, by showing that the seller, shortly before the trial, in company with another witness, examined a lot of wood which was the same kind of wood and was cut from the same place out of which the wood furnished the defendant was taken, and found that it was of a like quality therewith, and that it was cut about the same time and the other witness testifying as to the quality of this wood so examined by him, this not being any of the wood which was delivered to the buyer, Barr v. Borthwick, 19 Or. 578, 25 Pac. 360.

The seller of a horse may not show that it will "gait" with the buyer's mare, or will "gait" with it in the plow, by proving that the horse sold would "gait" with a third horse which "gaited" with the mare in the plow. Lore v. Frogge, 19 Mo. App. 368.

In Hutchinson Lumber Co. v. Dickerson, 127 Ga. 328, 56 S. E. 491, where only the headnote is reported, it was held that "where the proprietor of a sawmill sold certain lumber [to be air dried and of a specified character], and it was in controversy whether such lumber came up to warranty, it was not competent to show that he had sold lumber of the same kind to other customers, and that all of the boards 'went through without any trouble whatever, with the exception of this lot.' Whether other customers accepted boards sent to them without trouble did not show whether the boards sold to the defendant complied with the warranty made as to them."

In Henkel v. Burke, — Me. —, 10 Atl. 249, the report does not indicate whether the court excluded the evidence because it was evidence by comparison, or because the similarity was not sufficient. It was there held that evidence of the buyer of baking powder that it is of poor quality may not be rebutted by proof that at the same time as the sale in question the seller made other sales of the same grade of powder to various dealers, and that purchasers from such dealers found the powder of good quality.

In Holcombe v. Hewson, 2 Campb. 391 (which was not a case of warranty), upon the question of the quality of beer furnished by the plaintiff to the defendant, Lord Ellenborough declined to permit the plaintiff to show that he had supplied excellent beer to others, saying: "This is *res inter alios acta*. We cannot here inquire into the quality of different beer furnished to different persons. The plaintiff might deal well with one and not with the others."

While the scope of this note excludes cases where the goods were sold by sample, the two following cases of that nature may be here referred to:

In an action for the price of cigars sold by sample, where it was objected that the goods were not up to the sample, being damp and unfit for use, it was held error to permit the plaintiff to show that at about the same time he furnished the cigars in question he also furnished cigars of the same kind to other purchasers who made no complaint that the cigars received by them had the defect specified by the defendant, as this was *res inter alios acta*, and wholly incompetent. Barton v. Kane, 17 Wis. 38, 84 Am. Dec. 728.

In an action by the buyer for the portion of the purchase price paid for hominy bought by sample, which he claimed was unfit for use, it was held error to permit

frame. Shipped to Zack Van Dam. Sta. Grand Rapids, *via* Style C. Size 24. Was anything missing? Remarks: Building to be repaired and storm porch put on. The workmanship on this job is satisfactory to me.

Henry Deker, Treasurer.

July 31, 1912.

E. L. Griffith, Setter.

Thereafter, during the winter of 1912–13, the heating plant was used to some extent by the defendant. Under a claim that it did not operate satisfactorily, the defendant refused to pay therefor, and the plaintiff thereupon brought suit. Defendant filed a plea of the general issue, and gave notice thereunder that defendant would seek to recoup damages against plaintiff for a breach of the warranty contained in the contract in the sum of $300; the balance over and above the claim of the plaintiff to be certified in favor of defendant. Under these pleadings, the defendant recovered a verdict against plaintiff of $75. Judgment having been entered thereon, plaintiff reviews the case in this court by writ of error, raising two questions only.

The first question is covered by assignments of error numbered 1, 2, 3, and 4, and relates to the ruling of the circuit court to the effect that plaintiff could not show that other apparatus similar in character to the one which plaintiff had sold defendant, when properly operated, satisfactorily heated the buildings in which they were installed.

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the defendant to show that the hominy was bought by it from a third party, from whom the samples came on which the sale was made, and that it had sold other hominy bought from such third party and had had no unusual complaint therefrom, there being nothing to show the similarity of the hominy shipped with the samples or with that sold to others. T. S. Reed Grocery Co. v. Miller, 36 Okla. 134, 128 Pac. 271.

b. Things particularly affected by circumstances of use or operation.

1. In general.

The question, as above indicated, becomes complex when the thing sold is a machine or other article particularly dependent upon the skill with which, and the special circumstance under which, it is used or operated.

2. Where similarity is sufficient.

(a) In general.

The excellence or efficiency of a thing not simple in use or operation may be shown by the excellence or efficiency of a similar thing, provided the similarity of the subjects of comparison and of the circumstances of use or operation at the times of such comparison is reasonably sufficient.

Illustrations.

Thus, it has been held that the seller may show—

—the excellence of automatic separators to be used on natural gas wells, by proof that other similar separators had worked properly under similar conditions, Findlay v. Pertz, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 681;

—the efficiency of a patent ditching machine warranted to do certain work in a certain county in Ohio, by proving the quantity and quality of work done by machines of the same pattern and construction in a certain county in Illinois, Baber v. Rickart, 52 Ind. 594 (judgment for the buyer reversed on other grounds);

—the excellence of the water cylinders of pumping machinery alleged to be too weak for the pressure put upon them by proving that it had put up in another place other pumps with water cylinders made from the same patents and identical in all respects to those in question, which operated successfully against a considerably greater static head, Ward v. Blake Mfg. Co. 5 C. C. A. 538, 12 U. S. App. 295, 56 Fed. 437;

—the efficiency of a certain attachment to the buyer's looms, by proving that a large number of these attachments were at work on another kind of loom, which, however, was similar to the buyer's loom in motion and also in the mechanical arrangement of the part where the attachment was applied,—the jury being instructed that if in all particulars respecting the use of these attachments they were not satisfied that the two looms were substantially the same, they could draw no comparison, Brierly v. Davol Mills, 128 Mass. 291. See also Beach v. Huntsman, next subdivision.

While cases of evidence of experiments are excluded, it may be noted that in Davis v. Oakland Chemical Co. 121 App. Div. 242, 105 N. Y. Supp. 693, an action for damages by the buyer of a bleaching liquid called "Perozone," because it ruined his goods, one of the seller's officers testified that after the alleged damage the seller had successfully bleached in its factory samples of the buyer's goods with Perozone from its "regular factory stuff," but probably not out of the same "batch" as sold to the buyer, and it was held to be error to refuse to permit the seller to show that the liquid used did not differ from that sold to the buyer.

In Barber v. Rickart, supra, the court said as to evidence by comparison of patent ditching machines: "The weight of such evidence would greatly depend upon the difference in the soil and the other surroundings of the two places. Such a machine might perform well in one character of soil, and yet would fail in another and different character of soil. Evidence ought not to be excluded because it is entitled to but little consideration and weight."

Bearing in mind that it was the contention of the defendant that, though properly operated in accordance with the instructions of the plaintiff, the heater would not heat the defendant's schoolhouse in accordance with the terms of the guaranty, and that the plaintiff claimed that any failure of the heater to give the requisite service was attributable solely to a failure on the part of the defendant to properly operate the same, we are of opinion that this testimony was admissible. Avery v. Burrall, 118 Mich. 672, 77 N. W. 272; 17 Cyc. 289.

The second point raised by the plaintiff is that the court erred in instructing the jury as to the burden of proof. Upon this question the plaintiff submitted the following request:

"Gentlemen of the Jury: On the question whether or not the express warranty contained in the contract has been broken on this branch of the case, the burden of proof is upon the defendant. The defendant must prove, by preponderance of the evidence, that the plaintiff has broken its warranty, and that the defendant has suffered damages thereby. If you find, considering all the evidence that has been introduced on this part of the case, that the defendant has failed to establish, by a preponderance of the proof, that the plaintiff has broken its warranty, then you will find for the plaintiff the amount of its damages, which would be the purchase price of the furnace. Now this involves proof of these propositions, which are included in the condition

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(b) The issue of plan or design.

Showing good design by comparison.

Where a machine or appliance is attacked as faulty in design or plan, evidence that other machines or appliances of the same pattern will work efficiently properly tends to show that the fault is not in the design or plan. See the cases cited in the preceding subdivision.

This has been held where it was claimed that there was some fault in the plan or design of a harvester (Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88), or that a hub machine was constructed upon a defective principle or had an inherent error in mechanism (Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561, as stating the rule). So, the seller of a hot air furnace may show (by the opinion of the janitor of a building having the same "make" of furnace) that such a furnace would work well if the ashes were not allowed to accumulate and it were otherwise properly cleaned out. Glaeser v. Hoeffner, 68 Mo. App. 158. So, to rebut evidence that a harvester could not be made to do good work, particularly in short grain, because of a defect in the design, the seller may show that other machines of the same manufacture and pattern, and exactly like the one in question, did good work under the same conditions. Paulson v. D. M. Osborne & Co. 35 Minn. 90, 27 N. W. 203.

Upon an action to foreclose a mechanics' lien for erecting a furnace in the defendant's house under contract, where there was testimony that the furnace did not supply heat as agreed, it was held proper to admit evidence that "other furnaces installed by" the plaintiff "furnished heat satisfactorily," as this showed "the capacity of the furnace to furnish the guaranteed amount of heat." Beach v. Huntsman, 42 Ind. App. 205, 85 N. E. 523, modifying the opinion reported in 83 N. E. 1033.

But a claim that a construction is of defective design cannot be rebutted by proof that similar constructions of a different class worked well. Thus, where the contract was that the defendant was to construct a boiler according to the plaintiff's plans, and the defense was that a leak in the tubes was owing to defective design, it was error to permit the plaintiff to show that he had had no complaint from ten or twelve much smaller boilers of the same plan made for him by others, and apparently sold by him, as the defendant could not be called upon thus to show that the plan was defective as applied to much smaller boilers than the one in controversy. Watson v. Bigelow Co. 77 Conn. 124, 58 Atl. 741.

In Findlay v. Pertz, supra, preceding subdivision, the court approved the following charge in relation to the evidence by comparison of automatic separators to be used on natural gas wells: "The manner in which these machines did their work elsewhere is not proof that these machines did their work well at Findlay, but is a fact important and material, if you find the separators were all constructed alike, as showing whether the Findlay machines were properly put on, properly cared for, and fairly tested. Because two or more machines equally well made, and similarly constructed and used, ought to work alike, and if one worked well at Kokomo, Indiana, and another failed to work at Findlay, and both were tried and used under substantially similar conditions, the fact that the Kokomo separator did work is a circumstance which ought to help you very much in deciding whether the failure of the separators to work at Findlay was from plaintiff's failure to properly make them, or from defendant's failure to properly put them upon the gas wells, and properly care for and use them after they were attached."

In Glaeser v. Hoeffner, supra, the court said: "It was a part of the plaintiff's case to prove that the furnace was constructed on correct principles, and when properly set up and properly attended to would produce good results. The testimony of the witness bore directly on the last proposition and indirectly on the first, which made it relevant, and therefore the defendant's objection on the ground of irrelevancy was properly overruled."

of the warranty: First. Whether the material and workmanship used in the construction of this heating plant were of the best of their respective kinds, and that the installation was performed in a workmanlike manner. Second. Whether the apparatus, as a whole, was capable of warming the schoolroom to a temperature which the guaranty provided when the proper fuel was used and the furnace was properly managed. Now, if neither one of these propositions has been established by a preponderance of evidence, you should consider that the defendant has failed to establish its contention upon this branch of the case, and you should find for the plaintiff the amount that is due it under the contract, the purchase price of the furnace."

The court refused to give this request, but instead charged the jury as follows: "Many of the facts are not in dispute. The contract between the parties is in writing, and its terms and provisions are therefore not in dispute. It is not disputed that the plaintiff installed the Waterbury heating and ventilating system of the style and size mentioned in the contract. It is not disputed that the furnace was constructed of first-class material, as required by the contract. The claim in dispute is as to the efficiency of the system to maintain in the coldest weather, with proper care in operation, a temperature of 70 degrees. Under its contract the plaintiff was required to install a heater that would heat the schoolhouse to 70 degrees during the coldest

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Compare, as holding or suggesting that evidence of the good working of other machines of the same pattern does not show that the design is efficient, Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963, infra, IV.; Fox v. Stockton Combined Harvester & Agri. Works, 83 Cal. 333, 23 Pac. 295, infra. IV.; Haynes v. Plano Mfg. Co. 36 Tex. Civ. App. 567, 82 S. W. 532, infra, IV.

—theory that the evidence proves the character of management, and not the quality of the design.

Some of the cases in Michigan and Kansas have entertained the theory that success or failure of machines of a similar pattern proves nothing as to the design or plan of the machine, but may prove something as to its handling or management. As will be seen infra, IV. it seems to be the theory in Michigan that you may not prove the good design of a machine or appliance in controversy by the success of other machines or appliances of the same pattern but you may prove that the machine or appliance in controversy has not been properly handled by proof that machines or appliances of the same pattern when properly handled have produced good results.

Thus, in Avery v. Burrall, 118 Mich. 672, 77 N. W. 272, cited in WATERMAN-WATERBURY CO. v. SCHOOL DIST., where the seller of a steam heating plant was allowed to show its efficiency with soft coal, by proving that other boilers of the same character were successful when burning soft coal, the buyer claiming that the plant did not heat the premises properly with soft coal and required hard coal, the court referred to Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963, infra, IV., and said: "It is undoubtedly true, as stated in the case just cited, that it would not follow that, because one machine did good work, another similar to it would also do good work, and the court so stated when he admitted the testimony, and he allowed the testimony only for the purpose of showing the kind and character of the fuel necessary to be used, and the kind and character of management necessary. We think the testimony, with the limitation put upon it by the judge, was competent. It was the claim on one side that the boilers were properly managed, and upon the other side that they were not, and that question was passed upon by the jury in arriving at their verdict."

So, in the WATERMAN-WATERBURY CASE it is apparently to prove that the apparatus sold was badly managed that evidence of the success of a similar apparatus is allowed. The court states that the plaintiff claimed that any failure "was attributed solely to a failure on the part of the defendant to properly operate the same." It would seem to be sufficiently obvious in this, as in the other cases, that such evidence is no evidence of bad management unless it is evidence that apparatus of the same pattern if properly handled will do good work, that is that it is of good design.

The Kansas cases will be found in the next subdivision.

See also in this connection infra, IV.

Showing bad design by comparison.

While it is intended generally to treat separately the question of evidence by comparison to show unfitness, it is convenient to bring together here the cases where there was claimed to be a defect in design, whether the intent was to show fitness or unfitness.

Referring to what is said in the preceding subdivision with reference to proof of excellence by comparison, it would seem similarly to be true that proof on the part of the buyer that other like machines work badly tends to prove, if anything at all, that the machine is not efficient in design or construction. It does not seem that the evidence can prove that the management or handling was good until after we have reached the idea that the machine is bad in nature or construction, and even then we are left without any probative fact at all as to whether the handling actually was good or bad, but simply conclude that the

weather, provided proper care was used in its operation. Now the plaintiff claims that it has installed a furnace of such efficiency; the defendant says it has not. You will determine from the evidence what the facts are. Did it maintain a temperature of 70 degrees? Was proper care used in the operation of the furnace? If the furnace, properly operated, would not heat the schoolroom to 70 degrees during the coldest weather, and when I use the term 70 degrees, it is used as understood and explained to you by counsel. Substantially 70 degrees is a proper heat, proper temperature for a schoolroom, and that was what the parties contemplated. If the furnace, properly operated, would not heat the schoolroom to 70 degrees during the coldest weather, then it was not such a furnace as the plaintiff contracted to furnish, and the plaintiff would not be entitled to recover the purchase price, under the circumstances of this case. If, on the other hand, the furnace, properly operated, would maintain a temperature of 70 degrees during the coldest weather, then the plaintiff would be entitled to recover the purchase price, which was fixed by the contract at $120. (So, before the plaintiff is entitled to recover in this case, it must convince your minds, by a fair preponderance of the evidence, that it complied with its contract by furnishing a furnace that would, if properly operated, maintain a temperature of 70 degrees in the coldest weather.) If you find that the plaintiff did furnish such a furnace, your

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handling was immaterial as the machine "would not work anyway." In the first of the Kansas cases, the evidence was excluded as there was no claim of defective design, but in the Lyon Case, infra, the evidence was held admissible solely as bearing upon the question of handling or management. The later cases seem to have drifted away from this doctrine.

Where the buyer claims that a machine or apparatus is defective in design, evidence that other machines or apparatus of the same pattern will not do the work for which the machines or apparatus are designed tends to show that the thing in controversy is defective in design.

In Hazlehurst Compress & Mfg. Co. v. Boomer & B. Compress Co. 1 C. C. A. 102, 2 U. S. App. 139, 48 Fed. 803, in affirming a judgment for the seller of a cotton press where the buyer had offered evidence to show breach of guaranty, that other presses sold to other persons had not been satisfactory, the court stated that this testimony "is not incompetent when it is shown that the presses were of the same make and pattern, and were operated under similar circumstances and conditions" but pointed out that in the peculiar circumstances of the case the evidence did not establish the breach.

In Blackman v. Collier, 65 Ala. 311, it was held that to show the unfitness of the machine in controversy, it is relevant to prove that a better machine of the same general description, built by the same maker, was not equal to the representations made of the one in controversy, and that the weight of the evidence "may be affected by the differences between the two machines, but not its admissibility." (While the holding is clear, it seems possible from the report that the court misunderstood the testimony.)

See also, as recognizing the rule, Marsh v. Snyder, 14 Neb. 237, 15 N. W. 341, infra, III. b, "Where similarity is insufficient."

In Craver v. Hornburg, 26 Kan. 94, upon the fitness of a Randolph header it was held that it was not relevant to give evidence that other Randolph headers had a defect similar to the one in the machine in controversy, where it was not claimed that the Randolph header as a machine was unfit for the purpose for which it was designed, for such evidence would lead the jury to suppose that the trouble arose from defect, and not from mismanagement, and the seller could not be ready with proof that in other cases the trouble had arisen from mismanagement, and not defect. This case is distinguished in the Sandwich Case, infra, on the ground that it was not shown that the headers were of the same pattern or series.

But in Lyon v. Martin, 31 Kan. 411, 2 Pac. 790, the court, in laying down the rules for the conduct of a new trial in an action on notes given in payment of a harvester warranted to be well built, of good material, and capable of cutting, if properly managed, from 10 to 15 acres per day, stated that the trial court went outside the scope of the warranty in allowing an inquiry into the design, and a comparison of that design with other machines intended for similar work, and said: "If it failed to do such work, was it, or was it not, properly handled? Perhaps, for the purpose of tending to show that it was properly handled, testimony was admissible that other like machines, in the hands of parties familiar with farm machinery, also failed to do the work warranted. Of course, this latter testimony is a little remote, but we think it was competent as tending to sustain any direct testimony of defendants as to the manner in which this one was managed and handled."

While part of the above extract is quoted in Sandwich Mfg. Co. v. Nicholson, 36 Kan. 383, 13 Pac. 597, the actual decision seems to follow the result rather than the reason of the Lyon Case, for in the Sandwich Case it was held that it was proper for the buyer to show that a binder of the same design on a harvester sold to a neighbor of the defendant did not work properly in the hands of persons familiar with farm machinery, in a case where the buyer claimed that the defect was in the design of the binder, and that a machine so designed

verdict should be for the plaintiff in the sum of $120 and interest. If you find that it did not furnish such a furnace, your verdict should be no cause of action, unless you also find that the defendant has suffered damages by reason of the plaintiff's failure to comply with its contract, in which case you will render a verdict for such damages as the evidence shows it has suffered. These damages, the defendant claims, amount to $75. The plaintiff claims, if you find for the defendant damages, such damages would not exceed $19.59. On this question of damages claimed by the defendant, the burden of proof is upon the defendant to show its damages by a fair preponderance of the evidence."

In a case like the present, where the article contracted for was delivered by the plaintiff and accepted by the defendant as in accordance with the contract and warranty, and the defendant relies upon an affirmative defense, it is clear that the burden of proof rests upon the defendant to establish the defense relied upon,—in this case a breach of the warranty as to what the furnace would do under proper care in operation. Keystone Mfg. Co. v. Forsyth, 123 Mich. 626, 82 N. W. 521; Avery v. Burrall, supra; 35 Cyc. 457.

Judgment reversed, and a new trial ordered.

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would not do the work for which it was designed, and the seller claimed that the machine was not properly handled. The court distinguished the Craver Case, supra, as there it was not shown that the machines were of the same pattern or series.

And the earlier reason seems to have entirely disappeared in Dempster Mill Mfg. Co. v. Fitzwater, 6 Kan. App. 24, 49 Pac. 624, where, in sending the case back for a new trial on other grounds, the court said in an action for the purchase price of a well-boring machine: "There is another contention, and that is that the court erroneously admitted proof that other machines of the same kind, made by the plaintiff, and handled by competent parties in the same vicinity, failed to do the work for which they were designed, and for which the defendants purchased this machine. This evidence was admissible under the rule laid down in Lyon v. Martin, supra.

It may be noted that in Showen v. J. L. Owens Co. — Mich. —, 148 N. W. 666, it was held that the assignee of the buyer of a large number of threshing machines bought and resold, and all in controversy, could show common, inherent mechanical defects which produced common results, by proving, by some of the sub-buyers, defects and breakages in operation, and by other persons that machines returned by other sub-buyers had, when observed in the shop, similar breakages and defects, as this testimony raised the presumption or inference that such common results were produced by a common cause.

3. Where similarity is insufficient.

In the case of things not simple in use or operation, where the similarity is insufficient, the excellence of the article sold may not be shown by proof of the excellence of another article.

Thus, it has been held that the seller may not show the excellence of a machine for making wheels, by showing the working of other machines and the help employed on them, when it appears that the other machines were not like the one in suit. Locke v. Priestly Exp. Wagon & Sleigh Co. 71 Mich. 263, 39 N. W. 54.

In B. F. Roden Grocery Co. v. Gipson, 9 Ala. App. 164, 62 So. 388, an action for the price of an automobile, where the defense was breach of warranty, it was held that it was proper to exclude evidence whether any complaint had been made of another car sold by the plaintiff to a stranger. (As this ruling was made in affirming a judgment for the defendant, perhaps it may be surmised that the excluded evidence was offered by the plaintiff.)

In an action to recover the price paid for filters as not in accordance with the warranty, which was that the Chicago river water and the condensed water would be rendered clear and suitable for the plaintiff's boilers, where it appeared that the water at their factory "was the worst of any place in the city," it was held that the trial court properly refused the defendant's offer of evidence that other filters of the same make, constructed by the same defendant, used for the purpose of filtering Chicago river water under substantially the same conditions as those obtaining in the plaintiffs' establishment, did their work to the satisfaction of the parties, and without objection on their behalf. The court said: "It is difficult to see how evidence of the operation of other filters could throw any light on the issue in this case, the question here being, Did these filters perform the work which they were guaranteed to perform? . . . What was expected of the filters under the guaranty in those cases does not appear. Was the water furnished for use in boilers? That other parties were satisfied, or their failure to make objection, does not tend to prove that the water furnished to them was like that which appellant guaranteed to furnish appellees. The offer was not to show that another filter constructed exactly like these, for the purpose of filtering water under identical conditions obtaining in appellees' establishment, so purified the water that it was made suitable for boilers." O. H. Jewell Filter Co. v. Kirk, 200 Ill. 382, 65 N. E. 698.

A warranty that a roasting and separating plant will handle certain ores is not shown to be fulfilled by evidence as to how

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it handles certain other ores. Trego v. Roosevelt Min. Co. 136 Wis. 315, 117 N. W. 855.

It may be here noted that upon an action for the price of water wheels which the plaintiff agreed to set up, he further agreeing that if they did not, after reasonable trial, perform the work required, he would take them out and replace the old wheels, it was held that the plaintiff could not show, upon the question of the capacity of his wheels, that wheels of the same kind under different circumstances had performed work of a different nature, which experts estimated required double the amount of power required for defendant's work. Bastion v. Flanders, 1 Thomp. & C. 12, Addenda.

Perhaps, the decision is intended to be generally against evidence by comparison, in Brummett v. Nemo Heater Co. 177 Mass. 480, 59 N. E. 58, where, in an action by the purchaser to recover for breach of an agreement to furnish a system of heating in his apartment house, it was held that the testimony that the system had worked well in other houses was rightly excluded, as such evidence was remote from the issue, which was whether the heater as constructed in this house was capable of warming the rooms mentioned in the contract. The court said: "The introduction of such evidence would have raised many collateral issues that could not properly be tried in this action."

III. Evidence by comparison to show unfitness.

a. Things in common use or simple in operation.

Where similarity is sufficient.

In the case of things in common use or of those simple in operation, where the similarity is sufficient, the unfitness of the article sold may be shown by proof of the unfitness of another article.

Thus, it has been held that the buyer—

—of seed might show that some of the seller's seed "had at the same time" and kept in the same manner, with that sold, would not germinate, Buchanan v. Collins, 42 Ala. 419;

—of seed wheat sold for White Australian, after the seller had testified that he sold wheat from the same lot to a third person, might show by such third person that he had bought from such seller, "near to" the time of the sale in controversy, wheat which proved to be other than White Australian, Moody v. Peirano, 7 Cal. Unrep. 247, 84 Pac. 783 (judgment for buyer reversed on other grounds);

—of fruit trees nearly all of which died, although she used due care in planting and cultivating them, might show that of "two other lots of apple trees" bought from other nurseries the same fall and set out and cared for in the same manner as those in controversy, the greatest loss was 25 per cent, De Foe v. Williams, 99 Mo. App. 24, L.R.A.1915B. 72 S. W. 475 (the court considering the evidence very persuasive against the quality of the trees in issue).

So, it was stated in Wilcox v. Henderson, 64 Ala. 535, supra, II. a, that the buyer of the guano in question should be permitted to show that other planters bought and used the same guano in the same year without profit or with little profit.

It may be noted that it was held in Pike v. Fay, 101 Mass. 134, that the falsity of representations as to the quality of willow cuttings might be shown by proof that those tendered to the defendant were part of a general lot sent to a depot, out of which cuttings were delivered to other purchasers, which were similar to those offered to the defendant, and inferior. (But a judgment for the defendant was reversed on other grounds.)

Where similarity is insufficient.

Conversely, in the case of things in common use or of those simple in operation, where the similarity is insufficient, the unfitness of the article sold may not be shown by proof of the unfitness of another article.

Thus, the buyer may not show that corduroy bought by him by sample was bad or unsatisfactory, by proof that other corduroy received from the same seller under similar orders was unsatisfactory, when there is no evidence that the lots of clothing were similar in quality. Kupfer v. Michigan Clothing Co. 141 Mich. 325, 104 N. W. 582.

So, the buyer of a carload of onions may not show that the onions were not ripe when harvested, nor properly cured, by proof that other onions forwarded at the same time by the same seller to other parties were not ripe nor properly cured, when there is no evidence that the onions sold to others had been subject to the same conditions as those in controversy. Lake v. Clark, 97 Mass. 346. See infra.

Similarly, in Luetgert v. Volker, 153 Ill. 385, 39 N. E. 113, cited supra, II. a, it was also held that there was no error in rejecting evidence offered by the defendant that another person purchased of the plaintiff sausages which were sour and spoiled when they reached their destination, the court considering that the evidence would have been admissible if the defendant had offered to prove that these sausages were made by the plaintiff, or belonged to the same lot which the defendant purchased.

So, that oranges were green and unmerchantable is not shown by proof that other parties at about the time of the shipment of such oranges had purchased and received from the same seller green and unmerchantable oranges, when the evidence does not show that the various lots came from the same grove as those in controversy, or that they were of the same variety, or grown, handled, and shipped under similar conditions and circumstances. Newton v. Bayless Fruit Co. 155 Ky. 440, 159 S. W. 968.

So, it was held in Cook v. Sheehan, 16 S. D. 92, 91 N. W. 452, that the defendants, when sued for the price of 4,000 cigars deliverable some weeks after the contract, could not show that on the same day they contracted for 1,000 cigars of the same brand, sold by the same sample for immediate shipment, and that such 1,000 cigars were of a bad quality and inferior to the sample, as this was no evidence of the quality of the 4,000 lot, the court stating that, had it been shown that the 1,000 cigars and the 4,000 had been taken from the same lot, the evidence might have been admissible.

Lake v. Clark, supra, is a doubtful case on the facts, but the supreme court held that the trial judge had the option to pass upon the preliminary question whether the other onions had been subjected to the same conditions as those in suit, or in his discretion leave it to the jury, and, he having found that there was no evidence that they were so subjected, no exception lay to his decision. There was evidence that all the onions were grown by the buyer and another person, that they were taken from the same lots, and that those for the third parties and those in controversy were all loaded indiscriminately into three cars, some of each being put into each car.

b. Things particularly affected by circumstances of use or operation.

Where similarity is sufficient.

The unfitness of a thing not simple in use or operation may be shown by the unfitness of a similar thing, provided the similarity of the subjects of comparison, and of the circumstances of use or operation at the times of such comparison, is reasonably sufficient.

Thus, in Ganson v. Madigan, 13 Wis. 67, it was held that the defendant, the buyer of a reaper, might show that one of a lot of twenty reapers was bought by a neighbor and was not such a one as the defendant ordered, the seller having already shown that he offered to the defendant any one of the twenty reapers, stating that they were all alike. It may be noted that at the time of the offer it seems that the pieces of the various reapers, while separately numbered, had not been assembled.

While it is not intended generally to go into the question of false representations, it may be noted that in Waters Patent Heater Co. v. Smith, 120 Mass. 444, it was held that the defendant, the buyer of a heater, was properly allowed to show that other heaters made and sold by the plaintiff to other parties, identical in construction with the one in question, transmitted oil to and injured their boilers, this being in support of his claim that the heater was not as represented, and that he was induced to buy it by the false and fraudulent representation of the plaintiff's president as to the capabilities of the heater, particularly with respect to its capability of keeping oil from reaching the boiler.

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The issue of plan or design.

For cases on showing a defect in design by the bad working of similar machines, etc., see supra, II. b.

Where similarity is insufficient.

Conversely, in the case of things not simple in use or operation, where the similarity is insufficient, the unfitness of the article sold may not be shown by proof of the unfitness of another article.

Thus, the unfitness of a gas engine built and erected by the plaintiff in the defendant's factory is not shown by evidence of the alleged unsatisfactory work of two other engines built by the plaintiff for a street car system, where there was no proof that they were the same as the one in suit, or intended for like use or were operated under the conditions of the guaranty in question. Hammerschlag Mfg. Co. v. Struthers-Wells Co. 83 C. C. A. 198, 154 Fed. 326.

So, the buyer of an ice box, in order to show that it was defectively built and unfit for its purpose, may not ask the seller whether he ever got or asked for his pay for another box sold to a third person; nor may he ask another purchaser how the box made for him by the same seller turned out, as both these questions raised matters entirely collateral to the issue on trial, and there was no evidence of any similarity in said boxes except that the work was done in a good, substantial, and workmanlike manner on all. Morawetz v. McGovern, 68 Wis. 312, 32 N. W. 290.

So, it is error to permit the buyer of an automobile to show that owners of the same model as the car bought by him, had trouble, and that their experiences were similar to his, as it was admitted by the seller that trouble would ensue if the cars were not operated under proper conditions, and to admit this character of evidence without stating under what conditions the cars were run is misleading and injurious. White Automobile Co. v. Dorsey, 119 Md. 251, 86 Atl. 617.

So, it is error to permit the buyer of a windmill to show that a certain other windmill of the same name, which another person had purchased from the same seller, was a failure, and not equal in capacity to another mill of a different pattern which he had afterward obtained to use on his farm, as, in order to make this testimony pertinent to the issue, some material defect as in the design or construction of the mills, which was common to both, must be shown. Marsh v. Snyder, 14 Neb. 237, 15 N. W. 341.

That an artesian well is defectively constructed is not shown by the flow of other wells without a radius of 4 or 5 miles, in the absence of evidence of the character of the water-bearing rock. Norbeck & N. Co. v. Mallock, 26 S. D. 54, 127 N. W. 471, where, however, it was also held that the contract did not guarantee the amount of the flow as compared with other wells.

Upon a contract to construct an artesian

well for the defendant, the plaintiff drilled and completed a well which was not satisfactory to the defendant, and thereupon, with the defendant's consent, in order to fulfil the contract, he drilled a new well filling up the first. On an action for the contract price of the second well, it was error to permit the defendant to show the defects in the first well. Ibid.

IV. Theory that evidence by comparison does not prove quality.

The cases holding this doctrine seem to be limited to the cases of machines and appliances, with the exception of two cases in Michigan, unless Henkel v. Burke, — Me. —, 10 Atl. 249, supra, II. a, is to be so construed. In Michigan, as will be seen, the court does admit evidence by comparison in the case of machines as showing the nature of the handling or management, but not as bearing upon the efficiency of design.

It has been held in a few cases that evidence that other machines or appliances of the same pattern worked well does not tend to prove the excellence of the particular machine in controversy. Byrne v. Elfreth, 41 Pa. Super. Ct. 572; Murray v. Brooks, 41 Iowa, 45; Osborne & Co. v. Simmerson, 73 Iowa, 509, 35 N. W. 615; D. M. Osborne & Co. v. Bell, 62 Mich. 214, 28 N. W. 841; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Watkins v. Phelps, 165 Mich. 180, 130 N. W. 619; Illinois Surety Co. v. Frankfort Heating Co. 178 Ind. 208, 97 N. E. 158 (so stating). Not so precise in terms, but probably open to a similar construction, are Fox v. Stockton Combined Harvester & Agri. Works, 83 Cal. 333, 23 Pac. 295; Haynes v. Plano Mfg. Co. 36 Tex. Civ. App. 567, 82 S. W. 532. See also Brummett v. Nemo Heater Co. 177 Mass. 480, 59 N. E. 58, supra, II. b, 3.

Similarly, it has been held that the unfitness of an appliance or machine is not shown by that of another appliance or machine. Lander v. Sheehan, 32 Mont. 25, 79 Pac. 406; Fetzer v. Haralson, — Tex. Civ. App. —, 147 S. W. 290 (*obiter*).

Thus, upon an action for breach of warranty upon the sale of a filter warranted to give clear and sparkling water, it is proper to refuse the defendants' offer to prove that "precisely similar filters of the same construction" furnished by them to other persons did good service, as the making and selling by the defendants of one or two or a dozen mechanically perfect filters does not necessarily show that every other one made by them is perfect. Byrne v. Elfreth, 41 Pa. Super. Ct. 572.

So, it has been held that the seller of a reaper or harvester—

—may not show that he has sold the same season sixty reapers of the same kind in the buyer's neighborhood, and that they have all worked well, as the other machines may have been well constructed, but this did not tend to prove that the one in question was not defective, Murray v. Brooks, 41 Iowa, 45;

—to prove that it worked as represented, may not show whether other machines made by him the same year, and the same as that in question, worked well or not, as the material question was not whether the machine was properly constructed, but whether it had had a fair trial, Osborne & Co. v. Simmerson, 73 Iowa, 509, 35 N. W. 615;

—may not show, as proving compliance with the warranty, that he had sold a hundred other harvesters that season, and that they had all worked well, that they were all duplicates, and that no other person had complained, as this did not tend to prove that the operation of the machine in question was as promised, D. M. Osborne & Co. v. Bell, 62 Mich. 214, 28 N. W. 841, citing Gage v. Meyers, 59 Mich. 300, 26 N. W. 522;

—may not show that other machines made on the same pattern and of like material did good work, as it involved an inquiry on an outside issue; the other machines may have worked well and still those in question may have failed to do so; the conditions may not have been the same and the other machines may have been "better constructed," Fox v. Stockton Combined Harvester & Agri. Works, 83 Cal. 333, 23 Pac. 295.

Similarly, it was held that it was proper to exclude testimony offered to show that threshing separators made and sold by the same manufacturers, of the same pattern and size as the one in question, worked and gave good satisfaction, the witnesses offered to make this proof being unacquainted with the machine in controversy having never seen it work, as "such testimony had no tendency to show that the machine was properly constructed and did its work well." Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963.

So, it was held that the seller might not show the excellence of a hot air wood furnace installed by him, by proof that he had erected other heating plants with the same kind of furnaces, that all had been efficient, and some had satisfactorily heated with wood fuel houses of equal size with the one in question, the buyer claiming that the furnace would not heat the house with wood and was better adapted to coal. Watkins v. Phelps, 165 Mich. 180, 130 N. W. 619. The court distinguished Avery v. Burrall, 118 Mich. 672, 77 N. W. 272, supra, II. b, 2 (b), cited in the WATERMAN CASE, and stated that that case was not intended to abrogate the general rule as hitherto applied.

In Haynes v. Plano Mfg. Co. 36 Tex. Civ. App. 567, 82 S. W. 532, it was held that one who sets up other harvesters of the same make for the seller may not testify that he had no complaint from the buyers of such other machines as to any defect, as this does not show that the machine in question is properly constructed and will do good work as warranted; and this is especially true when it is not shown that the other machines are identical in construction and material, and are operated under identical or similar conditions.

In Illinois Surety Co. v. Frankfort Heating Co. 178 Ind. 208, 97 N. E. 158, an action by the buyer of a steam heating plant, it was held that the defendant could not show the working of a certain device perfected by him and in use upon another plant, the court saying: "It was not competent to establish the quality or efficiency of the machine in controversy by proving that of a machine sold to someone else;" but what the purpose of the evidence was is not clear from the report, and it does not appear whether a similar device was or was not in use on the plant in suit. Nor does the court refer to the apparently contrary cases of Baber v. Rickart, supra, II. b, 1; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561, supra, II. b, 2 (b); Beach v. Huntsman, 42 Ind. App. 205, 85 N. E. 523, modifying the opinion reported in 83 N. E. 1033.

In an action for the purchase price of a range, where the defense was that the range was entirely worthless, etc., it was held that it was error to permit other parties to testify that they had in their house for two years a range bought of the plaintiff, bearing the same trademark as that sold to the respondent, and that it was worthless. Lander v. Sheehan, supra. The court cites the Fox Case and Murray v. Brooks, supra, and quotes from Stockton Combined Harvester & Agri. Works v. Glens Falls Ins. Co. 121 Cal. 167, 53 Pac. 565, a case without the scope of this note, to the effect that worthlessness or value, etc., of one machine, is not to be shown by comparison with the working of another.

It was apparently held in Fetzer v. Haralson, supra, that it was incompetent for the buyer to show defects in a piece of machinery "by showing that another machine made by the same people was defective," but the case went against the buyer on other grounds. The court disposed of the point briefly, citing the Haynes Case, supra, and Hill v. Hanan, — Tex. Civ. App. —, 131 S. W. 245, supra, II. a, "Where similarity is insufficient," which does not go to such a length.

In connection with the Iowa cases, supra, reference should be made to Kramer v. Messner, 101 Iowa, 88, 69 N. W. 1142, infra, V.

It will be seen that it is held in the Wheeler Case and less strongly in the Haynes Case, that evidence of the successful working of other machines of the same pattern does not show that the plan or design of the machine in question is a success, if we are to understand "properly constructed" to refer to the design or plan. The Watkins Case apparently means to hold the same thing. It will also be noted that in the Simmerson Case the material question to be proved was stated by the court to be whether the machine had a fair trial.

Michigan cases.

The Michigan cases seem to have started with Gage v. Meyers, 59 Mich. 300, 26 N. W. 522, infra, where evidence of comparison of cutter wood sold was excluded as the quality of the wood in controversy was the only thing in issue. This case is cited in the Bell Case, supra, which was followed in turn in the Wheeler Case. In Avery v. Burrall, 118 Mich. 672, 77 N. W. 272, supra, II. b, 2 (b), cited in the WATERMAN-WATERBURY CASE, and in that case, the evidence is held admissible, not as proving the excellence of design, but as showing that when well operated the machine or appliance works well.

In the Watkins Case the court distinguished Avery v. Burrall, and excluded the evidence entirely. Perhaps, the later case of Habicht v. Gallagher, infra, may be an indication of an adherence to the rule of Gage v. Meyers, infra. In Showen v. J. L. Owens Co. — Mich. —, 148 N. W. 666, supra, II. b, 2 (b), it was held that common defects of the members of a class of machines, all of which were in controversy, might be shown.

In Gage v. Meyers, 59 Mich. 300, 26 N. W. 522, it was held that the seller may not show the excellence of the quality of cutter wood, by proof that the same year he made and shipped cutters to a dozen different parties; that they were all made of the same material by the same workmen from the same stock; that there was no difference between the cutters shipped to the buyer and the other parties, except that the buyer picked out wide dashes; as the only thing in issue was the workmanship and material in the manufacture of the cutter woods contracted for and delivered to the defendant, and the testimony should have been confined to these.

In Habicht v. Gallagher, supra, an action for the price of the unaccepted part of cherries sold, it was held that it was not competent for the defendant to show that the cherries refused were not up to the standard by evidence that those delivered were not up to the standard. (There was it seems no evidence offered of similarity in the two lots, but the court apparently does not refer to this.)

V. Miscellaneous.

As heretofore stated, it has not been sought in this note to collect cases of "evidence by contrast," but a few of them are here cited by way of illustration.

Evidence to show unfitness by the excellence of a different thing.

It was held in Paulson v. D. M. Osborne & Co. 35 Minn. 90, 27 N. W. 203, supra, II. b, that "proof that another machine" (presumably of a different nature) "worked well in the same grain where this one failed had a reasonable tendency to show that the difficulty was not in the condition of the grain, which was very short, but in the machine."

So, in an action to recover for the price of a threshing machine which was warranted to do first-class work, it was held

proper for the defendants to introduce evidence comparing the machine received of plaintiffs with a good machine bought by them after they returned the machine in question, as tending to show that the machine in question did not comply with the conditions of the contract, for it was thus shown to be insufficient by comparison with a good machine. Davis's Sons v. Sweeney, 80 Iowa, 391, 45 N. W. 1040.

So, it has been held that the buyer of food for cattle may show that the article sold is bad by comparing it with a good article, irrespective of similarity of manufacture. Thus in Taylor Cotton-Seed Oil & Gin Co. v. Pumphrey, — Tex. Civ. App. —, 32 S. W. 225, it was held proper for the buyer of cotton seed meal sold and used for cattle, to show that it was defective and unfit for such use by samples from other mills, without showing that they were of the average quality sent out by other mills, or that the condition of manufacture was similar, when these samples were offered simply for showing by comparison what a good meal is in contrast with the bad meal in question.

So, in Kramer v. Messner, 101 Iowa, 88, 69 N. W. 1142, in an action by the buyer against the seller for breach of a contract to furnish a machine to heat a greenhouse to 70 degrees in the coldest weather, it was held that it was proper for the plaintiff to show that after the failure of the defendant's apparatus, with another apparatus, a less amount of radiation, a poorer grade of coal, a colder winter, and the building in worse condition; he had no difficulty in procuring heat, as this evidence tended to show that the difficulty was not with the building, but with the apparatus. The court stated that ordinarily tests were not admissible, citing Osborne & Co. v. Simmerson, 73 Iowa, 510, 35 N. W. 615, supra, IV., etc., but said: "It has been quite frequently held that, upon disputed questions of fact, a test fairly made may be given in evidence, when such evidence points with sufficient certainty to one side or the other of the controversy."

In Louisville Lithographic Co. v. Schedler, 23 Ky. L. Rep. 465, 63 S. W. 8, it seems to be held admissible in defense of an action by a lithographer for goods sold and delivered, to show the work of another lithographer on the same design; but the court's ruling was based, at least in part, on the bearing of this evidence upon the question whether the work of the plaintiff was so doubtful in excellence that the defendant was not bound to accept unexamined goods sent C. O. D.

But in an action for the price of a harvester where it was claimed that it was not according to a warranty that it would work well, it was held to be error to permit the defendant to show by a witness that the draught of the harvester was much harder than that of other machines of that character. McCormick Harvesting Mach. Co. v. Brower, 88 Iowa, 607, 55 N. W. 537.

So, it was held to be error to permit the buyer of a 20-horse power traction engine to make unfavorable comparison with the work of another engine of different horse power, in a field 2 miles off, operated by another driver, it not being shown that the soil and physical conditions were the same, or what kind of man the driver was, and the driver who operated the machine in controversy being without experience. Southern Gas & Gasoline Engine Co. v. Adams, — Tex. Civ. App. —, 169 S. W. 1143.

In Erie City Iron Works v. Dempsey, 77 Ill. App. 667, it was held to be error to permit the purchaser of a machine which he claimed was not up to the warranty, to make a comparison between this machine and one which he had formerly used. See also Marsh v. Snyder, 14 Neb. 237, 15 N. W. 341, supra, III. b, "Where similarity is insufficient."

Miscellaneous cases.

While without the scope of this note, it may be noted that in Kauffman Mill Co. v. Stuckey, 37 S. C. 7, 16 S. E. 192, where the defense was that flour was not according to the sample, and was unsound and unfit for the purposes for which it was bought, it was held to be error to permit the seller to show that at about the same time that he sold the flour in question, he sold flour of the same brand to other parties, and that it gave them satisfaction. While the case seems clear as to the above holding, it is insufficiently reported on some of the facts.

In defense to an action for the price of 15 pigs sold to the defendant, he claimed that they were diseased and worthless, and for the purpose of proving that they had been exposed to a contagious disease, he offered evidence that several other pigs sold out of the same drove a day or two before were then sick and that some of them died, and the plaintiff in rebuttal showed that the drove consisted of 150 pigs, and that 7 pigs sold to different parties showed no signs of disease, and a judgment for the plaintiff was affirmed. Bradley v. Rea, 103 Mass. 188, 4 Am. Rep. 524.

In Bush v. Jackson, 24 Ala. 273, upon the question of breach of warranty of soundness of a slave who had died of chronic pneumonia, and who, as was testified, had never recovered from an attack of acute pneumonia which she had had prior to the sale, it was held that it was error to admit the testimony of the physician who attended her as to the history of two other cases of pneumonia he had treated bearing some resemblance to the case of the slave in question, which cases he stated were "in favor of" the party claiming the breach. The court seems to think that possibly this evidence might have been admissible if it was shown to have any bearing on the case, but that it was too indefinite as given.

It may be noted that in Campbell v. Russell, 139 Mass. 278, 1 N. E. 345, where the builder of a house claimed that the sagging of the floors was due to the architect, it

was held that the owner might not show that the timbers and floors were all right in a similar house planned by the same architect in which some of the timbers and spans were the same and some were different from those in this house, as such evidence would not aid the jury unless the houses were identical and subject to the same conditions.

In Mayes v. McCormick Harvesting Mach. Co. 110 Ga. 545, 35 S. E. 714, an action by the seller for the purchase price of a harvester, it was held admissible for the seller to show that the defendant made no objections to the operation of a machine purchased by his neighbor, but expressed entire satisfaction with it before his machine was set up, and that the neighbor's machine was identical in character and construction with the machine purchased by the defendant, and that the latter machine operated as well as the former.

It may be noted that in Watson v. Bigelow Co. 77 Conn. 124, 58 Atl. 741, supra, II. b, 2 (b), it was also held that it was error to permit the plaintiff to show that at about the time of the making of the boiler in controversy, the defendant made for the plaintiff a much smaller boiler after the plaintiff's plan, and that the smaller boiler was improperly made, and that the defendant had made a deduction in its price not claiming that the defect was due to the plaintiff's plan.

The following cases are insufficiently reported on the facts to be of material value upon the subject of this note: Depew v. Peck Hardware Co. 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed in 197 N. Y. 528, 90 N. E. 1158, where proof of the quality of certain other seed than that concerned in the action was allowed in peculiar circumstances; Slack v. Bragg, 83 Vt. 404, 76 Atl. 148, excluding a certain comparison as without probative force; Rice v. Dickson Car Wheel Co. — Tex. Civ. App. —, 65 S. W. 645; Kinston Cotton Mills v. Rocky Mount Hosiery Co. 154 N. C. 462, 70 S. E. 910.

B. B. B.

NORTH CAROLINA SUPREME COURT.

MILES W. FEREBEE
v.
W. E. SAWYER et al., Appts.

(— N. C. —, 83 S. E. 17.)

Mortgage — foreclosure — postponement of sale — notice.

1. A sale under mortgage foreclosure may be postponed without the necessity of giving an entirely new notice of the time of postponement.

Same — notice of postponement — sufficiency.

2. A notice of postponement of a mortgage foreclosure sale is not sufficient where the sale is postponed four times, and the only notice is by notation at the foot of one of the posted notices of sale and by proclamation at only part of the postponements, with few persons present.

Judgment — res judicata — notice of postponement of sale.

3. A judgment for defendant in an action to enjoin the making of a deed under a foreclosure sale, in which the want of notice of sale was made an issue, precludes plaintiff from setting up that fact in defense of an action to recover possession of the land from him.

(October 14, 1914.)

APPEAL by defendants from a judgment of the Superior Court for Camden County in plaintiff's favor in an action to recover possession of certain land. Affirmed.

Statement by **Hoke, J.**:

Civil action to recover a tract of land tried. Plaintiff claimed title under a deed from Calvin Upton and J. M. Cartwright, made pursuant to a foreclosure sale under and by virtue of a mortgage with power of sale, executed by defendant W. E. Sawyer and wife to plaintiff's grantors, dated December 14, 1909. Defendant resisted recovery on the grounds set up by answer, that no valid foreclosure of said mortgage had been made, in that the sale was not properly advertised as "provided by the trust or by law;" (2) that the mortgage had never been "proved, executed, or acknowledged." In reference to the alleged defective advertisement, it appeared that the sale was originally advertised to take place at the courthouse door on October 17, 1910, and mortgagees, by their agent and attorney, appeared for the purpose of making the sale, when he was stayed by reason of an injunction sued out and served at the instance of one Hinton, who also held a mortgage on the property; that pursuant to the exigencies of the writ, the sale was first postponed for an hour to enable the agent to examine into the regularity of the process, and then to November 12, and again to November 26, and again to December 10, and finally to

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Note. — Sufficiency of notice of postponement of judicial sale.

Generally, as to the validity of a judicial sale on a date other than that appointed therefor, see McLaughlin v. Houston-Hudson Lumber Co. 38 L.R.A.(N.S.) 248, and note.

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Notice held sufficient.

In Crutchfield v. Hewett, 2 App. D. C. 373, it is held that notice of the postponement of a sale under a trust deed need not be published for the length of time required for the original notice.

A sale regularly adjourned, so as to give

December 22, when, the writ of injunction having been dissolved, the sale was had, pursuant to the last notice, and deed made to present plaintiffs, who were purchasers for value at said sale; that the original notices of the sale were in all respects full and regular; that, as to the postponed sale, the agent of the mortgagees made a memorandum of such postponed date, at the bottom of the original notice at the courthouse door, and also made announcement of same at the courthouse door, and, as to subsequent notices, memorandum of postponement was made at the bottom of the original notice at the courthouse door, and proclamation of postponement was also made at courthouse door at one or more of the additional postponements. It was further made to appear in evidence that on December 23, 1910, the present defendant W. E. Sawyer had instituted an action against the mortgagees, Upton and Cartwright, and filed his complaint, alleging that the mortgage was given to secure the purchase price of a sawmill bought by complainant of the mortgagees for $2,500, and by reason of the breach of certain binding stipulations incident to the sale, complainant had been damaged in the sum of $3,500. It was further alleged in said complaint, § 8, that the mortgagees "had advertised said lands and attempted to sell the same on December 22, 1910, and said sale was illegal and void because not properly advertised." On the complaint and supporting affidavits, a temporary injunction was obtained restraining the mortgagees from selling or making title pursuant to the sale. Defendants answered, denying any breach of contract on their part, and making further specific averment that the said sale was properly advertised and in all respects regular. The cause was tried on issues as to breaches of the contract stipulations alleged against the mortgagees, defendants, no issue having been tendered as to the regularity of sale, and, on verdict for defendants, it was adjudged that they go without day, etc. In the present trial, on issue submitted, there was verdict for plaintiff. Judgment on the verdict, and defendants excepted and appealed.

Messrs. **Aydlett & Simpson**, for appellants:

In order to get title through a mortgage sale, the terms of the mortgage must be complied with strictly, it being the contract between the parties.

Eubanks v. Becton, 158 N. C. 230, 73 S. E. 1009.

Where a mortgage sale is postponed, new and sufficient notices of the time and place must be published.

27 Cyc. 1476.

A sale cannot be continued from day to day for more than six days, unless new and

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notice to all persons present of the time and place to which it is adjourned, is, when made, in effect, the sale of which previous public notice was given. Richards v. Holmes, 18 How. 143, 15 L. ed. 304. Therefore, the notice of an adjournment of a sale need not be as minute and specific as the original advertisement. Dexter v. Shepard, 117 Mass. 480.

The main purpose of a statute requiring that notices of levy under execution shall be set up for three months before the property shall be exposed for sale is to give the owner an opportunity to redeem, and this purpose is accomplished by the original notice, so that, where the owner secured a stay of execution during appeal, which stay operated as a postponement of the sale, a renewal of the notification was not necessary, but an advertisement of the postponed sale for three weeks was sufficient. Horton v. Bassett, 16 R. I. 419, 16 Atl. 715.

In Beacon Hill Land Co. v. Bowen, 33 R. I. 404, 82 Atl. 81, where, after the limit of bidding had been reached, a sale was adjourned to another place on the same day for the purpose of determining if a higher bid would be authorized by the principals of the bidders, announcement of the adjournment being made to all present, it was held that the notice of adjournment was sufficient without publication.

Personal service of the notice of a postponement is not necessary, publication in a newspaper being sufficient. Westgate v. Handlin, 7 How. Pr. 372.

Reasonable effort to prevent a sacrifice of the property is all that is necessary. Marcus v. Collamore, 168 Mass. 56, 46 N. E. 432.

Where the statute provides only for publication of notice of the time and place first appointed for sale, publication of an adjournment is not necessary. Coxe v. Halsted, 2 N. J. Eq. 311.

Public proclamation of the adjournment made at the time at which the sale was published to take place is sufficient under such circumstances. Allen v. Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416.

In Hewitt v. Montclair R. Co. 25 N. J. Eq. 392, it is held, under a statutory provision for the advertisement of mortgage foreclosure sales, that "if said sale shall be adjourned for more than one week, said adjournment shall be published in said two newspapers," that a sale could be adjourned from week to week without publication, such publication being necessary only when any one adjournment was for more than one week.

In Stearns v. Welsh, 7 Hun, 676, it is held that whether publication of an adjournment of a foreclosure should have been made, or whether one that was made was sufficient, must depend on the particular case, and is for the court to determine in its discretion.

sufficient notices be posted as required by statute or the terms of the mortgage.

Wade v. Saunders, 70 N. C. 270; Eubanks v. Becton, supra; Love v. Harris, 156 N. C. 88, 36 L.R.A.(N.S.) 927, 72 S. E. 150, Ann. Cas. 1912D, 1065.

No sale under this mortgage is valid unless it is advertised in accordance with the terms of the trust, both at the courthouse door and at three other public places and in a newspaper, or under order of court in foreclosure suit.

T. J. McTeer Clothing Co. v. Hay, 163 N. C. 495, 79 S. E. 955; Jones v. Beaman, 117 N. C. 263, 23 S. E. 248.

Messrs. **Ward & Thompson**, for appellee:

The mortgage given by defendant Sawyer to Cartwright and Upton was valid.

Doe ex dem. Leggett v. Bullock, 44 N. C. (Busbee, L.) 283; Brem v. Lockhard, 93 N. C. 191; Williams v. Jones, 95 N. C. 504; Barrett v. Barrett, 120 N. C. 130, 36 L.R.A. 226, 26 S. E. 691; Den ex dem. Gilliam v. Reddick, 26 N. C. (4 Ired. L.) 368; Doe ex dem. Burke v. Elliott, 26 N. C. (4 Ired. L.) 355, 42 Am. Dec. 142; Burton v. Patton, 47 N. C. (2 Jones, L.) 124, 62 Am. Dec. 194; People ex rel. Norfleet v. Staton, 73 N. C. 546, 21 Am. Rep. 479; State v. Davis, 109 N. C. 780, 14 S. E. 55; Southern Spruce Co. v. Hunnicutt, 166 N. C. 202, 81 S. E. 1079.

The sale under the mortgage was valid.

Richards v. Holmes, 18 How. 143, 15 L. ed. 304; 28 Am. & Eng. Enc. Law, 2d ed. 806; Marcus v. Collamore, 168 Mass. 56, 46 N. E. 432.

Even if the sale was not valid, defendant Sawyer cannot be heard now to complain and claim the land.

Herman, Estoppel, §§ 122, 123; Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; Tyler v. Capeheart, 125 N. C. 64, 34 S. E. 108; McCall v. Webb, 135 N. C. 356, 47 S. E. 802; Scott v. Mutual Reserve Fund Life Asso. 137 N. C. 515, 50 S. E. 221; Bunker v. Bunker, 140 N. C. 23, 52 S. E. 237; Shakespeare v. Caldwell Land & Lumber Co. 144 N. C. 516, 57 S. E. 213; Case Mfg. Co. v. Moore, 144 N. C. 527, 10 L.R.A. (N.S.) 734, 119 Am. St. Rep. 983, 57 S. E.

In Hosmer v. Sargent, 8 Allen, 97, 85 Am. Dec. 683, a sale of mortgaged property under a power of sale contained in the mortgage, made after several adjournments, without a new notice to the mortgagor after he had been duly notified of the original time and place of sale, was held valid, a notice of the adjournments being unnecessary in the absence of bad faith.

So, where the mortgagor was present at the time set for the sale of mortgaged property, and an adjournment was made at his request, readvertisement was not necessary. Stevenson v. Dana, 166 Mass. 163, 44 N. E. 128.

Likewise, the mortgagor was held to be bound by a sale on an adjournment date without readvertisement, where the adjournments were all made at the request of his representative at the sale, by whose action he was bound, who consented to the notices as they were given and knew of the sale without making any objection. Way v. Dyer, 176 Mass. 448, 57 N. E. 678.

And the fact that no notice of adjournments of a sale had been given by the bailiff is unimportant where the circumstances create a presumption that the debtor knew of the day finally fixed for the sale. Dixon v. Mackay, 21 Manitoba L. Rep. 762.

Where nothing appears to show that the interested parties did not have notice or information of the adjournment of a sale under a foreclosure decree, the sale will be confirmed. Old Colony Trust Co. v. Great White Spirit Co. 181 Mass. 413, 63 N. E. 945.

In Avon-by-the-Sea Land & Improv. Co. v. Finn, 56 N. J. Eq. 808, 41 Atl. 360, under a statute providing that in the publication of notice of the adjournment of a sale for more than a week, it should not be necessary

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to continue the publication of the original advertisement of sale, it was held that it was not necessary to describe the land to be sold in the notice of adjournment.

In Pier v. Storm, 37 Wis. 247, the court said that notices of adjournments published at the foot of the original notice of sale would have been valid though not dated at all, so that the fact that a notice of postponement was dated later than the day originally appointed for the sale would raise no presumption that the sheriff did not attend at the hour and place appointed for the sale, and there adjourn it.

In Thompson v. Milliken, 15 Grant, Ch. (U. C.) 197, in discussing the matter of costs of a mortgage sale, the court referred an item for a new advertisement of a postponed sale back to the master for determination, and expressed its opinion that when a sale is put off the expense and delay of a new advertisement should not be incurred, but that a note at the foot of the old advertisement stating the postponement should suffice.

A mere typographical error in the notice of a postponed sale, which could not have prejudiced the sale, is immaterial. Horton v. Bassett, 16 R. I. 419, 16 Atl. 715.

And omission of the sheriff's official title from his signature to a notice of postponement is a mere clerical mistake affecting no substantial right, and should be disregarded. Cord v. Hirsch, 17 Wis. 404.

Notice held insufficient.

In Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64, it was held that the publication of a notice of the adjournment of a sale without the original notice of sale was insufficient.

213; Buchanan v. Harrington, 152 N. C. 333, 136 Am. St. Rep. 828, 67 S. E. 747; Re Lloyd, 161 N. C. 557, 77 S. E. 955; 23 Cyc. 1238.

Hoke, J., delivered the opinion of the court:

In foreclosure proceedings under power of sale, our decisions hold, and they are in accord with doctrine generally prevailing elsewhere, that the requirements of the statute and of the contract stipulations of the instrument not inconsistent with the statute, in respect to the notice and other terms on which the power may be exercised, shall be strictly complied with. Eubanks v. Becton, 158 N. C. 230, 73 S. E. 1009; Brett v. Davenport, 151 N. C. 56, 65 S. E. 611. In Brett v. Davenport, the court said: "In an instrument of this kind [a mortgage with power of sale] the law is that a statutory requirement or contract stipulation in regard to notice is of the substance, and, unless complied with, a sale is ineffective as a foreclosure, and even when consummated by deed the conveyance only operates to pass the legal title subject to certain equitable rights in the purchaser, as of subrogation, etc., in case he has paid the purchase money in good faith."

And the position is approved in Eubanks v. Becton, in a well-sustained opinion by Associate Justice Allen, citing, among many other authorities, 27 Cyc. 1465, as follows: "A power of sale contained in a mortgage or deed of trust must be strictly pursued, and all its terms and conditions fully complied with, in order to render the sale valid."

And on page 1466: "It is essential to the validity of a sale under a power in a mortgage or deed of trust, to comply fully with its requirements as to giving notice of the sale." And page 1472: That "directions of the statute or of the mortgage as to the length of time the notice must be published, or the number of times it must appear, are imperative, and a sale made without strict compliance therewith is invalid, and passes no title,"—a position which certainly obtains with us as to the immediate parties to the sale. Hinton v. Hall, 166 N. C. 477, 82 S. E. 847, at the present term. A perusal

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When land is struck off to a bidder and the parties separate without any adjournment of the sale being announced, but the sale is not consummated, the original notice is spent, and the publication of a notice of postponement only is insufficient. Goodwin v. Burns, 1 Mich. N. P. 228. The court said that, had oral notice been given at the time of the sale, that in case the bidder should not complete the sale, the property would again be offered at another specified time, the property could properly have been sold at that time, or the sale adjourned to a different day.

In Miller v. Hull, 4 Denio, 104, where an adjournment to a certain date was announced at the time and place set for the sale, but, by mistake of the printer, the published notice of postponement contained a later date, and the sale was conducted on that date, it was held that the notice was unauthorized and irregular, and the sale void.

In Clark v. Simmons, 150 Mass. 357, 23 N. E. 108, where a sale was adjourned from time to time for want of bidders, the only notice of adjournment being the oral proclamation of the auctioneer, and a sale was finally made to the mortgagee at an inadequate price, it was held that the sale was not in good faith as to a second mortgagee, who had requested notice of when a sale would be held, but to whom none was given except by a letter received the night before the adjournment date, giving the date of sale only, without the hour or place; and who, upon inquiry of persons living near the property, was unable to learn anything concerning the sale.

Where a sale which was prevented by an injunction was adjourned by the sheriff from week to week for a period of two and one half years, and then, upon dissolution of the injunction, was held without the knowledge of the interested parties, it was held that, though the notice fulfilled the letter of the law, it was not a substantial compliance therewith, and the sale was set aside. Chamberlain v. Larned, 32 N. J. Eq. 295, affirming 30 N. J. Eq. 494.

In Patten v. Stewart, 26 Ind. 395, where a sale on the day for which it was advertised was prevented by injunction, it was held that an oral notice of an adjournment to those present on the day advertised was not sufficient, a new publication being necessary, under a statute requiring that "the time and place of making sale of real estate on execution shall be publicly advertised by the sheriff for at least twenty days successively next before the day of sale."

Publication of a notice of a postponed sale four days before the date to which it was postponed is not a compliance with a decree requiring the trustee to give at least three weeks' notice inserted in some newspaper, and such other notice as she might think proper, though there had been three weeks' publication of the original date of sale. Glenn v. Wootten, 3 Md. Ch. 514.

In Thornton v. Boyden, 31 Ill. 200, where, by the terms of a deed of trust, thirty days' notice of a sale thereunder was required, it was held that a notice of an adjournment for eight days, published under the original notice in the same paper, was not sufficient, the same notice as was originally given being necessary.

And it is immaterial that the mortgage authorizes an adjournment, so that where the mortgage permitted a sale only after sixty days' notice, advertisement of an adjournment for thirty days was insufficient. Griffin v. Marvin Co. 52 Ill. 130.

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of these and other authorities bearing on the subject will disclose that the principle has been established in reference to an original or independent notice of sale, and does not prevail to the same extent in reference to the postponement of a sale which has been in all respects regularly advertised. In such case, and in the absence of some statutory or contract provision to the contrary, a notice of postponement made in good faith, and reasonably calculated to give proper publicity of the time and place, has been deemed sufficient. Richards v. Holmes, 18 How. 143, 15 L. ed. 304; Allen v. Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416; Way v. Dyer, 176 Mass. 448, 57 N. E. 678; Stevenson v. Dana, 166 Mass. 163, 44 N. E. 128; 27 Cyc. 1476; 28 Am. & Eng. Enc. Law, 2d ed. 806. There are cases to the contrary, and holding that an entirely new notice should be given, but the weight of authority seems to be in support of the position as stated. In 27 Cyc. it is said: "Where a mortgage foreclosure sale is postponed or adjourned, a new and sufficient notice of the time and place for the sale must be published; but it is generally held that it need not be published or advertised for the same length of time that is requisite in the first instance, such notice as will give reasonable publicity being sufficient, provided the notice is given in good faith, and contains all the essential requisites of a notice of sale."

And in Am. & Eng. Enc. Law, supra: "When the sale is postponed or adjourned, proper notice thereof must be given; statutory provisions or terms of the power applicable to the giving of such notice must, of course, be complied with. If there be no such provision, reasonable notice is sufficient."

Section 645 of the Revisal, authorizing the postponement of a sale from day to day for not more than six days, from its terms and juxtaposition, clearly has reference to sales by the sheriff or persons acting under court decrees, and does not apply to sales under power contained in the instrument. While we decide that a sale of this character may be postponed, and, unless the statute or some stipulation of the contract otherwise provides, that a reasonable notice of the postponement may suffice, we do not think that the notice attempted in this present case can be upheld, the evidence showing that the original sale, set for the 17th of October, was adjourned not less than four times, and the only published notice of the postponement was a memorandum at the bottom of one of the original notices, and no satisfactory evidence that proclamation was made at more than two of the dates, and no testimony informing the court of the number of persons who were in hearing when the same was made, except the first time, and then only a half dozen present.

The sale and foreclosure, therefore, must be declared invalid, but, on the record, the position cannot be made available to defendant, for the reason that, in our opinion, he is precluded from asserting it by reason of the verdict and judgment had in the case of W. E. Sawyer, the present defendant, against the mortgagees, who sold and conveyed to the present plaintiff. In that case, as hereinbefore stated, the present defendant instituted the action to recover damages and to restrain the mortgagees from making the deed to plaintiff, and on the express ground, among others, that a sale was had without the proper notice. The mortgagees answered, making direct averment that the sale was in all respects regular, and, this suit having been concluded and judgment entered that defendants therein go without day, the present defendant is estopped from making further question as to the regularity of this sale. In Tyler v. Capeheart, 125 N. C. 64, 34 S. E. 108, the court held: "The judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them; this certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings."

The principle has been approved and applied in numerous decisions of the court before and since that well-considered case. Owen v. Needham, 160 N. C. 381, 76 S. E. 211; Caudle v. Morris, 160 N. C. 168, 76 S. E. 17; Coltrane v. Laughlin, 157 N. C. 282, 72 S. E. 961; Gillam v. Edmonson, 154 N. C. 127, 69 S. E. 924; Bunker v. Bunker, 140 N. C. 18, 52 S. E. 237. In Coltrane's Case, the doctrine is stated as follows: "It is well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant, and were in fact investigated and determined on the hearing" (citing Gillam v. Edmonson, 154 N. C. 127, 69 S. E. 924; Tyler v. Capeheart, supra; Tuttle v. Harrill, 85 N. C. 456; Fayerweather v. Ritch, 195 U. S. 277, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Aurora v. West, 7 Wall. 82, 103, 19 L. ed. 42, 49; Chamberlain v. Gaillard, 26 Ala. 504; 23 Cyc. 1502, 1504, 1506).

In Gillam v. Edmonson, 154 N. C. at page

130, 69 S. E. at page 924, it was held that an estoppel of record will bind parties and privies as to matters in issue between them, and, delivering the opinion, the court said: "It has come to be well recognized that the test of an estoppel by judgment is the identity of the issues involved in the suit."

We were referred by counsel for the defendant to the case of J. T. McTeer Clothing Co. v. Hay, 163 N. C. 495, 79 S. E. 955, as an authority supporting defendant's position, but a perusal of that case will show that, in holding that a judgment was an estoppel only as to points actually investigated and decided, Associate Justice Allen was careful to note that the principle, as stated, applied to cases where the second suit was based upon a different cause of action from that in which the judgment had been entered, and that when the cause of action was one and the same, in such case, a final judgment in the former suit is conclusive, not only as to matters determined, but as to all issuable matter presented in the pleadings or necessary to the proper decision of the cause. In support of the distinction, the learned judge quotes from Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, as follows: "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

And the case of Jones v. Beaman, 117 N. C. 259, 23 S. E. 248, to which we were also cited, can be sustained, if at all, only on the same distinction; that the second suit was on a different cause of action than that presented by the pleadings or necessarily involved in the first. In the suit of Sawyer, however, the present defendant, against the mortgagees, the validity of the sale, on account of insufficient notice, was made a direct issue in the pleadings, and, judgment having been entered on that record in favor of the mortgagees, it cannot be again debated in this case, where the same issue is directly involved, to wit, the validity of the sale at which the plaintiff purchased. The objection to the probate of the mortgage is without merit, and was very properly not insisted on in the brief of counsel. Even if the justice who took the acknowledgment was not regularly appointed, he was an officer *de facto*, and, under our decisions and on the facts in evidence, the probate must be held sufficient. Southern Spruce Co. v. Hunnicutt, 166 N. C. 202, 81 S. E. 1079; Hughes v. Long, 119 N. C. 52, 25 S. E. 743. There is no error, and judgment in plaintiff's favor is affirmed.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE, Appt.,
v.
PRUDENTIAL COAL COMPANY, Respt.

(— Tenn. —, 170 S. W. 56.)

Constitutional law — fine for failing to pay wages — imprisonment for debt.

A statute providing a fine for failure to pay wages in cash violates the constitutional provision against imprisonment for debt, if failure to pay the fine will result in imprisonment.

(October 31, 1914.)

Note. — Constitutionality of imprisonment for debt.

I. What are debts.
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  d. Against officers of the court, 651.
VIII. Ne exeat, 651.

For the earlier cases on this subject, see note to Carr v. State, 34 L.R.A. 634.

For cases involving the constitutionality of statute providing for imprisonment for breach of contract of labor or rental, see

APPEAL by the State from a judgment of the Criminal and Law Court for Morgan County sustaining a demurrer to an indictment charging defendant with unlawfully and wilfully refusing to pay wages due in cash to one of its employees. Affirmed.

The facts are stated in the opinion.

Mr. **Frank M. Thompson**, Attorney General, for the State:

The court erred in holding that the act upon which the indictment is based is violative of article 1, § 18, of the Constitution of Tennessee.

State v. Paint Rock Coal & Coke Co. 92 Tenn. 82, 36 Am. St. Rep. 68, 20 S. W. 499; State v. Hoskins, 106 Tenn. 431, 61 S. W. 781.

Messrs. **Lindsay, Young, & Donaldson** for respondent.

Williams, J., delivered the opinion of the court:

The Prudential Coal Company was indicted for a violation of Acts 1913 (1st Ex. Sess.), chap. 29, in that it, being the operator of a commissary, unlawfully and wilfully failed and refused to pay to one of its employees wages, balance then due him, in lawful money, after deducting from his wages all amounts furnished him in the way of cash, supplies, rents, etc., according to statute.

The trial judge sustained a demurrer to the indictment, which demurrer impeached the statute as unconstitutional because in

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note to Ex parte Hollman, 21 L.R.A.(N.S.) 242.

I. What are debts.

a. Meaning of the word "debt."

Supplementing note in 34 L.R.A. 636.

Speaking of imprisonment for debt, it is said, 8 Cyc. 879: "As a general rule it may be stated that this prohibition applies only to debts growing out of contracts, and does not apply to cases of tort or cases of a criminal nature."

Thus, it is said in Ex parte Berry, 85 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344, that "the term 'debt' as used in the Constitution is held by the great weight of authority to embrace obligations arising out of contract, and to exclude liability for torts and fines imposed for crime."

So, in People v. Zito, 237 Ill. 434, 86 N. E. 1041, affirming 140 Ill. App. 611, the court says that the constitutional provision against imprisonment for debt "applies only to debts in their proper and popular sense, where the relation of debtor and creditor exists."

And in Bray v. State, 140 Ala. 172, 37 So. 250, the constitutional provision is held to be limited to contract liabilities.

b. Debts in general.

Supplementing note in 34 L.R.A. 637.

The portion of a statute requiring hotel inspection which imposes fine or imprisonment for failure to pay inspector's fee has the effect of subjecting a hotel owner to imprisonment for debt within the terms of the constitutional provision. Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; State v. McFarland, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792.

Where a person convicted of a misdemeanor makes a contract with a second person who confesses judgment with him for the fine and costs in accordance with statute, the contract stipulating that such convicted person shall work for his surety until the fine and costs are paid "over and above the amount advanced to him for living expenses," the convicted person's liability for the advances "is just as much a debt as would be his liability for advances for any other purpose," and imprisonment for failure to pay it would be unconstitutional. Elston v. State, 154 Ala. 62, 45 So. 667.

See also Ex parte Dig, 86 Miss. 597, 38 So. 730, infra, III. a.

And it is held by Cooley, Ch. J., in his opinion in Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611, that a statute authorizing a writ of ne exeat to prevent insolvent debtors from leaving the state amounts to a violation of the constitutional provision.

See also Ledford v. Emerson, 143 N. C. 527, 10 L.R.A.(N.S.) 362, 55 S. E. 969, infra, II. b.

II. Action founded on tort.

a. In general.

Supplementing note in 34 L.R.A. 640.

A judgment for damages for injury from assault and battery is not a debt within the constitutional prohibition of imprisonment for debt, and its payment may be enforced by imprisonment. Ex parte Berry, supra.

b. Fraud.

Supplementing note in 34 L.R.A. 642.

See also Ex parte Hollman, 21 L.R.A. (N.S.) 242, and note.

A constitutional provision forbidding imprisonment for debt except in cases of fraud is not violated by imprisonment for fraud practised in transferring and concealing property for the purpose of avoiding payment of judgment debts. Baker v. State, 109 Ind. 47, 9 N. E. 711.

But under a constitutional provision that there shall be "no imprisonment for debt in this state except in cases of fraud," there can be no imprisonment to enforce the payment of a debt under final process, unless it is founded upon an allegation duly made in the complaint, and a corresponding issue submitted to the jury, that there has been fraud, and a judgment is entered in con-

violation of Constitution 1870, art. 1, § 18: "The legislature shall pass no law authorizing imprisonment for debt in civil cases."

The state has appealed and assigned errors.

The statute under test provides that all corporations doing business within this state which shall employ any salesmen, mechanics, laborers, and which operate a commissary or supply store in connection with their business, shall pay the wages, balance then due such employee, in lawful money, semi-monthly on the 15th and 30th of each month, after deductions for advancements, have been made.

It is provided in the 2d section of the statute that a violation of the 1st section, above outlined, shall be a misdemeanor punishable by fine therein set forth. Imprisonment is not in terms provided to be imposed.

The question thus raised is ruled, in principle, by the case of State v. Paint Rock Coal & Coke Co. 92 Tenn. 81, 36 Am. St. Rep. 68, 20 S. W. 499, in which a statute was held unconstitutional which provided that it should be a misdemeanor for any person, firm, or corporation to refuse to cash or redeem in lawful currency, any check or scrip within thirty days of issuance, and that, upon conviction, a prescribed fine should be imposed.

The court, after remarking upon the fact that it was not for any fraudulent intent of the person or corporation issuing the check or scrip that he or it was sought to

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formity therewith. Ledford v. Emerson, 143 N. C. 527, 10 L.R.A.(N.S.) 362, 55 S. E. 969.

And in Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179, where a decree based upon the findings adjudged the defendant guilty of fraud in receiving transfers of his brother's property made to defraud the brother's creditors, and directed him to return such property to his brother's assignee in insolvency, the court held that the action was merely a proceeding in equity to declare the transfers void, and did not fall within the exception of the constitutional provision that "no person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud;" and that the portion of the decree ordering his arrest until he should obey such order was unconstitutional.

III. Fines and penalties as debts.

a. In general.

Supplementing note in 34 L.R.A. 651.

A law which authorizes imprisonment for the failure to pay the fine assessed for its infraction does not authorize imprisonment for debt within the constitutional meaning of the term. State v. Hoskins, 106 Tenn. 430, 61 S. W. 781.

And where imprisonment is provided for failure to pay a fine, the fact that one fourth of the fine assessed is paid to the complaining witness does not make it a debt, the enforcement of which by imprisonment is unconstitutional. Sothman v. State, 66 Neb. 302, 92 N. W. 303.

The constitutional prohibition of imprisonment for debt is inapplicable to imprisonment for failure to pay fines. People v. Zito, 237 Ill. 434, 86 N. E. 1041, affirming 140 Ill. App. 611 (fine for violation of penal laws prohibiting sale of cocaine); Re Roe Chung, 9 N. M. 130, 49 Pac. 952 (fine for practising medicine without authority of board of health); Ruggles v. State, 120 Md. 553, 87 Atl. 1080 (fine for operating a motor vehicle without a license); State v. Thompson, 25 S. D. 148, 125 N. W. 567 (fine for failure to pay peddler's license).

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Under a statute providing that a prisoner who has served his sentence, and who desires to be released before completely working out his fine and costs, must pay, in addition to the unearned amount of such fine and costs, the value of the clothes furnished him by the prison contractor while in his custody, the sum due for his clothes cannot be designated a debt within the terms of the Constitution. Ex parte Dig, 86 Miss. 597, 38 So. 730.

See also Elston v. State, 154 Ala. 62, 45 So. 667, supra, I. b.

And see Rosenbloom v. State, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053, infra, IV., in which the court fails to distinguish between imprisonment for nonpayment of a fine and imprisonment for nonpayment of a tax.

b. Fines imposed by city authority.

Supplementing note in 34 L.R.A. 653.

The constitutional prohibition of imprisonment for debt is inapplicable to imprisonment for failure to pay fines imposed by city authority. Chicago v. Morell, 247 Ill. 383, 139 Am. St. Rep. 340, 93 N. E. 295 (penalty for failure to pay wheel tax); Peterson v. State, 79 Neb. 132, 14 L.R.A. (N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306 (fines for violations of ordinance regulating speed of railroad trains).

So, it is held in Deadwood v. Allen, 9 S. D. 221, 68 N. W. 333, on former appeal not involving this point, 8 S. D. 618, 67 N. W. 835, that whether the action is civil or criminal, a fine imposed for violation of a city ordinance may be enforced by imprisonment without violating the constitutional prohibition of imprisonment for "debts arising out of or founded upon a contract."

A prosecution for the refusal to pay for the services of a hack at the rate provided by ordinance "is not for the purpose of coercing the payment of the hack hire," but "for the violation of an ordinance in which every citizen has the same interest;" and a fine levied upon the offender is not a debt within the constitutional meaning. Bray v. State, 140 Ala. 172, 37 So. 250.

be thus punished, said: "The act of the legislature in question, while not directly authorizing imprisonment for debt, does attempt to create a crime for the nonpayment of debts evidenced by check, scrip, or order, and for such crime provides a penalty which may or may not be followed by imprisonment. In that way and for that reason the act is violative of the spirit, if not the letter, of the constitutional provision above cited. It is an indirect imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition."

On failure to pay any fine adjudged, by operation of law imprisonment would be imposed on the violator of the statute, if valid.

Obviously the purpose of the statute in question was to enforce the payment of contract wages, and at stated periods, under the penalty prescribed, and it must fall as unconstitutional. We have not been cited any other case which rules the point.

This court, in Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955, affirmed in 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, upheld as constitutional act 1899, chap. 11, which required and regulated the payment

IV. Taxes as debts.

Supplementing note in 34 L.R.A. 654.

Imprisonment for refusal either to work on the public highways or to pay a tax in lieu thereof is not imprisonment for debt within the terms of the constitutional prohibition. Mashburn v. State, 65 Fla. 470, 62 So. 586.

Likewise, it is held in South v. State, — Tex. Crim. Rep. —, 162 S. W. 510, that imprisonment for failure to pay an occupation tax is not imprisonment for debt, whether it is imposed for the purpose of revenue only, or for revenue and police regulation.

And in Rosenbloom v. State, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053, it is held that a statute providing for imprisonment in event of refusal to pay a fine assessed for the failure to pay a peddler's license tax is not unconstitutional as providing for imprisonment for debt. The court bases its decision on the ground that such a tax is not a debt, overlooking the fact that the imprisonment is imposed for the refusal to pay the fine, and not for the failure to pay the tax.

V. Costs as debts.

a. Not debts in civil actions.

Supplementing note in 34 L.R.A. 656.

In a statute providing that the payment of costs in an action may "be enforced by attachment," the attachment referred to is not a capias satisfaciendum, but merely ordinary process by which the person is brought before the court to answer for an alleged contempt, and the statute does not therefore provide for imprisonment for debt. Burbach v. Milwaukee Electric R. & Light Co. 119 Wis. 384, 96 N. W. 829.

b. Not debts in criminal actions.

Supplementing note in 34 L.R.A. 658.

Costs of prosecution are not debts within the constitutional prohibition of imprisonment for debt, especially where the Constitution provides that in case of conviction, defendants in criminal actions may be taxed with costs. Ex parte McInnis, 98 Miss. 773, 54 So. 260.

So, a statute authorizing the imprisonment of the complaining witness in a malicious prosecution until payment of costs incurred in the action imposed a penalty, and not a debt within the constitutional provision against imprisonment for debt. Colby v. Backus, 19 Wash. 347, 67 Am. St. Rep. 732, 53 Pac. 367.

And under a constitutional provision that "imprisonment for debt is prohibited, except for the nonpayment of fines and penalties imposed for the violation of law," the legislature has "authority to provide as a part of the penalty for the violation of the law the payment of costs and the enforcement of the payment by imprisonment." Ex parte Bowes, 8 Okla. Crim. Rep. 201, 127 Pac. 20. It is further held, however, that in the absence of statutes making the costs of a part of the penalty, the court may not imprison convicted defendants for nonpayment of costs.

VI. Statutory, criminal, or quasi criminal cases.

a. In general.

Supplementing note in 34 L.R.A. 660.

For cases involving the constitutionality of statute providing for breach of contract of labor or rental, see note to Ex parte Hollman, 21 L.R.A.(N.S.) 242.

A statute making it a felony to issue a check on a bank without funds or credit to meet it, with intent to defraud, is intended to punish the party "for his fraud, and not for his failure to redeem his check," and does not provide for imprisonment for debt within the constitutional provision. State v. Pilling, 53 Wash. 464, 132 Am. St. Rep. 1080, 102 Pac. 230.

Likewise, a statute giving subcontractors, laborers, and materialmen liens on the money received by the contractor in building and repairing houses, and making it a misdemeanor for the contractor to apply such money to other uses than that of paying such subcontractors, laborers, and materialmen, makes penal "not the mere failure to pay a debt, but the disposition by the contractor of a specific sum of money held by him under a lien so as to defeat the lien;" and the statute does not impose imprisonment for debt within the

of laborer's scrip, but that statute prescribed a civil remedy for violation, and not a penalty, so that it was not tested as to validity by the clause of the Constitution here under construction.

In a case (State v. Williams, 150 N. C. 802, 63 S. E. 949) which declared an act unconstitutional because it provided for imprisonment for debt, it appeared that the act made immediate provision for imprisonment. Clark, Ch. J., said: "The offense here charged has no element of fraud, and as the statute imposes imprisonment it cannot be sustained. Speaking only for myself, there is nothing, however, which forbids the general assembly to authorize the imposition of the fine upon the tenant of the landlord for the conduct described in the statute, but the party could not be imprisoned for nonpayment of the fine or costs, since that would be to allow by indirection what cannot be done directly."

The court, however, in that case, refrained from expressing its opinion on the point.

The trial court, following State v. Paint Rock Coal & Coke Co. supra, held the act here under consideration void.

Affirmed.

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constitutional provision. State v. Hertzog, 92 S. C. 14, 75 S. E. 374.

So, where a property owner refuses to lay a sidewalk in accordance with a city ordinance which requires the laying of sidewalks and imposes fine and imprisonment as punishment for failure to comply therewith, and where the city does not lay the sidewalk, it cannot be objected that the ordinance imposes imprisonment for debt, since there is no debt. O'Haver v. Montgomery, 120 Tenn. 448, 127 Am. St. Rep. 1014, 111 S. W. 449.

And a statute making it a misdemeanor to obtain "advances upon representation of the ownership of property and promising to apply the same to payment of the debt, and failing to do so." is not intended to enforce payment of the debt, but to punish the fraud in failing to apply the property to the debt, and is not unconstitutional. State v. Torrence, 127 N. C. 550, 37 S. E. 268.

And it is held in Youmans v. State, 7 Ga. App. 101, 66 S. E. 383, application to compel certification of question denied in 133 Ga. 559, 66 S. E. 941, that a statute providing imprisonment for fraudulently causing a bank to become insolvent "is aimed at the fraudulent practice by which the bank was rendered insolvent, and has no reference whatever to debt or the failure to pay back the money obtained."

A statute prohibiting any person from changing his name with intent to defraud is intended for the prevention of fraud, and does not violate the constitutional provision prohibiting imprisonment for debt. Morris v. State, 144 Ala. 81, 39 So. 973.

In State v. Ensley, 177 Ind. 483, 97 N. E. 113, Ann. Cas. 1914D, 1306, it is held that a statute making a county treasurer guilty of embezzlement for failing to turn public funds over to his successor must be construed as if such failure were expressly characterized as felonious and fraudulent, and that when so construed it is not in conflict with the constitutional provision which prohibits imprisonment for debt except in cases of fraud.

A statute providing for fine and imprisonment for the sale of property covered by a lien if the debt is not paid within ten days after the sale does not impose imprisonment for debt within the terms of L.R.A.1915B.

the Constitution. State v. Barden, 64 S. C. 206, 41 S. E. 959.

But see STATE v. PRUDENTIAL COAL CO., where the offense created by the statute is the failure to pay a particular character of claim; and State v. Paint Rock Coal & Coke Co. 92 Tenn. 81, 36 Am. St. Rep. 68, 20 S. W. 499, cited in the opinion, and also set out at pp. 660, 661, of the note in 34 L.R.A.

b. Beating board bill.

For the earlier cases falling within the scope of this section, see note on constitutionality of statute providing for imprisonment for beating board bill, appended to Re Milecke, 21 L.R.A.(N.S.) 259.

A statute providing imprisonment for persons obtaining entertainment at a hotel or restaurant with intent to defraud the owner thereof does not contravene the constitutional provision against imprisonment for debt except in case of fraud, since "it is plain that this constitutional inhibition was directed against imprisonment for debt in civil actions, at the instance of the creditor with a view to coercing payment of his debt, and had no reference to such actions as might be brought by the state through its officers in the interests of good morals and honest dealing." Clark v. State, 171 Ind. 104, 84 N. E. 984, 16 Ann. Cas. 1229.

VII. Enforcing orders and decrees of court.

a. In general.

Supplementing note in 34 L.R.A. 661.

As stated in the earlier note, the question whether imprisonment to enforce orders or decrees of court constitutes imprisonment for debt depends upon two questions: *viz.*, whether the money the payment of which is being enforced by imprisonment constitutes a debt within the meaning of the Constitution, and whether the imprisonment is primarily for the purpose of enforcing the payment or for the purpose of punishment for failure to obey the orders or decrees of the court. In order for the imprisonment to be unconstitutional, the money owed must be held to be a debt

within the meaning of the Constitution, and the imprisonment must be held to be for the purpose of enforcing its payment. If either of these things is lacking, the imprisonment cannot be found to be imprisonment for debt within the constitutional meaning.

Thus, where a surviving partner makes use of the coupons attached to bonds purchased with partnership funds, the money due for the coupons is merely a debt, and an order of imprisonment until he shall pay an amount equal to the value of the coupons is illegal as providing for imprisonment for debt. Ex parte Dickens, 162 Ala. 272, 50 So. 218.

In the preceding case it seemed to be admitted that the proceeding was primarily for the enforcement of the payment of the money, and not for the purpose of enforcing an order or decree of court. The court therefore devoted itself to the question of whether the money owed was a debt within the meaning of the Constitution. In the three succeeding cases it seems to be admitted that the money owed constitutes a debt, the question being whether the proceedings are primarily for the purpose of enforcing the payment of the debt, or for the purpose of punishment for disobeying the orders or decrees of the court.

In Knutte v. Superior Ct. 134 Cal. 660, 66 Pac. 875, it was held that proceedings in contempt having for their avowed purpose the enforcement of an order for the payment of rent are unconstitutional.

And in Waldron v. Olsen, 81 N. J. L. 326, 79 Atl. 1061, it is said: "It is beyond the power of the legislature to provide for the imprisonment of a debtor by way of attachment for contempt, in aid of an execution issued on a judgment for a debt, in the absence of fraud, and a statute which authorizes imprisonment simply because the debtor is entitled to property, or is in receipt of an income, without an unlawful or fraudulent refusal to apply it in payment of his debt appearing, or being required, is a statute permitting imprisonment for debt generally, without regard to the question of fraud, and contravenes the Constitution in that particular."

In Second Nat. Bank v. Becker, 62 Ohio St. 289, 51 L.R.A. 860, 56 N. E. 1025, it is held that an order made in a proceeding in contempt against sureties on an undertaking for the redelivery of attached property by the principal, requiring them to pay the judgment recovered against the principal, and directing that in default of such payment they shall be imprisoned until they shall pay the judgment, is an order for the payment of a debt within the terms of the Constitution. The court says: "It seems indisputable that the money due the bank on its judgment against Becker is a debt. . . . The end sought by the order, and its sole purpose was to coerce payment by imprisonment."

But, although the money owed is conceded to constitute a debt, if the imprisonment is primarily for the purpose of punishment for failure to obey an order or decree of court, the imprisonment is constitutional.

Thus, it is held in Re Meggett, 105 Wis. 291, 81 N. W. 419, that a statute authorizing imprisonment for refusal to pay a sum of money in accordance with the orders of the court is not unconstitutional in its application to a mortgagor who collects rents on property in disobedience to the orders of the court, since, in that case, "the imprisonment is not for the debt, but for disobedience of an order to pay money, made, not because he owed it, but because, after the court had sequestered it, . . . he had wrongfully diverted it from the court's control."

And in Re Knaup, 144 Mo. 653, 66 Am. St. Rep. 435, 46 S. W. 151, it is held that a court may enforce its order to an execution debtor to deliver up certain bonds by commitment for contempt without committing an unconstitutional act.

In Meeks v. State, 80 Ark. 579, 98 S. W. 378, where an order directing that a person be imprisoned for contempt consisting of disobedience to an order directing the payment of a debt found by the court to be due to a third person is held not to constitute imprisonment for debt, the court says: "It is true that the order relates to the debt evidenced by the judgment against the estate; but this in no way alters the fact that the imprisonment is for the contempt, not for the debt."

And it is held in Stonehill v. Stonehill, 146 Ind. 445, 45 N. E. 600, that imprisonment for contempt consisting of the failure to pay money for the support of a child is for the purpose of enforcing its decree, and does not constitute imprisonment for debt.

And in Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179, it is said *obiter*, that although a decree ordering a person to surrender property was unconstitutional so far as it ordered him imprisoned for debt, he might be imprisoned for his refusal to obey the decree.

Other cases are based upon the ground that the money owed does not constitute a debt within the meaning of the Constitution.

Thus, an order of the court of bankruptcy for the payment to the trustee of money which constitutes a part of the estate in bankruptcy, and which is in the possession of the bankrupt, has been held not to be an order to pay a debt; and commitment to jail for contempt for failing to obey will not therefore be unconstitutional. Re Rosser, 41 C. C. A. 497, 101 Fed. 562; Re Schlesinger, 42 C. C. A. 207, 102 Fed. 117; Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, reversing 44 C. C. A. 620, 105 Fed. 581; Schweer v. Brown, 64 C. C. A. 574, 130 Fed. 328; Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68, certiorari denied in 201 U. S. 646, 50 L. ed. 903, 26 Sup. Ct. Rep. 761.

But to imprison a bankrupt for his failure to comply with an order to deliver up property not in his hands or under his

control is an imprisonment for debt, and not for contempt. Boyd v. Glucklich, 53 C. C. A. 451, 116 Fed. 131.

And in Samel v. Dodd, 73 C. C. A. 254, 142 Fed. 68, it is said that "it is not within the power of the court, in such a proceeding, to render judgment for the value of property ascertained to be in the possession of, and contumaciously withheld by, a bankrupt, and attach him for contempt upon his refusal to pay. Such procedure would approach dangerously near the line, if it did not overstep it, of imprisonment for debt."

b. Alimony.

Supplementing note to Ex parte Davis, 17 L.R.A.(N.S.) 1140, on imprisonment for failure to pay alimony as a violation of the constitutional provision against imprisonment for debt, which is supplemental to the note in 34 L.R.A. 665.

In Adams v. Adams, 80 N. J. Eq. 175, 83 Atl. 190, Ann. Cas. 1913E, 1083, it is held that alimony is not a debt within the meaning of the constitutional provision forbidding imprisonment for debt.

And in Ex parte Canavan, 17 N. M. 100, 130 Pac. 248, it is held that where a husband is imprisoned for failing to obey an injunction restraining him from removing from the state a part of the community property which has been awarded to his wife in divorce proceedings, the imprisonment is a punishment for his contempt, and not a proceeding to enforce the payment of a debt. The court says, however, that a different question would have been raised if the husband had been imprisoned until he should pay the debt. In that case the proceeding would be for the enforcement of the delivery of the property, and the question would then arise whether the property held by the husband constituted a debt.

In Re Kinsolving, 135 Mo. App. 631, 116 S. W. 1068, however, the court says: "Imprisonment for debt being abolished in this state, a party cannot be imprisoned as for a contempt of court in refusing to obey an order or decree directing the payment of a mere debt, such as is alimony."

c. Bastardy.

Supplementing note in 34 L.R.A. 667.

The duty of a putative father to provide for the maintenance of a bastard child in accordance with the order of the court is not a debt within the constitutional inhibition, but a public duty for the failure to perform which he may be imprisoned. State v. Morgan, 141 N. C. 726, 53 S. E. 142.

And it is held in Ex parte Bridgforth, 77 Miss. 418, 78 Am. St. Rep. 532. 27 So. 622, that a sum of money ordered by the court to be paid for the support of an illegitimate child is in the nature of a penalty, and is not a debt within the constitutional meaning of that term.

And, although the proceeding to affiliate a bastard child is a civil proceeding, the power given by statute to commit the father to jail for failure to pay the judgment for lying-in expenses does not amount to an imprisonment for debt. Land v. State, 84 Ark. 199, 120 Am. St. Rep. 25, 105 S. W. 90.

d. Against officers of the court.

Supplementing note in 34 L.R.A. 669.

See Burbach v. Milwaukee Electric R. & Light Co. 119 Wis. 384, 96 N. W. 829, supra, V. a, in which the person who was complaining of the imprisonment was a guardian *ad litem* and an officer of the court.

VIII. Ne exeat.

Supplementing note in 34 L.R.A. 671.

In a suit in equity for an accounting of property held under a contract, a part of which is in a foreign country, and for a receiver therefor, the court may issue a writ of ne exeat to preserve the property and to compel its delivery to the receiver to abide final decree, and such writ is not in violation of the constitutional provision prohibiting imprisonment for debt. Gooding v. Reid, 101 C. C. A. 310, 177 Fed. 684.

See also Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611, supra, II. b. E. L. D.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

OSCAR J. WEEKS, Doing Business under the Name of O. J. Weeks & Company, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(— C. C. A. —, 216 Fed. 292.)

Indictment — necessity of verification of information in Federal court.

An information charging the commission of a misdemeanor, filed by a state's attorney in a Federal court, need not be verified or supported by an affidavit showing personal knowledge or probable cause, the provision of the Federal Constitution that warrants shall not be issued but upon probable cause supported by oath or affirmation not applying to the institution of a prosecution.

(June 18, 1914.)

Note. — Necessity of verifying information.

The scope of this note is limited to informations, defined as criminal accusations preferred by public prosecuting officers, as distinguished from criminal complaints or accusations made by private individuals; and the latter are not included in the note, although sometimes denominated "informations."

As to waiver of verification of information, see note to Ex parte Talley, 31 L.R.A. (N.S.) 805.

ERROR to the District Court of the United States for the Southern District of New York to review a judgment convicting defendant of a violation of the pure food and drugs act. Affirmed.

The facts are stated in the opinion.

Argued before Coxe, Ward, and Rogers, Circuit Judges.

Mr. **Walter Jeffreys Carlin**, for plaintiff in error:

The information should have been dismissed because it is not supported by verification or oath showing personal knowledge or probable cause.

United States v. Polite, 35 Fed. 58; Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554; United States v. Tureaud, 20 Fed. 621; Johnston v. United States, 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187, 11 Am. Crim. Rep. 349, 22 Cyc. 267; United States v. Sapinkow, 90 Fed. 654; United States v. Baumert, 179 Fed. 735; Re Wilson, 168 Fed. 566; DeGraff v. State, 2 Okla. Crim. Rep. 519, 103 Pac. 538; Ex parte Burford, 3 Cranch, 448, 2 L. ed. 495; United States v. Morgan, 222 U. S. 282, 56 L. ed. 200, 32 Sup. Ct. Rep. 81; United States v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750; United States v. Smith, 40 Fed. 755; Foster, Fed. Pr. 5th ed. § 494, p. 1659; Erwin v. United States, 2 L.R.A. 229, 37 Fed. 470; United States v. Yarborough, 122 Fed. 296.

Mr. **Robert Stephenson**, with Mr. **H. Snowden Marshall**, for the United States:

The demurrer to the information on the ground that it was not supported by verification or oath showing personal knowl-

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As to a complaint or information based on information and belief as the basis for the issuance of a warrant, or for an examination preliminary thereto, see notes to People ex rel. Livingston v. Wyatt, 10 L.R.A.(N.S.) 159, and Salter v. State, 25 L.R.A.(N.S.) 60.

At common law.

"At common law in England there were two kinds of information for crime, one of which was filed by the attorney or solicitor general, and the other by the masters of the Crown office upon the complaint or relation of a private subject. . . . Formerly both of these informations could be filed without leave of court and without further oath or affidavit than the oath of office of the officer preferring it; but by an English statute [4 & 5 Wm. & Mary, chap. 18] old enough to be a part of our common law if applicable to our conditions, it was provided that informations by masters of the Crown office could only be filed by leave of court, and that they must be supported by the affidavit of the person at whose suit they were preferred. Informations by the attorney or solicitor general could still be filed without leave of court and without affidavit or verification." 22 Cyc. 259.

In the United States, it has been held, as stated in WEEKS v. UNITED STATES, that the informations used by the prosecuting officers are those used by the attorney general in England, and not those filed by the masters of the Crown, which were governed by the statute above mentioned. And accordingly, it has been held that, in the absence of any constitutional or statutory provision to the contrary, an information filed by a prosecuting attorney need not be verified. State v. Ransberger, 42 Mo. App. 466; State v. Kyle, 166 Mo. 287, 56 L.R.A. 115, 65 S. W. 763 (*obiter*).

As stated in State v. Graham, 68 W. Va. 248, 40 L.R.A.(N.S.) 924, 69 S. E. 1010: "A prosecuting officer need not swear to an information which he officially tenders, unless the statute so directs, since he acts under his official oath."

And an information filed by the district attorney in his official capacity, with leave of the court, need not be verified, or supported by any affidavit or affirmation. State v. Smith, 114 La. 318, 38 So. 202. The court said: "The officer acts upon his official oath. The court will not assume that that oath is not sufficient to warn him against the grave impropriety or criminality of instituting a prosecution for any other reason than the proper administration of justice. The purpose of the official oath is to maintain good faith and guard against unjust and vindictive prosecution. If this fails of its purpose, an additional oath taken by the prosecuting officer to verify the information would also fail."

So, in Obermark v. People, 24 Ill. App. 259, it was held that an information filed by the state's attorney on behalf of the people, charging the defendant with unlawfully selling intoxicating liquors, need not be sworn to.

And an information filed by the public prosecutor with the consent of the court need not be founded upon or supported by any affidavit. State v. Anderson, 30 La. Ann. 557.

And in Davis v. State, 11 Ga. App. 10, 74 S. E. 442, it was held that "a criminal accusation in the city court of Savannah must be drawn up by the prosecuting officer, but need not be supported by a precedent affidavit."

Under constitutional or statutory provisions—4th Amendment to United States Constitution, and similar constitutional provisions.

In most of the states, there are constitutional or statutory provisions governing the filing of informations, upon which provisions the necessity for verification depends. The most common constitutional provision affecting this question is one similar to that contained in the 4th Amendment to the United States Constitution, to the effect that

edge or probable cause was properly overruled, and the motion in arrest of judgment was properly denied.

Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; Mackin v. United States, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Hurtado v. California, 110 U. S. 516, 524, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292; Cole, Information, 262; 19 How. St. Tr. pp. 1382–1389, Addenda; Territory v. Cutinola, 4 N. M. 305, 14 Pac. 809; State v. Kelm, 79 Mo. 515; Hale v. Henkel, 201 U. S. 62–66, 50 L. ed. 660–662, 26 Sup. Ct. Rep. 370; Washburn v. People, 10 Mich. 372; King v. State, 17 Fla. 183; Lustig v. People, 18 Colo. 217, 32 Pac. 275; State v. Gleason, 32 Kan. 245, 4 Pac. 363, 5 Am. Crim. Rep. 172; Eichenlaub v. State, 36 Ohio St. 140; Thornberry v. State, 3 Tex. App. 36; State v. Dover, 9 N. H. 468; State v. Keena, 64 Conn. 212, 29 Atl. 470; State v. Guglielmo, 46 Or. 250, 69 L.R.A. 466, 79 Pac. 577, 80 Pac. 103, 7 Ann. Cas. 976; State v. Smith, 114 La. 318, 322, 38 So. 202, 204; Information v. Jager, 29 S. C. 438, 7 S. E. 605; State v. Sickle, Brayton (Vt.) 132.

Rogers, Circuit Judge, delivered the opinion of the court:

The defendant has been convicted of a crime committed in violation of the pure food and drugs act, approved June 30, 1906

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no warrant shall issue without probable cause, supported by oath or affirmation. And under such provisions it has been held that an information must be supported by the oath or affirmation of the officer filing it, or by that of some other person, to authorize the issuance of a warrant of arrest. United States v. Shepard, 1 Abb. (U. S.) 431, Fed. Cas. No. 16,273; United States v. Baumert, 179 Fed. 735; Lustig v. People, 18 Colo. 217, 32 Pac. 275; Noble v. People, 23 Colo. 9, 45 Pac. 376; Myers v. People, 67 Ill. 503 (*obiter*); Eichenlaub v. State, 36 Ohio St. 140.

It will be observed that the decision in WEEKS v. UNITED STATES, holding that verification was not necessary, is upon the assumption that the information was not the basis of an application for the issuance of a warrant of arrest.

And so, in United States v. Polite, 35 Fed. 58, it was held that an information filed by a district attorney, which sets out that it is on his oath of office, but is not sworn to, is not bad for want of verification, where the accused was arrested on a warrant issued upon an affidavit stating facts on knowledge, was brought before a committing magistrate, and the evidence against him was there taken on oath, and the information has been filed upon this sworn testimony, and is accompanied by the papers of the magistrate who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused.

And an information filed by the district attorney, by leave of court, upon a certified transcript of the proceedings before a justice of the peace, after the accused had been arrested and brought before him for a preliminary examination, upon a complaint duly sworn to before him, need not be verified; and a statute providing for no verification of an information in case a preliminary examination has been had or waived is not in derogation of a constitutional provision that no warrant shall issue without probable cause, supported by oath or affirmation reduced to writing, where it also expressly provides that, unless a preliminary examination has been had or waived, the information must be supported by a proper and sufficient affidavit before a warrant of arrest can issue. Ratcliff v. People, 22 Colo. 75, 43 Pac. 553.

So, in Ohio, under a constitutional provision similar to the 4th Amendment to the United States Constitution,—although of course, in original proceedings, in criminal matters (other than by indictment) there must be an affidavit upon which to found a warrant,—an information filed in the probate court need not be sworn to, where there was a sufficient affidavit in the preliminary proceedings in the case before the mayor's court. Oberer v. State, 28 Ohio C. C. 620.

And an information filed by the prosecuting attorney of the police court of a city, upon the bringing into court of the accused, who has been arrested under a warrant issued by the judge upon an affidavit made by a private individual, charging him with a violation of a city ordinance, need not be verified. O'Brien v. Cleveland, 4 Ohio Dec. Reprint, 189, 1 Cleveland L. Rep. 100. The court said: "He [the prosecuting attorney] signs it [the information] officially. It is his official act in the nature of an indictment in which he sets up the charge against this party for the purpose of giving him to understand the nature of the charge against him. It is not a prosecution under any state law."

—Oklahoma Constitution and statutes.

In Oklahoma, under a constitutional provision that no warrant shall issue but upon probable cause supported by oath or affirmation, and statutes providing that all informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person; and that, when an information, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and there is reasonable ground to believe that the defendant has

L.R.A.1915B.

(act June 30, 1906, chap. 3915, 34 Stat. at L. 768, Comp. Stat. 1913, § 8717). The information charged the defendant with having shipped from New York city to St. Louis, Missouri, a certain article of food, labeled in part as follows:

"Cream thick—Serial No. 2049—Manufactured by O. J. Weeks & Company, New York, New York. It is guaranteed to contain no gelatine, gum arabic, egg albumen, or similar article."

This label, it was charged, was false and misleading, and calculated to mislead and deceive purchasers in that the article of food contained as one of its ingredients an article similar to gum arabic, to wit, India gum. The information was signed by the United States attorney, but was not verified, nor were any affidavits filed or submitted to the court. The defendant appeared and demurred to the information, and in specification of points under his demurrer alleged "that the said information is not supported by a verification or oath showing personal knowledge or probable cause."

His demurrer was overruled, and being required to plead, he pleaded not guilty. At the close of the trial his counsel renewed his motion that the information be dismissed for reasons before stated, but his motion was denied, and the case was submitted to the jury, and a verdict of guilty was rendered.

The question we have to decide, therefore, is whether an attorney for the United States

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committed it, issue a warrant of arrest,—it has been held that an information charging a misdemeanor must be verified by the positive oath or affirmation of the prosecuting attorney or of some other person competent to testify to the facts presented to the magistrate, in order to authorize the issuance of a warrant of arrest, or support a judgment of conviction (Ex parte Flowers, 2 Okla. Crim. Rep. 430, 101 Pac. 860 [*obiter*]; Salter v. State, 2 Okla. Crim. Rep. 464, 25 L.R.A. (N.S.) 60, 139 Am. St. Rep. 935, 102 Pac. 719; Snapp v. State, 2 Okla. Crim. Rep. 515, 103 Pac. 553; DeGraff v. State, 2 Okla. Crim. Rep. 519, 103 Pac. 538; Drake v. State, 2 Okla. Crim. Rep. 643, 103 Pac. 878; Re Talley, 4 Okla. Crim. Rep. 398, 31 L.R.A.(N.S.) 805, 112 Pac. 36; Ex parte Simmons, 4 Okla. Crim. Rep. xiv., 112 Pac. 41; Ex parte Crawford, 4 Okla. Crim. Rep. xiii., 112 Pac. 41); unless verification be waived by the accused (Re Talley, Ex parte Simmons, and Ex parte Crawford, supra).

But it is not necessary, under the Oklahoma Constitution and statutes, that an information in a felony case should be verified. Re Talley, 4 Okla. Crim. Rep. 398, 31 L.R.A.(N.S.) 805, 112 Pac. 36 (*obiter*); Davis v. State, 4 Okla. Crim. Rep. 508, 113 Pac. 220; Heacock v. State, 4 Okla. Crim. Rep. 606, 112 Pac. 949; Henson v. State, 5 Okla. Crim. Rep. 201, 114 Pac. 630; Martin v. State, 5 Okla. Crim. Rep. 355, 114 Pac. 1112; Gunnells v. State, 7 Okla. Crim. Rep. 98, 122 Pac. 264; Hughes v. State, 7 Okla. Crim. Rep. 117, 122 Pac. 554; Brown v. State, 9 Okla. Crim. Rep. 382, 132 Pac. 359.

As stated in Re Talley, 4 Okla. Crim. Rep. 398, 31 L.R.A.(N.S.) 805, 112 Pac. 36, and, in substance, in several other of the cases last above cited: "There is no constitutional or statutory requirement in this state that informations charging a felony be verified at all. As to felonies, the constitutional provision for a showing of probable cause supported by oath or affirmation, to authorize the arrest and detention of the accused, is fully met, (1) by the verified complaint filed with the examining magistrate as provided for by § 6577 of Snyder's Comp. Laws, and (2) by the evidence taken under oath in the accused's preliminary examination as required by § 30, art. 2, of the state Constitution, and by his being held to answer by the magistrate, or by the fact that the accused waived such preliminary examination, thereby admitting the existence of probable cause to believe him guilty sufficient to warrant his formal accusation and trial. But these preliminary proceedings are not required in misdemeanor cases."

—Missouri statutes.

Under an early Missouri statute providing that an information filed with a justice of the peace must be "verified by the oath or affidavit of a person competent to testify against the accused or by the prosecuting attorney," it was held that a prosecution could not be maintained upon an information filed with a justice of the peace by the prosecuting attorney, but not verified by oath or affidavit. State v. Calfer, — Mo. —, 4 S. W. 418.

But under later statutes authorizing prosecutions before justices of the peace for misdemeanors by information, and providing that such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted, under his oath of office, and shall be filed with the justice, etc.; and that whenever the prosecuting attorney has knowledge of the commission of an offense, or shall be informed thereof by complaint deposited with him, it shall be his duty to file an information,—"it is not necessary that the prosecuting attorney [or assistant prosecuting attorney] should swear to an information presented to a justice of the peace. In presenting it he acts officially under his oath of office." State v. Ransberger, 106 Mo. 135, 17 S. W. 290; State v. Webster, 206 Mo. 558, 105 S. W. 705; State v. Fletchall, 31 Mo. App. 296; State v. Wilkson, 36 Mo. App. 373; State v. Parker, 39 Mo. App. 116; State v. Buck, 43 Mo. App. 443; State v. Davidson, 44 Mo. App. 513; State v. Mc-

can proceed in the courts of the United States by information to prosecute one who is alleged to have committed a misdemeanor, where the information is not verified or supported by an affidavit showing personal knowledge or probable cause.

There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting, his trial and conviction is a nullity; for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: Indictment or presentment by a grand jury, and information by the public prosecutor.

The colonists who came to this country from England brought with them the common and statute laws of England as they existed at the time of their immigration and in so far as they were applicable to the local circumstances of the colonies which they established. Among the principles of the common law which they thus brought were those which regulated the mode of proceeding in criminal cases, the law relating to indictments and informations, and the right to trial by jury. Prior to the Declaration of Independence, various statutes had abolished in the colonies as well as in England a number of the oppressive provi-

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Carver, 47 Mo. App. 650; State v. Hart, 47 Mo. App. 653; State v. Haley, 52 Mo. App. 520; State v. Sweeney, 56 Mo. App. 409; State v. O'Connor, 58 Mo. App. 457 (*obiter*): State v. Maupin, 71 Mo. App. 54: State v. Blands, 101 Mo. App. 618, 74 S. W. 3; State v. O'Kelley, 121 Mo. App. 178, 98 S. W. 804; State v. Ostmann, 123 Mo. App. 114, 100 S. W. 696; State v. Simpson, 126 Mo. App. 169, 103 S. W. 592.

And under the provision that, whenever the prosecuting attorney has knowledge of the commission of an offense, or shall be informed thereof by complaint deposited with him, it shall be his duty to file an information, an information filed in the circuit court by the prosecuting attorney need not be verified, as it is filed on his official oath. State v. Ramsey, 52 Mo. App. 668.

But under a statute expressly providing that informations filed in courts of record, including the circuit court, shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, filed with the information,—an information so filed, but not verified or supported by affidavit, is, at least, insufficient and should be quashed upon motion (State v. Kirschner, 23 Mo. App. 349; State v. Pruett, 61 Mo. App. 156); and it has been held that such an information is fatally defective, and will not warrant the arrest of the defendant, or support a conviction thereunder (State v. Bragg, 63 Mo. App. 22), and a judgment of conviction rendered thereon should be arrested upon motion (State v. O'Connor, 58 Mo. App. 457; State v. Sayman, 61 Mo. App. 244).

In State v. Pohl, 170 Mo. 422, 70 S. W. 695, where it appears that a private individual had signed an information charging the defendant with the crime in question, which information purported to be sworn to before the circuit clerk of the county, but did not contain the seal; and that the prosecuting attorney of the county, in his official capacity, and not under oath, thereafter filed an information charging the defendant with the crime, upon which information the defendant was placed on trial, —the court, holding untenable the defendant's contention that the information was not sufficient to require him to be placed on trial, because (among other things) it was "not supported by the affidavit of any person," said: "It [the information] was filed on September 24, 1901; and since the adoption of the amendment to the Constitution which took effect on December 19, 1900, an information in case of felony need not be under oath, but is sufficient if presented by the attorney general or the prosecuting attorney of the proper county under his official oath."

Concerning this case, however, the court in State v. Hicks, 178 Mo. 433, 77 S. W. 539,—the same judge (Burgess) writing the opinion,—said: "It was advertently said in the case of State v. Pohl, 170 Mo. 422, 70 S. W. 695, that an information for felony filed on the 24th day of September, 1901, which was after the amendment to the Constitution went into effect on the 19th day of December, 1900, need not be under oath, but was sufficient if presented by the attorney general or the prosecuting attorney of the proper county under his official oath. As a matter of fact, however, the information in that case was supported by the affidavit of a person who had knowledge of the commission of the offense and by whom it was committed, as provided for by § 2478, Revised Statutes 1899, amended by Laws 1901, pages 138 and 139. Moreover, no objection was taken to the information by motion to quash, but for the first time by motion in arrest, and then upon the grounds only that the information and the allegations therein contained were insufficient to require the defendant to be placed upon trial, and because the information did not charge the defendant with a crime known to the law. It will thus be seen that no objection was taken to the information as not being sworn to by the prosecuting attorney, and what was said by us in this regard was mere *obiter*."

And in the Hicks Case it was also said that "since the Acts of the General Assembly, approved March 13, 1901 (Laws 1901,

sions of English law relating to criminal trials. Among the principles which had thus been abrogated, for example, was that which denied to a person accused of a capital crime the right to have compulsory process for his witnesses, and that which withheld from him the right to examine on oath those witnesses who voluntarily appeared for him, as well as that which forbade him the aid of counsel in his defense, except only as regarded the questions of law. See United States v. Reid (1851) 12 How. 361, 363, 13 L. ed. 1023, 1024.

The proceeding by information is said to have been unpopular in England and to some extent in the colonies. But it has never been abolished in England, although in some of our states it has been done. At the time of the Declaration of Independence it was a familiar mode of criminal procedure in all the colonies.

When the statute of 3 Hen. VII. extended the jurisdiction of the court of star chamber, and informations became restricted in practice to that court, the members of which were the sole judges of the law, the fact and the penalty, a very oppressive use was made of them for something more than a century, "so as continually to harass the subject and shamefully enrich the Crown." 4 Bl. Com. p. 310. And when the court of star chamber was abolished in the time of Charles I., and proceedings by information were again used in the court of King's bench, the prejudice which had arisen from the long abuse of informations was so

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pp. 138, 139), went into effect, which was before the information in the case in hand was filed, all informations are required to be signed by the prosecuting attorney, and to be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information." Ibid.

And in the following cases, it has been held that, under statutes specifically requiring that all informations shall be signed by the prosecuting attorney and verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information,—an information filed by the prosecuting attorney, but not thus verified or supported by affidavit, is irregular, and should be quashed for such irregularity, upon motion duly made, unless amended by leave of court, before verdict, or the irregularity waived: State v. Bonner, 178 Mo. 424, 77 S. W. 463; State v. Schnettler, 181 Mo. 173, 79 S. W. 1123; State v. Brown, 181 Mo. 192, 79 S. W. 1111 (irregularity waived); State v. McGee, 181 Mo. 312, 80 S. W. 899; State v. Sheridan, 182 Mo. 13, 81 S. W. 410; State v. Hannigan, 182 Mo. 15, 81 S. W. 406; State v. Decker, 185 Mo. 182, 83 S. W. 1082; State v. Gutke, 188 Mo. 424, 87 S. W. 503; State v. Kelly, 188 Mo. 450, 87 S. W. 451; State v. Runzi, 105 Mo. App. 319, 80 S. W. 36 (irregularity waived); State v. Weyland, 126 Mo. App. 723, 105 S. W. 660.

So, in State v. Balch, 178 Mo. 392, 77 S. W. 547, holding the information therein fatally defective as a criminal pleading, the court added: "While not insisted on by defendants, we observe that this information is not verified in any manner as required by" the statute. (Citing State v. Bonner, 178 Mo. 424, 77 S. W. 463.)

And under this statute, an information must be verified or supported by affidavit filed therewith, notwithstanding a complaint, duly verified by the prosecutrix, has previously been filed with a justice of the peace, whereupon he has duly issued a warrant, and the defendant, after due statutory procedure, has been held to await the action of the grand jury or the filing against him of an information, and the transcript of the justice, together with the verified complaint, has been filed in the office of the clerk of the circuit court by the justice of the peace prior to the filing of the information in question; such facts not being a sufficient compliance with the requirement of the statute. State v. Lawhorn, 250 Mo. 293, 157 S. W. 344.

And an information signed and filed by the prosecuting attorney is bad for want of a proper verification, where it is merely followed by an affidavit of verification upon information and belief, drawn as if to be executed by him, but signed only by the prosecuting witness, as the affidavit is not a verification by the prosecuting attorney, because not signed by him, and is not sufficient as a verification by the prosecuting witness, because made upon information and belief only. State v. McCoy, 140 Mo. App. 395, 124 S. W. 78.

In State v. Zeppenfeld, 12 Mo. App. 574, and State v. Fitzporter, 17 Mo. App. 271, it was held that, under a section of the act establishing the St. Louis court of criminal correction, which provided that an information lodged by the prosecuting attorney or the assistant prosecuting attorney need not be under oath, it was not necessary that an information filed by the assistant or acting assistant prosecuting attorney should be verified, notwithstanding a later general statute providing that all informations should be verified by the oath of the prosecuting attorney or of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which should be filed with the information.

But in the later case of State v. Bennett, — Mo. —, 11 S. W. 264, the supreme court of Missouri held that, under the general law, an information filed in the St. Louis court of criminal correction by the assistant prosecuting attorney thereof must be verified or supported by affidavit as provided by said law, notwithstanding the ear-

strong that it was strenuously contended that all proceedings by information were illegal as being contrary to the nature of English laws and to Magna Charta. But the objections were overruled; Sir Matthew Hale saying: "That although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentment or indictment of twelve sworn men, yet, for crimes inferior to capital ones, proceedings might be by information, and this, from long and frequent practice, he held was certainly established as the law of the land. Prynn's Case, 5 Mod. 463; Rex v. Berchet, 1 Shower, K. B. 106; Bacon Abr. Information, A; 2 Hawk. P. C. 260; 4 Bl. Com. 310; 1 Chitty, Crim. Law, 843; 1 Erskine, Speeches, 275; State v. Dover (1838) 9 N. H. 468.

And the unpopularity of informations was not restricted to the mother country, but, as we have already said, existed to some extent in this country. Mr. Justice Wilson of the Supreme Court of the United States, and who was also a member of the Constitutional Convention of 1787, in the lectures which he delivered as professor of law in the University of Pennsylvania in 1790–92, after calling attention to the two kinds of informations—those filed *ex officio* by the public prosecutor and those carried on in the name of the commonwealth or Crown, but in fact at the instance of some private person or common informer—said: "The first have been the source of much;

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lier special statute relating to the local criminal court.

But the affidavit is not required to be signed by the prosecuting attorney, and there is a substantial compliance with the statute, if the information is signed by him, and the clerk of the court in which it is filed certifies under his hand and the seal of the court that the "prosecuting attorney makes oath and says that the facts stated in the information are true according to his best knowledge, information, and belief" (State v. Hicks, 178 Mo. 433, 77 S. W. 539), or a notary public of the county certifies under his hand and seal that the required oath was administered to the prosecuting attorney (State v. Zehnder, — Mo. App. —, 168 S. W. 661).

And the omission of the prosecuting attorney to verify an information is simply an irregularity which does not render the information or the proceedings under it void, and the information may be amended by leave of court, by adding a verification, at any time before trial, or the irregularity may be waived by the defendant. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123.

And where an information was properly verified before trial, the omission to verify it before filing was an irregularity which is cured by verdict. State v. Patton, 94 Mo. App. 32, 67 S. W. 970.

—Texas Constitution and statutes.

Under a constitutional provision that no warrant shall issue without probable cause, supported by oath or affirmation, and statutes requiring that an information shall be based upon, and shall not be presented prior to the making of, the written affidavit of some credible person, sworn to before the county or district attorney, or some officer authorized by law to administer oaths, and filed with or prior to the information,—such an affidavit is absolutely essential to the validity of an information, and an information not based upon an affidavit as thus described is fatally defective, and wholly insufficient to support a conviction. Morris v. State, 2 Tex. App. 502; Thornberry v. State, 3 Tex. App. 36; Deon v. State, 3 Tex. App. 435 (*obiter*); Turner v. State, 3 Tex. App. 551; Dishongh v. State, 4 Tex. App. 158; Casey v. State, 5 Tex. App. 462; Scott v. State, 9 Tex. App. 434; Thomas v. State, 14 Tex. App. 70; Wadgymar v. State, 21 Tex. App. 459, 2 S. W. 768; Robertson v. State, 25 Tex. App. 529, 8 S. W. 659; Neiman v. State, 29 Tex. App. 360, 16 S. W. 253; Jennings v. State, 30 Tex. App. 428, 18 S. W. 90; White v. State, — Tex. Crim. Rep. —, 35 S. W. 391; Domingues v. State, 37 Tex. Crim. Rep. 425, 35 S. W. 973; Moore v. State, — Tex. Crim. Rep. —, 105 S. W. 817; Abbey v. State, 55 Tex. Crim. Rep. 232, 115 S. W. 1191; Mendoz v. State, 56 Tex. Crim. Rep. 65, 118 S. W. 1031; Carroll v. State, 56 Tex. Crim. Rep. 78, 118 S. W. 1031; Montgomery v. State, 60 Tex. Crim. Rep. 303, 131 S. W. 1087.

—miscellaneous statutes.

Under a statute providing that prosecutions for violations of the provisions thereof shall be on information filed by the United States marshal or any deputy marshal, or by the district attorney or by any of his assistants, or may be by indictment; and that it shall be the duty of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the grand jury,—the information therein authorized need not be verified by the officer filing it, or supported by his affidavit. United States v. John J. Seanon Co. 3 Alaska, 595.

And under a statute providing that "all offenses cognizable in county courts shall be prosecuted by information of the state's attorney, attorney general, or some other person, and when an information is presented by any person other than the state's attorney or attorney general, it shall be verified by affidavit of such person,"—an information signed and filed by the state's attorney in his official capacity need not be verified. People v. Viskniskki, 255 Ill. 384, 99 N. E. 621, affirming 169 Ill. App. 230; Sam-

the second have been the source of intolerable vexation; both were the ready tools, by using which Empson and Dudley and an arbitrary star chamber fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes; but ingenious tyranny can torture in a thousand shapes without depriving the person tortured of his life."

After calling attention to the fact that in England restraints had been imposed upon informations at the instance of private persons, but not upon those filed *ex officio* by the public prosecutor, he went on to say: "By the Constitution of Pennsylvania, both kinds are effectually removed. By that Constitution, however, informations are still suffered to live; but they are bound and gagged. They are confined to official misdemeanors; and even against those they cannot be slipped but by leave of the court. By that Constitution, 'no person shall, for any indictable offense, be proceeded against criminally by information,' 'unless by leave of the court, for oppression and misdemeanor in office.'" 2 Wilson's Works, Andrews's ed. p. 450.

There seems to be no doubt that prosecution by information is as ancient as the common law itself. The subject had no reason to complain because this method of prosecution was adopted, for, as Blackstone Commentaries, vol. 4, p. 310, states: "The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same

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uel v. People, 164 Ill. 384, 45 N. E. 728 (*obiter*); Giroux v. People, 132 Ill. App. 562; Hall v. People, 134 Ill. App. 559.

In People v. Viskniskki, 255 Ill. 384, 99 N. E. 621, however, the court said: "Plaintiff in error concedes that the statute above quoted authorizes the presentation of an information by the state's attorney without any affidavit, but he urges that this statute is unconstitutional, as being in violation of § 6 of the Bill of Rights. The constitutional question suggested was waived by the plaintiff in error by removing his case to the appellate court, and he cannot now be heard in this court upon that question."

Under the Kansas Code of Criminal Procedure, the terms of which are not set out, an information must be verified by the oath of the prosecuting attorney, the complainant, or some other person (State v. Spencer, 43 Kan. 119, 23 Pac. 159); but an information filed by the county attorney need not be verified by him, where it is duly verified by the positive oath of some other person (State v. Brooks, 33 Kan. 708, 7 Pac. 591, 6 Am. Crim. Rep. 299).

Under a provision of the charter and laws of a city, that "prosecutions in the recorder's court for crimes, misdemeanors, and offenses arising under the laws of this state, and within the jurisdiction of said court, shall be by information as provided for by statute: Provided, that in all cases where an information shall be filed against any person held for trial before said court it shall not be necessary that said information be verified by oath,"—an information signed by the prosecuting attorney and filed by him in the recorder's court of the city, in which court the defendant is to be tried, need not be verified by the oath of the prosecuting attorney or any other person. People v. Graney, 91 Mich. 646, 52 N. W. 66.

And under a statute providing that the name of the district attorney shall be subscribed to all informations, by himself or his deputy, and that, in all cases in which the defendant has not had or waived a preliminary examination, there shall be filed with the information the affidavit of some credible person verifying the information, L.R.A.1915B.

etc.,—no verification of any kind need be attached to an information; but where a verification is necessary at all, it must be contained in the independent affidavit of a proper person, filed with the information, as prescribed in the statute. White v. People, 8 Colo. App. 289, 45 Pac. 539.

So, under the Indiana statute upon the subject of prosecutions by information, such a proceeding must be based upon an affidavit first filed; and, on due motion, an information not founded on such an affidavit, legally sworn to, should be quashed (Carpenter v. State, 14 Ind. 109; Cantwell v. State, 27 Ind. 505; Miller v. State, 122 Ind. 355, 24 N. E. 156), or a judgment of conviction, after a trial on such an information, should be arrested (Baramore v. State, 4 Ind. 524); and it is not sufficient that the information itself is merely verified (Carpenter v. State, supra).

And in Virginia, an information not filed either upon a presentment or indictment by a grand jury, or upon a complaint in writing verified by the oath of a competent witness, as required by statute, cannot be maintained, and will not support a judgment of conviction. Wilson v. Com. 87 Va. 94, 12 S. E. 108.

Sufficiency of oath of office, where an oath is required by law.

A formal complaint to the court, of a constructive criminal contempt, made by one of the prosecuting officers of the court, in his official capacity,—he being duly sworn to the proper performance of his official duties,—carries with it the sanction of his oath of office, and, in the absence of a statute or an established rule of law requiring that in all cases the complaint itself shall be sworn to, requires no other verification, to justify the issuance of process and a hearing. Hurley v. Com. 188 Mass. 443, 74 N. E. 677, 3 Ann. Cas. 757. The court said: "Assuming, as we do, that a statement of a constructive criminal contempt should be properly verified before action is taken upon it by a court, we are of opinion that a formal presentation, by a sworn prosecuting

judgment was given by the same judges, as if the prosecution had been by indictment."

Moreover, it seems to have always been the rule that the substantial parts of the information had to be drawn with as much exactitude as the corresponding parts of an indictment for the same offense.

In the early years of the Federal government, informations were principally used, if not exclusively used, for the recovery of fines and forfeitures. And Mr. Justice Story in his Commentaries on the Constitution, § 1780, published in 1833, said, in speaking of informations: "This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of Congress under the national government, in mere cases of misdemeanor, though common enough in civil prosecutions for penalties and forfeitures."

But within the last fifty years prosecutions by informations have increased greatly in the Federal courts. See Ex parte Wilson, 114 U. S. 417, 425, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283.

It appears, as Stephen states in his History of the Criminal Law, vol. 1, p. 295, that from the earliest times the law officers of the King accused persons of offenses not capital in his own court without the intervention of a grand jury. But the right to prefer a criminal information is at common law restricted to misdemeanors.

"At common law any information will lie

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officer, is a sufficient verification to justify judicial action."

So, under a statute providing that, in certain cases, "the prosecution shall be in the form of an information on the official oath of the corporation counsel," an information signed and presented by the corporation counsel, and stating that he "comes into court, and upon his oath of office gives the court to understand," etc., need not be otherwise verified, as the personal presentation by the officer of an information containing this statement and signed by him is to be "regarded as the actual taking of the oath required by law, and quite as legal, although expressed in writing or in print, as if expressed verbally." Information against Jager, 29 S. C. 438, 7 S. E. 605.

And in State v. Comstock, 27 Vt. 553, it was held that a criminal complaint made and signed before a justice of the peace by a "town grand juror," in his official capacity, —he being "a standing officer of the government, as much so as the state's attorney,"— need not state that it is made upon his oath of office, as it will be presumed that he has taken that oath, and his official act must have been under the sanction thereof, and no other oath is required of him.

And a statute authorizing the institution of a criminal prosecution by an information filed by the district attorney, without requiring any verification thereof other than his official oath, although not requiring that the information be preceded by the arrest or preliminary examination of accused, does not contravene the due process of law clause of the 14th Amendment of the Federal Constitution. Lem Woon v. Oregon, 229 U. S. 586, 57 L. ed. 1340, 33 Sup. Ct. Rep. 783.

And even under the provision of the 4th Amendment of the United States Constitution, that no warrant shall issue but on probable cause, supported by oath or affirmation, it has been held that an information filed by the district attorney needs no verification, as his oath of office is a sufficient compliance with that provision: an information filed by a public prosecuting officer being "probable cause" for the issue of a warrant, and his oath of office being sufficient support thereof, under the provision. Territory v. Cutinola, 4 N. M. 305, 14 Pac. 809.

Likewise, in State v. Guglielmo, 46 Or. 250, 69 L.R.A. 466, 79 Pac. 577, 7 Ann. Cas. 976, rehearing denied in 46 Or. 262, 69 L.R.A. 473, 80 Pac. 103, 7 Ann. Cas. 981, it was held that, notwithstanding a constitutional provision against the issuing of warrants for the arrest of any person, except upon probable cause, supported by oath or affirmation, an information filed by the prosecuting attorney need not be verified, to authorize the issuance of a warrant of arrest or support a judgment of conviction, as the prosecuting attorney's official oath is sufficient to comply with the constitutional provision. The court said: "The Bill of Rights of this state does not demand that the oath or affirmation sustaining the probable cause shall be reduced to writing, nor does our statute require an information charging the commission of a crime to be verified; and, in the absence of any enactment on the subject, the rules of the common law in relation to informations exhibited by the attorney general are applicable and controlling." And as an indictment "is based on and supported by the oath of the grand jurors, which fact, in this state, need not be recited in the written accusation, so an information, under our statute, need not be verified; for the official oath of the person whose duty it is to prosecute the formal charge complies with the requirement of the organic act, and supplies the necessary oath or affirmation, thereby supporting the probable cause."

And an information filed by the district attorney on his oath of office is supported by sufficient oath to satisfy the requirement of the Louisiana Bill of Rights, that no warrant shall issue except upon probable cause, supported by oath or affirmation, without any verification or supporting affidavit. "A special oath by that officer is not required, nor an oath on the part of the person complaining, if the officer, in the exercise of a proper discretion, deems that

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for any misdemeanor, but not for a felony." 22 Cyc. 187, and cases there cited.

The offense charged in the information now under consideration was plainly a misdemeanor, and for more than 200 years in England the right has been established to prosecute by information, and, without the sanction of a grand jury, a person charged with having committed a misdemeanor.

Bacon in his Abridgment, vol. 3, 635, after stating that an information differs principally from an indictment in that "an indictment is an accusation found by the oath of twelve men, whereas an information is only the allegation of the officer who exhibits it," goes on to explain that there were two kinds of criminal informations in use in England under the common-law procedure. The first, which was for offenses more immediately against the king, was filed, he says, by the attorney general *ex officio* and without leave of court. The second, which was for offenses against private individuals, was exhibited by masters

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he has sufficient ground to present an information without requiring that oath." State v. Smith, 114 La. 322, 38 So. 204.

But under the Oklahoma constitutional provision that no warrant shall issue but upon probable cause, supported by oath or affirmation, it has been expressly held that an information merely on the official oath of the prosecuting attorney, without other verification, is not sufficient. The Oklahoma criminal court of appeals said: "This contention [that an information filed by the prosecuting attorney requires no verification other than his official oath] is obviously without merit. The error of the argument is so self-evident as to require only a passing notice. Counsel overlooks the fact that by the adoption of the 4th Amendment of the Federal Constitution the procedure by information lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation. . . . The constitutional provision in the Bill of Rights is but a reiteration of this essential safeguard of the liberty and security of the citizen against the arbitrary action of those in authority. Such pernicious practice may suit the purpose of despotic power, but is alien to the pure atmosphere of political liberty and personal freedom. The constitution expressly requires a showing of cause before a warrant shall issue, and the constitutional safeguards for security and liberty cannot in this manner be abrogated or abridged. They must stand as adopted by the people." Salter v. State, 2 Okla. Crim. Rep. 464, 25 L.R.A.(N.S.) 60, 139 Am. St. Rep. 935, 102 Pac. 719; Snapp v. State, 2 Okla. Crim. Rep. 515, 103 Pac. 553.

Amended information.

An information amended at the trial in a mere matter of form, to correct a mistake in spelling, need not be reverified. State v. Bugg, 66 Kan. 668, 72 Pac. 236, 14 Am. Crim. Rep. 109.

And where an information verified by the prosecuting witness is amended in matter of form, after the defendant had been arrested under the warrant issued thereupon, and when he appears for trial, by adding, in the presence, and at the instance, or with the full assent, of the prosecuting witness, certain words which do not change the offense charged, the information need not be sworn to anew. State v. Nash, 51 S. C. 319, 28 S. E. 946.

So, where the prosecuting attorney who filed and verified an information has, by leave of court, amended the same by inserting, over his own signature and affidavit, in one place the word "deliberately," and in another, "wilfully," the information need not be reverified, under a statute providing that "any affidavit or information may be amended in matter of form or substance at any time by leave of court before the trial, and on the trial as to all matters of form and variance, at the discretion of the court, when the same can be done without prejudice to the substantial rights of the defendant, on the merits, etc." State v. Darling, 216 Mo. 450, 23 L.R.A.(N.S.) 272, 129 Am. St. Rep. 526, 115 S. W. 1002.

And where an original information was positively verified, and the defendant was legally arrested thereon, and afterwards gave bond and thereafter appeared in pursuance of the provision of the bond and not because of the warrant, and amendment of the information by adding the word "unlawfully" does not render necessary a new verification, or afford a ground for quashing the information for want thereof. State v. Engborg, 63 Kan. 853, 66 Pac. 1007.

Where the county attorney, upon leave obtained, filed in a criminal case an amended complaint in seven counts, verified by himself, and has subsequently, with the permission of the court, stricken out all of the counts except two, and changed the number of one of the two remaining counts, making the complaint practically the same as the original complaint in the action, it is not necessary that it should be again verified after the striking out of the several counts and the changing of the number. State v. Redford, 32 Kan. 198, 4 Pac. 98.

But where an information, verified as required by law, is amended by interlineation containing a new and material allegation, it must be reverified. Hazelton v. State, 8 Okla. Crim. Rep. 184, 126 Pac. 703.

And where a duly verified information charging one with the statutory offense of imputing a want of chastity to a female is amended by permission of the courts, under statutory authority, so as to charge the accused with the wholly distinct statutory offense of using obscene language in a public place, it must again be verified as provided by statute. Hubbard v. Territory, 20 Okla. 764, 95 Pac. 217. A. C. W.

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of the Crown, and, as matter of course, prior to the statute of 4 & 5 William & Mary, chap. 18. But, after that statute was enacted, informations of the second class, he declares, could not be filed except upon leave of court, and all such informations had to be supported by the affidavit of the person at whose suit it was filed.

In the United States it has been suggested that informations brought by the prosecuting officers answer to the informations filed by the masters of the Crown, and which, as said, had to be supported by affidavit, and not to the informations of the first class or those which related more immediately to the King, and which could be filed without affidavit. Those who make this suggestion rely upon the statement found in Blackstone's Commentaries, vol. 4, p. 309, where that distinguished commentator says: "The objects of the King's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the Crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English Constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the Crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

Now this statement may seem to imply that the attorney general's right to file informations for misdemeanors was not unlimited, but was restricted to misdemeanors which tended to disturb or endanger the government. But, if this was his meaning, it is evident that he was mistaken in his understanding of the law.

Chitty in his great work on the Criminal Law, p. 884, says: "Informations may be filed by the attorney general for any offense below the dignity of felony, which tends, in his opinion, to disturb the government or immediately interfere with the interests of the public or the safety of the Crown. He most frequently exercises this power in cases of libels on governments or high officers of the Crown, etc. He seems, indeed, at his option to exact it when any offense occurs which may thus be prosecuted in the Crown office. He may file an information against anyone whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding."

And Cole in his work on Criminal Informations, p. 9, says that "the attorney general may exhibit an *ex officio* information for any misdemeanor whatever."

And Hawkins in his Pleas of the Crown, vol. 2, p. 369, says: "As to the first of these particulars, *viz.*, in what cases such informations lie, it hath been holden that the King shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience, for it is everyday's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the attorney general or of the master of the Crown office, for offenses of the former kind, as for batteries, cheats, seducing a young man or woman from their parents in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies, whether to accuse an innocent person or to impoverish a certain set of lawful traders, . . . and other such like crimes done principally to a private person, as well as for offenses done principally to the king."

In Clark on Criminal Procedure, pp. 128, 129, it is said: "By an early English statute (4 & 5 Wm. & Mary, chap. 18), however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that informations by masters of the Crown office could only be filed by leave of court, and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the attorney general (and as already stated he could file them for any misdemeanor) need not be verified, and that he was the sole judge of the necessity or propriety of filing them. . . . There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the Crown office. . . . But, by the better opinion,

the other kind of information is the one in use with us."

In Bishop's Criminal Procedure, § 144, it is said: "In our states the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become . . . [common law with us]. As with us the powers which in England are exercised by the attorney general and solicitor general are largely distributed among our district attorneys, whose office does not exist in England, . . . [the latter officers] would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office and without leave of court."

If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled to proceed upon information, and that without leave of the court and without affidavit.

It is necessary to keep in mind that Mr. Stephen in his General View of the Criminal Law of England, p. 156, calls the "most characteristic principle of the law of England" on the subject of criminal procedure; namely, that in that country "everyone, without exception, has the right to use the Queen's (King's) name for the purpose of prosecuting any person for any crime." The statute (4 and 5 Wm. & Mary, chap. 18) was intended to restrict the right of prosecution by private, and not public, prosecutors. Prior to that act it had been within the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited. Rex v. Jolliffe, 4 T. R. 290. And the meaning of the statute was that the clerk of the Crown should thereafter file no information of a private prosecutor without leave of the court, and that the fact that there was probable cause for filing it should be disclosed in order that the court might know whether to grant leave, and it was further intended to preclude the issuance of process on such informations without recognizance. 4 Comyns's Dig. p. 558, note "d." But there was no intention to limit the right of the attorney general to prosecute by information, as he always had done. It was not necessary in England, either before or after the statute, that he should obtain leave of the court before filing his information, and there was therefore not the same reason why he should verify any information which he filed. Moreover, he was acting throughout under his oath of office, and it was not assumed that he would proceed upon information without probable cause.

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We think that the weight of authority is that in this country, as the text writers assert, the informations used by the prosecuting officers are the informations used by the attorney general in England, and not those exhibited by masters of the Crown, and which were governed by 4 & 5 William & Mary, chap. 18. And as at common law an information could be filed by the attorney general simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary, unless required by some constitutional or statutory provision. Long v. People, 135 Ill. 435, 10 L.R.A. 48, 25 N. E. 851; People v. Graney, 91 Mich. 646, 52 N. W. 66; State v. Pohl, 170 Mo. 422, 70 S. W. 695; 22 Cyc. 281.

We pass, therefore, to inquire whether there is anything in the Constitution of the United States or in the acts of Congress which in any way alters the common law respecting the right of the prosecuting officers of the government of the United States to proceed by information in criminal cases in the Federal courts.

The Constitution of the United States leaves all offenses against the United States open to prosecution by information except those which are capital or infamous. The restriction as to those offenses is contained in the 5th Amendment: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The Supreme Court in Ex parte Wilson (1885) 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283, authoritatively decided what meaning is to be attached to the word "infamous" in this connection. The court held that a crime punishable by imprisonment for a term of years with hard labor is an infamous crime. In the constitutional sense it is not the character of the crime, but the nature of the punishment, which renders the crime infamous. The offense with which the defendant in this case is charged is not an infamous one, but one upon which he might be tried upon information.

The acts of Congress not only have not prohibited the use of informations, but have on the contrary expressly authorized their use in certain cases. See § 1022 of the Revised Statutes, Comp. Stat. 1913, § 1686.

The 4th Amendment to the Constitution of the United States provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures

shall not be violated; no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Mr. Justice Story in his Commentaries on the Constitution, vol. 2, § 1902, in speaking of this amendment, states that "it is little more than the affirmance of a great constitutional doctrine of the common law."

If that be true, and if it also be true that at common law the attorney general could file an information without verification or affidavit of probable cause, his oath of office being regarded as sufficient, then this particular amendment should not be regarded as altering the rule upon that subject.

In United States v. Maxwell (1875), 3 Dill. 275, Fed. Cas. No. 15,750, in an opinion written by Judge Dillon, it is said: "We are of the opinion, therefore, that offenses not capital or infamous may in the discretion of the court be prosecuted by information. We cannot recognize the right of the district attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury."

The facts in that case were that prior to the term, complaint on oath had been made before a United States commissioner charging the defendant with several violations of the internal revenue laws, and the defendant was arrested upon a warrant issued by the commissioner and held to answer to the district court. At the term the district attorney upon the said complaint, warrant, and recognizance moved the court for leave to file criminal information against the defendant charging him with the said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant could only be punished criminally upon an indictment, and not upon an information. The motion in arrest of judgment was overruled; the court using, in the course of its opinion, the language already quoted. The case cannot be regarded as holding that an information must be verified. The court in a *dictum* announced that it would not permit an information to be filed and a warrant of arrest to issue without some evidence being presented under oath that probable cause of guilt existed.

In United States v. Smith (1889), (C. C.) 40 Fed. 755, in a case which arose in the circuit court for the eastern district of Virginia, Judge Hughes said: "A preliminary question raised in the argument was whether the district attorney may of right, by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This cannot be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer, and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the district attorney shall have leave from the court to file an information; and, if it is within the discretion of the court whether to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him, before granting leave, to bring the accused, by rule or other proceeding, before the court, to show cause, if cause there be, against the filing of the information."

The case most frequently cited in the Federal courts on this subject is that of United States v. Tureaud (C. C.) 20 Fed. 621, decided in 1884 in the fifth circuit by Judge Billings of the eastern district of Louisiana. It was decided in that case that informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. And the court quashed an information which was based on an affidavit which read: "George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes."

It was conceded "that under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts, without any evidence and against all evidence." The opinion then continued: "But the adoption of the 4th Amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a capias. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by the King, because we have in

the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations: or by the district attorney, nor by any other officer of the United States, for the Constitution has said in effect that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse."

What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information. In United States v. Polite (1888) 35 Fed. 58, in the district court for the district of South Carolina, it is said that "informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them, and mere belief is not sufficient."

In this case the information was not sworn to, but accompanying it were the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. It was held that this was sufficient, and a motion to quash was refused.

In Johnston v. United States (1898) 30 C. C. A. 612, 58 U. S. App. 313, 87 Fed. 187, 11 Am. Crim. Rep. 349, in the circuit court of appeals for the fifth circuit, the two preceding cases are referred to and approved. The information was not sworn to, but was accompanied by an affidavit. The court said: "The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that 'there is probable cause to believe that the said offense has been committed by P. T. Johnston.' However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it."

In United States v. Baumert (1910) (D. C.) 179 Fed. 735, 742, District Judge Ray, in a carefully prepared opinion, said: "Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the 4th Amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it state facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge."

There is nothing in the opinion rendered which holds that an information must in all cases be verified or supported by an affidavit showing probable cause. But only that an information must be so verified or supported when an application for the issuance of a warrant is based on it. The sole question before the court was as to the issuance of a warrant, and the court declined to direct its issuance on an information made on the information and belief of the district attorney alone.

In United States v. Morgan (1911) 222 U. S. 274, 282, 56 L. ed. 198, 200, 32 Sup. Ct. Rep. 81, 82, the Supreme Court, in the case of one prosecuted for a violation of the pure food and drugs act, said: "A further answer is that as to this and every other offense the 4th Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of someone having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the government or prompted by private malice."

This statement as to the necessity of the information being supported by the oath of someone having knowledge of facts showing the existence of probable cause is *obiter dictum*. That court has certainly never decided that, under such circumstances as exist in the case now before us, no trial could be had.

In Foster's Federal Practice, 5th ed. § 494, p. 1659, this usually accurate writer states the rule as follows: "An information cannot be filed without leave of the court. . . . An information must be supported by an affidavit showing probable cause for the prosecution arising from facts within the knowledge of the affiant, or by the depositions of witnesses taken upon a preliminary examination, or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient."

The limitation imposed by this amendment is a limitation solely upon the powers of the Federal government, and not upon the powers of the state governments. This principle of construction was settled as early as 1833 by a decision written by Chief Justice Marshall in the leading case of Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672, and has been adhered to by the Su-

preme Court in numerous cases which subsequently have arisen. But in the Constitutions of some of the states a provision exists similar to that embodied in the 4th Amendment. And we may briefly inquire as to the effect given to it, as respects informations, by the decisions of the state courts. They have held in a number of cases that a constitutional provision similar in terms to that embodied in the 4th Amendment to the Constitution of the United States is violated if proceedings are had under an information which is not supported by the oath or affirmation of any person (Lustig v. People [1893] 18 Colo. 217, 32 Pac. 275; State v. Gleason [1884] 32 Kan. 245, 4 Pac. 363, 5 Am. Crim. Rep. 172; Myers v. People [1873] 67 Ill. 503; Eichenlaub v. State [1880] 36 Ohio St. 140; De Graff v. State [1909] 2 Okla. Crim. Rep. 519, 103 Pac. 538; Thornberry v. State, [1877] 3 Tex. App. 36; State v. Boulter [1894] 5 Wyo. 236, 39 Pac. 883); but the state courts are not agreed in this view, some of them having reached a contrary conclusion. See State v. Smith (1905) 114 La. 322, 38 So. 204; State v. Guglielmo (1905) 46 Or. 250, 69 L.R.A. 466, 79 Pac. 577, 80 Pac. 103, 7 Ann. Cas. 976; Territory v. Cutinola (1887) 4 N. M. 305, 14 Pac. 809.

In the case at bar the information was not verified; neither was it supported by any affidavit. The information begins:

"Now comes Henry A. Wise, United States Attorney for the southern district of New York, leave having been first had and obtained, and respectfully informs this court that," etc.

It does not appear, however, that, in obtaining leave of the court to file the information, there was ever presented to the court any complaint under oath, or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him. If the 4th Amendment makes it necessary that, under all circumstances, an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the 4th Amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government, or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except "upon probable cause supported by oath or affirmation," and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the 4th Amendment has been infringed. The fact that in the case at bar the defendant demurred to the information because it was not verified, and then pleaded not guilty only after his objection to the demurrer was overruled, does not affect the matter. There was nothing in the ruling of the court that deprived him of his constitutional right to have no warrant issued for his arrest "but upon probable cause supported by oath or affirmation." No such warrant has been at any time issued, and no application for its issuance has ever been so much as requested.

The pure food and drugs act makes it a crime against the United States if any part of the label on goods sent in interstate commerce is false and misleading. The label used on the goods shipped by the defendant guaranteed that the goods contained "no gelatine, gum arabic, egg albumen, or similar article." The claim of the government is that, while the goods contained no gum arabic, they did contain India gum, and that India gum was "similar" to gum arabic. The jury found that this was so after being instructed that, if they had a reasonable doubt on the subject, they must find for the defendant. There was sufficient evidence to warrant the submission of the case to the jury, and we find no error in the rulings of the court.

Judgment affirmed.

Writ of certiorari denied by the Supreme Court of the United States, October 19, 1914. 235 U. S. 697, 59 L. ed. —, 35 Sup. Ct. Rep. 199.

DELAWARE SUPREME COURT.

MODEL HEATING COMPANY, Plff. in Err.,
v.
THOMAS MAGARITY.

(2 Boyce (Del.) 459, 81 Atl. 394.)

Pleading — abatement — suit by foreign corporation.

1. A plea in abatement has power to

Note. — The effect of a provision for a penalty in the event of the failure of a for-

raise the question whether or not a foreign corporation can maintain an action to enforce a contract when it has not complied with the local prerequisites to its doing business in the state.

Corporation — foreign — noncompliance with statute — enforcement of contract.

2. Legislation forbidding under penalty a foreign corporation to do business in the state by branch offices, representatives, or agents without having properly appointed an agent upon whom process may be served does not prevent the enforcement in the courts of the state by a corporation which has not complied with its requirements of payment of the purchase price of the goods sold through its agent in the state and delivered to the purchaser.

(October 16, 1911.)

ERROR to the Superior Court for New Castle County to review a judgment overruling a demurrer to a special plea in abatement in an action brought to recover the price of certain heating apparatus sold and delivered to defendant by plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. **Christopher L. Ward** and **John P. Nields**, for plaintiff in error:

Where a state statute prescribes the conditions on which a foreign corporation may engage in business in the state, and fixes a penalty such as a fine, for violation of the statute, without specifically declaring contracts made in violation thereof to be void, such contracts will not be held void by the courts of such state, but may be enforced therein.

Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; Seymour v. Slide & S. Gold Mines, 153 U. S. 523, 38 L. ed. 807, 14 Sup. Ct. Rep. 847; Harris v. Runnels, 12 How. 79, 13 L. ed. 901; Union Nat. Bank v. Matthews, 98 U. S. 627, 25 L. ed. 189; Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; National Bank v. Whitney, 103 U. S. 103, 26 L. ed. 444; Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939; Reynolds v. First Nat. Bank, 112 U. S. 412, 28 L. ed. 736, 5 Sup. Ct. Rep. 213; Chattanooga, R. & C. R. Co. v. Evans, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809; Blodgett v. Lanyon Zinc Co. 58 C. C. A. 79, 120 Fed. 893; Jarvis-Conklin Mortg. Trust Co. v. Willhoit, 84 Fed. 513; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545; State Mut. F. Ins. Asso. v. Brinkley Stave & Heading Co. 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157; Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242; State v. American Book Co. 69 Kan. 1, 1 L.R.A. (N.S.) 1041, 76 Pac. 411, 2 Ann. Cas. 56; Northwest Thrasher Co. v. Riggs, 75 Kan. 518, 89 Pac. 921; Hallam v. Ashford, 24 Ky. L. Rep. 870, 70 S. W. 197; Johnson v. Mason Lodge, 106 Ky. 838, 51 S. W. 620; Connecticut River Mut. F. Ins. Co. v. Whipple, 61 N. H. 61; Connecticut River Mut. F. Ins. Co. v. Way, 62 N. H. 622; Alleghany Co. v. Allen, 69 N. J. L. 270, 55 Atl. 724; Union Mut. L. Ins. Co. v. McMillen, 24 Ohio St. 67; Garratt Ford Co. v. Vermont Mfg. Co. 20 R. I. 189, 38 L.R.A. 545, 78 Am. St. Rep. 852, 37 Atl. 948; Galletley v. Strickland, 74 S. C. 394, 54 S. E. 576; La France Fire Engine Co. v. Mt Vernon, 9 Wash. 144, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; Rathbone, S. & Co. v. Frost, 9 Wash. 168, 37 Pac. 298; Toledo Tile & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37; Thompson v. National Mut. Bldg. & L. Asso. 57 W. Va. 551, 50 S. E. 756; Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Wright v. Lee, 2 S. D. 596, 51 N. W. 706; Murfree, Foreign Corp. § 75; Beale, Foreign Corp. §§ 212, 213; Lewis's Sutherland, Stat. Constr. 2d ed. § 503; Page, Contr. § 1088; Thomp. Corp. § 5274; Morawetz, Priv. Corp. 2d ed. 665; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286; Taylor v. Bell & B. Soap Co. 18 App. Div. 175, 45 N. Y. Supp. 939; Loeb v. Firemen's Ins. Co. 78 App. Div. 113, 79 N. Y. Supp. 510; Farrior v. New England Mortg. Secur. Co. 88 Ala. 275, 7 So. 200; Craddock v. American Freehold Land Mortg. Co. 88 Ala. 281, 7 So. 196; Eslava v. New York Nat. Bldg. & L. Asso. 121 Ala. 480, 25 So. 1013.

Messrs. **Artemas Smith** and **Alexander M. Daly**, for defendant in error:

Where a corporation comes into a state and does business under a statute similar to ours without having complied with the provisions thereof, it cannot enforce any contract made by it, because such contract is prohibited and illegal under such statute.

Beeber v. Walton, 7 Houst. (Del.) 471, 32 Atl. 777; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 91, 8 Am. Rep. 626; Pennington v. Townsend, 7 Wend. 276; Cooper Mfg. Co. v. Ferguson, 113 U. S. 733, 28 L. ed. 1138, 5 Sup. Ct. Rep. 739; Rising Sun Ins. Co. v. Slaughter, 20 Ind.

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eign corporation to comply with the conditions of doing business within the state, upon the validity or enforceability of a contract made within the state without complying with such conditions, is considered L.R.A.1915B.

in the notes to Tri-State Amusement Co. v. Forest Park Highlands Amusement Co. 4 L.R.A.(N.S.) 688, and Fruin-Colnon Contracting Co. v. Chatterson, 40 L.R.A.(N.S.) 857.

520; 19 Cyc. 1290 and note; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Diamond Glue Co. v. United States Glue Co. 103 Fed. 838; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Commonwealth Mut. F. Ins. Co. v. Edwards, 124 N. C. 116, 32 S. E. 404; Electric News & Money Transfer Co. v. Perry, 75 Fed. 898; Jones v. Smith, 3 Gray, 500; G. Heileman Brewing Co. v. Peimeisl, 85 Minn. 123, 88 N. W. 441; Franklin Ins. Co. v. Louisville & A. Packet Co. 9 Bush, 590; Bank of British Columbia v. Page, 6 Or. 431; Pioneer Sav. & L. Co. v. Mostert, 62 Neb. 812, 87 N. W. 1059; Williams v. Cheney, 8 Gray, 206, 3 Gray, 215; Harris v. Runnels, 12 How. 84, 13 L. ed. 903; Taber v. Interstate Bldg. & L. Asso. 91 Tex. 92, 40 S. W. 954; Hanchey v. Southern Home Bldg. & L. Asso. 140 Ala. 246, 37 So. 272; Hoskins v. Rochester Sav. & L. Asso. 133 Mich. 505, 95 N. W. 566; Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123; Edison General Electric Co. v. Canadian Pacific Nav. Co. 24 L.R.A. 317, note; Law v. Hodgson, 2 Camp. 147, 11 East, 300, 10 Revised Rep. 513; Langton v. Hughes, 1 Maule & S. 593, 14 Revised Rep. 531; Re Comstock, 3 Sawy. 218, Fed. Cas. No. 3,078; Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 22, 53 Atl. 533; Reeder v. Jones, 6 Penn. (Del.) 69, 65 Atl. 571; Cook v. Pierce, 2 Houst. (Del.) 499; Belding v. Pitkin, 2 Caines, 149; Farmers & M. Ins. Co. v. Harrah, 47 Ind. 236; American Ins. Co. v. Pressell, 78 Ind. 442; National Mut. F. Ins. Co. v. Pursell, 10 Allen, 232; 8 Am. & Eng. Enc. Law, 340; Hoffman v. Banks, 41 Ind. 1; Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Cook v. Pierce, 2 Houst. (Del.) 499.

Curtis, C., delivered the opinion of the court:

The writ of error is taken by the plaintiff below to a judgment of the superior court overruling a demurrer of the plaintiff to a special plea in abatement to the declaration. The action was in assumpsit to recover for goods sold and delivered. By a special plea the defendant alleged that the plaintiff was a corporation under the laws of Pennsylvania; that at the time the contract was made the corporation was doing business in Delaware through and by branch offices, agents, or representatives located here, without having complied with the provisions of law, constitutional and statutory, hereinafter mentioned, respecting foreign corporations, and that the contract was made by the agent of the plaintiff located in this state.

It is provided by § 5 of article 9 of the Constitution, adopted June 4, 1897, as follows: "No foreign corporation shall do any business in this state through or by branch offices, agents or representatives located in this state, without having an authorized agent or agents in the state upon whom legal process may be served."

At the time the contract was made and the suit brought there was and still is a statute, approved March 23, 1903 (22 Del. Laws, chap. 395, p. 824), referred to in the declaration, which contained the following provision:

"Section 1. That it shall not be lawful for any corporation created by the laws of any other state or the laws of the United States, to do any business in this state through or by branch offices, agents, or representatives located in this state, until it shall have filed in the office of secretary of state of this state a certified copy of its charter and the name or names of its authorized agent or agents in this state, together with a sworn statement of the assets and liabilities of such company or corporation, and paid to the secretary of state, for the use of the state, fifty dollars ($50); and the certificate of the secretary of state under his seal of office, of the filing of such charter, shall be delivered to such agent or agents upon the payment to said secretary of state of the usual fees for making certified copies; the said certificate shall be prima facie evidence of such company's right to do business in this state."

By § 2 it is made the duty of the secretary of state to deliver to the prothonotary of each county a certificate of the name of the agent, and by § 3 it is made the duty of each prothonotary to record the certificate. By § 4 it is enacted that service of process may be made on such agent, and that it shall be as effectual as if served on the corporation. It is enacted in § 6 that any corporation doing business here without having first complied shall be guilty of a misdemeanor and be subject to a fine for each and every offense, and also that any agent of such foreign corporation who shall transact any business here for any foreign corporation, before it has complied, shall be guilty of a misdemeanor and fined for each and every offense.

At the time of the adoption of the present Constitution on June 4, 1897, there were in force two statutes relating to this same subject-matter. These two statutes taken together contain in substance the same requirements of foreign corporations

as are contained in the act of 1903, above referred to, and impose fines for violation thereof, and make service on the agent good, the only substantial difference being the requirement that the certificate naming an agent be filed in each county by the corporation, and not in the office of the secretary of state, to be by him filed with the prothonotary of each county. These statutes are chapter 703, vol. 19, Laws of Delaware, p. 900, passed April 28, 1893, and chapter 513, vol. 20, Laws of Delaware, p. 544, passed May 12, 1897.

It appears, therefore, that at the time of the adoption of the Constitution there were in force laws of substantially the same import as now exist respecting foreign corporations doing business here. In substance this legislation forbids foreign corporations to do business here by branch offices, or agents located here, without having filed a certificate naming an authorized agent in the state upon whom process may be served, and also a copy of its charter and a sworn statement of its assets and liabilities, and imposes penalties for each and every offense by fine upon both the corporation and the agent violating the laws, and makes service of process on the designated agent equivalent to service upon the corporation.

In this case, then, is presented in this court for the first time the question whether by such legislation a contract made here by an agent in this state of a foreign corporation which had not complied with the laws of Delaware, whereby goods were sold and delivered to a citizen of Delaware, can be enforced here so that the vendor may collect payment for the property so parted with by it and received and retained by the vendee. As rightly held in the case of Standard Sewing Mach. Co. v. Frame, 2 Penn. (Del.) 430, 48 Atl. 188, the question is properly raised by a plea in abatement, and the vendee can take advantage of the noncompliance of the vendor in this way only, if at all.

In its opinion, reported in 1 Boyce (Del.) 240, and 75 Atl. 614, the court below stated that it felt bound by the decision of the superior court, rendered in the case of Beeber v. Walton, 7 Houst. (Del.) 471, 32 Atl. 777, and expressly based its conclusion thereon; but as herein indicated, this court does not consider that the principles applicable to that case apply to the case now before it, and holds that other and different rules are applicable. With the view of following any well-established, pertinent, and controlling doctrine, or even policy, of the law of this state, as evidenced by the Constitution, statutes, or decisions, a careful examination has been made of the laws and reported decisions, and as a conclusion it is found that there is no such pertinent doctrine or policy established here, and, therefore, that this court must reach conclusions independent of any decision of the courts of Delaware. The case of Gregory v. Bailey, 4 Harr. (Del.) 256, seems to be pertinent, and, if so, as a decision of the court of errors and appeals, is controlling, in its influence, at least. Without careful reading it seems to hold "that a seller of lottery tickets, having no license to sell them, may recover the price of tickets sold, though the sale be prohibited by statute." But in reality the court did not so hold, and it was not necessary to do so, because there the sale was not of lottery tickets in retail, but by wholesale, and as part of a sale of the whole lottery scheme, including tickets, and the court held that the statute regulating the sale of lottery tickets did not apply. In Cook v. Pierce, 2 Houst. (Del.) 499, a usurious contract was declared unenforceable because prohibited, and therefore invalid and void. By statute the rate of interest for the use of money lent was fixed, and money loaned at a greater rate of interest was forfeited to anyone who would sue for it, though the statute did not expressly render the contract void or unenforceable. The court considered that both by the words and policy of the law a contract for a greater rate of interest was a forbidden one, and, being made unlawful, was void. But obviously there is a difference in the effect of statutes which expressly, or by necessary implication, and as part of a commercial policy of the state, made a particular kind of contract unlawful, and one which prohibits under penalty a foreign corporation from carrying on business generally, without reference to a particular kind of business, until one carrying on business maintains an agent on whom process against it may be served. In Cook v. Pierce, a well-established principle was applied correctly. Prohibited contracts are unenforceable because rendered void by the prohibition to make them, whether the statute so declares or not, and whether the act be *malum in se* or *malum prohibitum*. A legislative intent to make the contracts unenforceable is evident in such cases. A usurious contract is a typical instance. So contracts for the sale of intoxicating liquors are unenforceable when the sale of such article is prohibited. But this principle is not applicable where there is no prohibition to carry on the particular business in which the plaintiff is engaged, in the course of which the contract in question was made.

In Johnson v. Mason Lodge, 106 Ky. 838, 51 S. W. 620, the court distinguished be-

tween statutes regulating corporations in general and those intended to protect the public against sellers of worthless fertilizers, and those which prohibited the sale of intoxicating liquors without license, and also statutes to regulate insurance corporations. Concerning such prohibited contracts the court said: As "the vice was in the contract itself and they [the statutes] are therefore distinguished in this respect from this case, which only involves the idea of disability to sue."

The principle applied in Reeder v. Jones (1902) 6 Penn. (Del.) 66, 65 Atl. 571, is equally well established. A person carrying on the business of real estate broker without having a license to carry on that particular business was not allowed to recover commissions for making a sale of real estate. The purpose of this statute is to obtain revenue, and it is made unlawful for all unlicensed persons to act as real estate brokers, and so, necessarily, their contracts for acting as such are unenforceable. But that is not applicable to the legislation under consideration here, the primary object of which is not to exclude foreign corporations, or to license them to carry on particular kinds of business, but to bring them within the reach of the process of the courts of Delaware.

In almost all (if not all) the states, including Delaware, corporations issuing policies of insurance, assurance, and suretyship are regulated by statute. Here the statutes respecting such corporations have as their primary object, whether it be so expressed or not, to protect people of the state from being injured or defrauded by corporations, fraudulently or dishonestly conceived or managed, or financially unsound. With this in view they require not only of such foreign corporations to put on record here evidence of their authority to transact such business, but of their ability to carry out their contracts, and of their financial stability. To insure this they require that the insurance commissioner shall examine their affairs annually and give certificates to those qualified. All others are prohibited from doing business of those kinds here. Incidentally, it is required that foreign corporations maintain agencies upon whom process can be served validly. Licenses are subject to revocation for cause and the power of the state officer over such kinds of corporations is constant and continuous. It is a fair construction of such a statute, considering its primary object, to hold that a suit to enforce payment of a note given here for a premium on a policy issued by a foreign corporation not qualified to do such business here cannot be maintained here by the corporation or its receiver. Such was Beeber v. Walton (1887) 7 Houst. (Del.) 471, 32 Atl. 777, which, by its express declaration, controlled the court below. The foreign insurance company sued on a note given for premiums on a policy, and at the time the note was given the corporation had not complied with the laws of Delaware, but had done so before the suit was brought. It was held in Beeber v. Walton, quite entirely on the authority of Cook v. Pierce, supra, that the contract was void and unenforceable, though not so declared by the statute. The court considered that the object of the statute was to protect the citizens of the state from spurious, insolvent, and dishonest insurance companies, and so held that the contracts made by such here in the course of that business to be unenforceable here. It is obvious that such is not the object of any legislation in Delaware under consideration, and therefore the same result should not follow.

In Franklin Ins. Co. v. Louisville & A. Packet Co. 9 Bush, 590, the Kentucky court took the same position as the court in Beeber v. Walton, respecting similar statutes regulating foreign insurance corporations, and considered that by such regulations the legislature intended the act to be not only a means to raise revenue, but to prohibit the particular business itself so far as carried on by those unqualified to do so. Barbor v. Boehm, 21 Neb. 450, 32 N. W. 221, was a similar case.

From this examination it is evident that the courts of Delaware have not heretofore adopted a policy of judicial construction of statutes like those now under consideration which would be applicable to the latter. Different principles are applicable where the primary object of legislation is not to regulate particular kinds of contracts, or license particular kinds of business, or to raise revenue, but the primary object is to secure to the state and the people thereof a way to serve process on corporations organized in other states, when they come here to do business by branch offices and agents located here. Such is the primary object and purpose of the laws of Delaware, constitutional and statutory, under present consideration. The revenue feature is distinctly a subsidiary one, unimportant to the discussion. There is no continuous supervision of the financial standing of the foreign corporations, and no discretion to refuse to give certificates of compliance when the simple requirements of the statute are complied with, whether the initial statement of its assets and liabilities be satisfactory to the secretary of state or not. Contracts made by noncomplying corporations, or by noncomplying agents, are

not declared to be either void or unenforceable, generally, or until compliance. To insure the presence in Delaware of someone on whom valid service of process can be served in suits against foreign corporations coming here to transact business by branch offices or agents located here, the state has prohibited foreign corporations from doing business here through or by branch offices, agents, or representatives located here, without having such agent authorized to receive such service, and makes valid a service of process on such agent, and to enforce it imposes, not only on the corporation, but also on the individual representing it, a fine in case a corporation shall so do business without having so complied.

Are contracts made with people of this state by a foreign corporation which has not so complied, either invalid in Delaware, or unenforceable here?

When the statute is silent on the subject of the enforceability of contracts made by unqualified foreign corporations, the whole statute should be considered and its purpose ascertained, in determining the unexpressed legislative intent respecting the enforceability of such contracts. This is not only reasonable, but has judicial support. Harris v. Runnels, 12 How. 79, 13 L. ed. 901; Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545. This is the established rule of the Federal courts respecting statutes in general, where the act prohibited under penalties is not *malum in se*. In the case of In Re T. H. Bunch Co. (D. C.) 180 Fed. 519, there is a large collection of authorities to that effect.

In the several states there is a variety of legislation, constitutional and statutory, concerning foreign corporations doing business by branch offices or resident agents. In some (a) there is simply a prohibition; in others (b) a prohibition and penalty; in others (c) in addition the contracts made by such agents are declared to be void for noncompliance; (d) in others, they are declared unenforceable; (e) in others, they are unenforceable until compliance: and various rules have been adopted respecting them in the several jurisdictions. But only those in class (b) are analogous to the Delaware law, and the decision of the courts of states with other provisions are necessarily not useful in reaching a conclusion in the case before this court.

Where there is solely a prohibition without a penalty, it may be sound reasoning to hold that the prohibition was intended to effect the desired protection by making unenforceable contracts made by corporations which had not complied, for in that way only could the prohibition be enforced. Some courts have so held, though it is no uniformly so held. Bank of British Columbia v. Page, 6 Or. 431; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626. *Contra*, Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544.

It is claimed that this is the effect of the Constitution of Delaware. If it solely prohibited foreign corporations from doing business in Delaware, and the above principle be considered sound, it might be applied in this case. But the Constitution is much narrower in its prohibition, in that it forbids foreign corporations to do business in Delaware, not generally, but by branch offices or agents located here, without an authorized agent here upon whom process may be served. Its clear purpose is to make all such corporations amenable to the process of the courts here. Is it effective to do so in itself, and without legislation?

Probably it is not, because not self-executing, in that it does not provide either the method of establishing and authorizing agencies, or make service of process on them valid, but leaves it to the legislature to supply these deficiencies. Until these features are supplied, it is not capable of being obeyed, and so its prohibition is ineffective. This was strongly argued by the counsel for the plaintiff in error, and in support he cited Cooley, Const. Lim. 98, 99; 9 Cyc. 752, 753, 759; Eau Claire Nat. Bank v. Benson, 106 Wis. 624, 82 N. W. 604; Davis v. Burke, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210, and Hyatt v. Allen, 54 Cal. 353, on the general proposition that constitutional provisions which require subsequent legislation to enforce them are not self-executing; and in addition, St. Louis, A. & T. R. Co. v. Fire Assn. of Philadelphia, 60 Ark. 325, 28 L.R.A. 83, 30 S. W. 350. In the last-cited case a provision of the Constitution of Arkansas, similar to that in Delaware, was held not to be self-executing or enforceable.

"The appellant contends that the evidence failed to show that the Commercial Company complied with § 11, art. 12, of the Constitution. This section declares that no 'foreign corporation shall do business in this state, except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served.' It is not self-executing. It does not provide how the agent shall be designated, or how the place of business shall be made known. The Commercial Company had no right to say upon what agent proc-

ess may be served. The legislature alone had the right. Until it exercised it, there was no penalty for the violation of the Constitution in that respect." Armour Packing Co. v. Vinegar Bend Lumber Co. 149 Ala. 205, 42 So. 866, 13 Ann. Cas. 951.

It may be that the constitutional provision in Delaware is only a limitation on the powers of the legislature to authorize foreign corporations to do business here by branch offices, etc., without requiring such corporations, as a condition of the privilege, to maintain agents here upon whom process shall be served in a manner to be designated by the legislature, the method of registration of such agents and other necessary administrative details being left to the legislature, and subject to change by it.

As already shown, the same legislation was in force in Delaware at the time of and since the adoption of the Constitution in 1897. Clearly, the provision of the Constitution, and the statutes of 1893 and 1897, in force when the Constitution was adopted, are *in pari materia*, in that they relate to the same subject-matter; *viz.*, a prohibition of foreign corporations from doing business here by branch offices, etc., without having an agent here on whom process could be served. Not being repugnant or inconsistent, they are to be construed together. The conclusion is inevitable that the members of the Constitutional Convention of 1897, whatever they may have said in the debates there (and we are not sure that we have examined all that was there said on the subject), must, in formulating the provision of the Constitution in question, have had regard to the existing statutes, which would in fact supplement and make effective the contemplated constitutional provision, probably otherwise ineffective; for these then-existing statutes provided a method of establishing agencies and of serving process on them with the same effect as though service had been made on the corporation itself. In other words, it was considered that the Constitution, whether otherwise ineffective or not, would certainly be made operative by the existing statutes on the same subject, which established a method of registering agencies, and a legal method for an effective service of process on them. This court is not daunted to so hold, because it may be argued that it would logically result that the interpretation and effectiveness of the Constitution would vary according as the legislature varied the statutes on the same subject-matter. Therefore, whether or not the constitutional provision be regarded as inoperative, except as a limitation on the power of the general assembly, or whether or not it be considered with the acts of 1893, 1897, and 1903, relating to the same matter, the result is the same, for the statute of 1903, in force when the contract in question was made, and now still in force, is in harmony with the Constitution, and contains all that it contains on the subject and more. Hence, in deciding this case, regard may be given only to the present existing statute, that of 1903.

By comity a corporation created by one sovereignty is permitted to make contracts in another, and sue on its contracts. Bank of Augusta v. Earle, 13 Pet. 588, 10 L. ed. 307. Each sovereignty by express statute or settled policy of the state may exclude corporations created by another sovereignty, or prescribe terms with which such foreign corporations must comply, except such as are engaged in interstate commerce and otherwise protected by valid provisions of the Constitution and statutes of the United States. The primary purpose of the legislation in Delaware being so obvious, it certainly was not intended to exclude foreign corporations from the state. It does not in terms render invalid the contracts made here by noncomplying foreign corporations. As has repeatedly been said elsewhere, if such consequences were intended, it was very easy for the legislature to have said so. Without undertaking to review all the many cases which have been cited or decided in construing the variously worded statutes of other states on the same subject, it is here asserted that the better reason, the wiser and fairer policy, and the greater weight, lie with those decisions of other courts which hold that where, as here, there is a prohibition with a penalty, with no express or implied declaration respecting the validity or enforceability of contracts made here by unqualified foreign corporations, the contracts made here by corporations created elsewhere and doing business here by branch offices or agents located here without complying with the laws of Delaware as to registration of agents, etc., are enforceable in the courts of Delaware on the ground that the purpose of the statute was not to prohibit business, but accomplish a collateral object; *viz.*, to bring such corporations within the reach of process of the courts here; and to effect this the penalty provided is deemed to be exclusive of all other consequences, and, therefore, the further penalty of forfeiture of rights under the contract, otherwise valid and enforceable, will not be added by the court when suit is brought on the contract. The courts of the following

states, where the laws are substantially like those of Delaware, have so held:

Colo.—Utley v. Clark-Gardner Lode Min. Co. 4 Colo. 369, 4 Mor. Min. Rep. 39; Kindel v. Beck & P. Lithographing Co. 19 Colo. 310, 24 L.R.A. 311, 35 Pac. 538; Rockford Ins. Co. v. Rogers, 9 Colo. App. 121, 47 Pac. 848; Helvetia Swiss F. Ins. Co. v. Edward P. Allis Co. 11 Colo. App. 264, 53 Pac. 242.

Ky.—Johnson v. Mason Lodge, 106 Ky. 838, 51 S. W. 620; Hallam v. Ashford, 24 Ky. L. Rep. 870, 70 S. W. 197.

S. C.—Galletley v. Strickland, 74 S. C. 394, 54 S. E. 576.

Wash.—Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; Edison General Electric Co. v. Canadian P. Nav. Co. 8 Wash. 370, 24 L.R.A. 315, 40 Am. St. Rep. 910, 36 Pac. 260; La France Fire Engine Co. v. Mt. Vernon, 9 Wash. 144, 43 Am. St. Rep. 827, 37 Pac. 287, 38 Pac. 80; Horrell v. California, O. & W. Homebuilders' Asso. 40 Wash. 531, 82 Pac. 889.

W. Va.—Toledo Tile & Lumber Co. v. Thomas, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37.

R. I.—Garrett Ford Co. v. Vermont Mfg. Co. 20 R. I. 187, 38 L.R.A. 545, 78 Am. St. Rep. 852, 37 Atl. 948.

In North Dakota, where by statute foreign corporations were prohibited from transacting business until compliance, but no penalty was provided for violations, it was held that contracts of unqualified corporations were not void or unenforceable, but could be enforced in North Dakota. A person who contracted with a foreign corporation and received and retained the benefits of such contract was not permitted to raise the question of noncompliance. Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544.

In New Jersey, in the case of Alleghany Co. v. Allen (1903) 69 N. J. L. 270, 55 Atl. 724, the suit was on a note made by a South Carolina corporation, and the plea alleged that the plaintiff was doing business in New York, where the note was given in the course of business, without complying with the laws of New York, and that by the laws of New York no suit could have been brought there. Held, that New Jersey would not enforce a contract made void by the law of New York, the place where the contract was made, but as New York courts had decided that such contracts were not void, the New Jersey court would enforce it.

"The tendency of judicial decision on this subject where the statute does not declare the contract to be void is to a strict construction, maintaining the validity of the contract, and holding that the only effect of such legislation in the state where it is enacted is to impose the prescribed penalties and the expressed disabilities. Outside of such state, until its courts give [it] . . . a wider scope, no greater latitude will be attributed to it."

In Iowa foreign corporations not qualified are denied, by the statute, rights and privileges conferred on corporations so complying, and yet the failure of a foreign corporation to comply does not render void or unenforceable in Iowa contracts made by the noncomplying corporation. Spinney v. Miller, 114 Iowa, 212, 86 N. W. 317, 89 Am. St. Rep. 351; Beach v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197.

In the following states a contrary interpretation is given to statutes similar to those in Delaware:

In Alabama noncomplying foreign corporations were denied the right to sue to recover by suit money loaned in Alabama. Hanchey v. Southern Home Bldg. & L. Asso. 140 Ala. 246, 37 So. 272; Dudley v. Collier, 87 Ala. 433, 13 Am. St. Rep. 55, 6 So. 304; American U. Teleg. Co. v. Western U. Teleg. Co. 67 Ala. 26, 42 Am. Rep. 90; in which latter case the supreme court said that the prohibition of the Constitution without a penalty was "just as much a police regulation for the protection of the property interests of its citizens [of the state] as a law forbidding vagrancy among its inhabitants." Armour-Packing Co. v. Vinegar Bend Lumber Co. (1906) 149 Ala. 205, 42 So. 866, 13 Ann. Cas. 951.

In Pennsylvania, contracts made in Pennsylvania by unqualified foreign corporations are unenforceable there. Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552; Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. 204 Pa. 25, 53 Atl. 533.

In the case of Delaware River Quarry & Constr. Co. v. Bethlehem & N. Pass. R. Co. supra, the plaintiff had built a road for the defendant at a cost of $31,000. The plaintiff was a New Jersey corporation and did not register in Pennsylvania until after the contract was completed, but before suit was brought. Without citation of authorities, or much discussion, the court held that the plaintiff could not recover.

"The purpose of the act is to bring foreign corporations doing business in this state within the reach of legal process. This purpose is not accomplished by a registration of the corporation at the pleasure of its officers, or when it may be to their interest to appeal to our courts. The act is for the protection of those with whom it does business, or to whom it may incur liability by its wrongful acts, and nothing short of a registration before the contract that it seeks to enforce is made can give

it a right of action. Any other construction of the act would violate its plain words and wholly defeat its object by affording protection to the corporation and denying it to the public."

In Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743, the court held contracts by a noncomplying foreign corporation, by which it furnished labor and materials for building in Tennessee, were not enforceable there. This was based on the case of Stevenson v. Ewing, 87 Tenn. 50, 9 S. W. 230, where the suit was by one who had not taken out a license to transact the business in which engaged. Other cases in Tennessee are: New York Nat. Bldg. & L. Asso. v. Cannon, 99 Tenn. 344, 41 S. W. 1054; Gilmer v. United States Sav. & L. Co. 103 Tenn. 272, 52 S. W. 851; Harris v. Columbia Water & Light Co. 108 Tenn. 245, 67 S. W. 811. All followed the above amplification of reasons.

In First Nat. Bank v. Coughron, — Tenn. —, 52 S. W. 1112, the Tennessee court went to the extreme limit in holding that even in the hands of an innocent purchaser for value, without notice, a note given to a foreign noncomplying corporation was invalid and uncollectible.

In the Federal courts the principle now adopted in the case under consideration has been with great vigor and emphasis uniformly adhered to. It is thus stated in Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545.

"The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy, and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void. And if from all these considerations it is manifest that the legislature had no such intention, the contracts should be sustained and enforced; otherwise they should be held void. . . .

"There is no declaration in the statute that contracts of unqualified corporations doing business in the state without complying with the prescribed conditions shall be void. So far as we are able to ascertain, the supreme court of the state has never held that such was the meaning or the effect of the law. If that had been the purpose of the legislature, it would have been easy to have made it manifest. A single line would have expressed and accomplished that purpose. The legal presumption is that the legislature specified all the penalties it intended to impose, and it is not the province of the court to inflict more by construction. . . .

"The object of the statute, the evil it was intended to remedy, the plain language of the entire act, the inequitable effect of the avoidance of contracts in violation of it, make it manifest that the lawmaking power of the state never intended that contracts of unqualified corporations doing business in the state should be void."

No further authority need be cited than the case of Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, and the cases therein referred to. Judge Sanborn, in Blodgett v. Lanyon Zinc Co. 58 C. C. A. 79, 120 Fed. 893, speaking of such statutes, said:

"The object of these statutes was to subject foreign corporations doing business in the state to the jurisdiction of its courts and to the inspection, and supervision of its officers, not to the end that the citizens of the state might avoid their contracts and perpetrate injustice, but to the end that justice might be administered to both the corporations and the citizens."

The Federal courts follow the construction placed on a state statute by the highest court of the state, and if it has been there clearly established, by such decisions, that contracts made by noncomplying foreign corporations are illegal and void in the particular state, such contracts are unenforceable in the Federal courts. It is thus stated in Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 151 Fed. 871: "If the highest court of the state has given construction to its statutes fixing the conditions on which a foreign corporation may do business within the state, and held they may make all contracts entered into by it without complying with such conditions void, and they do not directly relate to interstate commerce, or discharge citizens from their contract obligations, or are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or those principles of natural justice which forbid condemnation without opportunity for defense, . . . then the courts of the United States are bound by and give effect to such construction, . . . but such contracts are not necessarily void because of noncompliance with such conditions, . . . and the court of appeals of the state of New York has not given such a construction to the statutes referred to."

Where, however, the contract is not made void by the statute, or declared to be such by the state courts, but the statute merely prohibits unqualified corporations from maintaining an action thereon in any court in the state, the corporation may, neverthe-

less, maintain an action in the Federal courts, since the Federal court will not refuse to enforce a valid contract, harmless in itself, which is not enforceable in the state courts merely on account of noncompliance with the state administrative regulations. The states are powerless to limit the jurisdiction of the Federal courts in this respect. Blodgett v. Lanyon Zinc Co. supra; Eastern Bldg. & L. Asso. v. Bedford (C. C.) 88 Fed. 7; Sullivan v. Beck (C. C.) 79 Fed. 202; Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 151 Fed. 871; Johnson v. New York Breweries Co. 101 C. C. A. 639, 178 Fed. 513; Richmond Cedar Works v. Buckner (C. C.) 181 Fed. 424.

With unusual uniformity the writers of text books, who presumably consider such questions philosophically, approve the position herein taken. Beale on Foreign Corporations, §§ 212, 213, says: "This represents the prevailing and it would seem the better doctrine." Murfree on Foreign Corporations, § 75, says the weight of authority is in favor of the position. Morawetz on Private Corporations, 2d ed. § 665, thus states the rule:

"The object of the various statutes providing that foreign corporations, before transacting business, shall comply with specified conditions, such as filing copies of their charters, making statements of their financial conditions, appointing agents upon whom process can be served, etc., is to protect parties dealing with these companies from imposition, and to secure convenient means of obtaining jurisdiction in the local courts. These statutes place foreign corporations in the same position as domestic corporations, in the particulars provided for. It is clearly not the primary purpose of the legislature, in passing these statutes, to render the contract and dealings of corporations which have not complied with the statutes void and unenforceable. Hence, where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result, unless this be necessary in order to attain the primary object for which the statute was passed."

Thompson on Corporations, § 5274, thus states the general view: "The modern doctrine is coming to this: That one who enters into a contract is, when sued by the corporation upon such contract, estopped to deny that the corporation had power to make the contract. The obvious reason of the rule is, that a person ought not to be allowed to oppose such a dishonest defense to a bargain which is fair so far as he is concerned. The rule of public policy which aims to keep corporations within the limits of their chartered powers yields to the justice of the particular case; and the wrong which the corporation has done to the public, by transcending its powers, is left to be redressed in a public prosecution against the corporation."

The writer in 19 Cyc. 1298, in reviewing the various decisions, refers to "the shocking immorality involved in the proposition that a citizen should be judicially encouraged to repudiate his contract, fairly made with a foreign corporation, and to keep the fruits of such contract while repudiating the obligation on his part,—to keep the goods, but not to pay for them."

There is, then, ample and convincing authority, as well as good, wholesome reason, for adopting the rule now established in this state respecting those general administrative statutes concerning foreign corporations doing business generally here, and the conclusions here announced are not reached by overturning principles, precedents, or policies established by the legislation of the state, relating to corporations doing particular kinds of business, or judgments of its courts thereon; but rather by adopting a broad, fair, and liberal view, better fitted to changed conditions of the commercial life of the state in its relations to other states, and tending to promote rather than hinder fair dealing and commercial honesty.

The demurrer of the plaintiff below to the special plea in abatement will be sustained and the judgment below reversed.

GEORGIA SUPREME COURT.

H. C. UNDERWOOD, Plff. in Err.,
v.
MRS. CORDELIA UNDERWOOD.

(— Ga. —, 83 S. E. 208.)

Judgment — foreign — lack of notice — effect.

Where proceedings are instituted in a court of another state to secure a divorce and alimony, where a decree of divorce is

Headnote by BECK, J.

Note. — Necessity and sufficiency of service of notice of application for alimony or support, or for change of allowance in that regard, after decree of divorce or separation.

The scope of this note is limited to cases in which the court had jurisdiction of the

granted and the question of alimony is reserved, and the case stands for a period of twenty years and falls into a class of cases styled "stale actions" under a rule of that court providing that, where no steps are taken in a case for a period of two years, no further step can be taken in the same, unless the persons proposing to take the step shall first give reasonable notice in writing to the other party or his attorney, but the plaintiff does not take steps until after the lapse of twenty years from time the decree of divorce is rendered, and then, proposing to file an amendment asking for alimony, serves notice, not upon the defendant or upon one shown to be actually his attorney, but merely upon one who was the attorney of record when the decree of divorce was rendered, the court is not shown to have jurisdiction of the defendant: and a judgment rendered upon the application for alimony will not be enforced against the defendant residing in this state.

(September 22, 1914.)

ERROR to the Superior Court for Fulton County to review a judgment overruling a motion for nonsuit and directing a verdict for plaintiff in an action on a judgment obtained by plaintiff against defendant in another state. Reversed.

The facts are stated in the opinion.

Messrs. **A. H. Bancker, C. T. Hopkins,** and **L. C. Hopkins,** for plaintiff in error:

If the reservation and the retention of the cause for determination of alimony were good, they were good only for a reasonable length of time, and plaintiff, by letting the cause lie inactive for twenty years, must be conclusively presumed to have abandoned it.

1 Cyc. 756; Whailey v. Myers, 7 Ky. L. Rep. 759; Smith v. Jones, 119 N. C. 428, 25 S. E. 1022; First Nat. Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Nicol v. San Francisco, 130 Cal. 288, 62 Pac. 513; Baltimore & O. & C. R. Co. v. Eggers, 139 Ind. 24, 38 N. E. 466; Brown v. Gauss, 95 N. Y. Supp. 538, 17 N. Y. Anno. Cas. 242; Hale v. Shannon, 58 App. Div. 247, 68 N. Y. Supp. 803; Bishop v. Fuller, 34 Misc. 813, 68 N. Y. Supp. 1131; Wilson v. Altemus, 2 Watts & S. 255; Maynard v. May, 2 Coldw. 44; Exchange Bank v. Hall, 6 W. Va. 447; 25 Cyc. 1290; Punchard v. Delk, 77 Tex. 104, 13 S. W. 615; Johns v. Race, 48 La. Ann. 1170, 20 So. 660; Pringle v. Long Island R. Co. 157 N. Y. 100, 51 N. E. 435; Schmidt v. Heimberger, 21 Pa. Co. Ct. 564; Huffman v. Stiger, 1 Pittsb. 185; Waring v. Pennsylvania R. Co. 176 Pa. 172, 35 Atl. 1135; Bryan v. Zimmerly, 16 Pa. Co. Ct. 564; Wood v. Wood, 140 Ga. 59, 78

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party in the first instance, and in which the question arises as to the necessity or sufficiency of notice on a subsequent application in a supplementary proceeding.

Upon the general question of the award of alimony on constructive notice, see notes to Benton's Succession, 59 L.R.A. 178, and Stallings v. Stallings, 9 L.R.A.(N.S.) 593.

Where a divorce decree provides that the defendant pay the plaintiff "as alimony and for the maintenance of said children of the plaintiff and defendant, such sum or sums of money as may be hereafter determined by this court upon the application of any of the parties in interest," the court retains jurisdiction of the defendant for the purposes of applications brought in pursuance of such decree, regardless of the fact that the defendant is without the state; and the service upon the defendant's attorney of record of a copy of an application for alimony by the plaintiff, and of an order to show cause why such alimony shall not be granted, is sufficient to constitute notice to the defendant. McSherry v. McSherry, 113 Md. 395, 140 Am. St. Rep. 428, 77 Atl. 653.

A possible distinction between the preceding case and UNDERWOOD v. UNDERWOOD is the length of time which elapsed between the divorce decree and the action for alimony in the latter case.

In White v. White, 65 N. J. Eq. 741, 55 Atl. 739, it is held that where a court has acquired jurisdiction over a defendant in divorce proceedings, it retains jurisdiction for the purposes of subsequent proceedings to alter the amount paid to plaintiff for the maintenance of the children in accordance with the terms of the decree providing for such alteration: and that the court may use its discretion in prescribing the measures necessary to notify the defendant of such proceedings. And where personal service is prescribed by the court, it is immaterial that it is served without the state.

In an action brought upon an application for a sum of money in lieu of the tract of land decreed to the plaintiff as alimony in a former action for divorce, the court says: "In this case a petition was necessary, and doubtless it was necessary that a summons in the nature of a subpœna in chancery should also issue and be served on the defendant the same as in the original case, and such summons could no more be legally served on the person who acted as attorney for the defendant in the former suit than could the original or first summons have been so served." Ellis v. Ellis, 13 Neb. 91, 13 N. W. 29. In this case, however, the defendant in the action for alimony is held to have waived all irregularities of service by his appearance in court.

The preceding case is not necessarily opposed to McSherry v. McSherry, supra, inasmuch as in the former case the decree settled the matter of the alimony, while in the latter case the decree merely provided that alimony should be allowed upon application, and contemplated the making of such application.

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S. E. 416; Brunswick Hardware Co. v. Bingham, 110 Ga. 526, 35 S. E. 772.

The court could not in 1908 take up the case as a stale case, without service in writing of notice of the proposed action on Underwood or his attorney.

Rules of court regularly adopted and reasonable in application have the force of law.

11 Cyc. 742; Cox v. McDonald, 118 Ga. 416, 45 S. E. 401; Rio Grande Irrig. & Colonization Co. v. Gildersleeve, 174 U. S. 603, 43 L. ed. 1103, 19 Sup. Ct. Rep. 761; District of Columbia v. Roth, 18 App. D. C. 547; Talty v. District of Columbia, 20 App. D. C. 489; Hopper v. Mather, 104 Ill. App. 309; Magnuson v. Billings, 152 Ind. 177, 52 N. E. 803; Klinesmith v. Van Bramer, 104 Ill. App. 384.

In an action on a judgment rendered in another state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show that he was not served, and that the court never acquired jurisdiction of his person.

Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 59, 22 L. ed. 70; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236.

Messrs. **Green, Tilson, & McKinney** for defendant in error.

Beck, J., delivered the opinion of the court:

The controlling question in this case, and one that disposes of it in its entirety, is whether or not the Kentucky court, in which the judgment was rendered upon which the present suit is based, had jurisdiction of the person of the defendant. Whatever recitals as to service upon the defendant may be contained in the record of the case in the Kentucky court, the question as to whether or not there was legal service in some one of the ways provided by law upon the defendant can be inquired into. In the case of Knowles v. Logansport Gaslight & Coke Co. 19 Wall. 59, 22 L. ed 70, it is said: "But, in an action on a judgment rendered in another state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary; namely, that he was not served, and that the court never acquired jurisdiction of his person."

And in the case of Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897, it is said: "1. Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. 2. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. 3. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing."

Touching the construction of the full faith and credit clause of the Constitution of the United States, it is said in Black on Judgments, § 901: "It is fair to infer that the Constitution means no more than that full faith and credit shall be given to the valid and lawful judgments of the courts of a sister state. But if, in point of fact, the court had no jurisdiction of the defendant, the sentence which it assumed to pronounce is no judgment at all; it is a nullity. It is true that a record must be held uncontrovertible. But, in the absence of jurisdiction, the account of the court's proceedings is not a record, for those proceedings would be *coram non judice*. For the very purpose, therefore, of according due faith and credit to the judgment, it must first be ascertained whether the document purporting to be a record is in reality entitled to that character. Nor should recitals of jurisdiction be conclusive on this point. For if actually there was no jurisdiction, no greater force or credit can be given to such recitals than to any other part of the instrument."

There is no question that when the case in the Kentucky court was on trial resulting in the judgment of July 6, 1888, the defendant was represented by his attorney, and the question of service upon him and jurisdiction of his person for the purposes of that trial cannot now be controverted. In that trial the following judgment was rendered: "This cause coming on to be heard on the pleadings and proof, and the court being sufficiently advised, it is therefore considered and adjudged that the plaintiff, Cordelia Underwood, be, and she is hereby, divorced from the bonds of matrimony with the defendant, H. C. Underwood, and restored to all the rights and privileges of a single woman. It is further considered that either party be restored to such property not disposed of at the commencement of this action as either he or she obtained from or through the other during marriage in consideration or by reason thereof. The prayer for alimony on the part of plaintiff is reserved, and not determined in this judgment."

In her suit resulting in the judgment or decree just set forth, the plaintiff's prayer was "for divorce from the bonds of matrimony with the defendant, and for alimony in the sum of $——— per month, for her costs, and all further and proper relief." In this action the defendant was served and appeared by counsel, Frank Hagan, Esq. On July 6, 1888, the suit resulted in a decree for divorce, in which the sole reference to the alimony was as follows: "The prayer for alimony on the part of the plaintiff is reserved, and not determined in this judgment." From the date of this decree (July 6, 1888) until October, 1908, more than twenty years, Mrs. Underwood did nothing whatever to call the case up again or have the alimony question disposed of. During these twenty years the reservation of the court of the prayer for alimony and the case itself stood unchanged on the docket. In 1893 the Louisville chancery court, in which the cause had been pending, ceased to exist, and the Jefferson circuit court was created; it being duly provided that all causes which had been pending in the old chancery court should be transferred to the last-named court, which had jurisdiction of divorce and alimony questions. There was a rule of practice known as rule 15 (126 Ga. x; 57 S. E. vi), which was applicable to the latter court as well as the former, that, where an action had been in court and remained for two years without any steps being taken in it, it was termed a "stale action," and no step could then be taken in the cause except "upon reasonable notice given in writing to the opposite party or his attorney." Shortly after the decree to which we have referred was taken against Underwood, in 1888, he removed from Kentucky and became a resident of the state of Georgia. In October, 1908, over twenty years after the decree was rendered, Mrs. Underwood caused to be served upon Frank Hagan, Esq., the attorney who represented Underwood in 1888, a notice of an application to file an amended petition in the case. This service was made with a view, it would seem, of complying with the rule known as rule 15, the substance of which we have stated. If this service upon the attorney was not good as service upon the defendant or "his attorney," the court was without jurisdiction to take any further steps, or to take the case from the docket of stale actions. Hagan had been the attorney of the defendant a little over twenty years before this service was had. There is nothing to show that, after the taking of the decree of divorce, Hagan continued to be the attorney of the defendant. He stood as the attorney of record in the proceedings that eventuated in a divorce decree, and that decree, no appeal being taken therefrom, closed the case except as to the question of alimony. And we think alimony was a mere incident to the divorce proceedings. The defendant pleaded and offered to show that, after the taking of the decree of divorce, he paid off Hagan, and that Hagan afterwards had no further connection with the case. The defendant contends that, after the lapse of twenty years from the time the decree of divorce was taken, there was a presumption that Hagan was no longer his attorney; that especially after the action had, under the rules of the court where the case was pending, been passed to the docket of stale cases, and been styled "stale action," it could not, after the lapse of this long period of time, be presumed that, because an attorney had once represented a party thereto when the action was a live case and liable to be taken up at any time, the attorney of record before the case got into the class "of stale actions" was still actually the attorney of the party, but that the presumption would be the reverse of this. It will be noted that rule 15, prescribing that, where a case has been in court and remained for two years without any steps being taken in it, it will be termed a "stale action," and no steps can then be taken except "upon reasonable notice to be given in writing to the opposite party or his attorney," uses the expression "his attorney," and not "his attorney of record." We think the contention of the defendant is sound.

"Where a plaintiff takes no steps to bring his suit to trial for a long period of years, the presumption is that it has been abandoned." 1 Cyc. 756, citing a long list of authorities. "Inadvertence and the fact that one of plaintiff's attorneys did not know that a cause was not on the calendar were not a sufficient excuse for a failure for upwards of two years to bring a cause to trial, to require the court then to permit its further prosecution, even on terms, and such a cause was properly dismissed." Brown v. Gauss (Supp.) 95 N. Y. Supp. 538, 17 N. Y. Anno. Cas. 242. "Where there was a judgment in favor of plaintiff, and on appeal a new trial was ordered, and the judgment had been assigned, but no notice thereof was given defendants, and thereafter plaintiff died, but no personal representative was appointed, or anything done for over ten years indicating an intention to continue the action, a motion by the assignees to be submitted as plaintiff—the only excuse for the delay being that the moving parties believed the defendants insolvent, but had learned of their responsibility—was properly denied because of laches." Hale v. Shannon, 58 App. Div.

247, 68 N. Y. Supp. 803. A lapse of twenty years after suit brought, without an effort on the part of the plaintiff to obtain a trial, will raise the presumption that he has abandoned the suit. Wilson v. Altemus, 2 Watts & S. 255, 260. "The failure of a plaintiff to take any steps towards maturing a cause against a defendant, beyond the entrance of a common order, for eleven years, there not being, during that period, even an order of continuance, and no appearance, for some years, of the case upon the docket of the court, is a discontinuance of said cause." Exchange Bank v. Hall, 6 W. Va. 447.

We are of the opinion that the lapse of time stated above, between the time at which the case against this defendant became a "stale action" and the time when the notice that it would be taken up again was served upon the former attorney of this defendant, was such that the defendant had the right to presume that there was a discontinuance of the case or an abandonment of the same: and that, even if it could be taken up again for the purpose of passing upon the question of alimony, which, as we have said, was merely an incident to the main trial, it could not be so taken up without service upon the defendant or one who was authorized to receive service for him. The court below ruled otherwise, and in this we think it erred; and for this reason the judgment is reversed.

What we have said above disposes of the case upon the controlling issue made by both of the bills of exceptions, and it is unnecessary to pass upon the specific assignments of error in the cross bill of exceptions.

Judgment reversed on the main bill of exceptions. Cross bill of exceptions dismissed.

All the Justices concur.

INDIANA SUPREME COURT.

DANIEL BARKEY, Jr., Appt.,
v.
CARL M. BARKEY et al.

(— Ind. —, 106 N. E. 609.)

Deed — mark by unconscious person — validity.

1. A deed executed by using the hand of an unconscious person to make his mark on the paper at the place of signature is void.

Incompetent person — deed — recovery of property — disaffirmance.

2. Disaffirmance is not a prerequisite to a recovery of property a conveyance of which the grantee secured without consideration from a person of known unsound mind.

Appeal — striking answer — absence of prejudice.

3. A judgment will not be reversed because a portion of the answer was stricken if the court permitted the broadest inquiry into the rights of the parties, so that the merits of the case were fairly tried and determined.

(October 27, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Starke County in plaintiffs' favor, and from an order denying a new trial, in an action brought to cancel and set aside a deed for alleged fraud of defendant in its execution, and for the partition of certain property. Affirmed.

The facts are stated in the opinion.

Mr. **W. C. Pentecost** for appellant.

Messrs. **Charles Hamilton Peters** and **Glenn D. Peters**, for appellees:

The deed was not executed; consequently, not being executed, there was no act of Augusta Barkey to disaffirm.

Schuff v. Ransom, 79 Ind. 458.

Color of title cannot be based upon a bad-faith deed.

Den ex dem. Saxton v. Hunt, 20 N. J. L. 487.

A void deed needs no disaffirmance.

Ætna L. Ins. Co. v. Stryker, 38 Ind. App. 312, 73 N. E. 953, 76 N. E. 822, 78 N. E. 245.

Cox, Ch. J., delivered the opinion of the court:

Daniel Barkey, Sr., the father of appellee, in his lifetime was the owner of 80 acres of land in Starke county. On November 3, 1900, conveyance was made of his land to appellant by a deed purporting to have been executed by Daniel Barkey, Sr., and Augusta Barkey, his wife, the mother of appellant. Daniel Barkey, Sr., died September 2, 1901, and his widow, Augusta Barkey, died intestate the year following. They left other children surviving them than appellant, and grandchildren who are children of other children

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Note. — Signature made by hand of unconscious person.

The question of what mental capacity is sufficient to enable a person to execute a valid instrument is not considered in the present note, only cases where it appears that the person was wholly unconscious when his signature was made being considered. The few cases involving that state of facts

1 L.R.A.1915B.

who had died before the parents. Certain of these grandchildren sued appellant to cancel and set aside the deed of November 3, 1900, as to Augusta Barkey, because of the alleged fraud of appellant, which, it was charged, procured the pretended execution of it by her, and to have one-third of the 80 acres partitioned as the statute of descent would cast the title. To this action of theirs all of the other children and grandchildren were made parties defendant with appellant. All made default but appellant. His demurrer to the complaint, which challenged the sufficiency of the facts to state a cause of action, was overruled. He then answered in general denial and by two special answers. Part of the second answer and all of the third was stricken out by the court on motion of plaintiffs. There was a trial by the court and a finding that the deed was void as to Augusta Barkey: that appellant was the owner of two thirds only of the 80 acres by virtue of the deed; that Augusta Barkey took the remaining one third on the death of her husband, and this on her death descended under the statute to her heirs. A judgment ordering partition accordingly was rendered and partition so made. Appellant's motion for a new trial was overruled, and he has in this appeal assigned this action of the court, together with the rulings on demurrer to the complaint, and on the motions to strike out his special answers, as errors for which a reversal of the judgment is demanded.

Omitting other allegations essential to the cause of action attempted to be stated, the allegations of the complaint relied on to establish the nullity of the deed of November 3, 1900, as to Augusta Barkey, through which deed appellant held the land, were, in substance, that while the deed purported on its face to be signed by her by mark and duly acknowledged, she was unconscious and without mental power to know that she was signing a deed or to direct anyone to sign for her or to acknowledge or deliver it, and without physical power to sign or deliver it; that she was at that time more than sixty-five years old, and then and for many years preceding had been subject to frequent periodical attacks of nervous sickness during which she suffered greatly from headache and lapses into unconsciousness, which periods of unconsciousness would frequently continue for three or four days; that at such a time of sickness and unconsciousness which had then persisted for five days, appellant, accompanied by a justice of the peace, brought the deed to her home, and, over the objections of another one of her children, took her hand in his and touched the pen with which her alleged mark was made; that so her pretended execution of the deed was consummated without consciousness on her part; that the deed was never read to her and she knew nothing of its contents; that it was without consideration; and that its execution was procured by appellant to defraud the other heirs of Augusta Barkey.

The basis of appellant's contention that his demurrer should have been sustained is

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sustain the position taken in BARKEY v. BARKEY, that an instrument, the signature to which was secured under such conditions, is wholly void.

In Dunlop v. Dunlop, 10 Watts, 153, it appears that the testator requested a witness to draw his will, giving him the particulars of how he wished to dispose of the property: the witness prepared a will in accordance with memoranda made by him, and the next day returned with witnesses to have it executed; upon finding testator speechless and senseless, and supposing a signature was necessary, they held him up in bed and directed his hand while a mark was made. It was held that the will was void, the signature being of no more effect than if it had not been made at all, and that it was not validated by the fact that the next day testator was better, sent for the witness, had the will read to him, and said it was just as he wanted it.

In Lenhard v. Lenhard, 59 Wis. 60, 17 N. W. 877, it was held that a deed secured by the scrivener placing the hand of the grantor upon his and the pen, and making a mark for her signature at a time when she was wholly without reason or conciousness, and so near death as to have lost even the faintest glimmer of observation or memory, was invalid, and should be set aside, the fact that at a prior time, when she had mental capacity, she had expressed an intention to dispose of property as the deed provided, being wholly immaterial.

In Abee v. Bargas, — Tex. Civ. App. —, 65 S. W. 489, it appears that the deed in question had been prepared without consulting the grantor, and, while he was in a dying condition, and was unconscious, and incapable mentally and physically of forming an intention or of executing any act or deed, his signature was secured by raising him in bed, taking his helpless hand, and, after touching it to a pen, making a cross mark between his given and surname which had already been written on the deed, he remaining unconscious until his death. The court held that the deed was in effect a forgery and wholly void, and not entitled to record, and, if recorded, could have no effect upon the title to the land, even as to a bona fide purchaser.

If a testatrix was not in a condition to know what was being done when someone else held her hand and guided it in making her signature to a will, it was not executed as required by law. Whitsett v. Belue, 172 Ala. 256, 54 So. 677.

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that the rule applies that the deed of a person of unsound mind, not under guardianship, is only voidable, and vests the grantee with title to the real estate involved until disaffirmance by the grantor upon becoming sane; or, if that event does not happen prior to the death of the grantor, until disaffirmance by the heirs; and that, as no disaffirmance is alleged in the complaint, it was fatally defective.

The rule as generally and broadly stated in this state is as stated by counsel for appellant. Disaffirmance in such cases is a condition precedent to the right of action. Downham v. Holloway (1902) 158 Ind. 626, 92 Am. St. Rep. 330, 64 N. E. 82, and cases there cited; Ætna L. Ins. Co. v. Sellers (1900) 154 Ind. 374, 77 Am. St. Rep. 481, 56 N. E. 98; Ashmead v. Reynolds (1891) 127 Ind. 441, 26 N. E. 80; Schuff v. Ransom (1881) 79 Ind. 458; Nichol v. Thomas (1876) 53 Ind. 42.

The facts alleged in the complaint before us, however, if true,—and they are admitted to be so for the purposes of the ruling on demurrer,—do not bring the case within the rule. The facts here alleged show that Augusta Barkey did not act at all, consciously, intelligently, or otherwise, necessary to the execution of the deed, and gave no direction for anyone to do any such act for her; and they exclude any conscious, tacit consent that such acts might be done in her behalf. And further, it is alleged that there was no consideration for the deed. Under the facts stated there was no more reason for saying that she had executed the deed than there would have been if, at the time, life had fled her body, and her hand, which was lifted, had been cold in death. Something more is here involved than mere mental incapacity. Under these allegations she did nothing whatever in the way of executing a deed. Everything was done by appellant. The facts averred exclude both a signing and a delivering of the deed by her through her own act, or by anyone authorized by her. If appellant had not gone to the bedside of Augusta Barkey and gone through the mockery of affixing her signature by touching her hand to the pen, not through her will and physical effort, but by his own, but, instead, had completed the deed out of her presence in the justice's office, by there writing her name and making her mark and procuring the justice of the peace to fill up the certificate of acknowledgment, there would be no room for any pretense that the alleged deed was other than a forgery. There is no legal difference between this suppositious state of facts and those alleged. In either event the alleged deed would be a forgery. It would in no sense be the deed of Augusta Barkey, but, as to her and those claiming under her, a mere nullity and void. Such a contract cannot be ratified or confirmed, and needs no disaffirmance. Henry v. Carson (1884) 96 Ind. 412, 422; Fitzgerald v. Goff (1884) 99 Ind. 28, 43; Henry v. Heeb (1887) 114 Ind. 275, 5 Am. St. Rep. 613, 16 N. E. 606; Caccioppoli v. Lemmo (1912) 152 App. Div. 650, 137 N. Y. Supp. 643; McElwain v. Russell (1890) 11 Ky. L. Rep. 649, 651, 12 S. W. 777; Lenhard v. Lenhard (1883) 59 Wis. 60, 17 N. W. 877; Turner v. Utah Title Ins. & T. Co. (1894) 10 Utah, 61, 37 Pac. 91; Dunlop v. Dunlop (1840) 10 Watts, 153; Hepler v. Hosack (1901) 197 Pa. 631, 47 Atl. 847; 40 Cyc. 214; 10 Am. & Eng. Enc. Law, 2d ed. 338.

But, on appellant's contention that the deed here involved is voidable merely, and not void, a reason presents itself for holding the complaint in this case not insufficient for failing to aver facts showing a disaffirmance. The rule as to the disaffirmance of conveyances and other executed contracts of persons of unsound mind before office found, so far as the very broad statement of it made above is concerned, strictly is applicable to cases where the person who dealt with the alleged mentally incapable one had no knowledge of such incapacity to contract at the time, dealt fairly with him, and parted with a valuable consideration. In such cases there must be a disaffirmance and tender back of the consideration, or, at least, in equity, an effort to return it, before a suit to set aside and cancel the conveyance can be maintained. The rule is for the protection of one who has acted in good faith. He is, in such case, entitled to notice of disaffirmance, so that he may restore what he has received without suit and costs if he chooses, and he is entitled to be placed *in statu quo* if he has given a valuable consideration for that which he received. But knowledge by one of the contracting parties of the mental incapacity of the other, and lack of any consideration paid, work a material modification of the rule.

It is settled that, where the mental incompetency of the one who has made the conveyance or other contract is known to the other at the time it was made, no allegation of a tender or offer to restore the consideration is a necessary averment of the complaint. Thrash v. Starbuck (1896) 145 Ind. 673, 44 N. E. 543; Studabaker v. Faylor (1908) 170 Ind. 498, 127 Am. St. Rep. 397, 83 N. E. 747; 1 Elliott, Contr. § 386. Such knowledge destroys good faith, and, when coupled with want of or gross inadequacy of consideration, establishes fraud. 1 Elliott, Contr. § 379.

It has been held that, when property has

been obtained by means of a fraudulent, voidable contract, and the vendor has received no consideration for it, the bringing of an action to reclaim the property is, ordinarily, a sufficient disaffirmance of the contract. Herbert v. Stanford (1859) 12 Ind. 503; Thompson v. Peck (1888) 115 Ind. 512, 1 L.R.A. 201, 18 N. E. 16; Mahoney v. Gano (1891) 2 Ind. App. 107, 27 N. E. 315.

The facts averred in the complaint before us, if they do not establish directly that appellant knew of the total mental and physical incapacity of Augusta Barkey to execute the deed in question by signing and delivering, as well as to acknowledge its execution, at least compel the inference of such knowledge to the exclusion of any other inference. Coupled with this is the direct averment that there was no consideration as to her for the deed. Under such circumstances we know of no rule which requires a formal act of disaffirmance before bringing suit to annul the deed and recover the property conveyed. The bringing of the action is a sufficient disaffirmance, and the complaint will be sufficient unless the facts pleaded show a ratification. 18 Enc. Pl. & Pr. pp. 829, 836, 840.

On the question arising on the action of the court in striking out part of the allegations of the second paragraph of answer and all of the third paragraph, it may be said that these allegations were by way of counterclaim, and lacked facts essential to enable them to withstand a demurrer. Furthermore, it appears that these allegations in part covered matters wholly irrelevant and immaterial to any issue tendered by the complaint, and not germane to the subject-matter of the cause of action stated therein; and these matters were so connected with others which might have been germane thereto that the trial court clearly would be unable to make a separation of them. They involved a general claim of indebtedness of Daniel Barkey, Sr., and Augusta Barkey to appellant, and a claim for improvements made on the land after he took possession of it under the deed, and asked that a lien be declared and enforced for him against the land in controversy. The complaint tendered no issue assailing the deed as to appellant's father. Appellant's title to the two thirds of the tract under that deed was not disputed. The only part of the land in dispute by the complaint was the one third which went, under the law, to his mother, if the averments of the complaint were true.

Now, a consideration of the evidence in the cause palpably shows that on the trial the court permitted the broadest inquiry into the rights of all the parties in the property involved, and, from the sordid facts detailed, found for appellant all that in justice and good conscience he was in any event shown by the evidence entitled to. The merits of the cause were fairly tried and determined. Under such circumstances the court's ruling on the motion to strike out cannot, if error in any sense, be deemed one which would justify a reversal of the cause. Section 700, Burns 1914; McGrew v. McCarty (1881) 78 Ind. 496; Hart v. Scott (1907) 168 Ind. 530, 81 N. E. 481; Clark v. Jeffersonville, M. & T. R. Co. (1873) 44 Ind. 248; Booher v. Goldsborough (1873) 44 Ind. 490; Acme Cycle Co. v. Clarke (1901) 157 Ind. 271, 279, 61 N. E. 561.

The cause of the motion for a new trial which is relied on for reversal is the insufficiency of the evidence to sustain the finding. The evidence convincingly supports the court's finding in every way.

The judgment is affirmed.

NORTH DAKOTA SUPREME COURT.

JOHN MARTYN, Appt.,
v.
JOURGEN OLSON, Respt.

(— N. D. —, 148 N. W. 834.)

Public land — entry — passing of title.

1. Until the issuance of a final patent, or until the doing of all things by the entryman upon government land which are prerequisite thereto, such entryman has no complete title in the land, either legal or equitable, nor has his estate after his decease.

Same — right of heirs.

2. Though the heirs of a deceased entryman, who homestead or commute land under the provisions of §§ 2291, 2301, Fed. Stat. Anno. have preferred rights as new entrymen or homesteaders, and in making proof are allowed to credit the improvements and period of residence of their ancestor, such heirs take directly from the government by donation or purchase rather than by inheritance.

Headnotes by BRUCE, J.

Note. — Validity of mortgage upon public lands executed by claimant under the homestead acts prior to patent or final proof.

The earlier cases on this question are set out in a note to Stark v. Morgan, 6 L.R.A. (N.S.) 934, where the various lines of authority are discussed.

No case has been found to have arisen since the former note in which the entryman died before acquiring title to the lands. None of the following cases involve the

Mortgage — on government land claim — effect.

3. A mortgage which has been executed by a deceased entryman, who dies before making final or commutation proof, or before he has done the things prerequisite and necessary thereto, is not a lien on such real estate, and is not assumed by his heirs who enter upon and take said land under the provisions of §§ 2291, 2301, Fed Stat. Anno.

(September 12, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Ward County in defendant's favor in an action to cancel a mortgage and certificate of sale and to quiet title to the land covered by it. Reversed.

Statement by **Bruce**, J.:

This is an action to quiet title. In December, 1904, one Robert J. Martyn, a single man, made homestead entry, under the government land laws of the United States, upon the land described in the complaint, and under such entry lived upon, occupied, and made the same his home for about thirty-eight months continuously thereafter, when he died intestate, unmarried, without issue, and without having made or attempted to make final proof upon said land, or to otherwise secure title thereto, and without having secured any such title. About a year prior to his death, being indebted to the respondent, Jourgen Olson, the said Robert J. Martyn executed and delivered to said respondent his promissory note for the amount of his indebtedness, and as security for the same also executed and delivered to respondent a mortgage upon the land in question and upon another quarter section of land, which latter piece of land, however, was already encumbered. No part of this indebtedness had been paid at the time of the death of the said Robert J. Martyn, and the mortgage securing the same has ever since remained of record unsatisfied. There is no showing that the money was used in improving the land. It is admitted, however, that it was used to defray the expenses of the homesteader while living upon it. Shortly after the death of the said Martyn, the said Olson, under a power of sale, in the usual form, contained in said mortgage, caused his mortgage to be foreclosed by a sale of the land covered thereby, himself became the purchaser, and a sheriff's certificate of said mortgage sale was duly issued to him, which he caused to be recorded, and which now appears of record. On April 24, 1908 (that is to say, two

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rights of the heirs of an entryman who dies before he acquires title to the homestead.

A mortgage executed by an entryman between final proof and the issue of the patent is valid notwithstanding the fact that the title was at that time still in the government. Rogers v. Minneapolis Threshing Mach. Co. 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014.

In holding a mortgage made within a year after entry to be valid, the court, in Adam v. McClintock, 21 N. D. 483, 131 N. W. 394, says: "The later authorities are unanimous that an entryman on government lands, holding the same under the homestead laws, may give a valid mortgage thereon, and that, regardless of the fact that legal title has not been conveyed by the government to the homesteader. Nor does the statute, U. S. Rev. Stat. § 2296, Comp. Stat. 1913, § 4551, to the effect that no land so held shall in any event become liable to the satisfaction of any debt contracted before final proof, invalidate a mortgage voluntarily given on land so held."

And the same court says, in Englert v. Dale, 25 N. D. 587, 142 N. W. 169, that the above statute "has repeatedly been held as intended as a prohibition on the involuntary appropriation of the homesteader's land by way of execution or attachment before final proof, but not to contemplate a restriction upon his power to voluntarily mortgage his interest therein."

It is likewise held in Runyan v. Snyder, 45 Colo. 156, 100 Pac. 420, that the statutes prohibiting the alienation of the homestead before the issuance of a certificate or patent do not prohibit a homesteader from giving, in advance of receiver's receipt upon final proof, a mortgage thereon, "unless, of course, it should be made to appear that the encumbrance was intended as a means of transferring the title in evasion" of the statute.

It is held, however, in Stark Bros. v. Glaser, 19 Okla. 502, 91 Pac. 1040, that a mortgage executed before final proof is invalid under the homestead statutes.

And in Stark v. Fallis, 26 Okla. 357, 109 Pac. 66, the court, after expressly overruling in part the earlier cases of Stark v. Duvall, 7 Okla. 213, 54 Pac. 453, and Fariss v. Deming Invest. Co. 5 Okla. 496, 49 Pac. 926, which are set out in the former note on this point, says: "We feel that up to the time the final proof is made by a homestead entryman we should adhere to the rule in Stark Bros. v. Glaser, that contracts made to fasten liens upon such homesteads prior to the expiration of the five years' residence required by the homestead statute will not be enforced."

Upon the question of the validity of a mortgage by an entryman who dies before making final proof, see MARTYN v. OLSON and Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056, cited in note in 6 L.R.A.(N.S.) 935. The reason underlying the holdings in these cases is applied and explained in the note to Hays v. Wyatt, 34 L.R.A.(N.S.) 397. E. L. D.

L.R.A.1915B.

months after the death of the said Robert J. Martyn, and without any further residence on or cultivation of the land than that furnished by the deceased), the heirs of said Martyn took the proceedings required by the homestead laws of the United States to commute said homestead entry and procure patent to said land to be issued to them. They paid the government purchase price, together with all fees, made the required proof, and a patent was subsequently issued to the appellant, John Martyn, as the sole nonalien heir of the said Robert J. Martyn, as was duly established and decreed by a former decree of the district court of the eighth judicial district, Ward county, North Dakota. The appellant then instituted this action to have the record of the said mortgage and certificate of sale canceled as clouds on this title, and to have the title to said land quieted in him as against the respondent. The district court having decided adversely to him, he has now appealed to this court and has asked for a trial *de novo*.

Messrs. **Gray & Myers** and **Myers & Myers**, for appellant:

The lien of a mortgage can only attach to some legal or equitable ownership, vested in the mortgagor, of such a definite and tangible character as to be "capable of being transferred," and will continue to subsist only against those so claiming under the mortgagor subsequent to the execution of the mortgage.

27 Cyc. 1034A, 1035B, 1138, ¶ 2, 1139d.

The homestead entryman, through his entry, acquires only an incipient and inchoate right to title upon the full performance of certain specified conditions; and, if he dies before making final proof, any and all rights which may have been acquired through his entry and the partial performance of the required conditions immediately lapse and become wholly extinguished.

Adam v. McClintock, 21 N. D. 483, 131 N. W. 394.

Rights acquired by the heirs of the original entrymen through patent issued to them as such are so acquired by donation or purchase, and not by inheritance.

Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Kelsay v. Eaton, 45 Or. 70, 106 Am. St. Rep. 662, 76 Pac. 770; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Council Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7; Powell v. Powell, 22 Idaho, 531, 126 Pac. 1058; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Braun v. Mathison, 139 Iowa, 409, 116 N. W. 789; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Demars v. Hickey, 13 Wyo. 371, 80 Pac. 521, 81 Pac. 705; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017; Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056.

There being no "privity of estate" as between such patent holder and such deceased entryman, neither the doctrine of estoppel nor the doctrine or "relation back" will subordinate the rights of the patent holder to those of a mortgage given by a mere homestead entryman who died before making final proof.

Gibson v. Chouteau, 13 Wall. 92, 20 L. ed. 534; Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253.

Messrs. **Coyle & Herigstad**, for respondent:

A mortgage executed by a homesteader, after he had done all he was required to do by law, although patent had not issued, was valid.

Cheney v. White, 5 Neb. 261, 25 Am. Rep. 487; Nycum v. McAllister, 33 Iowa, 374; Lewis v. Weterhell, 36 Minn. 386, 1 Am. St. Rep. 674, 31 N. W. 356; Fuller v. Hunt, 48 Iowa, 163; Lang v. Morey, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88; Skinner v. Reynick, 10 Neb. 323, 35 Am. Rep. 479, 6 N. W. 369; Meinhold v. Walters, 102 Wis. 389, 72 Am. St. Rep. 888, 78 N. W. 574; Ford v. Ford, 24 S. D. 644, 124 N. W. 1111; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394.

Bruce, J., delivered the opinion of the court:

Although the courts at first doubted the validity of a mortgage which was made before the issuance of the patent, and this even as against the original homesteader, they later, and in a number of recent decisions, have asserted the doctrine of what may be termed the inchoate right to legal title in the entryman, and have upheld such mortgages as promises to mortgage and inchoate liens which become vested and enforceable when the patent is once issued to the entryman. See Adam v. McClintock, 21 N. D. 483, 131 N. W. 394, and cases cited.

They have, on the other hand, held that until the issuance of such final patent, or,

at any rate, until the doing of all things by the entryman which are prerequisite thereto, the entryman has no complete title in the land, either legal or equitable, nor has his estate after his decease.

Whatever right he had under his homestead entry they have held is terminated at his death, and the title to the land reverts to the government, and does not pass to his heirs or to his estate after his decease. These heirs, under §§ 2291, 2301, Fed. Stat. Anno. Comp. Stat. 1913, §§ 4532, 4589, § 32, circular No. 10, of the Department of the Interior, have preferred rights as new entrymen or homesteaders, and in making proof and in commuting are allowed to credit the period of residence of their ancestor. They are looked upon, however, as new entrymen who have no privity with their ancestor, and who take directly from the government by donation or purchase rather than by inheritance. Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; Council Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7; Haun v. Martin, 48 Or. 304, 86 Pac. 371; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056.

Such being the case, there was no estate in the deceased, Robert J. Martyn, to which the inchoate mortgage to the respondent ever attached. The deceased had no complete legal or equitable title before his death, and his heirs took, not as his heirs, but as donees or purchasers of the land, which, upon the death of their ancestor, had reverted to the general government, free and clear of all liens and encumbrances. Counsel for appellant seeks, we know, to base an equitable, if not a legal, title in Robert J. Martyn, the deceased, upon the fact that, before his death, he had lived upon the land for a sufficient length of time to enable him to commute his proof if he had so desired, and that his heirs afterwards relied upon this fact and commuted their proof upon the strength of their ancestor's residence, and without further work or residence on their part. The fact remains, however, that the ancestor did not commute or at any time pay to the government the sum of money necessary therefor, nor is there any evidence that he intended so to do. It may be, as counsel for respondent suggests, that in certain cases equitable, as well as legal, titles are recognized, and that equitable titles have been held to exist in cases where the entryman has done everything necessary to his final proof, but has not actually received his patent. See Adam v. McClintock, supra.

Unfortunately no such state of facts is before us. The payment of the amount provided by the statute is as necessary to commutation as is the residence upon the land which is required by the statute, and at no time did the deceased pay this amount, nor have we any evidence that he ever intended to do so, nor in fact that he had any intention of commuting at all. Such being the case, there was no complete title in the said Robert J. Martyn, deceased, either legal or equitable, to which the mortgage could or did attach. See Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Hussman v. Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253, 41 L. ed. 664; Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056; Stark v. Fallis, 26 Okla. 357, 109 Pac. 66. We may personally be of the opinion that, in cases where an heir obtains title by relying upon the residence and labor of his ancestor, it would be an equitable and wise rule to make him liable to the payment of mortgages such as that before us. It is not for us, however, to establish the public policy of the national Congress or of the national courts. All that we can do is to announce the law as we believe it to have been announced by that Congress and by those courts.

Nor is there any merit in the argument of counsel for respondent that this is an equitable action, and that, under the maxim that he who seeks equity must do equity, the plaintiff and appellant should be required to pay the mortgage before he is entitled to the relief prayed for. We are aware of the decisions in the cases of Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, and Cotton v. Horton, 22 N. D. 1, 132 N. W. 225. All that these cases decided, however, was that a court of equity will not cancel a real estate mortgage securing a just debt which concededly has not been paid at the suit of the mortgagor or one standing in his shoes, when the only ground urged for such relief is that the statute of limitations is available as a defense against its foreclosure. The distinction between the case at bar and the cases cited is that, in the case at bar, there was no privity of estate between the plaintiff and his ancestor, nor had the mortgage ever attached to the land. The plaintiff owed no debt, nor had he any legal obligations to anyone. He did not claim under his ancestor, nor was he in privity with him. "The doctrine of relation," says the Supreme Court of the United States in Gibson

v. Chouteau, 13 Wall. 92, 20 L. ed. 534, "is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim and right to the title" of the land. See also Hussman v. Durham, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; 16 Cyc. 1716.

The judgment of the District Court is reversed, and the trial court is directed to enter a decree canceling the said mortgage and the records thereof as clouds on the title of the appellant, and quieting his title as against the respondent. The defendant and respondent will pay the costs and disbursements of this appeal.

DISTRICT OF COLUMBIA COURT OF APPEALS.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.
EVE A. DANT.

(42 App. D. C. 398.)

Telegraph — unrepeated message — limitation of liability.

Where by statute telegraph messages may be classified and a different rate charged for each class, a condition made part of the contract for transmission, that the company will be liable for mistakes or delays in nonrepeated messages only to the amount paid for their transmission, is valid and enforceable against the sendee.

(November 2, 1914.)

APPEAL by defendant from a judgment of the Supreme Court in plaintiff's favor in an action brought to recover damages for the alleged negligent failure of defendant promptly to deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. **George H. Fearons, Nathaniel Wilson, Clarence R. Wilson, and Paul E. Lesh**, for appellant:

The stipulations limiting the liability of the company to the amount received for sending the message, in the case of an unrepeated message, are valid.

Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098.

The stipuations limiting liability are valid as against the addressee.

Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955; 37 Cyc. 1695; Ellis v. American Teleg. Co. 13 Allen, 226; M. M. Stone & Co. v. Postal-Teleg. Co. 120 R. I. 174, 29 L.R.A. (N.S.) 795, 76 Atl. 762; Halsted v. Postal Teleg.-Cable Co. 120 App. Div. 433, 104 N. Y. Supp. 1016, 193 N. Y. 293, 19 L.R.A. (N.S.) 1021, 127 Am. St. Rep. 952, 85 N. E. 1078; Russell v. Western U. Teleg. Co. 57 Kan. 230, 45 Pac. 598; Coit v. Westen U. Teleg. Co. 130 Cal. 657, 53 L.R.A. 678, 80 Am. St. Rep. 153, 63 Pac. 83; Western U. Teleg. Co. v. Waxelbaum, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10 Am. Neg. Rep. 254; Western U. Teleg. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827; Clement v. Western U. Teleg. Co. 77 Miss. 747, 27 So. 603; Lewis v. Western U. Teleg. Co. 117 N. C. 436, 23 S. E. 319; Broom v. Western U. Teleg. Co. 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611; Manier v. Western U. Teleg. Co. 94 Tenn. 442, 29 S. W. 732; Western U. Teleg. Co. v. Culberson, 79 Tex. 65, 15 S. W. 219; Western U. Teleg. Co. v. White, — Tex. Civ. App. —, 149 S. W. 700; Whitehill v. Western U. Teleg. Co. 136 Fed. 499; Findlay v. Western U. Teleg. Co. 64 Fed. 459; Beasley v. Western U. Teleg. Co. 39 Fed. 181.

Messrs. **Daniel W. Baker** and **William E. Leahy** as *amici curiæ*.

Mr. **F. Elwood Pratt**, with Messrs.

Note. — Telegraphs: validity of limitation of liability of telegraph company for unrepeated messages.

This note supplements earlier notes on the same subject, appended to Western U. Teleg. Co. v. Milton, 11 L.R.A.(N.S.) 561, and Strong v. Western U. Teleg. Co. 30 L.R.A.(N.S.) 409.

In Weld v. Postal Teleg.-Cable Co. 210 N. Y. 59, 103 N. E. 957, reversing 148 App. Div. 588, 133 N. Y. Supp. 228, the court held that a stipulation limiting liability in case of an unrepeated message was valid except against gross negligence, and that, gross negligence not having been shown, the stipulation was a valid defense. The mistake complained of in this case was, among other mistakes, in inaccurately stating the price of 20,000 bales of cotton.

In Western U. Teleg. Co. v. Bennett, — Tex. Civ. App. —, 124 S. W. 151, it was held that such a stipulation was valid in so far as it exempted the company from liability for mere errors or mistakes committed in transmission, but that it was invalid and ineffectual to relieve the telegraph company from its negligence in not delivering or transmitting an unrepeated message. On this question, see note to Box v. Postal-Teleg. Co. 28 L.R.A.(N.S.) 566.

And in Western U. Teleg. Co. v. Anniston Cordage Co. 6 Ala. App. 351, 59 So. 757, it was likewise held that such a stipulation

Thomas M. Baker, John C. Gittings, and J. Morrill Chamberlin, for appellee:

Plaintiff, Mrs. Dant, to whom the telegram was addressed, had a right of action.

Fererro v. Western U. Teleg. Co. 9 App. D. C. 455, 35 L.R.A. 548.

She was not bound by the terms of the conditions printed on the back, nor limited by them in the amount of recovery.

Strong v. Western U. Teleg. Co. 18 Idaho, 389, 30 L.R.A.(N.S.) 409, 109 Pac. 910, Ann. Cas. 1912A, 55; Box v. Postal Teleg. Cable Co. 28 L.R.A.(N.S.) 566, 91 C. C. A. 172, 165 Fed. 138.

Mr. Justice **Robb** delivered the opinion of the court:

This is an appeal by the Western Union Telegraph Company, the defendant below, from a judgment for the plaintiff in an action for damages for the negligent failure of the defendant promptly to deliver a telegraphic message sent by a third party from this city to the plaintiff at New Orleans, Louisiana.

The message, written upon one of the defendant's printed blanks, is as follows:

> Mrs. E. A. Dant, Christian Woman's Exchange, South and Camp streets, New Orleans, La.
>
> See Estopinal Godchaux Building. Buy mileage. Take day train.
>
> (Signed) F. H. Tompkins.

Without unnecessary delay the message was telegraphed to New Orleans, but, through the negligence of the defendant, the name of the addressee was changed to "Mrs. E. H. Grant." This change caused delay in the receipt of the message by the plaintiff, to her damage.

At the trial the defendant offered to show that the face of the blank upon which the message was written bore this notice: "Send the following message subject to the terms on back hereof which are hereby agreed to;" and that on the back of the blank were printed, among others, the following terms:

"All messages taken by this company are subject to the following terms which are hereby agreed to:

"To guard against mistakes or delays, the sender of a message should order it repeated—that is, telegraphed back to the originating office for comparison. For this, one half the unrepeated message rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially valued; nor in any case for delays arising from unavoidable interruption in the working of its lines; nor for errors in cipher or obscure messages.

"2. In any event the company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the nondelivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of $50, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to $\frac{1}{10}$ of 1 per cent thereof."

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in a telegraph blank did not exempt the company from liability for damages resulting from the negligence of its employees in the transmission and delivery of telegrams (changing words "sixteen half" to "fifteen half" in a telegram giving price of yarn).

And likewise, in Western U. Teleg. Co. v. Dobyns, — Okla. —, 138 Pac. 570, it was held that such a stipulation in a contract or the transmission of a telegraph message made and executed in Indian Territory was binding and valid in the absence of wilful misconduct and gross negligence (changing "white," referring to corn, to "wheat").

And in Williams v. Western U. Teleg. Co. 203 Fed. 140, also, it was held that a stipulation in relation to unrepeated messages was valid where, under the facts, only ordinary negligence was established (words "June fifth" changed to "June first" in a L.R.A.1915B.

telegram to agent to buy tomatoes for delivery June fifth).

And in Rhyne v. Western U. Teleg. Co. 164 N. C. 394, 80 S. E. 152, it was held that a stipulation limiting liability for mistake or delay in the transmission or delivery, or for nondelivery, of a message to a specified sum, whether due to negligence or not, was void.

But, in Union Constr. Co. v. Western U. Teleg. Co. 163 Cal. 298, 125 Pac. 242, it was held that a contract limiting liability "for mistakes or delays in transmission or delivery" did not apply to delay in delivery to addressee of a message that had been correctly transmitted.

In WESTERN U. TELEG. CO. v. DANT, it was held that a stipulation limiting liability for negligence, which was binding upon the sender, was also binding upon the addressee.

A. H. N.

The defendant then offered to show that the message in question was unrepeated and paid for as such.

The court rejected the contention of the defendant that the plaintiff's right of action, in the circumstances of the case, was limited and controlled by the terms of the undertaking between the defendant and the sender of the message. The correctness of this ruling forms the controlling question here.

The applicable portions of the act of June 18, 1910, entitled, "An Act to Create a Commerce Court and to Amend the Act Entitled 'An Act to Regulate Commerce,'" etc. read:

"All charges made . . . for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable, . . . Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

It appearing that the business of the defendant is carried on between the states as well as with foreign countries, and that the message in question was to be sent from this District to Louisiana, it is apparent that the above-quoted provisions of the act of 1910 at least control the relations of the sender of the message and the defendant. That the limitations printed on the message in question are reasonable and valid, so far as they affect the sender of the message, has been authoritatively determined. Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098. In that case the court observed: "By the regulation now in question the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise."

That messages such as the present, passing over telegraph lines extending through different states, or from one state or district to another state or district, constitute a portion of commerce itself, and hence, when exercised, subject to the exclusive control of Congress, likewise has been determined. Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 17 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955. In the case last cited a telegraphic message was sent from South Carolina to the plaintiff in this city, which, through the negligence of the defendant, was not delivered. The action was brought in South Carolina and recovery had under a statute of that state which made mental anguish a cause of action. The court ruled this statute "objectionable in its aspect of an attempt to regulate commerce among the states. That is, as construed, it attempts to determine the conduct required by the telegraph company in transmitting a message from one state to another or to this District by determining the consequences of not pursuing such conduct." In the Milling Company Case the court sustained a judgment for the plaintiff obtained under a statute of Michigan which prohibited a telegraph company from limiting its liability for the nondelivery of messages. But the cause of action arose in that case prior to the passage of said act of 1910. By this act express authority is given for the different classification of messages, and the charge of different rates for the different classes is also expressly authorized. Repeated and unrepeated messages were well known to the art and, of course, it must be presumed that Congress intended the words to be given their ordinary meaning. Prior to the enactment of this statute, as we have seen, the court of last resort had ruled that, in the absence of state statutes to the contrary, it was competent for a telegraph company to make such classification of its messages. Primrose v. Western U. Teleg. Co. supra. Congress, therefore, in express terms, has sanctioned the practice theretofore existing.

But it is not necessary to decide whether, by this legislation, Congress intended to take complete and exclusive possession of the subject, because the plaintiff does not base her right to recovery upon any statute, but upon the common law, her contention being that her action is purely in tort for the reckless and negligent performance of a public duty. In other words, it is the plaintiff's contention that her right of action is not affected in any way by the conditions upon which the message was received by the defendant.

In Fererro v. Western U. Teleg. Co. 9 App. D. C. 455, 35 L.R.A. 548, which was an action for damages by the addressee of a telegram, there was a demurrer to plaintiff's declaration. The sole question considered, therefore, was whether, in any event, a right of action accrued. This ques-

was answered in the affirmative. The question now at issue was neither raised nor discussed in the opinion of the court. But in Ellis v. American Teleg. Co. 95 Mass. 226, an action in tort by the addressee of a telegram, the precise question was in issue and the court observed: "It is difficult to see how the plaintiff, who claims through a contract entered into by the sender of the message with the defendants, which created the duty and obligation resting on the defendants, can claim any higher or different degree of diligence than that which is stipulated for by the parties to the contract. Certainly a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such a right accrued or was derived." In M. M. Stone & Co. v. Postal-Teleg. Co. 31 R. I. 174, 29 L.R.A.(N.S.) 795, 76 Atl. 762, which was an action in trespass on the case for negligence, brought by the addressee of a telegram, the court said: "Any rights which the plaintiff may have are based upon and limited by the terms of the contract for transmission. The claim of the plaintiff that he has rights in the matter independent of this contract has no basis in reason. The defendant's duty in the premises must be regulated by its contract; not only its duty to the sender, but to this plaintiff. The American cases permit the plaintiff, as the receiver of the telegram, to come in and avail himself of the defendant's express and implied obligations arising under the contract; but the plaintiff's rights can be no greater than those of the party to the contract."

So, too, in Western U. Teleg. Co. v. Van Cleave, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827, it was said: "While the nature of his [plaintiff's] action is in tort and not on a contract,—as he had none with the company,—he cannot recover if the company has complied with the terms of its contract and undertaking with the sender of the message, provided, indeed, those terms are such as may reasonably be imposed and agreed upon." The supreme court of Tennessee in Manier v. Western U. Teleg. Co. 94 Tenn. 442, 29 S. W. 732, where the plaintiff contended, as here, that he was not bound by the terms of the contract between the telegraph company and the sender of the message, said: "We think that the sound rule is that the contract made between the sender and the telegraph company, which is for the benefit of the addressee, confers upon him the benefits, and charges him with the conditions, of the contract." To the same effect are Russell v. Western U. Teleg. Co. 57 Kan. 230, 45 Pac. 598; Coit v. Western U. Teleg. Co. 130 Cal. 657, 53 L.R.A. 678, 80 Am. St. Rep. 153, 63 Pac. 83; Western U. Teleg. Co. v. Waxelbaum, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, 10 Am. Neg. Rep. 254; Brown v. Western U. Teleg. Co. 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611.

What "public duty" was imposed upon the defendant? It was its duty to receive and transmit with reasonable promptness the message addressed to the plaintiff, provided the sender complied with such conditions as the defendant was authorized to impose. The conditions which it in fact imposed have been held just and reasonable, as we have seen. The sender, knowing those conditions, and knowing that there was greater liability to error in transmitting an unrepeated than a repeated message, nevertheless elected the former mode of transmission, and paid according to the service to be rendered. But, it is insisted, the addressee had nothing to do with the negotiations of those terms. While, in a literal and technical sense, this undoubtedly is true, in the real sense the company was to serve both the sender and addressee upon certain terms and conditions. Someone had to negotiate those terms with the defendant, and, in the very nature of the case that duty and responsibility devolved upon the sender of the message. The sender and the addressee were mutually interested therein, and, unless it be held that the liability of the telegraph company to the addressee is measured and fixed by the terms agreed upon between the company and the sender, the right of the company to impose reasonable terms and conditions when it accepts messages for transmission is shattered and of no avail. It may be argued that the statute would still have some force where the message was for the sole benefit of the sender, but how is the company to know, when it receives a message, for whose benefit it is? Not knowing, the company, to protect itself from the danger of suit by the addressee, would be compelled in every instance to take more than ordinary care and repeat the message. Thus, while expressly authorized by statute to send unrepeated messages and impliedly to limit its obligation growing out of the sending of such a message, it would in effect be deprived of that right. After all, how in reason can it be said that the public duty, the breach of which forms the basis of plaintiff's action, is not measured by the conditions upon which that duty was undertaken? In enacting this legislation Congress in effect has said to the defendant that it may permit the public to elect the class of services desired, and that the company's liability will be according to the class of service paid for. In the present case, the company was paid

for an unrepeated message. In transmitting that message a mistake occurred which, as was observed in the Primrose Case, 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098, amounted to no more than "ordinary negligence." The sender of this message agreed, and we think that, upon both principle and authority, the plaintiff was bound by the agreement, that, in the event of mistake or delay in transmission or delivery, the defendant would not be liable beyond the amount received for sending the message. As the plaintiff was permitted to recover a greater amount than agreed upon, the judgment must be reversed, with costs, and the cause remanded for further proceedings.

KENTUCKY COURT OF APPEALS.

DR. FRANK MELTON, Appt.,
v.
COMMONWEALTH OF KENTUCKY.

(— Ky. —, 170 S. W. 37.)

Courts — jurisdiction — branches — contempt.

1. When a court is composed of branches, a judge of any branch may punish for contempt committed against any other branch.

Contempt — inciting to institution of fictitious suit.

2. An information for contempt cannot be filed by a judge of the court against a physician for inciting the institution of an action for damages for an alleged personal injury which has no basis in fact.

Obstructing justice — inciting fictitious suit.

3. A physician who incites the institution of an action to recover damages for personal injuries which do not exist is guilty of obstructing justice.

(Hobson, Ch. J., and Hannah, J., dissent.)

(November 5, 1914.)

APPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, convicting him of criminal contempt. Reversed.

The facts are stated in the opinion.

Messrs. **Burnett & Burnett** and **A. P. Dodd**, for appellant:

Criminal contempts are only those acts which disrespect the court or its process, or which obstruct the administration of the proceedings in court or the enforcement of its process or orders.

Rapalje, Contempt, § 21; French v. Com.

Note. — Bringing or inciting the bringing of a false or fictitious suit as contempt.

The courts agree that the bringing of a fictitious suit for the purpose of obtaining the opinion of the court or of affecting the rights of third parties constitutes contempt of the court.

Thus, in Lord v. Veazie, 8 How. 251, 12 L. ed. 1067, the court, in dismissing a writ of error because it appeared that the suit was a fictitious one instituted by parties having the same interests in the matter, said: "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

And to the same effect is Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93.

In Giles v. Halbert, 12 N. Y. 38, which was a suit to recover costs against one who had commenced a suit in the name of another, the defense made was that defendant was not liable for the costs for the reason that he was not legally interested in the suit in question because the agreement between him and the real party in interest was founded in champerty, and was therefore void. In answer to this argument the court said: "The fact assumed deprives Parce of the only apology he had for instituting the suit. If he had no interest in the demand except under a champertous agreement, he has perverted the process of the court to purposes of injustice and oppression, and this was alway punishable as a contempt."

In Butterworth v. Stagg, 2 Johns. Cas. 291, it was held to be a contempt where one person brought a suit in the name of another without his privity or consent, and, the nominal plaintiff being nonsuited, an attachment for the costs was granted against the person who brought the suit, the court saying: "It is a contempt to bring a fictitious suit, or to use the name of another without his privity or consent." It does not appear from the report whether the offending party was an attorney or a private person.

In Smith v. Junction R. Co. 29 Ind. 547, it appeared that the suit was a fictitious one designed to obtain a decision upon the validity of the issue of certain certificates of stock, and that the appellant was a fictitious person. The court held that the proceeding was a contempt of the court, dismissed the appeal, and taxed the costs on the appellee. As to the attorneys bringing the suit the court said: "An attorney takes an oath 'faithfully and honestly to discharge

30 Ky. L. Rep. 101, 97 S. W. 427; Gordon v. Com. 141 Ky. 461, 133 S. W. 206.

That court alone in which a contempt is committed, or whose order or authority is defied, has power to punish it or to entertain proceedings to that end.

Rapalje, Contempt, § 13; Johnston v. Com. 1 Bibb, 598; Moore v. Jessamine, Litt. Sel. Cas. (Ky.) 104.

A conviction cannot be had upon the testimony of an accomplice unless corroborated, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

Code Crim. Proc. § 241.

It is the duty of the trial court to acquit in all cases where the law requires two witnesses, or one witness and corroborating circumstances, unless this provision is met by the proof of the commonwealth.

Code Crim. Proc. § 242.

Sections 241 and 242 of the Criminal Code are sufficiently broad in their terms to include both felonies and misdemeanors, since both are public offenses.

Com. v. Barton, 153 Ky. 467, 156 S. W. 113.

Criminal contempt is a misdemeanor, and the same rules of criminal procedure and evidence, made and provided for misdemeanors in general, apply with equal force to criminal contempts.

Gordon v. Com. 141 Ky. 461, 133 S. W. 206; Rapalje, Contempt, §§ 125, 126.

Messrs. **James Garnett**, Attorney General, and **Robert T. Caldwell**, Assistant Attorney General, for the Commonwealth:

The information and rule were not demurrable.

French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427.

This form of contempt may occur before filing of suit.

Com. v. Berry, 141 Ky. 477, 33 L.R.A. (N.S.) 976, 133 S. W. 212, Ann. Cas. 1912C, 516; Wages v. Com. 13 Ky. L. Rep. 925.

Conviction does not rest upon the testimony of an accomplice.

Com v. Barton, 153 Ky. 465, 156 S. W. 113; Com. v. Bossie, 100 Ky. 151, 37 S. W. 844; Com. v. Burns, 4 J. J. Marsh. 177; Com. v. McAtee, 8 Dana, 28; Com. v. Patrick, 4 Ky. L. Rep. 623; French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427; Peoples v. Com. 87 Ky. 487, 9 S. W. 509, 810; Whittaker v. Com. 95 Ky. 632, 27 S. W. 83.

Carroll, J., delivered the opinion of the court:

On May 26, 1914, the following information was filed in the Jefferson circuit court

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the duties of an attorney at law;' among these are, to maintain the respect that is due to the courts of justice; to counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just; to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth. With such an oath resting upon the conscience, in view of these simple but high and important duties, it is difficult to conceive how an attorney of this court, sustaining a respectable standing at home, could be guilty of the offense brought to light by this record. It is due to the profession to say that such occurrences are very rare."

Hatfield v. King, 131 Fed. 791, was a proceeding to determine if two attorneys had committed contempt by submitting a feigned issue to the court, but it was found that the charge was not sustained by the evidence.

In Smith v. Brown, 3 Tex. 360, 49 Am. Dec. 748, the court says that the bringing of a fictitious suit is a contempt of the court, but decides the case as being brought on a wager rather than as being a mere fiction, and merely affirms the trial court's refusal to give plaintiff a judgment.

In Hoskins v. Berkeley, 4 T. R. 402, it was held that a fictitious proceeding without the consent of the court is a contempt of the court.

In Re Elsam, 5 Dowl. & R. 389, 3 Barn. & C. 597, 3 L. J. K. B. 75, where a party instituted a fictitious suit to get the opinion of the court as to the nature of an estate left to him under a will, the court imposed a fine upon him for contempt, though he did not intend any fraud.

Coxe v. Phillips, Cas. t. Hardw. 237, an action on a note which was instituted to enable the signer to plead as a defense that she was a married woman, for the purpose of raising a prejudice against the person whom she alleged to be her husband, it was held that the action was a contempt of the court even though the debt were real.

In Blaine v. Briscoe, 16 Mont. 582, 41 Pac. 1002, the court expressed its opinion that one who employs an attorney to appear for a third person without that person's knowledge, consent, or approval is guilty of contempt, the act being an "unlawful interference with the process or proceedings of a court," within a statute, and advised the district court to institute proper proceedings to determine if a contempt had been committed in the case, where that fact appeared incidentally on appeal.

Presentation by a coroner of a false and fictitious claim to a court for audit constitutes a contempt of the court which the judge to whom it is presented has jurisdiction to punish, such claim being a matter depending in the court and requiring the exercise of judicial judgment. Re Toepel, 139 Mich. 85, 102 N. W. 309. R. L. S.

L.R.A.1915B.

by the Honorable William H. Field, one of the judges of that court:

Commonwealth of Kentucky, Plaintiff, v. Arthur C. Popham, William H. Roose, Dr. Frank Melton, Defendants.
Information.

The commonwealth of Kentucky, upon information based upon the statements of Clyde C. Collins, this day filed, charges: That Arthur C. Popham and William H. Roose each is and each was at the times mentioned herein an attorney at law practising at the bar of the Jefferson circuit court, being members of the firm of Popham, Trusty, & Roose; that Dr. Frank Melton is a practising physician of the city of Louisville; that on October 9, 1913, one Clyde C. Collins was driving a wagon of the American Ice & Cold Storage Company, which came into collision with an automobile of Grainger & Company near the intersection of Eighth and Walnut streets, and went into the drug store at that corner for the purpose of telephoning; that, while there, defendants, Popham, Roose, and Melton, arrived, coming without call or solicitation by said Collins; that said Collins was not injured, and so stated; that the defendants, and each of them, endeavored to persuade said Collins that he was injured; that defendants Popham and Roose told said Collins in substance that he could get "a bunch of money" out of it; that defendants and each of them insisted upon said Collins submitting to examination, and that he was examined by defendant Dr. Melton; that said Melton discovered a small bandage worn by Collins as a result of a slight accident sustained the day previous; that, in spite of Collins's explanation, said Melton rebandaged him, saying in substance that "they don't know about that," that subsequently Dr. Melton again bandaged Collins; that suit was subsequently filed by Popham, Trusty, & Roose, in behalf of Collins, against Grainger & Company. The statement, under oath, of said Collins, is made a part hereof.

Wm. H. Field, Judge.

Accompanying this information was the verified statement of Collins in the form of a deposition, in which he was asked and answered many questions, the substance and effect of his evidence being as stated in the information; and it was on the faith of this statement that Judge Field filed the information, upon which a rule issued from the circuit court against Popham, Roose, and Melton. The rule against Melton cited him "to show cause, if any he has or can, why he shall not be proceeded against for contempt of court, as particularly set forth in information this day filed." In answer to this rule Melton appeared in court and filed a response in which, after averring that the charge made against him by Collins in his evidence supporting the information, and the charge contained in the information, were each false, he proceeded to say that on the occasion mentioned in the information, and while he was engaged in a professional way in the vicinity of Eighth and Walnut streets, "he stopped at the drug store at the corner of Eighth and Walnut streets for the purpose of telephoning to his office; that while there he observed that there had been a collision or accident of some kind; and that when he entered the drug store he observed two men, unknown to him, sitting in chairs and claiming to have been injured in the collision; that the clerk of the drug store was at the time at the telephone, and turned to this respondent and said that the said two men had been hurt, and that he had been trying to call a doctor; that he had called up two doctors, and had been unable to reach either of them, and asked this respondent to aid the two men. Respondent says he did examine the said two men, who claimed that they were injured, and especially the said Clyde Collins; that said Collins at that time had no bandages or plaster on his back, as is claimed in said statement, but did complain of pains in his back, and that in order to relieve the same this respondent, with the assistance of the said clerk, and no one else, did first wash with alcohol the places claimed to be causing the pain, and then put over that place an adhesive plaster, in order to limit the motions and use of the muscles in the neighborhood of the place where the said Collins claimed the pain came from."

He further said: "That he is in no way, shape, or form connected with the firm of Popham, Trusty, & Roose, or any member of said firm; that he has not in this or any other transaction in any way employed said firm, or done anything to suggest or encourage their employment; that neither of them was present in the drug store on the 9th day of October, 1913, when this respondent entered said drug store for the sole purpose of using the telephone; that respondent did not have any knowledge or information whatever as to how said attorneys were called to the said drug store, or as to their business there; that all of the statements made in said affidavit and statement of Clyde Collins filed herein, connecting said firm of attorneys with respondent, or that said attorneys directed respondent what to do, are absolutely false; that respondent received no instructions from said attorneys, or either one of them,

nor was he in any way guided or controlled in his treatment of Collins by directions from or the interests of said attorneys in the case." He also said: "That, if the said Collins was not hurt, he misstated the facts to respondent, and represented to respondent that he was suffering from pains in his back as above set out."

It further appears from the record that Melton did not see or prescribe for Collins in a professional way, or give him any advice, or make to him any suggestions about his injury, after the suit was brought; that the acts committed by Melton, and on which the contempt charge was based, occurred before the suit was instituted, but were done in contemplation of the suit and for the purpose of sustaining it; that, six days after the incident at Eighth and Walnut, a suit was brought in the Jefferson circuit court by Popham, Trusty, & Roose, attorneys for Collins, against Grainger & Company, to recover damages for the alleged injury; that this suit was assigned for trial in the division of the Jefferson circuit court, presided over by Judge Field, but before coming to trial was dismissed by Collins, and soon thereafter this rule was issued; that the attorneys Popham and Roose were disbarred; that Judge Field impaneled a jury to try Melton, and the jury, after hearing the evidence and receiving the instructions, found him guilty, and fixed his punishment at $500.

On this appeal by Melton, although several grounds are assigned why the judgment should be reversed, the principal one is that the prosecution and conviction of Melton on the information filed by Judge Field, and the rule issued thereon, was void, because Judge Field had no authority or jurisdiction to issue the rule or hear and determine the issues arising thereon. This ground of reversal involves an inquiry into the power and jurisdiction of Judge Field to proceed against Melton for contempt on the state of facts shown in the information and supporting evidence, and, if Judge Field was without jurisdiction to issue the rule and hear and determine the matter, the judgment of conviction was unauthorized and void.

The Jefferson circuit court is composed of seven branches or divisions, presided over by seven judges; six of them having civil jurisdiction and one criminal jurisdiction. But these seven divisions constitute only one court, namely, the Jefferson circuit court, and these seven judges merely preside over divisions of that court. A contempt against the authority of any of these judges or courts would be a contempt against the authority of the Jefferson circuit court, and any of the judges or any of the courts would have jurisdiction to proceed against any person guilty of a contempt against the authority of any of the judges or any of the courts composing the Jefferson circuit court, although the contempt might not have been committed against the authority of the particular judge or particular court in which the proceeding for contempt was instituted and heard. It is therefore not material whether the particular contempt here in question was committed by Melton against the authority of Judge Field or the division of the court presided over by Judge Field, because, if it was a contempt against the authority of any of the other judges or any of the other courts, Judge Field would have jurisdiction to hear and determine the contempt proceeding.

So that the question for decision is: Was the conduct of Melton such a contempt of the Jefferson circuit court as that he might be proceeded against by rule as for contempt, or was he guilty of an offense for which he could only be proceeded against and punished by the ordinary processes of the criminal law in the form of a warrant such as may be issued under the authority of the Criminal Code, or by indictment of the grand jury?

We assume, and will hereafter show, that Melton's conduct amounted to an offense that may be described as the common-law misdemeanor of obstructing justice, for which he could be proceeded against and punished in the manner provided by law for the punishment of persons guilty of a common-law misdemeanor; there being no statute in this state describing or defining this particular offense. But it does not follow from this that he could be proceeded against and punished as for contempt of court, as was done in the case we have.

Contempt of court is a very ancient offense, and, as we understand it, from the beginning has been confined to acts or conduct amounting to disrespect of or indignity to the judge or court, or interference with or disobedience of the processes, orders, or judgments of a court, or some obstruction of the due and proper administration of justice in a pending cause, or some misconduct of an officer of the court. It is generally divided into two classes, known as direct and constructive, and Melton, if guilty at all, was guilty of constructive contempt.

In Blackstone's Commentaries, bk. 4, p. 283, this great law writer, in discussing particular offenses, speaks of contempt as follows: "To this head of summary proceedings may also be properly referred the method, immemorially used by the superior

courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon. The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are consequential, which (without such gross indolence or direct opposition) plainly tend to create an universal disregard of their authority. The principal instances of either sort that have been usually punishable by attachment are chiefly of the following kinds: . . . (2) Those committed by sheriffs, bailiffs, gaolers, and other officers of the court by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. (3) Those committed by attorneys and solicitors, who are also officers of the respective courts, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the malpractice of the officers reflects some dishonor on their employers, and, if frequent or unpunished, creates among the people a disgust against the courts themselves. (4) Those committed by jurymen, in collateral matters relating to the discharge of their office, such as making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without the leave of the court, and especially at the cost of either party, and other misbehaviors or irregularities of a similar kind, but not in mere exercise of their judicial capacities, as by giving a false or erroneous verdict. (5) Those committed by witnesses by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. (6) Those committed by parties to any suit or proceeding before the court, as by disobedience to any rule or order, made in the progress of a cause, by nonpayment of costs awarded by the court upon a motion. . . . Some of these contempts may arise in the face of the court, as by rude and contumelious behavior, by obstinacy, perverseness, or prevarication, by breach of the peace, or any wilful disturbance whatever; others in the absence of the party, as by disobeying or treating with disrespect the King's writ or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people. The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves. For law, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."

In Bouvier's Law Dictionary, "contempt" is defined as "a wilful disregard or disobedience of a public authority."

In Bishop's Criminal Law, vol. 2, § 243, under the title of "Contempt of court and the like," it is said: "It is not possible for any judicial tribunal to fulfil its functions without the power to preserve order, and to enforce its mandates and decrees. And the common, and apparently the only practical, method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every such tribunal, derived from its very constitution, without any express statutory aid. The doctrine is generally asserted in these broad terms, and is believed to be sound; the narrower doctrine, about which there is no dispute, is that this power is inherent in all courts of record."

And in § 251 it is further said: "We shall look at the act constituting judicial contempt as committed, first, in the presence of the court; secondly, in its absence by persons attached to it as officers; thirdly, in its absence by persons attached to it as parties or as having had process served upon them; fourthly, in its absence by other persons; fifthly, in these several ways as against justices of the peace."

In §§ 257–262 the author describes the contempts that may be committed against the court in its absence by other persons, as abusing judge out of court, enticing away witnesses, improper conduct toward a juror, publications about causes pending, and disobedience to subpœnas.

In Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205, the court said: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."

As further illustrating that it has been deemed proper and wise in this country to

confine what are called contempts of court within limits affecting judges or courts, or proceedings in or processes of a court, or affecting officers of the court, it may be said that it appears in this opinion that Congress has limited summary punishment for contempt to cases: "(1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts."

In Yates v. Lansing, 9 Johns. 395, 6 Am. Dec. 290, the court said: "The right of punishing for contempts by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our state Constitution. The discretion involved in this power is, in a great measure, arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice. The known existence of such a power prevents, in a thousand instances, the necessity of exerting it; and its obvious liability to abuse is perhaps a strong reason why it is so seldom abused. This power extends not only to acts which directly and openly insult or resist the powers of the court or the persons of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court."

In Rapalje on Contempt, § 21, it is said: "Criminal contempts are all those acts in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring the court into disrepute, . . . such as acts of misconduct by attorneys or other officers, disobedience of subpœnas or other process, disturbance or insolent behavior in the presence or immediate vicinity of the court, and the like."

In Re Fellerman (D. C.) 149 Fed. 244, the court said: "Contempt of court involves two ideas,—disregard of the power of the court and disregard of its authority. Disregard of power, in that lawful orders have not been obeyed; and disregard of authority, in that its jurisdiction to declare the law and ascertain and adjudicate the rights of the parties is hindered, prevented, or set at naught. Such conduct is an offense against the court as an organ of public justice, and may be rightfully punished on summary conviction, whether the act complained of be punishable as a crime on indictment or not. The offense may be double; so is the remedy and the punishment."

In Johnston v. Com. 1 Bibb, 598, this court said: "It seems to be an established principle of law that one court cannot punish for a contempt committed against another court. Intimately related to this is another sentiment that one court cannot judge of a contempt committed against another. In fine, it seems necessary to the very existence of a court, in the healthy exercise of its powers, that it should have exclusive jurisdiction to judge of contempts to its authority."

In Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567, it was held to be contempt for a defendant in a civil action to procure a postponement of a trial upon the false representation that he was ill and unable to attend court.

In Smith v. Brown, 3 Tex. 360, 49 Am. Dec. 748, parties and their attorneys who brought a fictitious suit were held to be guilty of contempt of court.

In Fisher v. McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056, an attempt to bribe a witness in a pending case was held to be contempt.

To attempt to obtain information from a juror is a contempt. State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671. And so is an attempt to bribe a juror. Little v. State, 90 Ind. 338, 46 Am. Rep. 224.

In Goodhart v. State, 84 Conn. 60, 78 Atl. 853, Ann. Cas. 1912B, 1297, it was held that any act committed in the course of a judicial proceeding, with the intent to deceive the court, and which is calculated to impede or obstruct the court in its administration of justice, is a contempt.

Many other cases might be referred to, but these are sufficient for the purpose of illustrating the principle expressed in the unbroken current of authority that contempt proceedings are confined to acts or conduct of attorneys or officers of the court, or acts or conduct affecting the administration of justice in pending cases, or to some interference with the processes of the court or obstruction of its orders or judgments, or to some indignity to or disrespect of a judge or court. And a very diligent investigation has failed to discover any authority extending beyond these limits the power of a court to punish criminal contempt by summary proceedings.

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that have been written by this court on the subject, the contempt consisted of some indignity committed against the judge or the court, or interference with its proceedings or processes, or grew out of the misconduct of some officer of the court. Philips v. Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166; Arnold v. Com. 80 Ky. 300, 44 Am. Rep. 480; Re Woolley, 11 Bush, 95; French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427; Gordon v. Com. 141 Ky. 461, 133 S. W. 206; Richardson v. Com. 141 Ky. 497, 133 S. W. 213. In some of these cases the proceedings were summary and the penalty inflicted by the judge; in others a jury was impaneled to assess the punishment.

We therefore think that Melton could not be proceeded against or punished in the manner appearing in this record. He was not an officer of the Jefferson circuit court. He did not commit any offense in the presence of the court, or interfere with the execution of any process, order, or judgment issued by the court, or obstruct in any manner the administration of justice in a case pending in the court.

We are not disposed to concede that a judge of any court has authority to proceed in this summary way to punish persons not court officers, who have not committed any offense against the judge or his court, and who have not interfered with or obstructed in any manner the processes or orders or judgments of his court, or the administration of justice there.

In all the history of the law there has been a special practice and procedure for the prosecution and punishment of persons guilty of criminal offenses, and this practice and procedure, with one exception, has always been applicable to crimes, great and small. No matter who the offender or what the offense, he must be prosecuted and punished according to and under the rules and forms by and through which the criminal law is administered in all cases and in a courts.

The only exception to this is found the prosecution and punishment of guilty of the misdemeanor known as nal contempt. And this exception made so that a court of justice a summary and expeditious those who offended against The exception was not nal contempt was be punished u dure applicabl haps without nal contemp punished, b at all tim preserve it thority w L.R.A.19

dent to the prosecution of offenders generally. But this method should, as we think, be limited to the class of offenses to which it has always been confined. There appears to us no good reason why it should be extended to cases not within the fair scope purpose of the exception. There are many common-law offenses that fall within definition of obstructions of justice offenses against government, and these fenses should be prosecuted and pu according to the course of the comm when they do not involve a cont court, as we have defined it. think it consistent with a wis icy, or in harmony with the law as administered in this str try, to invest judges wit summarily proceed, as by sons guilty of criminal offe not offend against the dig of the court, or with th ing cases, and who a There seems to us making such a depar settled course of th and especially is dure of the crimin ently point out by which offende be punished.

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case, as we think that an attorney or any officer of the court who is guilty of conduct calculated to embarrass the court in the performance of its duties, or who attempts, by improper methods, to secure or suppress evidence, or interfere with witnesses, or approach jurors, or obtain favors by deceitful means, would be guilty of an offense punishable by a contempt proceeding, although this conduct or these acts were not committed in a pending case. A higher standard of duty is exacted of court officers than is demanded of others, and they might be guilty of contempt of court by committing acts that would not amount to contempt if committed by other persons. Attorneys at law and court officers being a part of the court, and charged in an especial degree with the duty of aiding the court in the correct administration of the law, it is just that the court should have much larger authority over them than it has over other persons.

Returning now to Melton, we think that, although not guilty of a contempt of court, he yet committed a public offense, to wit, the common-law misdemeanor of obstructing justice, for which he might be proceeded against and punished in the manner provided for the punishment of persons guilty of common-law misdemeanors. It is true that, when he approached Collins and prevailed on him to subject himself to the treatment prescribed, Collins had no case pending in court, but, according to Collins's version of the affair, the purpose of Melton was to fraudulently make up a state of facts that would enable Collins to maintain a suit to recover damages for an injury that he had not sustained. And, while it is true that Collins afterwards brought a suit to recover damages, yet we do not consider this circumstance of controlling importance. The offense of Melton was complete when he attempted, by the methods described, to induce Collins to bring a suit. His purpose was to prostitute the administration of the law, and make the courts an instrument of fraud and wrongdoing. He was aiding and assisting in the institution of a suit that he knew was fraudulent and entirely unjustified by the facts, for the purpose of extorting, with the aid of and through the instrumentality of the courts, money from an innocent party.

Courts are established for the purpose of administering justice, but the object of Melton was to pervert this purpose by having them administer injustice and be the agency through which a fraud and a wrong might be perpetrated. Bishop in his Criminal Law, vol. 1, § 468, describes acts like this as an obstruction of justice, which is a common-law offense, punishable by fine and imprisonment, or both.

In Russell on Crimes, vol. 1, p. 182, it is said: "All who endeavor to stifle the truth and prevent the due execution of justice are highly punishable; and therefore the dissuading or endeavoring to dissuade a witness from giving evidence against a person indicted is an offense at common law, though the persuasion should not succeed."

In Com. v. Reynolds, 14 Gray, 87, 74 Am. Dec. 665, the court, in the course of an opinion defining indictable common-law offenses having a tendency to obstruct the administration of justice, said: "And the 'due course of justice' means not only the due conviction and punishment, or the due acquittal and discharge, of an accused party, as justice may require, but it also means the due course of proceedings in the administration of justice. By obstructing those proceedings, public justice is obstructed."

In State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450, the court also said: "And the doing of any act tending to obstruct the due course of public justice has always been held indictable as a misdemeanor at common law."

In Com. v. Berry, 141 Ky. 477, 33 L.R.A. (N.S.) 976, 133 S. W. 212, Ann. Cas. 1912C, 516, we held that it was an obstruction of justice and an indictable common-law misdemeanor to persuade a person to go beyond the jurisdiction of the court so that he might not be summoned as a witness before the grand jury, and in the course of that opinion it was said: "The course of public justice must not be impeded. The gist of the offense is not a contempt of the court, or an abuse of its process, but the obstruction of justice. He who knows that another will be a witness, or has reason to know it, and, so knowing, causes the witness to absent himself for the purpose of preventing his testifying, is guilty of obstructing justice, although the witness may not have been subpœnaed, or his testimony, if given, would not have been important. The law does not tolerate that its proceedings shall be stifled, and the running off of a witness to stifle a prosecution is none the less an offense because it is done before the grand jury is impaneled."

In the French Case, 30 Ky. L. Rep. 98, 97 S. W. 427, French enticed away a witness in attendance upon the court under its subpœna, and this undoubtedly was an interference with the processes of the court and a contempt of court. For this offense he was arraigned under a contempt proceeding and tried before a jury that assessed his punishment at $5,000, and, in

the opinion affirming the judgment, the procedure to be followed in this class of cases was carefully and thoroughly considered.

The Berry Case and the French Case illustrate the difference between offenses amounting to what may be called an obstruction of justice, that must be prosecuted by indictment, and those that may be prosecuted under contempt proceedings. Berry, as said by the court, was not guilty of a contempt of court or an abuse of its process, but of obstructing justice not in a pending case or proceeding, and so committed the common-law offense for which he was indicted, while French was guilty of obstructing justice in a pending case, and therefore committed a contempt of court, for which he could be and was prosecuted and punished in a contempt proceeding. There are also aggravated offenses that may be contempts of court and also indictable crimes, and punishment for contempt would not bar a prosecution by indictment for the larger crime; but it is not necessary to pursue further an inquiry into this class of offenses.

Melton was, under the evidence for the commonwealth, guilty of the common-law offense of obstructing justice, and for this offense he could have been indicted by the grand jury of Jefferson county, and upon his trial, if proven guilty, under the rules of law and evidence that obtain in criminal practice, the jury could have assessed his punishment at a fine in any amount or imprisonment for any length of time, or have both so fined and imprisoned him.

Being of the opinion that this course should have been pursued, and that Judge Field had no power or jurisdiction to proceed by information and rule, the judgment is reversed, with directions to discharge the rule and set aside the judgment.

Hobson, Ch. J., dissenting:

The facts of the case are these: While one Clyde Collins, with two others, was driving a wagon along a street of Louisville, an automobile owned by another person collided with the wagon, breaking it and throwing out the men in the wagon. They repaired to a near-by drug store, where Collins was telephoning to his employers what had happened, and also telephoning to the owners of the automobile, when the defendant Dr. Melton and two attorneys came in. They at once proceeded to induce Collins to bring a suit against the owners of the automobile. He told them he was not hurt, but they insisted that he was. The doctor examined him and found an injury upon his back. Collins explained to him that this was due to a previous accident. The doctor replied that that did not matter, they would not know; and proceeded to bandage Collins up. After obtaining a contract from Collins for the bringing of a suit, the three departed. The suit was brought a day or two later, and the facts coming to the knowledge of the judge, the information set out in the opinion was filed against Dr. Melton and the two attorneys.

The proof on the hearing leaves no doubt that a fraudulent conspiracy was entered into between the two attorneys and Dr. Melton to induce Collins to bring a fake suit; they telling him that he would get a large amount of money, and arranging so that they would divide it with him. A clearer case of a criminal conspiracy to corrupt the administration of justice cannot well be imagined. The judgment against the two attorneys has not been appealed from, and this appeal only questions the correctness of the judgment against their co-conspirator, without whose aid the conspiracy would have been impossible of execution.

It is well settled that courts have an inherent power at common law to punish any act, whether committed in or out of their presence, which tends to impair, embarrass, or obstruct them in the discharge of their duties; and the legislature, while it may regulate the procedure, cannot fetter the power. Re Shortridge, 99 Cal. 526, 21 L.R.A. 755, 37 Am. St. Rep. 78, 34 Pac. 227; State ex rel. Phelps v. Civil Dist. Ct. Judge, 45 La. Ann. 1250, 40 Am. St. Rep. 282, 14 So. 310; Hale v. State, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; State ex rel. Atty. Gen. v. Circuit Ct. 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193; Re Knaup, 144 Mo. 653, 66 Am. St. Rep. 435, 46 S. W. 151; Bradley v. State, 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630; State v. Fredlock, 52 W. Va. 232, 94 Am. St. Rep. 932, 43 S. E. 153. Many other cases are referred to in those cited.

Contempts are divided into direct and constructive contempts, which are thus defined in 1 Chamberlayne on Evidence, § 255: "The administrative power and dignity of the court necessarily involve the right of punishing summarily for offenses against justice committed in the immediate presence and hearing of the judge, or so near as to interrupt proceedings before him. These are called direct contempts. An act by any person done in presence of the presiding judge, which shows disrespect for his person or authority while acting in his official capacity, is an offense against the power and dignity of the court. The judge needs no evidence; he is himself,

in such cases, the percipient witness; should pleadings be deemed advisable, they may be of the briefest and simplest discription. Constructive contempts, on the other hand, may be defined as those arising from matters not occurring in court, but which tend to degrade or make impotent the authority of the judge, or which tend to impede or embarrass the administration of justice. In dealing with contempts not committed in the presence of the judge, the offender must be brought before the court by a rule or some sufficient process. In other words, while the power to punish in cases of direct contempts and constructive contempts is the same, the procedure is different; in cases of direct contempt the court acts spontaneously and commits the offender summarily, while in cases of constructive contempts the court, on information, issues a citation to the offender to show cause why he should not be punished for contempt. The information in a proceeding for contempt is sufficient if it clearly apprise the defendant of the nature of the charge against him, and no particular form is, in general, essential."

In Yates v. Lansing, 9 Johns. 395, 6 Am. Dec. 290, as quoted in the opinion, the court, speaking of the power to punish for contempt, said: "This power extends not only to acts which directly and openly insult or resist the powers of the court or the persons of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court."

The decisions on the subject are clear and harmonious. Not a dissent or contrary view is to be found anywhere.

In 9 Cyc. 5, 6, direct and constructive contempts are thus defined: "A direct contempt is an open insult in the presence of the court to the person of the presiding judge, or a resistance or defiance in his presence to its powers or authority. A constructive contempt is an act done not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice."

To same effect, see 7 Am. & Eng. Enc. Law, 28; note in 50 Am. St. Rep. 572–585; State ex rel. Crow v. Shepherd, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79; Burdett v. Com. 103 Va. 838, 68 L.R.A. 251, 106 Am. St. Rep. 916, 48 S. E. 878.

In State ex rel. Russell v. Ives, 60 Minn. 478, 62 N. W. 831, the distinction between direct and constructive contempts is thus very clearly stated: "Direct contempts are those committed in the immediate view and presence of the court. They are punishable summarily by order of the presiding judge, who takes judicial notice of such contempts, acts upon his own motion, and upon facts within his own knowledge, based upon the words or acts of the accused, or both, said or done in his presence or hearing. No formal trial is necessary. The court simply makes an order without proof, reciting what occurred in its presence or hearing, adjudging the person proceeded against guilty, and fixing his punishment. Gen. Stat. 1894, § 6157. This is an arbitrary power, born of necessity, which must be exercised with great prudence, and always limited to cases of direct contempts. Constructive contempts are those which are not committed within the immediate presence of the court, but arise from matters not transpiring in court, but at a distance, of which it has no knowledge except as informed by others; while constructive contempts are punishable equally with those which are direct, yet the procedure in the two cases is radically different. They cannot be punished summarily, but the court must be informed of the facts constituting the alleged contempt by affidavit or other evidence."

In 2 Bishop on Criminal Law, after a discussion of the different kinds of contempt, summing up the matter in § 261, the learned author says: "On this question of contempts committed by persons neither attached to the court nor in its presence, we can discern no difference between those attached and those not, or between those present and those absent, other than arises from the very different degrees of ability to obstruct the working of the judicial machinery possessed by these differing classes. Since the whole doctrine of contempt of court grows out of the necessity for it to administer justice, the consequence must be that, whenever any obstruction to its justice is laid before it, the judge must cause the same to be removed. And though ordinarily men in no way connected with the tribunal, either as officers or parties, cannot obstruct the course of its justice without going into its presence, yet circumstances may and do occur in which they can. If they take advantage of these circumstances, and do what tends directly to impede the course of justice, or to corrupt the justice itself, they should be dealt with summarily for the contempt."

That the conspiracy of the defendants to have an action instituted upon grounds which were false, and which they knew to be false, carried out by the actual bringing of the suit, was the doing of that which "tends directly to impede the course of justice and to corrupt justice itself," there can be no question. That the courts at

common law had the power to protect themselves from false and fraudulent suits must also be admitted. In Coxe v. Phillips, Cas. t. Hardw. 237, Lord Hardwick held a fictitious action to be a contempt of court, and committed the parties and their common-law attorney. See also Re Elsam, 5 Dowl. & R. 389, 3 Barn. & C. 597, 3 L. J. K. B. 75; Henkin v. Guerss, 12 East, 247; Gibson v. Tilton, 1 Bland. Ch. 352, 17 Am. Dec. 306. These were cases of feigned causes of action, and if the bringing of such an action is a contempt, how much more a contempt is it to bring a fraudulent action for the express purpose of corrupting justice.

The authorities cited by the court do not conflict with those above cited. A long quotation is made from Blackstone's Commentaries, but it will be observed that Blackstone, among other things, says: "Some of these contempts may arise . . . by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people." At the head of the discussion, after pointing out that contempts are either direct or indirect, and introducing the words quoted by the court, he says: "The principal instances of either sort that have been usually punishable by attachment are chiefly of the following kinds."

It will thus be seen that he only undertakes to give the principal instances of either sort that have been usually punished. While Bishop uses in § 243 the language quoted in the opinion, he also uses, near the close of the discussion, the language quoted from § 261. Section 252 closes with these words: "Among the particulars." Then follow a number of more common instances of contempt. In § 257 he discusses contempts in the absence of the court by other persons, and he winds up this discussion by § 261. Neither Blackstone nor Bishop undertakes to enumerate all the things that may be a contempt of court. They only give the commoner instances, and they both show that they do not intend to enumerate all the things that constitute contempt. The other authorities cited by the court are to the same effect.

The court refers to the act of Congress limiting contempts of court. If that act did not change the common-law rule, there was no necessity for it. It is known of all men that the passage of the act was due to certain contempt proceedings had in the Federal courts previous to its passage. We have no such statute in Kentucky; the common law, as it stood prior to the fourth year of the reign of King James I., is in force in this state. Ray v. Sweeney, 14 Bush, 2, 29 Am. Rep. 388. Sections 1291 and 1292, Ky. Stat. are as follows: "A court shall not, for contempt, impose upon the offender a fine exceeding $30 or imprison him exceeding thirty hours, without the intervention of a jury." Section 1291. "In all trials by jury arising under this subdivision, the truth of the matter may be given in evidence." Section 1292.

We have no other statute modifying in any way the common law applicable to constructive contempts such as this. The only limitation upon the power of the court to punish constructive contempts is that provided in §§ 1295 and 1299, Ky. Stat.: "No court or judge shall proceed by process of contempt, or impose a fine against any person who shall, by words or writing, animadvert upon or examine into the proceedings or conduct of such court or judge, by words spoken or writing published not in the presence of such court or judge in the courthouse during the sitting of the court." Ky. Stat. § 1295. "Nothing in this subdivision shall be construed to prevent any court, or judge thereof, from proceeding against any person writing or publishing a libel, or slanderous words, of and concerning such court or judge in relation to his judicial conduct in court, by indictment. . . ." Ky. Stat. § 1299.

All other constructive contempts are left as at common law, except as provided in §§ 1291, 1292, Ky. Stat., as to trial by jury, and giving the truth of the matter in evidence. The common law being in force in this state, the question to be determined is not what this court, as now constituted, may think the rule on the subject ought to be; the sole question is: What is the common-law rule on the subject? When the common-law rule is settled, it must, under the repeated decisions of this court, be followed until changed by the legislature. What the common-law rule is as to the punishment of constructive contempt, such as that before us, is shown by a long, harmonious, and clear line of decisions, beginning in the earliest times and extending down to our time. No decided case sustains the conclusion of the court, and no text writer sustains it, when all that he says on the subject is read.

Three reasons seem to underlie the opinion of the court.

(1) The transaction at the drug store took place when no suit was pending.

A conspiracy is usually carried out by a succession of acts, and the nature of the conspiracy is to be determined by all that was done, and not by what took place on

one occasion alone. The plastering up of Collins at the drug store, the drawing of the contract by which the attorney was to receive a sum equal to one half of the amount recovered, and the persuasion of Collins that he was injured and should bring a suit, was the first step. This was followed by the actual bringing of the suit pursuant to the purpose of the conspiracy. Under a regulation in force in the Jefferson circuit court, suits are assigned to the different divisions in rotation, and, this suit having fallen into the division presided over by Judge Field, the conspiracy culminated in the bringing of a false suit in his court. It is true that Dr. Melton did not write the petition, and did not file it in the clerk's office with his own hands. This was done by his ally and fellow worker, the attorney; but Dr. Melton is as much responsible for the contempt as if he had filed the petition with his own hands, because it was all done by his associates pursuant to the plan mapped out between them, and for the purpose of carrying out that plan. If A and B agree to kill C, and B loads a pistol and gives it to A, and A, pursuant to the plan, kills C, B, though absent at the time of the killing, is equally liable as if he had fired the shot with his own hand. And so here, as the original plan originally contemplated all that followed, and all that followed was done in pursuance of this plan to carry it into effect, Dr. Melton is equally responsible with the attorneys, who were simply acting for him as well as themselves in what they did. After the suit was brought, Dr. Melton, though he did not treat him professionally, directly and indirectly made efforts to get Collins to stand up to the action which had been brought and the attempt to foist the fraud upon the court. What he did at the drug store before the action was brought, and what he did by himself and others after the action was brought, is all to be considered together, for it was part of one plan, and all done for one purpose.

This is a very serious case, and not without importance in the administration of justice. Hairsplitting distinctions should not be indulged to protect from punishment a man who is clearly guilty of an effort to corrupt public justice. Dr. Melton is a member of a learned profession. He did not act ignorantly, and it is especially important that the administration of justice should be protected against frauds devised by people of learning and position in the community. It is peculiarly important that the big fish should not escape the net of the law in which the little fish nearly always find themselves entangled.

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(2) Melton was not an attorney or officer of the court.

It is conceded by the court that the attorneys who filed the false suit were properly punished for contempt of court. While it is true that an attorney or other officer of the court is more reprehensible in a case like this than a third person, it cannot be maintained that the court has not power to protect itself against third persons in a case like this, by punishing a contempt committed by them. The attorney may be disbarred for unprofessional conduct, but conduct that is a contempt in an attorney attempting to corrupt justice is equally a contempt of court in a third person doing the same thing. Lord Hardwick made no distinction; he punished the parties as well as their attorney; and the precedent he set has never been criticized, so far as I can find. The same rule was followed in Lord v. Veazie, 8 How. 251, 12 L. ed. 1067. In Cleveland v. Chamberlain, 1 Black, 419, 17 L. ed. 93, the appellant, who carried on a pretended controversy by counsel whom he employed for the purpose of obtaining a decision injurious to the rights of parties, was held guilty of contempt. In like manner the bringing of a fictitious action to ascertain the legality of the issue of certain stock was held a contempt of court (Smith v. Junction R. Co. 29 Ind. 546), or the bringing of an action in the name of another person without his knowledge or consent (Butterworth v. Stagg, 2 Johns. Cas. 291), or deceiving the court by falsely pretending to be sick (Welch v. Barber, 52 Conn. 147, 52 Am. Rep. 567), or filing a false answer (Martin Cantine Co. v. Warshauer, 7 Misc. 412, 28 N. Y. Supp. 139).

If the case referred to had come to trial, and on the trial the facts had come to light, could it be maintained, under the authorities above cited, that Dr. Melton and his associates had not been guilty of contempt in bringing this fabricated action. And if this is true, how can it be maintained that they were not guilty of contempt in filing the petition and having the defendant in that action summoned to answer it? Has not the court power to protect its process from abuse for fraudulent purposes? Do not such abuses of the processes of the court destroy respect for it, no less than the bringing of a fictitious action or the use of the name of a party without his knowledge or consent? The court says: "If there had been a suit pending in the Jefferson circuit court, and Melton had attempted to manufacture evidence in this suit, or had endeavored to persuade a witness to give false evidence or conceal the truth, or had in any manner or form interfered with the due administration of

justice in the court in which the case was pending, we would have no doubt of the right of the court in which the case was pending to proceed against him in the summary manner adopted by Judge Field in this case."

If this is true, how is the bringing of the suit to be distinguished from subsequent steps in the action? And the proof shows that Melton did not cease his activities when the petition was filed, but continued in one way and another to try to get Collins to stand up to it.

In Com. v. Berry, 141 Ky. 477, 33 L.R.A. (N.S.) 976, 133 S. W. 212, Ann. Cas. 1912C, 516, Berry was indicted for obstructing justice, and it was insisted for him that he could not be punished because the witness he ran off had not been subpœnaed, and in answer to this objection the court said the gist of his offense was not a contempt of court. No other question was involved in the case; and yet this is cited to sustain the opinion of the court. The other cases relied on by it support its conclusion no more than that case. Mr. Bishop, as shown above, also takes the same view. The cases are numerous where persons who fabricated evidence in pending suits have been punished for contempt; and certainly no sound distinction can be maintained between the fabrication of evidence in a pending suit, and the fabrication of evidence with a view to a suit and the immediate consummation of the plan by bringing the suit. The authority of the court and respect for it are as much destroyed in one case as the other. If the guilty parties may be punished for such conduct in a pending suit, how can it be maintained that their dismissal of the false suit shall purge the contempt and shield them from punishment for the contempt they committed before it was dismissed? Can "the purity of the court" be preserved if it has no power to protect itself from such frauds? If, as has been held time and again, the court has power to punish as a contempt the fabrication of testimony or the fabrication of a record, how can it be maintained that it has not power to punish as a contempt a deliberate fabrication of a case? If such bold attempt to pervert justice may not be summarily dealt with, how is the purity of the court to be maintained? Summary punishment in such cases is essential: the court is not powerless to protect itself without calling to its aid the grand jury, but, under all the authorities, has inherent power to punish such contempts which strike at the very foundation of the administration of justice.

(3) The conduct of Dr. Melton may be punished under an indictment for obstructing public justice.

If this were a sufficient reason for dismissing this case, it is safe to say few prosecutions for contempt of court could be maintained for corrupting public justice. If a witness is suborned to swear falsely, the person knowingly inducing him to do so may be indicted for subornation of perjury. If a record is changed, the person so changing it may be indicted for forgery. If a witness is persuaded to leave the state, and justice is thus obstructed, the person inducing him to leave may be indicted for obstructing public justice. But the fact that in any case a crime has been committed does not prevent the act being a contempt of court and from being punished as a contempt of court. The books are full of illustrations.

Bishop, in § 264, says: "Many acts are both contempt of court and indictable crimes."

In Bradley v. State, 111 Ga. 174, 50 L.R.A. 694, 78 Am. St. Rep. 162, 36 S. E. 632, the court said: "Nor does it make any difference that the same act is indictable under the penal laws of the state. On this subject Judge Seymour D. Thompson, in an admirable article in 5 Criminal Law Magazine, says (page 155): 'The power of the courts in this regard being founded in the principle of self-preservation, it does not at all go to deprive them of it that the law has provided some other mode for punishing the offender; it is quite immaterial that the offense is indictable. Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and trial by jury; it may be before some other tribunal, where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, or the state's attorney, or upon circumstances purely accidental.'"

In Fisher v. McDaniel, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056, the court said: "It is well settled that, if an act is a contempt of court, the fact that the same act is indictable as a criminal offense does not take away the jurisdiction of the court to punish the offender as for a contempt."

To same effect, see Hale v. State, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; People ex rel. Atty. Gen. v. Tool, 35 Colo. 225, 9 L.R.A.(N.S.) 822, 117 Am. St. Rep. 198, 86 Pac. 224, 229, 231; State ex rel. Haskell v. Faulds, 17 Mont. 140, 42 Pac. 285; Re Savin, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699; McCarthy v. Hugo, 82 Conn. 262, 135 Am. St. Rep. 270, 73 Atl. 778, 17 Ann. Cas. 219.

The books are full of cases where publications in newspapers have been punished

as contempts, in the absence of some statute such as § 1295, Ky. Stat., although in all these cases the publication might have been indicted as a libel. Chamberlayne, Ev. § 243. They are full of cases where the tampering with a witness or the fabrication of evidence has been punished as contempts, although in all these cases an indictment for obstructing public justice might have been maintained. Chamberlayne, Ev. §§ 246, 247, 248. The false swearing by a witness has been punished as a contempt, although the witness might have been indicted for perjury (Chamberlayne, Ev. § 249), also the intimidation of a witness and the suppression of testimony, advising a witness to leave, and the like (Chamberlayne, Ev. §§ 249–252). This court has followed the same course in French v. Com. 30 Ky. L. Rep. 98, 97 S. W. 427. French was fined $5,000 for causing a witness to leave, and the judgment was affirmed by this court, although clearly French might have been indicted for obstructing public justice. The same rule was followed in Arnold v. Com. 80 Ky. 300, 44 Am. Rep. 480, where a like indictment might equally have been maintained, and where it was earnestly insisted that, under the statute, the defendant could only be punished by indictment. These two cases are not now overruled. But it is maintained that the court has no power to punish as a constructive contempt the abuse of its process in a fabricated suit, although it has power to so punish the abuse of a subpœna in a real suit.

Though the acts committed by Dr. Melton constituted an indictable offense, still they may be punished as a contempt.

"A contempt is an offense against the court, as an organ of public justice; and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment, or not. . . . A conviction on indictment will not purge the contempt; nor will a conviction for a contempt be a bar to an indictment. The offense may be double; and so are the remedy and the punishment." Yates v. Lansing, 9 Johns. 417, 6 Am. Dec. 290 (cited also in the opinion of the court herein).

This is a well-settled rule. 9 Cyc. 32, and cases cited; 7 Am. & Eng. Enc. Law, 66, and cases cited; Re Fellerman (D. C.) 149 Fed. 244 (cited in the opinion of the court); Arnold v. Com. 80 Ky. 300, 44 Am. Rep. 480; Hale v. State, 55 Ohio St. 210, 36 L.R.A. 254, 60 Am. St. Rep. 691, 45 N. E. 199; Sherman v. People, 210 Ill. 552, 71 N. E. 618; Nichols v. Superior Ct. Judge, 130 Mich. 187, 89 N. W. 691; Ricketts v. State, 111 Tenn. 380, 77 S. W. 1076, 14 Am. Crim. Rep. 301; Fisher v. McDaniel, 9 L.R.A.1915B. Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056; Bradley v. State, 111 Ga. 168, 50 L.R.A. 691, 78 Am. St. Rep. 157, 36 S. E. 630; United States v. Debs (C. C.) 5 Inters. Com. Rep. 163, 64 Fed. 724; Chicago Directory Co. v. United States Directory Co. (C. C.) 123 Fed. 194; Ripon Knitting Works v. Schreiber (D. C.) 101 Fed. 810; State v. Woodfin, 27 N. C. (5 Ired. L.) 199, 42 Am. Dec. 161.

The sum of the opinion of the court is that the court thinks it will be a better practice that offenses such as this should be punished by indictment rather than the summary process for contempt. It may be that the rule suggested by the court might be a proper one for legislative consideration; but by what power does the court establish it in the face of the common-law authorities?

The slightest consideration of the origin of courts at common law will show that this never could have been the common-law rule. At the first, all litigants were heard before the King; the King heard litigants at court. As population increased, the King could not hear all litigants, and so he designated certain officers to hear them in his stead. The sittings of these officers were therefore called courts of our lord the King; the officers sitting as the representatives of the King and in his place. Any indignity to them was an indignity to the King. So it came about that to bring a feigned suit was a contempt of court, and it went without saying that a fraudulent suit would be a contempt, for certainly to knowingly attempt to foist a falsehood upon the King would have been regarded by him as a grave offense to his dignity; and what would be a contempt to the King would be a contempt to the officers sitting in his stead. In this way until this time the word "court" is used to designate the tribunal sitting for the hearing of causes; and these tribunals are protected now no less than they were originally by the power to punish for contempt.

For these reasons I dissent from the opinion of the court

Hannah, J., concurs in this dissent.

MAINE SUPREME JUDICIAL COURT.

DAVID DRISCOLL
v.
WILLIAM E. GATCOMB.

(112 Me. 289, 92 Atl. 39.)

New trial — surreptitious inspection by juror.

The surreptitious inspection by a juror

of a calf and a cow alleged to be its dam, in an action to recover possession of the calf, in which the question of its maternity is an important element, is ground for new trial, although he states that his decision was not influenced by his act.

(October 29, 1914.)

MOTION by defendant for new trial of an action brought in the Supreme Judicial Court for Washington County to recover possession of a calf, which resulted in a verdict for plaintiff. Granted.

The facts are stated in the opinion.

Mr. **Ashley St. Clair** for defendant.

Mr. **R. J. McGarrigle** for plaintiff.

Bird, J., delivered the opinion of the court:

In this action of replevin of a calf, a verdict was rendered for the plaintiff, and the case is now here upon a motion for new trial reported in accordance with the provisions of Rev. Stat. chap. 84, § 53. It appears from the printed record that the maternity of the calf was an important element in determining the question of title at the trial. The justice presiding had excluded evidence instituting a comparison between the calf and the cow alleged by plaintiff to be its dam. Subsequently, and

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Note. — Unauthorized view by juror or jury as ground for new trial or reversal.

This note supplements a note in 42 L.R.A. 394, on the same subject.

As to propriety of experiments by jury, see note in 34 L.R.A.(N.S.) 717.

Civil actions.

An unauthorized view by the jurors during the progress of the trial of a civil action has been held a ground for a new trial or reversal—

—in an action for personal injuries sustained as the result of a collision between a street car and a carriage, where measurements were taken and used in reaching a verdict (one juror), Chicago City R. Co. v. Strong, 127 Ill. App. 472, affirmed in 230 Ill. 58, 82 N. E. 335, apparently without considering this point;

—in an action for conversion, where there was a question as to whether witness could have made the observation testified to, State Secur. Bank v. Burns, — Iowa, —, 120 N. W. 626;

—in an action for damages for injuries sustained by being bitten by a dog, where the jurors visited the place where the dog was chained, and where there was misconduct of defendant in taking measurements for jurors' benefit (part of jury), Woolridge v. White, 105 Ky. 247, 48 S. W. 1081;

—in an action against a street railway company for personal injuries received after being knocked down and partly thrown under one of defendant's street cars, in which evidence was conflicting as to how far the car was from the place when plaintiff was thrown upon the track, and as to what rate of speed the car was running, although an accurate diagram was afterward introduced in evidence (two jurors), Rush v. St. Paul City R. Co. 70 Minn. 5, 72 N. W. 733;

—in an action to recover damages on account of the death of a fireman killed in a collision between a hook and ladder truck and a street car, in which the "gist" of the action was the character or condition of the *locus in quo*, although an accurate map of the locality had already been introduced in evidence, Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135;

—in an action for seduction, where it was claimed that from the locality and position of the rooms it was impossible that the witnesses testifying could have seen or heard certain acts or conversations testified to, although a diagram of the premises was introduced in evidence (five jurors), Koehler v. Cleary, 23 Minn. 325;

—in an action against a railroad company for damages for injuries sustained by a switchman when his engine was derailed because of a defective switch, Floody v. Great Northern R. Co. 102 Minn. 81, 13 L.R.A.(N.S.) 1196, 112 N. W. 875;

—in an action for damages for the maintenance of a nuisance consisting of a vault or cesspool, which was in a cellar that was being excavated (three jurors), Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072;

—in an action for labor performed and materials furnished in the construction of a building, where the court, instead of remedying the effect of the misconduct by proper instructions, emphasized it by erroneously directing the whole panel to view the premises (two jurors), Buffalo Structural Steel Co. v. Dickinson, 98 App. Div. 355, 90 N. Y. Supp. 268;

—in an action to recover the price of machinery and the cost of installation, where one of the chief points at issue was whether or not the engine and extractor jumped about the floor when in operation, Adams Laundry Machinery Co. v. Prunier, 74 Misc. 529, 134 N. Y. Supp. 475, affirmed without opinion in 153 App. Div. 930, 138 N. Y. Supp. 1105, which was affirmed without opinion in 208 N. Y. 577, 101 N. E. 1094;

—in an action to recover money deposited in a bank, in which the defense was robbery, where there was a question as to the construction of bank fixtures and as to whether the teller could have seen robbers leaving building (one juror), Wade v. Ordway, 1 Baxt. 229;

—in an action against a city to recover damages for personal injuries received as the result of a defective sidewalk, the purpose being to ascertain the condition of the sidewalk (part of jury), Peppercorn v. Black River Falls, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79;

before verdict rendered, one of the jurors engaged in the trial of the cause went to the house of plaintiff, and, denying to the plaintiff that he was connected with the court in any way, was permitted to examine the calf and the cow alleged by plaintiff to be its dam. The defendant did not learn of the action of the juror until after the rendition of verdict, when he promptly filed his motion for new trial. It is not apparent that the juror in question mentioned his visit to the house of plaintiff to his fellows.

Subject to objection of defendant, the juror was permitted, with grave doubt on the part of the court, to state that his examination and comparison of calf and alleged dam did not influence his decision in any manner. The objection was well taken. As said in Harrington v. Worcester, L. & S. Street R. Co. 157 Mass. 579, 581, 32 N. E. 955: "A juryman may testify to any

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—in an action by the mother of a child to recover damages for the death of her child, where a juror took measurements, and where there was other misconduct by jury, Ewers v. National Improv. Co. 63 Fed. 562.

And a new trial should be granted where a juror during the term, and before the trial, visits the defendant at his home upon defendant's invitation, and is shown the glass which is the subject-matter of the suit, and holds conversation with him relative thereto, and, while the case is on trial and before rendition of the verdict, gives to his associates information received by him, and describes to them the condition of the glass which had been shown him, but which was not exhibited to the jury. McIntire v. Hussey, 57 Me. 493.

And, according to DRISCOLL v. GATCOMB, it will be presumed that an unauthorized view more or less affects jurors so as to necessitate a new trial, where such presumption is not rebutted.

An unauthorized view by jurors during the progress of the trial of a civil action has been held not ground for new trial or reversal—

—in an action to recover damages for injury to a building, as the result of an explosion, the place viewed being along a convenient and natural route used in conducting the jury to luncheon, and the building having been repaired, Higgins v. Los Angeles Gas & Electric Co. 159 Cal. 651, 34 L.R.A.(N.S.) 717, 115 Pac. 313;

—in an action to recover for personal injuries due to alighting from a street car, the jurors being already familiar with the location (two jurors), Brodie v. Connecticut Co. 87 Conn. 363, 87 Atl. 798;

—in an action to recover for goods stolen from a store, where there was no controversy as to the appearance of the entrance or its approaches (two jurors), Bowman v. Western Fur Mfg. Co. 96 Iowa, 188, 64 N. W. 775;

—in an action against a city to recover damages for personal injuries received by falling down an elevator way, where measurements were taken (one juror), Carbon v. Ottumwa, 95 Iowa, 524, 64 N. W. 413;

—in an action to recover damages for change of grade, the view being casual and obtained while juror was conveying a passenger during an intermission in the trial (one juror), Caldwell v. Nashua, 122 Iowa, 179, 97 N. W. 1000;

—in an action by an employee for damages received during employment, the juror L.R.A.1915B.

watching plaintiff as he walked out of court room and along the street, although the jury concluded that plaintiff's injury was not a pretense (one juror), Gratz v. Worden, 26 Ky. L. Rep. 721, 82 S. W. 395;

—in an action for damages for injuries received as the result of a collision between a wagon and a street car, where the testimony is undisputed as to the location and surroundings (one juror), Gold v. Detroit United R. Co. 169 Mich. 178, 134 N. W. 1118;

—in an action by an elevator operator for damages for injuries received in falling down an elevator shaft, in which the existence of a dangerous custom in the maintenance of the elevator, unknown to the employee, was alleged, it appearing that the examination was merely casual (one juror), Lyons v. Dee, 88 Minn. 490, 93 N. W. 899, 13 Am. Neg. Rep. 542;

—in an action against an architect for damages for negligence in the drawing of the plans of a barn, and for negligence in superintendence, it appearing that the examination was casual, and that no additional information was obtained (three jurors), Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591;

—in an action to recover damages for injuries due to a defective sidewalk, the defect having been remedied, MacKinnon v. Minneapolis, 117 Minn. 261, 135 N. W. 814;

—in an action against a railroad company to recover damages for negligently causing the death of plaintiff's intestate, an engineer, who was killed as the result of running his train into an open switch which had no warning signal, where there was no conflict in the evidence, Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359;

—in a civil action against a city to recover damages for negligence in permitting an embankment of snow and ice to remain in the street, which caused injury to one driving by, where the real question was as to the height, shape, and situation of the obstruction, and at the time the view was taken the ice and snow had melted, Haight v. Elmira, 42 App. Div. 391, 59 N. Y. Supp. 193, 6 Am. Neg. Rep. 624;

—in an action against a municipal corporation for damages for personal injuries, where, although report was made to other jurors, such knowledge was not used in reaching the verdict (one juror), Dittman v. New York, 58 Misc. 52, 110 N. Y. Supp. 40;

—in an action against a railroad company

facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind."

And in the same case it is remarked that the question of fact in such a case as the present is not whether the mind of the juror was influenced, but whether his act might have influenced his mind, or was of such a nature as to have any tendency to influence it. See also Newell v. Ayer, 32 Me. 334; Clark v. Lebanon, 63 Me. 393, 395; Trafton v. Pitts, 73 Me. 408; Heffron v. Gallupe, 55 Me. 563, 566; State v. Hascall, 6 N. H. 352, 361, 363.

The question, therefore, is whether or not the action of the juror might have influenced his mind, or was of such a nature as to have any tendency to influence it. It is not a violent presumption that evidence received by jurors or remarks made to them out of court, or views without

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for personal injuries received at a railway crossing, there being no controversy as to the physical conditions, St. Louis Southwestern R. Co. v. Waits, — Tex. Civ. App. —, 164 S. W. 870;

—in an action against a city for damages for injuries sustained by falling over a projecting water cap in the street, where the act of exhibiting measurements was in favor of the party objecting (one juror), Ft. Worth v. Lopp, — Tex. Civ. App. —, 134 S. W. 824;

—in an action against a city for damages for personal injuries received by stumbling over a board sidewalk, it appearing that a cement walk had been laid at the time of examination (one juror), Brennan v. Seattle, 46 Wash. 427, 90 Pac. 434;

—in an action to recover the consideration price of an ice plant, in which the defense was that the plant would not produce merchantable ice (examining ice in one of defendant's wagons), Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co. 57 Fed. 898. But in this case the point was held to have been waived by failing to bring the trial court's attention to the matter as soon as it became known.

Criminal actions.

An unauthorized view by jurors during the progress of the trial of a criminal action has been held ground for a new trial or reversal—

—in a prosecution for homicide, as receiving material evidence after retirement, Darter v. State, 39 Tex. Crim. Rep. 40, 44 S. W. 850;

—in a prosecution for homicide, as receiving additional testimony, Nelson v. State, — Tex. Crim. Rep. —, 58 S. W. 107.

But it has been held that an unauthorized view by jurors during the trial of a criminal action is not ground for new trial or reversal—

—in a prosecution for burglary, a saloon where defendant claimed to be at the time the crime was committed in another part of the city having been visited (one juror), People v. Rowell, 133 Cal. 39, 65 Pac. 127;

—in a prosecution for homicide, where the jurors simply pointed out objects delineated on a diagram already in evidence, their visit not being disclosed to other jurors, and no additional or contradictory information being received (two jurors), People v. Yee King, 24 Cal. App. 509, 141 Pac. 1047;

—in a prosecution for sodomy committed in a depot water-closet, where the visit was made on the way home during adjournment, and not for an improper purpose or to obtain information (one juror), State v. Gage, 139 Iowa, 401, 116 N. W. 596;

—in a prosecution for rape, where no additional information was obtained (two jurors), State v. Crouch, 130 Iowa, 478, 107 N. W. 173;

—in a prosecution for homicide, where the view was casual, no object being pointed out nor remarks made, Tudor v. Com. 19 Ky. L. Rep. 1039, 43 S. W. 187;

—in a prosecution for homicide, where there was no dispute as to where the crime was committed, and no question as to whether witnesses were in a position to see what they related, State v. Brown, 64 Mo. 367;

—in a prosecution for burglary, where the jurors were not permitted to stop and comment on situation, and the effect, if any, was to weaken testimony of witnesses for the prosecution, Crowell v. State, 79 Neb. 784, 113 N. W. 262;

—in a prosecution for homicide, where the view was obtained from the hotel in which the jury was quartered and in passing to and from the hotel to the courthouse, State v. Boggan, 133 N. C. 761, 46 S. E. 111;

—in a prosecution for larceny of a cow, where part of the jury examined the hide of the cow which had erroneously been considered by counsel to be in evidence, Kennon v. Territory, 5 Okla. 685, 50 Pac. 172;

—in a prosecution for homicide, where there was no dispute as to relative positions of defendant, deceased, or witnesses, and only divergence in testimony was as to acts of deceased, Watson v. State, 52 Tex. Crim. Rep. 85, 105 S. W. 509;

—in a prosecution for homicide, where jurors, passing to a hotel to take meals, saw the premises and took measurements, where view could not have affected finding, Hardin v. State, 40 Tex. Crim. Rep. 208, 49 S. W. 607;

—in a prosecution for homicide, where there was no conflict in the evidence, Com. v. Brown, 90 Va. 671, 19 S. E. 447;

—in a prosecution for arson, where examination was in no way prejudicial, Parb v. State, 143 Wis. 561, 128 N. W. 65.

A. H. N.

order of court, more or less, affects jurors. Cilley v. Bartlett, 19 N. H. 312, 324; Bradbury v. Cony, 62 Me. 223, 227, 16 Am. Rep. 449. Nothing appears in the evidence reported to rebut this presumption. We are unable to conclude that there is no possibility (State v. Hascall, 6 N. H. 352, 363) that the juror was unaffected by his examination and comparison. See Heffron v. Gallupe, 55 Me. 563, 568; Belcher v. Estes, 99 Me. 314, 316, 59 Atl. 439.

Motion sustained.

New trial granted.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH OF MASSACHUSETTS
v.
JOHN J. KARVONEN.

(219 Mass. 30, 106 N. E. 556.)

Parade — red flag — effect of inscription.

1. Placing an inscription on a red flag does not take it out of the operation of a statute forbidding the carrying of red flags in parade.

Same — political banner.

2. That a flag is the regular banner of a political society does not take it out of the operation of a statute forbidding the carrying of a red flag in parade.

Constitutional law — carrying red flag.

3. No constitutional right of liberty is infringed by forbidding the carrying of a red flag in parade.

(October 22, 1914.)

EXCEPTIONS by defendant to rulings of the Superior Court for Worcester County, made during the trial of an action in which he was convicted of carrying a red flag, in violation of statute. Overruled.

The facts are stated in the opinion.

Messrs. **John McCarthy** and **Marshall Wilbur** for defendant.

Messrs. **James A. Stiles** and **Edward T. Esty**, for the Commonwealth:

The offense is complete when a red flag has been carried in a parade.

Lorain Steel Co. v. Norfolk & B. Street R. Co. 187 Mass. 500, 73 N. E. 646; Field v. Gooding, 106 Mass. 310; Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057; Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Stein v. Bienville Water Supply Co. 34 Fed. 145.

The fact that the flag carried was the

Note. — Validity of statutory or other regulation forbidding display of red flag or other symbol tending to incite disorder.

COM. v. KARVONEN seems to be the only case which has expressly passed upon the validity of a statute prohibiting the carrying of a red or black flag in parades; and no case has been found which determines the constitutionality of any statute relating to the carrying or displaying of any other flag or object which might, because of its symbolism or descriptive detail, have a tendency to incite to riot or cause a disturbance of the peace.

And in People v. Burman, 154 Mich. 150, 25 L.R.A.(N.S.) 251, 117 N. W. 589, where the court had under consideration a conviction for carrying a red flag in a parade in violation of a municipal ordinance relating to riots, disturbances, etc., but which did not in terms refer to the carrying of red flags, it was held that the act in question breached the ordinance, and that there is no constitutional right to display a red flag in a procession where those composing the procession know that the natural and inevitable consequence will be to disturb the public peace and tranquillity, in violation of ordinance. In this connection Carpenter, J., said: "It is insisted that a verdict should have been directed in defendant's favor. Their counsel urge that they had a right to parade and display the red flag, the emblem of their order, and that the ordinance prohibiting it—which ordinance defendants are now charged with violating—was invalid. That ordinance apparently was general in its nature, and forbade the display of a red flag in any parade whatever. Whether or not there might be occasions when defendants had a lawful right to parade with a red flag,—and this would be a question which would arise upon the validity of said ordinance,—we are not called upon to determine, and we ought not and will not attempt to determine in this case. The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such right when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity."

Generally as to validity of ordinances as to street parades, see note to People v. Burman, 25 L.R.A.(N.S.) 251. G. J. C.

regular society flag of the Fitchburg branch of the Socialist party did not operate to relieve it from the ban of the statute.

No constitutional rights of defendant are infringed by forbidding the carrying of the flag.

Com. v. Strauss, 191 Mass. 545, 11 L.R.A. (N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 945, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Jordan v. Massachusetts, 225 U. S. 167, 56 L. ed. 1038, 32 Sup. Ct. Rep. 651; Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Mutual Loan Co. v. Martell, 200 Mass. 482, 43 L.R.A.(N.S.) 746, 128 Am. St. Rep. 446, 86 N. E. 916; Opinion of Justices, 207 Mass. 601, 34 L.R.A.(N.S.) 604, 94 N. E. 558; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 591, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; License Cases, 5 How. 504, 12 L. ed. 256; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Carthage v. Frederick, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Com. v. Pear, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

Rugg, Ch. J., delivered the opinion of the court:

This is a complaint for the violation of Stat. 1913, chap. 678, § 2, which is in these words: "No red or black flag, and no banner, ensign or sign having upon it any inscription opposed to organized government, or which is sacrilegious, or which may be derogatory to public morals, shall be carried in parade within this commonwealth."

The defendant carried in a parade at Fitchburg a flag red in color throughout, except that upon one side was marked in gilt letters, "S. S. O. Saima, Fitchburg, Mass.," meaning in English, "Finnish Socialist Branch, Fitchburg, Mass." The flag is the regular Society banner of that "Branch," and has been used as such by it for many years. The parade was preliminary to a Socialist rally. Whether the flag in question was a red flag within the meaning of the act was left for the jury to determine as a fact.

As matter of construction the statute prohibits the carrying of red and black flags absolutely, and does not make this prohibition dependent upon the nature of the inscription. Color alone brings a flag within the terms of the act. Two things are within the scope of the act. The carrying in parade of flags red or black in color is forbidden, and also the like carrying of other objects having the inscriptions or characteristics described. The doing of either thing is made illegal.

The defendant contends that the statute refers only to those flags which are clear and uninterrupted red or black throughout, and that a banner with a red background, bearing a harmless inscription, is not within its inhibition. This contention cannot be sustained. If the flag is of the forbidden color in its essential and dominating characteristics, then the mere circumstance that it bears also an inscription or device of another color is not enough to prevent its being a red flag. The flag carried by the defendant plainly might have been found to have been a red flag. It was entirely of that color upon one side, and the crimson surface of the opposite side was broken only by the letters above quoted.

That this flag happens to be the usual banner of a society affiliated with a political party is no defense. The words of the statute are sweeping and make no exception in favor of political parties, social organizations, secret societies, or beneficiary or other associations.

The statute as thus construed does not violate any rights protected by either the state or Federal Constitutions. Under both these instruments the liberty of the citizen is guaranteed. But the liberty thus secured does not mean the unrestrained license of an unbridled will. Constitutional freedom means liberty regulated by law. Personal rights may be curbed in a rational way for the common good. Liberty is immunity from arbitrary commands and capricious prohibitions, but not the absence of reasonable rules for the protection of the community. Com. v. Libbey, 216 Mass. 356, 49 L.R.A.(N.S.) 879, 103 N. E. 923, and cases cited; Com. v. Riley, 210 Mass. 389, 97 N. E. 367, Ann. Cas. 1912D, 388, affirmed in 232 U. S. 671, 58

L.R.A.1915B.

L. ed. 788, 34 Sup. Ct. Rep. 469; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259. The statute here in question cannot be said to interfere unreasonably with the liberty of the citizens, nor can it be adjudged to have no rational connection with the preservation of public safety. The maintenance of order is plainly a lawful exercise of the police power. Statutes designed to promote that end cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result. It is said in Webster's Dictionary that "historically, a red flag has been a revolutionary and terroristic emblem." In the Century Dictionary is found this: "A red flag is a flag of a red color with or without devices associated with blood or danger." Other lexicographers give similar definitions. In the light of this well recognized significance of the red flag, it may be assumed that the legislature regarded it as the symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare. Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised.

Exceptions overruled.

MINNESOTA SUPREME COURT.

ALBERT A. JOHNSON, Doing Business as Albert Johnson Coal Company, Respt.,
v.
LEWIS H. STARRET et al.
and
W. K. MORRISON & COMPANY et al., Interveners.

HENNEPIN AVENUE METHODIST EPISCOPAL CHURCH, Appt.

(127 Minn. 138, 149 N. W. 6.)

Mechanics' lien — consumable supplies.

1. Coal and gasolene for generation of power, dynamite for blasting, lubricant, lighting materials and supplies, and materials for erection of a tool house, furnished excavating contractors, held lienable under Gen. Stat. 1913, § 7020, as being contributions to the improvement of defendant's realty. Supplies for, and repairs and parts of, the excavating machinery, held not lienable, being merely contributions to the personal property of the contractors.

Same — material not used.

2. Materials furnished in good faith for the improvement of realty may be lienable, though not actually used in the work

(October 9, 1914.)

APPEAL by the defendant church from an order of the District Court for Hennepin County denying a new trial after judgment in favor of claimants in an action to enforce mechanics' liens on defendant's realty for materials furnished. Affirmed in part.

The facts are stated in the opinion.

Mr. **Willard R. Cray**, with Mr. **L. K. Eaton**, for appellant.

Messrs. **George W. Hanson** and **Norton M. Cross**, for respondent Johnson:

Plaintiff was entitled to a lien by the plain expressed terms of the statute.

Cincinnati, R. & M. R. Co. v. Shera, 36 Ind. App. 315, 73 N. E. 293; Knight v. Norris, 13 Minn. 478, Gil. 438; Perry v. Duluth Transfer R. Co. 56 Minn. 306, 57 N. W. 792; McKinnon v. Red River Lumber Co. 119 Minn. 479, 42 L.R.A.(N.S.) 872, 138 N. W. 781; Emery v. Hertig, 60 Minn. 54, 61 N. W. 830; Berger v. Turnblad, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543; Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28; Fay v. Bankers' Surety Co. 125 Minn. 211, 146 N. W. 359; Rosman v. Bankers' Surety Co. 126 Minn. 435, 148 N. W. 454; Zipp v. Fidelity & D. Co. 73 App. Div. 20, 76 N. Y. Supp. 386; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; Hercules Powder Co. v. Knoxville, L. F. & J. R. Co. 113 Tenn. 392, 67 L.R.A. 487, 106 Am. St. Rep. 836, 83 S. W. 354; Luttrell v. Knoxville L. F. & J. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565; E. R. Darlington Lumber Co. v. Westlake Constr. Co. 161 Mo. App. 723, 141 S. W. 931; Chicago Lumber Co. v. Douglas, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac.

Headnotes by PHILIP E. BROWN, J.

Note. — As to mechanics' lien for materials wholly or partially consumed in the process of the work, but not actually becoming a part of the structure, see the notes to Moritz v. Lewis Constr. Co. 51 L.R.A.(N.S.) 1040, and Avery v. Woodruff, 36 L.R.A.(N.S.) 866. As to lienability L.R.A.1915B.

of explosives, see note in 2 L.R.A.(N.S.) 288; as to food for men and teams, note in 15 L.R.A.(N.S.) 509; as to rental of property let to contractor, note in 16 L.R.A. (N.S.) 585, and as to labor in preparing materials, note in 30 L.R.A.(N.S.) 82.

As to mechanics' lien upon premises for

563; Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 41 L.R.A.(N.S.) 296, 124 Pac. 230.

Messrs. **James C. Melville, W. W. Todd & H. C. Mackall** for other respondents.

Philip E. Brown, J., delivered the opinion of the court:

The trial court held that plaintiff and the interveners were all entitled to liens on defendant's realty for materials furnished, for the full amounts claimed. Defendant appealed from an order denying a new trial. The undisputed facts are:

Defendant, being the owner of a lot in Minneapolis, contracted on December 4, 1912, with Starrett & Cornman, for its excavation by them for the purpose of erecting a church. The terms of the contract do not appear. Between that date and March 5, 1913, the contractors were engaged in doing the excavating. The work was done with a portable steam power excavating machine known as a whirly, which was owned by the contractors and operated day and night. The earth, as excavated and lifted by the machine, was loaded upon motor trucks and carried away. Plaintiff furnished the contractors the coal used in generating the steam power for the whirly, and intervener Manhattan Oil & Linseed Company sold the gasolene used in the motor trucks; both of these fuels being sold to the contractors for the purposes stated and delivered on the premises. Intervener Gardner Hardware Company sold them materials of the value and for the purposes next stated, namely $9.81, for lumber used in building an office or tool house on defendant's premises; materials and supplies used in connection with the light plant of the machine, $19.25; dynamite, $173.50; supplies and repairs for and parts of the power engine, $119.51; materials for the dump platform of the whirly, $6.99; and supplies, materials, and parts of the machine, $89.46. Intervener Schurmeier Wagon Company furnished the contractors forgings, ironwork, and labor in repairing the machine, of the value of $94.57. Intervener W. K. Morrison & Company furnished them materials for the like purpose, to the amount of $42.56, and also $3 worth of rope grease to be used in lubricating the pulleys. After the excavation was completed the machine, with its appurtenances, was removed from the premises. One half the ground excavated consisted of clay, which the contractors were unable advantageously to blast or remove with shovel and pick, and which was more economically removable by use of the machine.

The sole question involved is: Were the several items mentioned lienable? Defendant, relying largely on decisions from other jurisdictions, insists upon a negative answer as to all. Upon the questions involved, however, foreign decisions, while instructive, are not of their usual weight; for, aside from the fact that this court has already determined some of the questions decided, the statutes considered are not alike, and the rules of statutory construction and policy affecting the foundation of the determinations in some of the cases are at variance with our holdings. The opinions in Indiana, Massachusetts, Pennsylvania, and California are notable in these regards. The Indiana statute is not given a liberal construction as being remedial. Cincinnati, R. & M. R. Co. v. Shera, 36 Ind. App. 315, 73 N. E. 293. The Pennsylvania court regards mechanics' lien laws as class legislation, the scope of which should not be unnecessarily enlarged by too liberal construction. Oppenheimer v. Morrell, 118 Pa. 189, 12 Atl. 307. Massachusetts and California, and also Pennsylvania, seem to be committed to the doctrine that liens cannot be allowed for materials incidentally promoting the construction of buildings, but only for such as enter into the construction and become a part of the structure. For example, their courts exclude forms for holding concrete in place during process of building, and temporary scaffolding. But Massachusetts, nevertheless, awards a lien for gunpowder used in building an aqueduct. George H. Sampson Co. v. Com. 202 Mass. 326, 88 N. E. 911. And California reaches the same conclusion regarding oil furnished for and applied on the threads of joints of pipe used in the structure, and also for soapstone used as a lubricant in order to facilitate the pulling of electric wires through the pipes in the building, both of which obviously do no remain as a part of the permanent structure. Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 41 L.R.A.(N.S.) 296, 124 Pac. 230. California, likewise, in accord with the great weight of authority (note in 2 L.R.A.(N.S.) 288), holds explosives lienable. California Powder Works v. Blue Tent Consol. Hydraulic Gold Mines, 3 Cal. Unrep. 145, 22 Pac. 391; Giant Powder Co. v. San Diego Flume Co. 78 Cal. 193, 20

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an improvement not placed thereon, but having a beneficial connection therewith, see the note to Speer Hardware Co. v. Bruce Bros. 42 L.R.A.(N.S.) 354.

As to materials furnished for a structure, but not actually used therein, see the note L.R.A.1915B.

to Pittsburgh Plate Glass Co. v. Leary, 31 L.R.A.(N.S.) 746.

As to nature of labor or materials which will support an action upon a contractor's bond, see the note to Standard Boiler Works v. National Surety Co. 43 L.R.A.(N.S.) 162.

Pac. 419. Wisconsin, adhering to the doctrine of liberal construction, holds that materials used directly upon the work or structure, and instrumental in producing the final result, are lienable if actually consumed in the use, though not physically incorporated therein, but apparently excludes coal used in portable engines and oil used in lubricating building machinery. Barker & S. Lumber Co. v. Marathon Paper Mills Co. 146 Wis. 12, 36 L.R.A.(N.S.) 875, 130 N. W. 866. On the other hand, in New York, Tennessee, Kentucky, Missouri, and Kansas, a much more liberal view is taken. See Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; Zipp v. Fidelity & D. Co. 73 App. Div. 20, 76 N. Y. Supp. 386; Hercules Powder Co. v. Knoxville, L. F. & J. R. Co. 113 Tenn. 382, 67 L.R.A. 487, 106 Am. St. Rep. 836, 83 S. W. 354; Avery v. Woodruff, 144 Ky. 227, 36 L.R.A.(N.S.) 866, 137 S. W. 1088; E. R. Darlington Lumber Co. v. Westlake Constr. Co. 161 Mo. App. 723, 141 S. W. 931; Chicago Lumber Co. v. Douglas, 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563. See also City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155. Many other cases to like effect might be added.

Our policy as to, and construction of, lien laws, are well expressed in Emery v. Hertig, 60 Minn. 54, 57, 61 N. W. 830, wherein it is said: "It is sufficient for us to say that, whatever may be the conflicting decisions of other tribunals, we are of the opinion that no narrow or limited construction of our mechanic's lien law should be indulged in by the courts, and that the labor and industry of the country should not be hampered by technicalities or harsh interpretations of what was evidently intended to be a just law for the benefit of our industrial pursuits, which tends so materially to the building of cities and towns, and is the embodiment of so much natural justice. He whose property is enhanced in value by the labor and toil of others should be made to respond in some way by payment and full satisfaction for what he has secured. To accomplish this result is the intent of the lien law."

These statutes must also have a reasonable and practical construction. Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448; Lindquist v. Young, 119 Minn. 219, 138 N. W. 28. Both the language quoted and the cases last cited accord with the report of the commission of statutory revision in New York, wherein it is said: "The underlying principle of all legislation of this character is that a person who, at the request or with the consent of the owner of real property, enhances its value by furnishing materials or performing labor for the improvement thereof, should be deemed to have acquired an interest in such property to the extent of the value of such materials or labor. This principle should be applicable generally to improvements of real property." Schaghticoke Powder Co. Case, 183 N. Y. 310, 312, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 154, 5 Ann. Cas. 443.

In the same decision it is said: "It is a familiar rule that in the construction of statutes their language must be adapted to changing conditions brought about by improved methods and the progress of the inventive arts."

Our statute reads: "Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, material, or machinery, for any of the purposes hereinafter stated, . . . shall have a lien . . . upon the land . . . for the price or value of such contribution, . . . that is to say, for the erection . . . of any building . . . thereon, or for . . . excavating the same." Gen. Stat. 1913, § 7020.

From a practical standpoint we think it cannot be justly said, under the plain terms of the statute, that those furnishing the coal, gasolene, and dynamite did not "contribute to the improvement" of defendant's property by "furnishing material for excavating the same." Clearly the work of the whirly and motor trucks contributed to the improvement of defendant's property, and as the coal and gasolene furnished the motive power for its accomplishment, the contractors would have been entitled to a lien therefor. But it is said that these materials were not furnished to excavate defendant's premises or for them, but, on the contrary, for use in and as a part of the plant and equipment of the contractors for the purpose of creating power, and therefore were not lienable. This contention, we think, is too restricted both as to the facts and law. It ignores both the policy and settled construction of the statute, and also modern methods employed in performing building contracts. Both the coal and gasolene were materials, and both were components of the resultant achievement. Had the excavation and removal of the earth been done by manual labor the right to a lien therefor would be undoubted, and we cannot differentiate such a case from one where the same result is reached by other and modern methods. The value of defendant's property was thereby enhanced, and it can make no difference that this was accomplished by use of power obtained from materials furnished by the lien claimants in-

stead of by common labor. See Fay v. Bankers' Surety Co. 125 Minn. 211, 146 N. W. 359. Had the improvement necessitated the pumping of water, the strained construction and refined reasoning necessary to exclude a lien for fuel used in generation of power for the pump would, perhaps, be more apparent. The rule as to explosives should be applied to the items for coal and gasolene, and the trial court's determination as to them is sustained, as is also, by a parity of reasoning, its disposition of the claims for dynamite, rope grease, and materials and supplies for the light plant. The fact that it does not appear that the dynamite was actually used is unimportant, for materials furnished in good faith for a particular improvement are lienable, though not used. See authorities cited in note 10 of the statute quoted. The claim for the tool house materials was likewise properly allowed. Lindquist v. Young, 119 Minn. 222, 138 N. W. 28. The other items, we hold, were not lienable. All were for supplies for, or repairs and parts of, the excavating machinery and engine, which were mere tools used in the work. These did not contribute to the improvement of defendant's realty, but to the personal property of the contractors. Furthermore, from aught that appears, they survived the performance of the work and remained the property of the contractors. They were not essentially different from repairs for tools requisite for an ordinary workman's labor on the job. Rosman v. Bankers' Surety Co. 126 Minn. 435, 148 N. W. 454, is not in point.

Order affirmed as to plaintiff and intervener Manhattan Oil & Linseed Company; reversed as to the other interveners, with directions to the trial court to amend its conclusions of law so as to disallow the Schurmeier Wagon Company's claim of lien, and to reduce intervener W. K. Morrison & Company's lien to $3, and that of intervener Gardner Hardware Company to $202.56.

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAYOR AND COUNCIL OF THE BOROUGH OF VINELAND
v.
FOWLER WASTE MANUFACTURING COMPANY, Appt.

(— N. J. —, 90 Atl. 1054.)

Estoppel — innocent misrepresentation.
The doctrine of equitable estoppel is essentially one of "good conscience." Where, therefore, one with convenient opportunity to ascertain the real facts by the exercise of reasonable diligence neglects to do so, he will not be permitted to defeat another's just rights by urging an equitable estoppel based upon his having acted to his disadvantage in reliance upon that other's innocently mistaken representation regarding those facts, where such representation was not made for the purpose of inducing him so to act.

Headnote by WHITE, J.
L.R.A.1915B.

(June 15, 1914.)

APPEAL by defendant from a judgment of the Cumberland County Circuit of the Supreme Court in plaintiff's favor in an action brought to recover a balance alleged to be due for electricity furnished by plaintiff to defendant. Affirmed.

The facts are stated in the opinion.

Note. — Mistake in statement of commodity furnished as affecting the right to recover for a larger amount actually furnished.

The broader aspect of the question here raised is discussed in a note in 23 L.R.A. (N.S.) 787, as to the conclusiveness of stated or settled account containing inaccuracy or error in method of mathematical calculation.

Electricity furnished.

The few cases that have considered the above question as a rule involve facts very similar to those involved in VINELAND v. FOWLER WASTE MFG. CO.,—the mistake arising through an erroneous computation of the electricity furnished as shown by a meter installed on the purchaser's premises. While the result has been reached on different grounds, in every case but one the right of the seller to recover the actual amount of current furnished has been sustained.

In Allegheny County Light Co. v. Thomas, 31 Pa. Super. Ct. 102, it is held that monthly statements furnished from time to time to a purchaser of electricity, according to which he made payment, are not conclusive between the parties, where a mistake occurred in each of the statements because of an error of a servant of the seller in computing the amount of current furnished as shown by the meter, and it is held that, both at law and in equity, a stated account may be opened or falsified on proof of mistake, since such an account is only prima facie evidence of its correctness.

And the same result was reached in Union Electric Light & P. Co. v. Surgical Supply Co. 122 Mo. App. 631, 99 S. W. 804, but the court refused to dispose of the case on the theory of an account stated, since that had not been the theory of the defense in the trial court. The defense there

Messrs. **Charles V. D. Joline** and **Albert W. Sanson**, for appellant:

Plaintiff having made a mistake in the bills, he is now estopped from claiming the additional amount, namely, ten times the amount of the original bill.

16 Cyc. 680; Central R. Co. v. MacCartney, 68 N. J. L. 165, 52 Atl. 575; Den ex dem. Richman v. Baldwin, 21 N. J. L. 403; Phillipsburgh Bank v. Fulmer, 31 N. J. L. 55, 86 Am. Dec. 193; Freeman v. Cooke, 2 Exch. 654, 6 Dowl. & L. 187, 18 L. J. Exch. N. S. 114, 12 Jur. 777, 11 Eng. Rul. Cas. 82; Kuhl v. Jersey City, 23 N. J. Eq. 86; Philadelphia & R. R. Co. v. Baer, 20 Pa. Dist. R. 536; Curnen v. New York, 79 N. Y. 511.

Mr. **Henry S. Alvord**, for appellee:

The doctrine of equitable estoppel cannot be applied because several of the essential elements are absent.

Barker v. Hoff, 52 How. Pr. 382.

White, J., delivered the opinion of the court:

The plaintiff appellee during a period of two years rendered monthly bills to the defendant appellant for electric current supplied the latter for motive power, etc., in its cotton waste factory at Vineland, which bills were duly paid and receipted. It was then discovered that through a mistake on the part of the plaintiff's chief electrician in failing to multiply the meter face readings by 10, the bills so rendered and paid

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was that the mistake of the seller was due to the negligence of his employees, and hence the rendition and payment of the monthly bills constituted a bar to the action. This contention was denied by the court, and it is said that there is no rule of law or equity requiring absolute accuracy in such matters, or in any other human transaction; on the contrary, the fallibility of man is recognized, and a person is granted relief when it is made to appear that he has inadvertently and innocently made a mistake which has caused him injury and resulted in profit to the opposite party; and his right of relief does not depend upon the knowledge, information, or belief of the opposite party that the mistake has been made. "It is enough," said the court, "if the mistake made resulted in injury to the plaintiff and to an unearned profit to the defendant, provided the latter, in ignorance of the mistake, has not so changed his situation with reference to the subject-matter that to correct the mistake would result in injury to him."

In Royal Electric Co. v. Davis, Rap. Jud. Quebec 9 B. R. 445, a contrary conclusion is reached under a very similar state of facts, the court denying the right to recover for electricity furnished in excess of bills rendered monthly on the ground that if the purchaser had known of the actual cost of the current he was consuming, he might have abandoned that form of lighting, and to enforce against him the additional charge would deprive him of the opportunity to abandon the agreement or change his system of lighting.

There is much justice in the view taken in the case just cited, especially as applied to the consumption of electricity or other commodity, for in perhaps the majority of cases such consumption is largely regulated or at least influenced by the cost. To keep the cost down to a certain point, in many cases there would be exercised such economy in the use of the commodity as would be necessary for that purpose, and if the expense could not be thus kept down, the entire system might be abandoned, and since the amount of the commodity consumed and the consumption itself, perhaps, is largely based on monthly bills rendered, it is reasonably clear that there is presented the element of estoppel, that where the act of the seller will result in the buyer's prejudice and detriment unless he is permitted to invoke this equitable defense, he will be permitted to do so. This doctrine is recognized in the foregoing cases, but held inapplicable. See next subdivision. It is to be noted, however, that in none of these cases was the claim made that the continued use of the electricity or the amount of consumption was influenced by the monthly statements rendered. These cases are therefore doubtful authority for a doctrine contrary to that applied in Royal Electric Co. v. Davis.

The effect of loss or prejudice to the purchaser.

See Royal Electric Co. v. Davis, supra.

It is recognized by the cases considering the question that if the seller of a commodity, by sending to the purchaser statements from time to time of the commodity furnished and the price thereof, has misled the latter to his injury, the former may thereby be precluded or estopped from asserting a mistake in the statements, and will not be allowed to recover any amount in addition thereto. Union Electric Light & P. Co. v. Surgical Supply Co. and Allegheny County Light Co. v. Thomas, supra; VINELAND v. FOWLER WASTE MFG. CO.

A hypothetical case is given in VINELAND v. FOWLER WASTE MFG. CO. to illustrate a proper application of the doctrine of estoppel; and it is said that if a jobber buying coal from a mine operator on an agreement that it should be shipped from the mine to the jobber's customers in carload lots, and billed at once to the jobber at the railroad weight, so that he might use that weight in billing to his customers, and the jobber settles with his customers in reliance on the weights billed to him by the operator, the latter would be estopped to assert the mistake; and the fact that the buyer did not ascertain from the railroad company wheth-

were for only one tenth of the amount actually due by the defendant to the plaintiff. This suit is for the other nine tenths, the same allowance of discounts being made as would have been credited if the proper bills had been originally rendered and promptly paid, and no interest or penalty for delay being asked.

The defense is a claim of equitable estoppel, and in substantiation of this claim it was testified by defendant's president that the amounts actually paid in response to the erroneous bills were used by the defendant in calculating its overhead expenses in arriving at the cost of its production and fixing the selling price to be charged therefor, and it was claimed that, the defendant having, during this period of two years, sold its product at prices based upon this cost calculation, it would now be inequitable to subject it to the loss incident to a change in its production cost because of a mistake for which it was in no way accountable. It is claimed therefore that the court should have directed a verdict in favor of the defendant.

The difficulty with this claim is that, quite apart from the rather indefinite and general character of this evidence, the president of the defendant company also testified that they sold their products for all that they could get for them, and that the defendant company was at the end of the period involved in charge of a committee of its creditors; so that it became a jury question to decide whether the prices at

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er or not a mistake was made, before settling with his customers, would not preclude him from asserting the estoppel. But it is said that this rule should not apply to a case of the character under consideration, where a meter upon the purchaser's premises would have disclosed the mistake to him had he referred to it. In this case the instruction to the jury was sustained that if the purchaser had a convenient opportunity for the exercise of reasonable diligence to ascertain the true facts with regard to the amount of electricity it was using, it could not invoke an equitable estoppel, should the jury find that it had been misled to its injury by the rendition of erroneous statements.

In Allegheny County Light Co. v. Thomas, 31 Pa. Super. Ct. 102, it is said that a case of the character under consideration does not involve the rule as to which of two innocent persons a loss shall fall upon, since under such circumstances there has been no loss. The purchaser got what he contracted for, and is charged only for what he got at the price which he agreed to pay.

On this point it is to be noted that in VINELAND v. FOWLER WASTE MFG. CO. it was held proper to submit to the jury the question whether or not the error of the seller had prejudiced the buyer.

Omission of items.

It is a general rule that the omission through mistake of an item or items in a statement rendered for goods or chattels sold and delivered will entitle the seller to recover for such omitted item or items, although a settlement has been had based on the original statement, in which such items were omitted. Standard Oil Co. v. Van Etten, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178 (mistake in counting number of pieces of heading furnished, which formed the basis of an estimate and average to determine the entire amount of heading delivered); Union Lumber Co. v. J. W. Schouten Co. — Cal. App. —, 142 Pac. 910 (omission of items); Harman v. Maddy Bros. 57 W. Va. 66, 49 S. E. 1009 (item omitted); Fox v. Sturm, 21 Tex. 406 (item omitted).

But where the seller of grain at the time of presenting weight slips showing the quantity of grain delivered knows that the slips are inaccurate and under weight through a defect in the scales, after a settlement with him by the purchaser based upon such slips, he cannot recover the alleged excess. Johnson v. Gallatin Valley Mill Co. 38 Mont. 83, 98 Pac. 883.

The statutes of limitation may operate to preclude the right to recover for items omitted by mistake in a statement of articles furnished, where a settlement has been had in accordance with such statement; and this is true although the seller continued thereafter to furnish similar articles to the purchaser, and the same were settled for from time to time according to statements rendered. By bringing suit on the entire account the plaintiff does not prevent the omitted items from being barred by the statute of limitations. Lancey v. Maine C. R. Co. 72 Me. 34.

Miscellaneous.

While not strictly within the scope of this note, attention is called to Perry v Atwood, 6 El. & Bl. 691, 25 L. J. Q. B. N. S. 408, 2 Jur. N. S. 1071, 4 Week. Rep. 608, 8 Mor. Min. Rep. 440, holding that where the rental of a mine is to be determined by the amount of ore mined, the lessor can recover the rental based upon the actual amount of ore mined, although in excess of the amount shown by statements according to which the lessee settled.

And also Shillingford v. Good, 95 Pa. 25, wherein, under a similar lease, the court said that these monthly statements of the amount of ore mined, according to which settlements were made, were conclusive in the absence of full and satisfactory evidence of fraud or mistake, and that it was the duty of the lessor, if there was any irregularity or cause of complaint at the time of these monthly returns and payments, to then make known his objections.

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which defendant sold its products were in fact affected at all by plaintiff's error. This question was submitted to the jury by the learned trial judge, and in this we think there was no error.

It is urged that this view conflicts with that laid down by the supreme court in Central R. Co. v. MacCartney, 68 N. J. L. 165, 52 Atl. 575, but this is not so. In that case a common carrier released its freight lien upon the goods carried by delivering them to the consignee with a freight bill, which through error was for less than it should have been. The consignee deducted the amount of the freight bill so rendered from the price it had agreed to pay the consignor and remitted to him the remainder. The carrier then discovered its error and claimed additional freight charges from the consignee. The court held there was an equitable estoppel, because the consignee not being liable for the cost of shipment as such (that being the obligation of the consignor), but only upon his implied contract to pay resulting from the release of the carrier's lien at his request, it would be inequitable to impose upon him a loss resulting from an error of the carrier about which he neither knew nor had convenient opportunity to know, and upon the faith of which he had settled with the consignor.

The defendant further contends that, conceding the correctness of the court's ruling upon the foregoing point, there was, nevertheless, error in that portion of the charge to the jury wherein they were told that if the defendant had "a convenient opportunity by the exercise of reasonable diligence," to ascertain the true facts with regard to the amount of electricity it was using and consequently what should have been the correct amounts of the bills as they were rendered, it could not invoke an equitable estoppel, even should the jury find that it had been misled to its injury in the manner claimed by the erroneous bills. Of course, if there were any way of knowing that the jury found that the defendant was not in fact injured, as they in all probability did, this point would have no importance; but as their verdict may mean that they found that the defendant was injuriously misled by the error, but that he had convenient opportunity with the exercise of reasonable diligence, to discover the error before being injured, it becomes important to examine the accuracy of this instruction. Under the peculiar facts of this case we do not think it erroneous.

In cases of this kind the doctrine of equitable estoppel rests upon the general principle that when one of two innocent persons, each guiltless of any intentional or moral wrong, must suffer a loss, it must be borne by that one of them whose erroneous conduct, either of commission or omission, was the cause of the injury. The doctrine, however, is, in its nature, essentially one of equity, that is, of good conscience, and as the one party may not assert his true right to the injury of the other, where his error has so misled the other that good conscience forbids him so to do, so on the other hand the other party may not in good conscience urge, in order to defeat another's just rights, that he was misled by that other's error, when in fact the error complained of was not intended for him to rely and act upon, and the real facts were equally or sufficiently open for his convenient ascertainment, but he has chosen not to take the trouble to observe them.

Thus, in Pomeroy's Jur. vol. 2, § 810 it is said: "If, at the time when he acted, such party [the one claiming the estoppel] had knowledge of the truth, or has the means by which with reasonable diligence he could acquire the knowledge, so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment."

And to the same effect in Cyc.: "As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge." 16 Cyc. 738 and 741, and numerous cases there cited.

This doctrine, of course, has no application in a case of what amounts to actual fraud, as where one owning land stands by and in silence allows another to improve it, knowing all the while that the other party is acting in erroneous belief that the land belongs to him, as in Sumner v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884. In such a case it is no answer to say that the title record was open equally to both parties.

Nor will the doctrine apply where the representation was made with the clear understanding upon both sides that it should be accepted and exclusively relied and acted upon in the way it was acted upon, for under such circumstances the party estopped cannot claim that the other party was negligent in treating the representation in the manner agreed upon by both. For instance, take the case of a jobber who buys coal from a mine operator under an

agreement that it shall be shipped from the mine to the jobber's customers in carload lots and billed at once to the jobber at the railroad weight, so that he may use that weight in billing his customers. Under such circumstances, a jobber who had settled with his customers in reliance upon the weights so billed to him by the operator would not, I think, be precluded from urging an equitable estoppel in case of error in such weights, by the fact that he might have made inquiry of the railroad and ascertained the correct weights.

But where, as here, the only purpose of the representation contained in the erroneous bills and receipts was to demand and acknowledge payment of a debt, it seems difficult to see just how it is to operate as an estoppel in the manner claimed (Kuhl v. Jersey City, 23 N. J. Eq. 84), and certainly if the party claiming the estoppel had convenient opportunity, by the exercise of reasonable diligence, to ascertain the true facts before being misled, and neglected such opportunity, he cannot in good conscience throw upon the other a loss to himself which resulted from his own carelessness quite as much as from the other's innocent mistake.

The evidence showed that the meter by which the consumption of current was measured, while the property of the plaintiff, was on the defendant company's premises and open to free inspection by their officers and employees, and there was some testimony that no particular technical knowledge was required to read it. There was evidence, therefore, justifying the instruction complained of, and we think that it expressed the true principle under the circumstances involved.

It is further urged that the learned trial judge erred in permitting, over objections, certain questions to be asked on cross-examination, tending to show the amount of the defendant company's authorized and outstanding capital, and of its dividends and profits, or, as it turned out, the absence of them, and the volume of its business and the salary paid its president during the period in question, and that at the end of that period it was in charge of a committee of its creditors. We do not think there was injurious error in these rulings. The important fact involved in the estoppel claim was that defendant would have established and successfully charged higher prices for its commodities than it did establish and charge if the error complained of had not occurred. All of the matters inquired about in the questions objected to tended to show an actual condition of affairs making it most unlikely that defendant would have done anything of the kind, but that, on the contrary, if it could have sold its products at a higher price than it did, there were ample and much more urgent reasons for so doing than the one which it is now claimed would, if it had known of it, have caused it to do so. The fact the defendant was unable to successfully raise its prices high enough to meet the demands of the big reasons for so doing which it knew did exist, was a fair ground from which a jury might properly conclude that its failure to raise these prices was not because of its ignorance of the small reason, of which it did not know. We think the evidence was properly admitted.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

HAVANA CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
CENTRAL TRUST COMPANY OF NEW YORK.

(123 C. C. A. 72, 204 Fed. 546.)

Bank — effect of payment of corporate check signed by agent.

1. A bank is not the agent of a corporate depositor to pass upon the validity of checks drawn by an officer to his own order and deposited by him to his own credit in another bank, so that payment of the check will relieve the latter bank of liability to return the deposit as a trust fund.

Same — corporate check to order of officer — notice.

2. A bank having the deposit account of a corporation is not charged with notice of misappropriation of funds by the fact that an officer having authority to draw checks on the account draws one to his own order and indorses it himself, if it does not know what use is made of it by him.

Same — notice of by-law.

3. A bank is not chargeable with notice of a by-law of a corporate depositor requiring two signatures to checks upon the deposit account, if it has not been the custom to comply with the by-law.

(March 31, 1913.)

ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor

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Note. — Check drawn by corporate officer payable to his own order as imparting notice to drawee bank of an intended misappropriation.

It is doubted in Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76, whether

of defendant in an action to recover the amount of three checks drawn to the order of another person named or the treasurer of the plaintiff railroad company upon its account with the defendant company. Affirmed.

Statement by Noyes, Circuit Judge:

The following is an outline of the facts particularly relevant to the principal questions of law discussed in the opinion:

On February 23, 1906, C. W. Van Voorhis, treasurer of the plaintiff, the Havana Central Railroad Company, opened a deposit account in its name with the defendant, the Central Trust Company. The account became active, further deposits were made and checks were drawn upon it signed "Havana Central Railroad Company, C. W. Van Voorhis, Treas." Among the checks so drawn and signed were three upon which this action is based. These checks were for $26,461.81, $21,944.55, and $15,000, respectively, and were payable to W. M. Greenwood or C. W. Van Voorhis. They were indorsed by said Van Voorhis, and not by said Greenwood; were deposited in the individual account of the former in the Knickerbocker Trust Company; were presented by that company to the defendant and were paid by it. Said Van Voorhis had no right to such checks and his acts in drawing them amounted to a criminal misappropriation of funds. The action was based upon an alleged breach of duty upon the part of the defendant in paying the checks.

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the mere fact that a check is drawn by the treasurer of a corporation payable to his own order is sufficient to charge the bank with notice of an intended misappropriation of the fund, but where, in addition to this fact, the funds are used in paying the personal obligation of the treasurer at the bank, the bank is charged with notice of the intended misappropriation, and is liable to the corporation therefor.

But as to the proceeds of such a check, which are used in paying a debt of a corporation of the same name as the corporate depositor, but organized in another state, and closely connected in interest, officers, and stockholders, it was held that the bank was not bound to inquire as to the special authority of the treasurer, who had general authority over the funds, to thus apply the proceeds of the check, in the absence of notice that he was appropriating the funds to unauthorized purposes. Ibid.

In Iowa State Bank v. Cereal Refund & Brokerage Co. 132 Iowa, 248, 109 N. W. 719, a bank which had inadvertently paid the check of a corporation drawn by its secretary and manager payable to his own order, when the corporation had no fund in the bank with which to pay it, was held entitled to recover the same from the secretary.

In Newburyport v. Spear, 204 Mass. 146, 134 Am. St. Rep. 652, 90 N. E. 522, an action against those who had received and cashed checks of a city treasurer drawn to his own order in payment of a personal debt of the treasurer, in which the defendants contended that the bank on which the checks were drawn could not legally pay them, and therefore the money of the town in the bank was not diminished by the payment, and the town was not damaged, the court held that the payments were properly made by the bank, and, on the fact that the checks were payable to the order of the city treasurer and indorsed by him, states that this is not an unusual form of making a check for a legitimate payment, and that there was nothing in this form to indicate that they were not delivered in payment of an approved debt of the city; that beyond the form in which the checks were made payable, there was nothing to inform the bank to whom or for what purpose they were issued; that in the absence of suspicious circumstances, the bank had no duty to concern itself with that subject, and that the presumption is that its arrangement with the treasurer, the official custodian of the city's money, was to pay checks drawn in the form which he was using, without reference to the person to whom they were made payable, so long as there was nothing to indicate that they were not given for a proper purpose.

There is *dictum* of like effect in Goodwin v. American Nat. Bank, 48 Conn. 550.

Even though a corporation may have a right of action against a bank for money paid out of its deposit upon a check payable to an officer, and signed by him and others, the corporation may lose such right by treating the officer who received the money as the debtor of the corporation. Security Warehousing Co. v. American Exch. Nat. Bank, 118 App. Div. 350, 103 N. Y. Supp. 399.

As to the right of one who takes commercial paper of a corporation in payment of, or as security for, an individual debt of the officer, see note to Kenyon Realty Co. v. National Deposit Bank, 31 L.R.A.(N.S.) 169.

As to the liability of the bank or other depositary, or of the drawee, for taking deposit of agent, fiduciary, or other representative to pay his own debt, see note to Rochester & C. Turnp. Road Co. v. Paviour, 52 L.R.A. 790.

See note to McPherrin v. Tittle, 44 L.R.A. (N.S.) 395, on the general question of what circumstances are sufficient to put a purchaser of negotiable paper on inquiry.

As to the power of agents to indorse negotiable paper, see note to Gage City Bldg. & L. Asso. v. National Bank, 27 L.R.A. 401.

As to the liability of a creditor who accepts as payment from a debtor a check of a third person which has been wrongfully procured by the debtor, see note to Hathaway v. Delaware County, 13 L.R.A.(N.S.) 273.

W. A. E.

L.R.A.1915B.

Argued before Lacombe, Ward, and Noyes, Circuit Judges.

Messrs. **Heyn & Covington** for plaintiff in error:

The form, the face, and the contents of the check were sufficient to put the defendant upon inquiry, and the failure of the court below to so charge constituted reversible error.

Havana C. R. Co. v. Knickerbocker Trust Co. 198 N. Y. 422, post, 720, 92 N. E. 12; Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435; Rochester & C. Turnp. Road Co. v. Paviour, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890; Farmers' Loan & T. Co. v. Fidelity Trust Co. 30 C. C. A. 247, 56 U. S. App. 720, 86 Fed. 541.

There was no duty of examination imposed upon the depositor.

New York Produce Exch. Bank v. Houston, 95 C. C. A. 251, 169 Fed. 785; Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501; Clark v. National Shoe & Leather Bank, 32 App. Div. 316, 52 N. Y. Supp. 1064.

Messrs. **Lewis H. Freedman** and **Albert Stickney**, with Messrs. **Joline, Larkin, & Rathbone**, for defendant in error:

One dealing with a corporation is not bound to take notice of any by-laws or provisions of the constitution not expressly authorized by the charter or general law under which a corporation is organized.

Pearsall v. Western U. Teleg. Co. 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Bacon v. Montauk Brewing Co. 130 App. Div. 737, 115 N. Y. Supp. 617; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Montreal & St. L. Light & P. Co. v. Robert [1906] A. C. 196, 75 L. J. P. C. N. S. 33, 94 L. T. N. S. 229, 13 Manson, 184; Clark & M. Priv. Corp. § 643, p. 1958; Taylor, Corp. § 698; Cook, Corp. § 725.

Under the facts proven, the question of whether the form, the face, and the contents of the check were sufficient to put the trust company upon inquiry was a question of fact for the jury to determine.

Even if the form, face, and contents of the checks put the trust company upon inquiry, the failure to charge as requested, and the submission of the question to the jury of whether the trust company was put upon inquiry, do not constitute reversible error.

The trust company could not be held liable if the railroad company so conducted its affairs that, by virtue of its negligence, the trust company was led to believe that these checks were authorized and proper, and such negligence was connected with the payment of the checks.

National Bank v. Tacoma Mill Co. 104 C. C. A. 441, 182 Fed. 1; New York Produce Exch. Bank v. Houston, 95 C. C. A. 251, 169 Fed. 785.

Noyes, Circuit Judge, delivered the opinion of the court:

Upon the trial the plaintiff claimed that the form, face, and contents of the checks were, as a matter of law, such as to put the defendant upon inquiry. The trial court ruled that the question was one of fact for the jury, and the assignment of error based upon this ruling brings up the primary question in the case,—a question which, as affecting the duties of banking institutions, is of far-reaching importance.

The rules for following trust funds apply for the protection of corporations from the breaches of trust of their officers, and these rules have heretofore been carried to their fullest extent by the courts of the state of New York. It has been said that one receives at his peril from an officer of a corporation the securities of such corporation in payment of his personal debts. And it has likewise been established that where a person receives from such an officer for his individual use corporate obligations drawn by himself in his own favor, such person is put upon inquiry to determine whether the officer has the right to so use such obligations. Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435; also the very late case of Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890. Moreover, upon the facts in this very case, the appellate division for the first department held that the Knickerbocker Trust Company, which, as shown in the statement of facts, received and collected the checks in question, was bound to account for their proceeds. The court said that the checks on their face charged the Knickerbocker Company with knowledge that the treasurer of the plaintiff corporation was converting its money to his own use, because they were drawn to his order and deposited to his credit; that, having been put upon inquiry and having failed to make it, the Knickerbocker Company was liable (Havana C. R. Co. v. Knickerbocker Trust Company, 135 App. Div. 313, 119 N. Y. Supp. 1035). Upon the appeal in the Knickerbocker Case, 198 N. Y. 422, post, 720, 92 N. E. 12, however, the court of appeals approached the subject from a different point of view and—as we

construe its decision—materially altered the underlying rules. The court assumed that the Knickerbocker Company was put upon inquiry by the checks and their deposit, but said that it was not bound to look beyond the bank upon which they were drawn,—the defendant in this case; that the defendant was the agent of the plaintiff "to make representations to third persons as to the validity of checks drawn upon the plaintiff's account;" that the defendant as agent might be liable to the plaintiff as depositor for its mistakes, but that the plaintiff was estopped to charge the intermediate holder after its agent, by paying the checks, had represented that they were "all right."

It is impossible to give the decision of the court of appeals a narrow interpretation. It was based upon the assumption that the Knickerbocker Company was put upon inquiry because the checks were drawn by the treasurer to his own order and were deposited to his personal credit. The inquiry involved two questions:

(1) The authority of the treasurer to draw checks of that kind.

(2) His authority to draw these checks and use them for his own purposes.

An answer to the first question would not have relieved the holder put upon inquiry. The defendant might well have answered that the treasurer was authorized to draw checks to his own order, provided they were to be used for corporate purposes. The question would have remained whether he was authorized to use these checks for his personal benefit, and unless the defendant was the agent of the plaintiff to make representations as to the validity of the checks in this respect, it was not—in the language of the opinion referred to—"the agent of the Havana Central Railroad Company to determine whether the checks in controversy were properly payable or not." We think it clear that the decision holds that a banking institution is the agent of its depositors to make representations to holders of corporate checks drawn upon it whether such checks are "all right," *i. e.*, whether in respect of matters concerning which a holder is reasonably put upon inquiry, they are valid instruments properly payable.

Manifestly, the decision curtails in marked degree the doctrine of following trust funds as applied in favor of corporations in the case of breaches of trust by their officers. In the absence of bad faith a bank which takes for deposit to the personal credit of an officer of a corporation, a corporate check drawn by such officer to his own order, and which, on account of such circumstance, is put upon inquiry, has—it is held—only to present it to the bank upon which it is drawn, and if it is paid, then the former bank is relieved of responsibility to the corporation. But as it would not be liable at all if the check were not paid, it is difficult to see under what conditions it would be responsible.

If, then, we accept the decision referred to, we must carry the principles involved to their legitimate conclusion. If a bank of deposit be the depositor's agent to make representations as to the validity of his checks to third persons who are put upon inquiry, and to relieve thereby such persons from doing more than to present them for payment, then the bank must be held to assume the responsibility of obtaining information concerning the history of the checks. We think that the decision necessarily leads to the conclusion that a bank undertakes in the case of corporation depositors to answer (1) whether an officer drawing a check has general authority, and (2) with respect to checks to his own order which may be used for either proper or improper purposes, whether particular ones are used in the one way or the other. Otherwise the bank does not stand in the shoes of the intermediate holder put upon inquiry, and the defrauded depositor is remediless.

But notwithstanding the results which seem to follow the court of appeals decision, the authority of that court is so high and our respect for its opinion so great, that we hesitate to depart from it. But we are constrained to do so. The underlying proposition that a bank is the agent of its depositors to the extent stated is so contrary to the principles which we regard as established in the law of banking, that we are unable to accept it.

The relation existing between a bank and its customers growing out of the general deposit and the withdrawal of moneys is that of debtor and creditor, and the courts, both in England and in America, have uniformly resisted all efforts to hold the bank as trustee, quasi trustee, factor, or agent.[1] 1 Morse, Banks & Bkg. 4th ed. § 289. The parties deal at arms' length. This is true with respect to the nature of the deposit. It is well settled that all sums paid into a bank by different depositors form one blended fund, and that the depositor has only a debt owing to him by the bank, and not a right to any specific moneys. So, on the other hand, when the deposit is made, nothing short of payment will discharge the bank; the loss of the specific moneys deposited is immaterial. And in respect of the payment of checks, it is the duty of

[1] Of course, a bank by particular contract may assume the functions of an agent, and it is generally an agent for collection purposes. But these exceptions have no bearing upon the present case.

the bank when a properly drawn check is presented to pay it if there are sufficient available funds. But the bank does not make payment because it is the trustee or agent of the depositor. It makes it to discharge *pro tanto* the simple debt which it owes the depositor, who by his check gives acquittance for it. When a corporation opens a deposit account with a bank, the latter must be satisfied that the officer signing checks is authorized to do so, and if it pay without question it takes the risk of being held still liable for the amount irregularly paid away. But the bank assures itself of the authority of the corporate officers for its own protection in discharging its indebtedness to the depositor, and not as the agent of the latter. We think that it is not correct to say that a depositary bank is the agent of the depositor to determine whether a check drawn conforms to the contract between them. It rather determines the question at its peril.

Not accepting then the proposition that the obligation of the defendant bank to the plaintiff was that of an agent, and looking at the case without regard to the previous litigation, we come to the inquiry whether, upon the facts and circumstances of this case, the defendant was put upon inquiry by the checks in question. So far as this defendant was concerned, there was nothing suspicious about the checks except that they were drawn by the general fiscal officer to his own order and were indorsed by him; other similar checks had been drawn and paid before. The defendant did not know the history of the checks. It did not have the knowledge of the Knickerbocker Company that the treasurer was using the checks for his personal benefit. That which it knew was that which appeared on the checks themselves when presented for payment. It appeared that the treasurer might have been guilty of a breach of trust and have been attempting to misappropriate the moneys of his corporation. On the other hand there might have been no breach of trust. The checks might have been drawn in favor of the treasurer for entirely legitimate corporate purposes. Transactions were disclosed which might or might not have been breaches of trust according to circumstances unknown to the defendant. In such circumstances, we think that it was not the duty of the defendant to question the checks, and that the language of Judge Hammond in Walker v. Manhattan Bank (C. C.) 25 Fed. 247, 255, upon an analogous subject, is applicable: "At all events the bailee must know that the contemplated appropriation is a breach of trust, not merely that a certain transaction is about to be consummated, which may or may not be a breach of trust, according to circumstances unknown to him."[2]

It must be observed that we are far from holding that a bank is free under all circumstances to pay without question checks drawn by corporate officers to their own order. While a bank may deal with its depositors at arms' length, it must take care to pay out their moneys only upon authorized orders. If it fail to use due care it may be required to pay again. Consequently, in case of a corporate check signed by an officer with express or implied authority, the mere fact that it is drawn to his own order and therefore may be improperly used will not require the bank to question it. But if the bank have knowledge that the officer is using the check for his personal benefit, *e. g.*, to pay his debt to the bank or to deposit it to his personal credit, then the bank is put upon inquiry, and if it fail

[2] In the case referred to the court was considering the established rule that a banker cannot refuse to pay a check merely because he is aware of an intended breach of trust. Thus, he is not justified in refusing to honor the checks of a depositor acting in a fiduciary capacity because he has reason to believe that the depositor is misappropriating funds. Gray v. Johnston, L. R. 3 H. L. 1, 16 Week. Rep. 842; Keane v. Robarts, 4 Madd. Ch. 356, 20 Revised Rep. 306; Merchants' & P. Bank v. Meyer, 56 Ark. 499, 20 S. W. 406; Goodwin v. American Nat. Bank, 48 Conn. 550; also Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693. Of course, these principles are only analogous to those involved in the present case. They have been placed upon the ground that the bank is not called upon to make itself a party to the inquiry between the trustee and his beneficiary, a third person, while here the corporation whose funds were misappropriated was not a third person, but was itself the bank's customer. Still the treasurer of a corporation is its trustee. When he is authorized to draw checks the bank holding available funds is bound to honor them. And, in the absence of knowledge, this is true with respect to checks drawn to his own order, because such checks may be for legitimate purposes. Certainly if a bank is not justified in refusing a trustee's check by incidental knowledge that he plans a misappropriation of funds, it is not required to question corporate checks by the mere fact that their form is adapted to permit a misuse of funds. On the other hand, as a bank is affected with knowledge of the misuse of trust funds when a depositor seeks to pay his own debt to the bank with funds to his credit in a fiduciary capacity, so it is proper that a bank should be put upon inquiry by information that an officer is using a corporate check for his own benefit. But there is nothing in the analogy which should push the bank's liability further.

to make it, pays at its peril. But the bank owes this obligation not because it is the representative of the depositor, but because it has no right to discharge its debts to its depositors except on their authorized orders, and a check misused by a corporate officer cannot be regarded by a bank having notice of its misuse as an authorized order.

It must also be observed, from another point of view, that to relieve a bank from questioning the validity of checks in the form under consideration works no real injustice to corporation depositors. Corporations may protect themselves by requiring counter signatures, provided they notify the bank of the requirement. If they do not choose to do so, it may fairly be presumed that they prefer the risk to the inconvenience. In such circumstances, it is not unfair to the depositor to say that if the bank have notice or knowledge of wrongdoing, it must make inquiry, but that if nothing wrong in the history of a check is brought to its attention, it is not called upon to inquire about it; that a bank is not bound to question every corporate check regardless of amount—and manifestly no line can be drawn—merely because it is drawn by a corporate officer to his own order.

For these reasons, we think that, as a matter of law upon the undisputed facts, the defendant was not put upon inquiry by the face, form, and contents of the checks, and that the trial court, in submitting the question to the jury, gave the plaintiff more favorable instructions than it was entitled to. This conclusion disposes of the principal question in the case, and renders unnecessary the consideration of the subsidiary questions relating to the defendant's duty if put upon inquiry, and to the plaintiff's negligence. It also deprives of any prejudicial effect the rulings upon the examination of one of the plaintiff's officers.

Only one more question need be considered. The by-laws of the plaintiff corporation were offered in evidence for the purpose of showing that two signatures were required upon all checks drawn upon its bank accounts, and were not admitted. But there was no evidence offered to show that the defendant had any knowledge of this requirement or that it was customary. In the absence of such additional proof we think that the by-laws were properly excluded. A bank is undoubtedly held to a knowledge of all that the charter of a corporation depositor discloses as to the authority of its officers to withdraw moneys. It is also bound to know what the general laws under which the corporation is organized provide upon the subject. So, perhaps, it may be charged with notice of by-laws particularly authorized by the charter or general laws. But with respect to an ordinary by-law like the one in question, we think it the better view that it is incumbent upon the corporation to bring the by-law to the notice of the bank, rather than for the bank to inquire whether such a by-law exists. Besides such by-laws may be waived, and they were undoubtedly waived in this case. The plaintiff knew for a considerable period before the time of the checks in question, that its checks were being paid upon one signature,—that of its general fiscal officer,—and made no objection. If there had been error in the ruling it would not have been prejudicial.

The judgment of the District Court is affirmed.

Petition for rehearing denied.

Petition for writ of certiorari denied by the Supreme Court of the United States, April 6, 1914, 234 U. S. 755, 58 L. ed. 1578, 34 Sup. Ct. Rep. 673.

NEW YORK COURT OF APPEALS.

HAVANA CENTRAL RAILROAD COMPANY, Respt.,
v.
KNICKERBOCKER TRUST COMPANY, Appt.

(198 N. Y. 422, 92 N. E. 12.)

Pleading — authority of agent — sufficiency.

1. That the treasurer of a corporation had no right to draw its checks to his own order is not charged by an allegation in a complaint that he had no authority to draw upon the account of the corporation except for the purposes of its business.

Bank — title to check — presumption.

2. A bank to which is presented for deposit a check payable to the order of the one presenting it may properly regard it as his property.

Check — payment — evidence of drawer's authority.

3. The payment by a bank of checks drawn upon the account of a corporation by its treasurer to his own order, to a bank in which he had deposited them, is sufficient evidence as between the corporation and the depositary of his uthority to draw the

Note. — HAVANA C. R. Co. v. KNICKERBOCKER TRUST CO. makes it the duty of a bank in dealing with checks drawn by a corporation by an officer thereof to his own order, to make some inquiry as to the authority of such officer, but treats the presentation of such check to the bank on which it is drawn as fulfilling its duty in this regard, so that if the check is paid, the first

checks in that form, to entitle it to hold the proceeds as his property and honor his checks therefor, although the treasurer in fact exceeded his authority so that, as between himself and the corporation, the checks were invalid.

Bank — authority to determine validity of check.

4. The bank with which one opens an account has the power to determine whether or not a check drawn upon the account conforms to the contract between itself and the customer, and a holder of the check performs his duty if he makes inquiry of the drawee as to the validity of the check which purports to be drawn on such account.

(May 17, 1910.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an interlocutory judgment overruling defendant's demurrer to the complaint in an action brought to recover the proceeds of certain checks deposited by C. W. Van Voorhis, a former treasurer of the plaintiff, to the credit of his bank account in the defendant company. Reversed.

The facts are stated in the opinion.

The certified question referred to in the opinion was as follows: Does the complaint state facts sufficient to constitute a cause of action?

Messrs. **Julien T. Davis** and **Herbert Barry**, for appellant:

The defendant received for deposit the checks in question in good faith and under such circumstances as created no actual notice of any improper purpose on the part of its depositor.

Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316; Campbell v. Upton, 66 App. Div. 434, 73 N. Y. Supp. 1084; Ashton v. Atlantic Bank, 3 Allen, 217.

The first and third checks having been duly accepted by the Central Trust Company, in legal effect a new instrument was created to which plaintiff was not a party; and it should not be permitted to maintain its claim against defendant upon such checks.

Negotiable Instruments Law, §§ 112, 321, 325; Morse, Banks & Bkg, § 414; First Nat. Bank v. Leach, 52 N. Y. 350, 11 Am. Rep. 708; Thomson v. Bank of British N. A. 82 N. Y. 1; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604, 19 L. ed. 1008; Willets v. Phoenix Bank, 2 Duer, 121.

Where a fiduciary draws a check to his individual order and deposits it elsewhere in his individual account, and subsequently uses the proceeds in breach of his trust, the bank receiving such deposit is not liable for the proceeds, in the absence of actual knowledge of the fiduciary's misconduct or of circumstances sufficient to put it upon inquiry.

Gray v. Johnston, L. R. 3 H. L. 1, 16 Week. Rep. 842; Coleman v. Bucks & O. Union Bank [1897] 2 Ch. 243, 66 L. J. Ch. N. S. 564, 76 L. T. N. S. 684, 45 Week. Rep. 616; Shields v. Bank of Ireland [1901] 1 I. R. 222; Mills v. Nassau Bank, 52 Misc. 243, 102 N. Y. Supp. 1119; Ashton v. Atlantic Bank, 3 Allen, 217; Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024; Goodwin v. American Nat. Bank, 48 Conn. 550; Safe Deposit & T. Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; Rhinehart v. New Madrid Bkg. Co. 99 Mo. App. 381, 73 S. W. 315; Martin v. Kansas Nat. Bank, 66 Kan. 655, 72 Pac. 218.

Mr. **Thomas B. Paton**, for American Banker's Association, intervener:

Where a corporation treasurer authorized to draw checks for corporation purposes draws, as treasurer, the corporation's check to his individual order, which he deposits elsewhere in his personal account, and after collection withdraws the proceeds in violation of his trust, the bank of deposit is not charged with notice of the misappropriation nor put upon inquiry by the mere form and contents of the check.

Gray v. Johnston, L. R. 3 H. L. 1, 16

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bank is entitled to regard the authority of the officer to draw the check in such form as established, at least, so far as it is concerned. Applying the doctrine of this case in a subsequent case involving a check payable to a corporation and indorsed by its president, it was held that a bank which accepted and credited to the account of a firm in which the president of the corporation was interested, checks drawn to the order of the corporation and indorsed merely by the corporation by the member of the above firm as president, without any inquiry as to the authority of the president to so indorse the checks or deal with them, is liable to the corporation for the loss resulting. Niagara Woolen Co. v. Pacific Bank, 141 App. Div. 265, 126 N. Y. Supp. 890.

The theory on which HAVANA C. R. Co. v. KNICKERBOCKER TRUST Co. is based is that the bank of deposit is the agent of the corporate depositor as to all third parties who may receive checks drawn upon the account to determine and declare whether such checks were genuine and drawn within the scope of the authority of the officer drawing them. This theory is disapproved in Havana C. R. Co. v. Central Trust Co. ante, 715, a subsequent action by the corporation against the bank of deposit for paying out the money on the checks involved in HAVANA C. R. Co. v. KNICKERBOCKER TRUST Co. And see note to former case.

Week Rep. 842; Coleman v. Bucks & O. Union Bank [1897] 2 Ch. 243, 66 L. J. Ch. N. S. 564, 76 L. T. N. S. 684, 45 Week. Rep. 616; Shields v. Bank of Ireland [1901] 1 I. R. 222; Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024; Safe Deposit & T. Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983.

The rule that where an agent draws a corporation check payable to himself, and uses it to pay his individual debt, the payee takes with notice of the fraud, does not apply to the bank, which merely receives the check in, and pays its proceeds from, the personal account of the agent.

Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Rochester & C. Turnp. Road Co. v. Paviour, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497; Montvale v. People's Bank, 74 N. J. L. 464, 67 Atl. 67.

Messrs. **Alfred A. Wheat** and **Jordan J. Rollins**, for New York State Banker's Association, intervener:

The decision of the court below carries the doctrine of notice as applied to those receiving negotiable instruments far beyond the limit which has heretofore been set by the courts or by statutory enactment.

Magee v. Badger, 34 N. Y. 249, 90 Am. Dec. 691; Vosburgh v. Diefendorf, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; Joy v. Diefendorf, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Jarvis v. Manhattan Beach Co. 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; American Exch. Nat. Bank v. New York Belting & Packing Co. 148 N. Y. 698, 43 N. E. 168; Cheever v. Pittsburgh, S. & L. E. R. Co. 150 N. Y. 60, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701.

Messrs. **Heyn & Covington**, for respondent:

Van Voorhis's attempt to deposit the check in his individual account was a transaction showing an attempt on his part to lend the plaintiff's money to the defendant under an agreement by which it was to pay it back to him personally, and such circumstances demand an inquiry on the part of the defendant.

Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435; Farmers' Loan & T. Co. v. Fidelity Trust Co. 30 C. C. A. 247, 56 U. S. App. 729, 86 Fed. 541; Rochester & C. Turnp. Road Co. v. Paviour, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

The fact that the defendant received the checks in suit as a banker, for deposit to Van Voorhis's individual account, and not in payment of an antecedent debt, cannot relieve it from liability.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; Farmers' Loan & T. Co. v. Fidelity Trust Co. 30 C. C. A. 247, 56 U. S. App. 729, 86 Fed. 541; Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252.

Willard Bartlett, J., delivered the opinion of the court:

This appeal involves the sufficiency of a complaint which contains the following allegations: The plaintiff is a New Jersey corporation organized to operate a railroad in the island of Cuba. The defendant is a New York corporation authorized to do the business of a trust company, including the receipt of deposits and the withdrawal of the same on checks, drafts, or orders, with its principal place of business in the city of New York. On February 23, 1906, the plaintiff by C. W. Van Voorhis, its treasurer, opened a deposit account with the Central Trust Company of New York in its name under an arrangement by which checks drawn upon said account were to bear the following signature: "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer." Between April 21 and June 15, 1906, without the knowledge of any other officer or employee of the plaintiff, C. W. Van Voorhis drew and signed three checks upon this account with the Central Trust Company, the first dated April 21, 1906, for $22,461.81, payable to the order of W. M. Greenwood or C. W. Van Voorhis; the second dated May 23, 1906, for $21,944.45, payable in the alternative to the same persons, and the third, dated June 14, 1906, for $15,000, payable like the two others. Each of these checks was signed "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer;" each was indorsed by C. W. Van Voorhis; and each was deposited by him in a bank account in his own individual name which he kept with the defendant. The first and third checks were accepted by the Central Trust Company before payment, and the amount of each check was paid by the Cen-

tral Trust Company to the defendant and credited by the defendant to C. W. Van Voorhis in his individual bank account already mentioned. The Central Trust Company charged such payments to the plaintiff corporation. After the deposit with the defendant of the amounts represented by these checks in the individual account of C. W. Van Voorhis, he was permitted to draw upon said account and did draw upon it until July 7, 1906, when the account was closed.

The complaint further alleges that C. W. Van Voorhis deposited the checks and used the proceeds thereof for his own purposes without any right or authority so to do, and that he had no right or authority to draw upon the account of the plaintiff, or to use its funds except for the purposes of the plaintiff's business, and that the plaintiff was not at any of the times heretofore mentioned indebted to C. W. Van Voorhis in any sum whatsoever, and that notice or inquiry by the defendant to and of the plaintiff would have revealed these facts, and would have shown that, by drawing the checks in the form already described and depositing them in his individual account with the defendant, the said C. W. Van Voorhis was wrongfully misappropriating and converting the same to his own use; but the defendant did not make any inquiry of the plaintiff, or anyone else, concerning the checks, or give any notice to the plaintiff in regard to their deposit with the defendant. It is alleged that on account of these matters the defendant has had and received $59,406.26 of the moneys of the plaintiff, and thereby became indebted to the plaintiff in said sum, no part of which has been paid except that $3,597.91 has been received by the plaintiff from the said C. W. Van Voorhis in reduction of the amount represented by the third check.

It will be observed that the complaint contains no averment of any conversion by the defendant. The only conversion alleged is a misappropriation of C. W. Van Voorhis, the plaintiff's treasurer. The action is for money had and received; the manifest theory of the pleader being that the defendant, by receiving the checks for deposit in the individual personal account of the plaintiff's treasurer under the circumstances disclosed by the complaint, has become legally obligated to repay the money represented by those checks to the plaintiff corporation. This theory is based on the proposition that the checks when presented to the defendant for deposit bore upon their face what the learned counsel for the respondent calls "a shadow," which ought to have prevented the defendant from taking them or collecting the proceeds without inquiry from some responsible officer of the plaintiff corporation other than its treasurer as to his authority to draw checks against the funds of the corporation payable to his own individual order.

The complaint does not allege that C. W. Van Voorhis, the plaintiff's treasurer, was not authorized to draw checks in this form. It merely avers that he had "no right or authority to draw upon said account of the plaintiff, or to use its funds except for the purposes of the plaintiff's business." This averment does not negative the idea that the purposes of the plaintiff's business may have required its treasurer on occasion to draw checks upon the corporation account payable to himself individually; the allegation simply amounts to an averment that he was not authorized to draw these particular checks to his own order, and that the defendant could have ascertained that fact upon due inquiry. The case really turns upon a determination as to what were the rights of the defendant and its duties toward the plaintiff upon the presentation of the checks for deposit in the individual account of the treasurer.

The defendant could properly regard the checks as the property of C. W. Van Voorhis. The possession of a bank check payable to the order of the holder is presumptive evidence of ownership. 2 Dan. Neg. Inst. 4th ed. § 1652. In behalf of the repondent, it is argued that the fact that the checks were drawn by the treasurer in behalf of the corporation payable to himself individually cast suspicion upon them, and imposed upon the banking institution to which they were offered for deposit a duty to make some inquiry as to their validity before it dealt with them as the property of the payee. If it be conceded that the offer of such a check for deposit to the individual account of an officer calls for some inquiry on the part of the bank to which it is offered as to the extent of his authority in the premises, I am of opinion that the Knickerbocker Trust Company in the present case did all that the law demands. When it caused the three checks to be presented to the Central Trust Company for payment, it thereby virtually made a twofold inquiry of that institution: (1) Whether the checks bore the genuine signature of an officer authorized to sign checks in behalf of the Havana Central Railroad Company; and (2) whether C. W. Van Voorhis, the treasurer of the Havana Central Railroad Company, had authority to draw checks upon the account of the corporation payable to his individual account. The drawee of a bill of exchange is bound to know the signature of the drawer

and his capacity to draw the bill. 1 Daniel on Negotiable Instruments (4th Ed.) §§ 534, 535. The acceptance of the bill is an acknowledgment of the genuineness of the signature and the authority of the drawer. So the payment of these checks by the Central Trust Company upon their presentation at the instance of the Knickerbocker Trust Company was an acknowledgment by the deposit bank of the Havana Central Railroad Company that C. W. Van Voorhis, its treasurer, possessed authority from the railroad corporation to draw precisely such checks in precisely the form in which they were drawn. The Havana Central Railroad Company, by opening its deposit account with the Central Trust Company, constituted the latter corporation its agent as to all third parties who might receive checks drawn upon that account, to determine and declare whether such checks were genuine and were drawn within the scope of the treasurer's agency as established by the contract between the Central Trust Company and the railroad corporation. When the Central Trust Company by paying these checks declared to the Knickerbocker Trust Company that they were genuine obligations of the railroad corporation which the treasurer had authority to draw, the Knickerbocker Trust Company was not obligated by law to make any further inquiry, but was authorized to deal with the proceeds of the checks as the individual property of the payee, and after it has turned over such proceeds to him it cannot be compelled to restore them to the Havana Central Railroad Company merely because the Central Trust Company ought to have withheld payment of the checks.

The distinguishing feature between this case and the cases relied upon to support the judgment which has been rendered herein is that in the cases cited the form of the transaction was notice to the party receiving the check or other instrument that it was sought to be used to pay an individual debt out of trust funds. Here the checks were not designed to discharge any obligation owing to the defendant. The defendant merely collected the amounts thereof and placed the same to the credit of the payee. It is conceded that they were properly signed as checks upon the plaintiff's bank account with the Central Trust Company; that is to say, they were signed: "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer." As has already been pointed out, the complaint does not allege that Mr. Van Voorhis had no authority to draw checks upon this account to his own order. The allegation is merely that he had no right or authority to draw upon the account of the plaintiff or to use its funds except for the purposes of the plaintiff's business, and, in substance, that these checks were not drawn for such purposes, as the defendant might have ascertained upon proper inquiry. But what inquiry and of whom? The obvious course, as it seems to me, was to present the checks for payment to the institution upon which they were drawn. If it paid them, such payment constituted the most emphatic assertion upon the part of the plaintiff's own deposit bank that under the arrangement existing between it and the plaintiff the plaintiff's treasurer was authorized to draw just such checks payanble to his own order. The defendant having relied upon that assertion and subsequently paid away the money thus collected, the plaintiff corporation is estopped from denying that its treasurer in fact possessed authority to draw the checks.

But it is said that inquiry of the plaintiff's deposit bank was not enough, because it was not the plaintiff's agent to make representations to third parties as to the validity of checks drawn upon the plaintiff's account. I think otherwise. It seems to me that when a corporation opens an account with a banking institution it confers upon that institution the power to determine whether any check drawn upon the account conforms to the contract between the depositor and the depositary. When it makes a mistake in the determination of such a question, the depositary may be liable to the depositor; but the depositor cannot recover back the money paid on such check to a third person who has received it in good faith, relying on the representation of the deposit bank that the check was all right, and has subsequently parted with the money.

The case of Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585, differs essentially from the case at bar in the fact that the corporation check there in controversy was delivered to the defendant in payment of a personal loan. In Squire v. Ordemann, 194 N. Y. 394, 87 N. E. 435, the check was that of executors given in payment of an individual debt. The only point decided in Robinson v. Chemical Nat. Bank, 86 N. Y. 404, which has any possible application here, was the obvious proposition that the indorsement of a check drawn to the order of a principal, by an agent having no authority to indorse, could not operate to transfer title to the paper. The principal matter litigated in the case of Bank of New York Nat. Bkg. Asso. v. American Dock & Trust Co. 143 N. Y. 559, 38 N. E. 713, was the validity of a warehouse receipt issued by the president of the defendant to his

own order; and it was there held that the certificate on its face gave the purchaser such notice as should put a prudent person upon inquiry in regard to the president's authority. In that case Judge Peckham said: "It is an acknowledged principle of the law of agency that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side." p. 564. And he further expressed the opinion that it was against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time. A similar certificate was the subject of consideration in the later case of Hanover Nat. Bank v. American Dock & Trust Co. 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72, where it was held that authority in the president to issue warehouse certificates of the character in question might be implied from acquiescence. In that case Judge Vann said that the authority of an agent was enlarged as to third persons by implication, when the principal permitted him to do acts not expressly authorized, and added: "For the protection of innocent persons, the law will imply authority in an agent to do acts which, although forbidden by the principal before they are done, are nevertheless recognized by him as valid after they are done." p. 620. I am unable to find any proposition actually decided in any of these cases, or in any other authoritative cases cited in behalf of the respondent, which is at variance with the view I entertain as to the rights and obligations of the defendant in the case at bar. That view, stated in the fewest possible words, is that the Central Trust Company was the agent of the Havana Central Railroad Company to determine whether the checks in controversy were properly payable or not; and when it decided that they were, and paid them to the Knickerbocker Trust Company, which received the proceeds in good faith, no right remains in the railroad corporation to recover such proceeds after the Knickerbocker Trust Company has paid them away.

For these reasons I advise a reversal of this order, and that the question certified be answered in the negative.

Cullen, Ch. J., and Gray, Haight, Vann, and Chase, JJ., concur.

Order reversed, and judgment ordered for defendant on demurrer, with costs in all courts, with leave to plaintiff to serve amended complaint within twenty days on payment of costs.

MASSACHUSETTS SUPREME JUDICIAL COURT.

QUINCY MUTUAL FIRE INSURANCE COMPANY v. INTERNATIONAL TRUST COMPANY.

(217 Mass. 370. 104 N. E. 845.)

Bills and notes — checks payable to town treasurer — ownership.

1. A check payable to the order of the treasurer of a town in legal effect stands upon the same footing as if payable to the town.

Same — check for forged note — right of maker.

2. A bank which collects a check payable to the treasurer of a town, and credits the proceeds to its correspondent, another bank, as the property of the latter, to which it had been fraudulently transferred with the indorsement of the treasurer upon it, is liable to account for the proceeds to the maker of the check, who issued it in payment of a forged note of the town.

Same — loss on innocent person — application of rule.

3. The rule that where one of two innocent persons must suffer by the fraud of a third, the loss must rest where it falls, does not apply in favor of a bank which collects for another bank as its property a check payable to the treasurer of a town, and indorsed by him, which was issued in payment of a forged town note, so as to throw the loss on the drawer of the check, since the collecting bank was charged with notice that the check was the property of the town, and could not be indorsed for circulation.

Same — delay in asserting rights — release from liability.

4. Delay by one who issues a check payable to the order of the treasurer of a town, in payment of a forged town note, to assert his right to the proceeds against the bank which collects it on account of another bank, does not release the collecting bank from liability to return the proceeds to him if its position is not different from what it would have been had the maker acted as soon as the check was collected.

(March 31, 1914.)

Note. — Notice imported to holders by commercial paper payable to a public body or officer thereof.

In Franklin Sav. Bank v. International Trust Co. 215 Mass. 231, 102 N. E. 363, a case involving defalcations by the same officer as the one involved in QUINCY MUT. F. INS. CO. v. INTERNATIONAL TRUST CO., a check was drawn, payable to the town, indorsed by the treasurer, "Town of Framingham by John B. Lombard, treasurer," and presented at a bank by one not connected with the town in any way, and the

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action to recover the amount of a check made by plaintiff to the order of the town treasurer, and indorsed and delivered by him to a banking company, which deposited it with the defendant trust company for collection. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. **R. G. Dodge**, for plaintiff:

Upon a check or note payable to the treasurer of a town, an action may be maintained by the town as payee.

Commercial Bank v. French, 21 Pick. 486, 32 Am. Dec. 280; Barney v. Newcomb, 9 Cush. 46; Eastern R. Co. v. Benedict, 5 Gray, 561, 66 Am. Dec. 384; Colburn v. Phillips, 13 Gray, 64; Pigott v. Thompson, 3 Bos. & P. 147; Dugan v. United States, 3 Wheat. 172, 4 L. ed. 362; Story, Promissory Notes, 7th ed. p. 78, note.

The town treasurer had no power to indorse the check for circulation. His only power was to indorse it for deposit for collection to the account of the town.

Franklin Sav. Bank v. International Trust Co. 215 Mass. 233, 102 N. E. 363.

The record does not show that the defendant changed its position in any way or was damaged by the delay. Under such circumstances delay in notifying the defendant of the claim is immaterial.

Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; A. Blum Jr's. Sons v. Whipple, 194 Mass. 253, 13 L.R.A.(N.S.) 211, 120 Am. St. Rep. 553, 80 N. E. 501; United States v. National Exch. Bank, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. Rep. 665, 16 Ann. Cas. 1184.

If it should be decided that the case turns on the issue whether the defendant took the check under circumstances of suspicion, without proper precaution (First Nat. Bank v. First Nat. Bank, 151 Mass. 283, 21 Am. St. Rep. 450, 24 N. E. 44; and see Newburyport v. Spear, 204 Mass. 146, 134 Am. St. Rep. 652, 90 N. E. 522), this evidence would be competent.

Messrs. **Robert M. Morse** and **William M. Richardson**, for defendant:

Where one of two innocent parties must suffer by the fraud of a third person, the loss must rest where it falls, especially if it falls upon the party whose negligence caused the loss.

Gloucester Bank v. Salem Bank, 17 Mass. 33; Mackintosh v. Eliot Nat. Bank, 123 Mass. 393, 25 Am. Rep. 108; First Nat. Bank v. First Nat. Bank, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; Brown v. Newburyport, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495; 5 Am. & Eng. Enc. Law, 1072.

The check was not payable to the town, but to the treasurer of the town; so that the title to the check was vested in the town treasurer, and he had the right to indorse it. At all events, the defendant was entitled to rely upon his indorsement.

Shaw v. Stone, 1 Cush. 228; Bartlett v. Hawley, 120 Mass. 92; Plimpton v. Goodell,

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proceeds deposited to the account of the one thus presenting it. It is held that the treasurer had no power to indorse the check for circulation, but his only power was to indorse it for deposit for collection to the account of the town, and that it not being received for deposit on account of the town, but on account of one not connected in any way with the town, the infirmity in the title of the depositor was thus apparent upon the check itself with the indorsement, so as to give the bank notice. Accordingly the bank was held liable to the drawer of the check, who had purchased forged notes of the town, and given the check in payment.

But a bank which receives a certified check payable to a city upon indorsement in proper form by the treasurer as funds with which to pay a note of the city, due at its banking house, is not liable to the drawer of the check, although the note paid was in fact fraudulent. Brown v. First Nat. Bank, 216 Mass. 298, 103 N. E. 780.

Neither is the bank liable to the municipality for paying out the funds on the void note. Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782.

A note payable to "A. B. sheriff of C. L.R.A.1915B.

county . . . for value received in the purchase of a tract of land sold to make partition thereof" was held, in Ranney v. Brooks, 20 Mo. 105, to bear on its face evidence to all persons of its consideration and of the official character of the payee, so that an assignee of the note could not recover thereon against the makers after the expiration of the term of office of the sheriff, and the order by the court to transfer all unfinished business to his successor, and the payment by the purchasers of the land, the makers of the note, of the purchase price to the successor.

But in Powell v. Morrison, 35 Mo. 244, the bona fide purchasers for full value of a note given for the deferred payments upon a partition sale, but payable merely to "A. B. sheriff of the county of C," who had received payment of the note from the makers, were held not liable to one of the cotenants in the land sold upon the partition sale for a portion of the proceeds of the note equal to his interest in the land, the court stating that the description as sheriff of the county should be regarded as merely descriptive of the person.

And in Fletcher v. Schaumburg, 41 Mo. 501, it was held that a note payable to "A.

126 Mass. 119; Towne v. Rice, 122 Mass. 67.

Plaintiff's offer of evidence of suspicious circumstances relating to the character and reputation of the depositor and of its dealings was properly excluded.

Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45.

Crosby, J., delivered the opinion of the court:

This action grows out of the dishonest conduct of John B. Lombard, formerly treasurer of the town of Framingham, acting in collusion with one Charles S. Cummings.

The check received from the plaintiff, being payable to the order of "Treas. of Town of Framingham," in legal effect stands upon the same footing as if payable to the town, and the money which it represented belonged to the town, who was the real payee of the check. Commercial Bank v. French, 21 Pick. 486, 32 Am. Dec. 280; Eastern R. Co. v. Benedict, 5 Gray, 561, 66 Am. Dec. 384; Colburn v. Phillips, 13 Gray, 64; Rev. Laws, chap. 73, § 59. Of course, the defendant cannot successfully plead ignorance of the law relating to negotiable instruments as a defense to this action.

The check, then, being the property of the town, the power of the treasurer, Lombard, to negotiate it, was limited to such authority as was given him by law. He had no legal authority to indorse the check for circulation, and knowledge of such want of authority was chargeable to the defendant, which, as the record shows and the defendant admits, dealt with the American Banking Company as being the owner of the check, and not merely as being an agent to collect it for the town. The town treasurer, Lombard, had limited powers as such to indorse the check. He could have indorsed it for deposit and collection to the account of the town, or for the purpose of providing an agent of the town with funds to pay a note or other obligation of the town, then due and outstanding, but it was wholly beyond his power as treasurer to indorse it for circulation.

The record shows that the defendant collected the check and credited the proceeds to the account of its depositor, the American Banking Company. The defendant was charged with knowledge that the check was the property of the town, because that fact was apparent on its face and the indorsement thereon. The defendant dealt with it as the property of the banking company, and thereby became in law liable to the plaintiff for the proceeds thereof. Franklin Sav. Bank v. International Trust Co. 215 Mass. 231, 102 N. E. 363; Brown v. First Nat. Bank, 216 Mass. 298, 103 N. E. 780; Newburyport v. First Nat. Bank, 216 Mass. 304, 103 N. E. 782.

The defendant contends that this case is to be distinguished from Franklin Sav. Bank v. International Trust Co. ubi supra, but we are unable to perceive such distinction. See also Smith v. Cheshire, 13 Gray, 318; Railroad Nat. Bank v. Lowell, 109 Mass. 214; Abbott v. North Andover, 145 Mass. 484, 14 N. E. 754.

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shff." did not impart notice to a bona fide purchaser that the money was payable to the sheriff in his official capacity as such, and that the bona fide holder might recover thereon against the makers.

Under a statute requiring money and securities arising from a sale on partition to be distributed and paid by the sheriff under order of court, the holder of a note payable to the sheriff of a county, with knowledge that the note was given in partition proceedings, is charged with the duty of inquiring whether the court had made an order for the transfer of the note; and where this has not been done, the holder cannot claim title thereto. Rowekamp v. Holters, 6 Ohio Dec. Reprint, 998.

The failure of one in purchasing a note made payable to a township treasurer individually, to make inquiry as to the manner of obtaining the note, is no evidence of bad faith on the part of the purchaser, precluding him from recovering as bona fide holder. Chapman v. Remington, 80 Mich. 552, 46 N. W. 34.

One who pays to the treasurer of a college the amount of a draft drawn in his favor by the college upon the state treasurer for the amount of an appropriation made by the state in favor of the college, having the draft indorsed to him by the treasurer with his official signature, cannot recover the amount of the draft in an action against the state treasurer, as acceptor, or the college, as drawer. Hardy v. Gardere, 2 Rob. (La.) 154. On the question of notice to the plaintiff of the character in which the treasurer held the draft, it is stated that he appears to have been conscious that the authority of the payee was an official one only, which required his official signature on the back of the draft. The draft involved in this case was drawn to the treasurer of the college individually.

If the one taking the paper does so in payment of an individual indebtedness, he is charged with notice. Thus, one who receives a draft payable to "A, Treasurer," knowing that the payee is state treasurer, in payment of an individual indebtedness, is charged with notice of the ownership of the money. Wolffe v. State, 79 Ala. 201, 58 Am. Rep. 590.

This is also the holding in Newburyport v. Spear, 204 Mass. 146, 134 Am. St. Rep. 652, 90 N. E. 522, in case of the check of a city treasurer, drawn to his own order in payment of a personal debt. W. A. E.

L.R.A.1915B.

The defendant relies upon the doctrine that where one of two innocent parties must suffer by the fraud of a third person, the loss must rest where it falls, especially if it falls upon the party whose negligence causes the loss. The case of Gloucester Bank v. Salem Bank, 17 Mass. 33, is cited to sustain this principle of law. In that case the defendant bank bought certain notes purporting to have been issued by the plaintiff bank, but upon which the name of the president had been forged. These notes were paid by the plaintiff, and fifteen days afterwards the plaintiff, having discovered the forgeries, returned the notes to the defendant, and later brought an action against the defendant to recover the amount so paid. Both the plaintiff and the defendant in that case were equally innocent and ignorant of the invalidity of the notes. It was held that as the plaintiff kept the notes for fifteen days after they were received, it was guilty of that degree of negligence which precluded it from calling upon the defendant to make good the notes, and that the circumstances showed an adoption of them by the plaintiff as its own notes, and that as the notes purported to have been issued by the plaintiff, who had the best means of detecting their invalidity, nothing short of immediate notice and demand for payment could authorize the plaintiff to maintain an action for the money paid.

The principle is well established that in such cases, where no fault or negligence is imputable to either party, generally the loss will remain where the transaction has placed it. Mackintosh v. Eliot Nat. Bank, 123 Mass. 393, 25 Am. Rep. 108, cited by the defendant, was a case where the clerk of the plaintiff forged the plaintiff's signature to three checks, the blank forms of which were taken from the plaintiff's check book. One of the checks was presented by the clerk to the defendant bank and cashed; and the other two were delivered to a third person, and paid to the latter by the defendant through the clearing house. It was held that the defendant bank must bear the loss, and that the plaintiff was not bound by his clerk's unauthorized acts.

First Nat. Bank v. First Nat. Bank, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44, also relied on by the defendant, was an action wherein the plaintiff sought to recover from the defendant the amount of a forged check in the name of one of the plaintiff's customers. The amount of this check afterwards was redeemed by the plaintiff to the defendant. It was found that the defendant was guilty of negligence in cashing the check without more inquiry as to its genuineness, and that the plaintiff was also negligent in not having more quickly discovered the forgery, and in not having given notice thereof to the defendant. It was further found (151 Mass. 284), "that in fact this negligence has not prejudiced the defendant. . . . The plaintiff acted with entire promptitude when the forgery was discovered, and no negligence . . . [of it] has prejudiced the defendant." It was accordingly held that the plaintiff was entitled to recover.

There is nothing in the case of Brown v. Newburyport, 209 Mass. 259, 95 N. E. 504, Ann. Cas. 1912B, 495, favorable to the defendant's contention. The cases cited by the defendant and above referred to relate to forgeries of commercial paper where the paper appears regular upon its face, and there is a duty to notify the bank promptly, that it may take measures to protect itself; but where, as in this case, the infirmity of the check is apparent upon its face, with the indorsement thereon, such cases have no application.

In view of the undisputed facts in this case the principle that, where one of two innocent persons must suffer by reason of the fraud of a third, the loss must rest where it falls, is not applicable.

The defendant also contends that delay and negligence on the part of the plaintiff in asserting its claim have released the defendant from liability, if such liability ever existed. There is nothing in the record to show that the defendant's position is different from what it would have been if an action had been instituted against it by the plaintiff immediately after the check had been received and collected by the defendant, and its proceeds placed to the credit of the American Banking Company.

In view of the admitted facts, the liability of the defendant is established.

In accordance with the terms of the report, judgment must be entered for the plaintiff on the verdict.

So ordered.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

MODERN WOODMEN OF AMERICA, Plff. in Err.,
v.
MARGARET GHROMLEY, Admrx., etc., of Christopher F. Green, Deceased.

(— Okla. —, 139 Pac. 306.)

Evidence — sufficiency — presumption of death.

1. G., whose age at the time is not known, but who was a mere youth, left his home in

Headnotes by SHARP, C.

Kentucky, going to Texas. At the time of his departure he left a brother four years his junior, an inmate of an orphans' home. Upon reaching eighteen years of age, G. returned to his former home in Kentucky, where he spent three days trying to get word of his brother, but failed. It is not shown that the brothers had ever corresponded with each other, or that the younger knew of the elder's whereabouts. The year previous to the brother's return, the yellow fever had visited the locality of the orphans' home, causing a number of deaths. It was not proven for what length of time the younger brother remained in the orphans' home, or whether he was an inmate thereof on the visit of the pestilence, nor did it appear of whom inquiry was made, or the extent thereof. Held, the facts proved were insufficient to raise the presumption of death, arising from an absence from home, unheard from, for a period of seven years.

Same — overcoming presumption of life.

2. In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry.

Death — what necessary to establish.

3. The inquiry should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to receive tidings if the party were alive, whether members of his family or not; and, in general, the inquiry should exhaust all patent sources of information, and all others which the circumstances of the case suggest.

Evidence — presumption of death — person at home.

4. The presumption of death is one that generally is applied only to those who were absentees from their home; but does not authorize such absent person or persons to presume, therefore, that any one of those remaining at the place which he or they have left has died.

Same — person of tender years.

5. With even greater force should the rule last announced be confined in the case of those of tender years, such as the separation of two brothers during their boyhood days.

Same — presumption of heirs.

6. It is a presumption of law that a person dying intestate has left heirs capable of succeeding to his estate.

(February 28, 1914.)

Note. — Presumption of death from absence.

I. Presumption in general.
  a. At common law, 729.
  b. Louisiana rule, 734.
  c. Under statute.
    1. Kentucky, Missouri, and West Virginia, 735.
    2. Texas, 736.
    3. Mississippi, 737.
    4. New Jersey, 737.
    5. Indiana, 737.
    6. New York and South Dakota, 738.
II. Circumstances strengthening presumption, 739.
III. Necessity of inquiry to raise presumption, 740.
IV. Failure to communicate accounted for, 740.
V. Who must be without tidings, 741.
VI. Presumption rebuttable.
  a. In general, 741.
  b. Admissibility of evidence in rebuttal, 742.
  c. Sufficiency of circumstances to rebut presumption, 743.
VII. Burden of proof, 744.

As to the presumption as to the time of death of one presumed to be dead after seven years' absence, unheard of, see the note to Butler v. Supreme Court, I. O. O. F. 26 L.R.A.(N.S.) 294, which is supplemented by the note to McLaughlin v. Sovereign Camp, W. W. post, 756.

As to the abridgment of time necessary to raise presumption of death from absence, L.R.A.1915B.

see the note to Coe v. National Council K. L. S. post, 744.

On the question of the place from which absence must be shown to raise presumption of death, see the note to Marquet v. Ætna L. Ins. Co. post, 749.

As to presumptions flowing from marriage ceremony, including conflict of presumptions, see notes to Megginson v. Megginson, 14 L.R.A. 540; Smith v. Fuller, 16 L.R.A.(N.S.) 98; and Vreeland v. Vreeland, 34 L.R.A.(N.S.) 940.

I. Presumption in general.

a. At common law.

The following cases are authority for the general proposition that a presumption of death arises in the case of one who is absent from his last or usual place of residence, and from whom no tidings have been received, for seven years:

Cal.—Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300; Garwood v. Hastings, 38 Cal. 216.

Del.—Crawford v. Elliott, 1 Houst. (Del.) 465; Garden v. Garden, 2 Houst. (Del.) 574; Prettyman v. Conaway, 9 Houst. (Del.) 221, 32 Atl. 15.

D. C.—Baden v. McKenny, 7 Mackey, 268; Hamilton v. Rathbone, 9 App. D. C. 48, on former appeal 4 App. D. C. 475; Posey v. Hanson, 10 App. D. C. 496.

Ga.—Doe ex dem. Cofer v. Roe, 1 Ga. 538; Adams v. Jones, 39 Ga. 479; Watson v. Adams, 103 Ga. 733, 30 S. E. 577; Hansen v. Owens, 132 Ga. 648, 64 S. E. 800.

Ill.—Whiting v. Nicholl, 46 Ill. 230, 92

ERROR to the District Court for Bryan County to review a judgment in plaintiff's favor in an action to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. **Truman Plantz, George L. Bowman,** and **George G. Perrin,** for plaintiff in error:

The contract in question consists of the application, the benefit certificate, and the by-laws of plaintiff in error.

Fitzgerald v. Metropolitan Acci. Asso. 106 Iowa, 457, 76 N. W. 809; Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222; Fullenwider v. Supreme Council R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; 1 Bacon, Ben. Soc. 3d ed. § 161; Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 830, Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369.

Members of fraternal beneficiary societies and their beneficiaries are presumed to know the by-laws of the society.

1 Bacon, Ben. Soc. 3d ed. § 81; Benes v. Supreme Lodge, K. L. H. 231 Ill. 134, 14 L.R.A.(N.S.) 540, 121 Am. St. Rep. 304, 83 N. E. 127; Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 830; Fry v. Charter Oak L. Ins. Co. 31 Fed. 197.

When statutory restrictions are placed upon the class of persons to be designated as beneficiaries in the benefit certificate of a fraternal beneficiary society, such restrictions are binding and cannot be waived.

Am. Dec. 248; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; Reedy v. Millizen, 155 Ill. 636, 40 N. E. 1028; Policemen's Benev. Asso. v. Ryce, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764, affirming 115 Ill. App. 95; Donovan v. Major, 253 Ill. 179, 97 N. E. 231, reversing on another point, 160 Ill. App. 195; Robinson v. Robinson, 51 Ill. App. 317; Litchfield v. Keagy, 78 Ill. App. 398.

Ind.—Cooper v. Cooper, 86 Ind. 75; Connecticut Mut. L. Ins. Co. v. King, 47 Ind. App. 591, 93 N. E. 1046.

Iowa.—Seeds v. Grand Lodge, A. O. U. W. 93 Iowa, 175, 61 N. W. 411; Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493; Oziah v. Howard, 149 Iowa, 199, 128 N. W. 364.

Kan.—Ryan v. Tudor, 31 Kan. 366, 2 Pac. 797; Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240; Farington v. Modern Woodmen, 82 Kan. 841, 109 Pac. 187.

Ky.—Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694.

Me.—White v. Mann, 26 Me. 361; Stevens v. McNamara, 36 Me. 176, 58 Am. Dec. 740; Wentworth v. Wentworth, 71 Me. 72; Johnson v. Merithew, 80 Me. 111, 6 Am. St. Rep. 162, 13 Atl. 132.

Md.—Tilly v. Tilly, 2 Bland, Ch. 436; Schaub v. Griffin, 84 Md. 557, 36 Atl. 443.

Mass.—Newman v. Jenkins, 10 Pick. 515; Loring v. Steineman, 1 Met. 204; Flynn v. Coffee, 12 Allen, 133.

Mich.—Bailey v. Bailey, 36 Mich. 181.

Minn.—Spahr v. Mutual L. Ins. Co. 98 Minn. 471, 108 N. W. 4.

Mo.—Lajoye v. Primm, 3 Mo. 529; Hancock v. American L. Ins. Co. 62 Mo. 26; Flood v. Growney, 126 Mo. 262, 28 S. W. 860; Dickens v. Miller, 12 Mo. App. 408; Biegler v. Supreme Council, A. L. H. 57 Mo. App. 419; Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69.

Mont.—Re Liter, 19 Mont. 474, 48 Pac. 753.

Neb.—Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341.

N. H.—Smith v. Knowlton, 11 N. H. 191; Brown v. Jewett, 18 N. H. 230; Forsaith v. Clark, 21 N. H. 409; Mooers v. Bunker, 29 L.R.A.1915B. N. H. 420; Bennett v. Sloman, 70 N. H. 289, 48 Atl. 283.

N. Y.—Eagle's Case, 3 Abb. Pr. 218, 4 Bradf. 117; Re Sullivan, 51 Hun, 378, 4 N. Y. Supp. 59; Cromwell v. Phipps, 6 Dem. 60, 1 N. Y. Supp. 276.

N. C.—Den ex dem. Bowden v. Evans, 3 N. C. (2 Hayw.) 222; Lewis v. Mobley, 20 N. C. 467 (4 Dev. & B. L. 323) 34 Am. Dec. 379; Moore v. Parker, 34 N. C. (12 Ired. L.) 123; Dowd v. Watson, 105 N. C. 476, 18 Am. St. Rep. 920, 11 S. E. 589.

Ohio.—Rice v. Lumley, 10 Ohio St. 596.

Pa.—Burr v. Sim, 4 Whart. 150, 33 Am. Dec. 50; Bradley v. Bradley, 4 Whart. 173; Duffy's Estate, 4 Pa. Dist. R. 147; Rhodes's Estate, 10 Pa. Co. Ct. 386; Wanner's Estate, 1 Woodw. Dec. 112; Whiteside's Appeal, 23 Pa. 114; Holmes v. Johnson, 42 Pa. 159; Esterly's Appeal, 109 Pa. 222; Francis v. Francis, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; Freeman's Estate, 227 Pa. 154, 75 Atl. 1063; Ancient Order, U. W. v. Mooney, 230 Pa. 16, 79 Atl. 233.

R. I.—Re Truman, 27 R. I. 209, 61 Atl. 598; Hackett's Appeal, 27 R. I. 587, 65 Atl. 268.

S. C.—Burns v. Ford, 1 Bail. L. 507; Griffin v. Southern R. Co. 66 S. C. 77, 44 S. E. 562; Craig v. Craig, 1 Bail. Eq. 102.

Tenn.—Puckett v. State, 1 Sneed, 355; Shown v. McMackin, 9 Lea, 601, 42 Am. Rep. 680; Ferrell v. Grigsby, — Tenn. —, 51 S. W. 114.

Tex.—Primm v. Stewart, 7 Tex. 178.

Wash.—Butler v. Supreme Court, I. O. O. F. 53 Wash. 118, 26 L.R.A.(N.S.) 293, 101 Pac. 481.

Wis.—Cowan v. Lindsay, 30 Wis. 586; Whiteley v. Equitable L. Assur. Soc. 72 Wis. 170, 39 N. W. 369.

U. S.—Moffit v. Varden, 5 Cranch, C. C. 659, Fed. Cas. No. 9,689; Montgomery v. Bevans, 1 Sawy. 653, Fed. Cas. No. 9,735; Fuller v. New York L. Ins. Co. 118 C. C. A. 227, 199 Fed. 897; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

Can.—Giles v. Morrow, 1 Ont. Rep. 527; Re McNeil, 12 Ont. L. Rep. 208, 7 Ont. Week. Rep. 563; Wallace v. Potter (Alta.) 7 D. L. R. 114, 22 West. L. Rep. (Can.) 281.

Gillam v. Dale, 69 Kan. 362, 76 Pac. 861.

It follows, therefore, that the beneficiary must be one designated in accordance with the by-laws of the society and the statute of the state in which the society is incorporated.

Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 399; Kirkpatrick v. Modern Woodmen, 103 Ill. App. 468; Gillam v. Dale, 69 Kan. 362, 76 Pac. 861; 2 Joyce, Ins. 744; 1 Cooley, Briefs on Ins. 799, 803; Niblack, Ben. Soc. 2d ed. 312; 1 Bacon, Ben. Soc. 3d ed. 244.

Defendant has authority to create a benefit fund only for the classes of beneficiaries designated in its by-laws and the statute of the state where it is organized.

Gillam v. Dale, 69 Kan. 362, 76 Pac. 862; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 676; Alexander v. Parker, 144 Ill. 363, 19 L.R.A. 187, 33 N. E. 183; Murphy v. Nowak, 223 Ill. 301, 7 L.R.A.(N.S.) 397, 79 N. E. 112; Supreme Council, C. B. L. v. McGinness, 59 Ohio St. 531, 53 N. E. 54.

Even if one is designated as the beneficiary, he cannot recover on the benefit certificate if he is not within the classes of beneficiaries provided by the by-laws and the statutes of the incorporating state.

Boice v. Shepard, 78 Kan. 308, 96 Pac. 486; Baldwin v. Begley, 185 Ill. 190, 56 N. E. 1065; Supreme Council, A. L. H. v.

Eng.—Re Aldersley [1905] 2 Ch. 181, 74 L. J. Ch. N. S. 548, 92 L. T. N. S. 826; Re Benham, L. R. 4 Eq. 416, 36 L. J. Ch. N. S. 502, 16 L. T. N. S. 349, 15 Week. Rep. 741; Doe ex dem. George v. Jesson, 6 East, 80, 2 Smith, 236, 8 Revised Rep. 408; Doe ex dem. Knight v. Nepean, 5 Barn. & Ad. 86, 2 Nev. & M. 219, 2 L. J. K. B. N. S. 150; Grissall v. Stelfox, 9 Jur. 890; Hickman v. Upsall, L. R. 20 Eq. 136, 23 Week. Rep. 776; Re Beasney, L. R. 7 Eq. 498, 38 L. J. Ch. N. S. 159, 19 L. T. N. S. 630; Re Lyford, 17 Jur. 570; Re Phene, L. R. 5 Ch. 139, 39 L. J. Ch. N. S. 316, 18 Week. Rep. 303, 22 L. T. N. S. 111; Prudential Assur. Co. v. Edmonds, L. R. 2 App. Cas. 487; Thorne v. Rolff, 2 Dyer, 185; Mullaly v. Walsh, Ir. Rep. 6 C. L. 314; Lambe v. Orton, 29 L. J. Ch. N. S. 286, 6 Jur. N. S. 61, 1 L. T. N. S. 290, 8 Week. Rep. 111; Re Lewes, L. R. 6 Ch. 356, 40 L. J. Ch. N. S. 602, 24 L. T. N. S. 533, 19 Week. Rep. 617; Dunn v. Snowden, 32 L. J. Ch. N. S. 104, 2 Drew. & S. 201, 7 L. T. N. S. 558, 11 Week. Rep. 160; Howe v. Maclean, 9 L. J. Exch. in Eq. N. S. 1.

MODERN WOODMEN v. GHROMLEY is in accordance with the above rule.

The presumption of death has been held to arise in the case of—

—a son who was last heard of by his parents fifteen years before, at a time just prior to his setting out for the gold diggings of Australia, Re Webb, Ir. Rep. 5 Eq. 235;

—a person who had gone beyond the sea, and had not been heard from for a number of years, Masten v. Cookson, 2 Eq. Cas. Abr. 414, ¶ 14;

—one who had gone to sea twenty-eight years before, and had not been heard from, Dixon v. Dixon, 3 Bro. Ch. 510;

—a passenger on board a vessel, where neither the vessel nor any person on board had been heard of for forty years, Bowditch v. Jordan, 131 Mass. 321;

—a seafaring man who had gone to sea and had not been heard of by his wife and children for more than seven years, Burleigh v. Mullen, 95 Me. 423, 50 Atl. 47;

—a person who had gone abroad seventeen years before, and had not been heard of, Rickman v. Ives, 1 Jur. 234, 6 L. J. Ch. N. S. 197;

—a husband who had left home and had gone to Chicago to seek work, whence he wrote three times, and was last heard of in a letter in which he said he was leaving Chicago, where it was shown that his domestic relations were friendly, Somerville v. Ætna L. Ins. Co. 21 Ont. L. Rep. 276, 16 Ont. Week. Rep. 301;

—one who had left wife and family to obtain temporary work, and had not returned and was not heard of for seven years, Re Stockbridge, 145 Mass. 517, 14 N. E. 928;

—a man who had left his family and had not been heard from for a number of years, and concerning whom no information could be obtained, Marden v. Boston, 155 Mass. 359, 29 N. E. 588;

—a man who is last seen suffering from a disease which ordinarily proves fatal, and is not heard of for seven years, Carpenter v. Modern Woodmen, — Iowa, —, 142 N. W. 411;

—one who had been absent from his usual place of abode or resort for seven years, and from whom no intelligence had been received within that time, Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068;

—a child which had been taken by its mother and stepfather to the place where the stepfather was engaged in a temporary occupation, and had not been heard of for seven years after the death of its mother and stepfather, Stevenson v. Montgomery, 263 Ill. 93, 104 N. E. 1075;

—a small boy who was sent West a number of years before, and had not been heard of since, Re Barr, 38 Misc. 355, 77 N. Y. Supp. 935;

—a resident of Brazil who set out for the southern frontier of his country, but never reached his destination, and was never heard of again, Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537;

—one who had not been heard of since he had "adhered to the enemy, and gone out of the United States" at the end of the Revo-

Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1049; Pilcher v. Puckett, (Modern Woodmen v. Puckett) 77 Kan. 284, 17 L.R.A.(N.S.) 1083, 94 Pac. 135.

Administratrix is not a proper party plaintiff, and is not entitled to maintain the action.

Pilcher v. Puckett, and Boice v. Shepard, supra; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; Burke v. Modern Woodmen, 2 Cal. App. 611, 84 Pac. 275; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Grand Lodge, A. O. U. W. v. Fisk, 126 Mich. 356, 85 N. W. 875; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. 19; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; 1 Cooley, Briefs on Ins. 820; 1 Bacon, Ben. Soc. 3d ed. 237.

If the petition does not show that the plaintiff is a legal beneficiary, the petition is bad on demurrer.

Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 400, 2 Ann. Cas. 660; Cook v. Supreme Conclave, I. O. H. 202 Mass. 85, 88 N. E. 584; Pine v. Brotherhood of the Union, 77 N. J. L. 344, 71 Atl. 1130.

The designation, "member of family," in a benefit certificate, means that the beneficiary is a dependent upon the member for support and sustenance, or, related to him by blood or consanguinity.

Supreme Council, C. B. L. v. McGinness,

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lution, a number of years before, McNair v. Ragland, 16 N. C. (1 Dev. Eq.) 533;

—a tenant for life who was not seen or heard of for fourteen years by a person residing near the estate, Doe ex dem. Lloyd v. Deakin, 4 Barn. & Ald. 433, 23 Revised Rep. 335;

—one who has been absent and unheard of for twenty years, Matthews v. Simmons, 49 Ark. 468, 5 S. W. 797.

"Where a person leaves home with the expectation of returning thereto within a short time, and he remains away, and his absence is unexplained and unaccounted for, and no intelligence is received from him and he is not heard from, and his whereabouts cannot be ascertained, although diligent search and inquiry are made in the vicinity of his home and at such places as he would be likely to go, and from such persons as he would be likely to meet and know, and nothing is heard from or of him, and he remains away from his family and home for the period of seven years, a presumption arises from these facts that he is dead." Kennedy v. Modern Woodmen, 243 Ill. 560, 28 L.R.A.(N.S.) 181, 90 N. E. 1084.

Thus, where it is shown that the missing person left home under such circumstances as to make it appear that he intended to return and make his home in the state, and that he has not been heard of for seven years by his mother, who employed an attorney to search for him, in addition to making inquiries herself, the evidence is such as should be admitted to the jury on the question of the absentee's death. Sizer v. Severs, 165 N. C. 500, 81 S. E. 685.

And it is held in McLaughlin v. Sovereign Camp, W. W. post, 756, that the evidence is sufficient to support a finding of death, where it is shown that the absentee was a young unmarried man having no fixed place of residence other than with his family, to whom he wrote every month and sent money; that he had gone to Peru and had started into the mining regions to go prospecting or to find some occupation; and that for the seven years since that time he had never been heard of, and that letters addressed to him were returned uncalled for.

And it is held in Pierson v. Modern Woodmen, 125 Minn. 159, 145 N. W. 806, that the evidence is sufficient to support a finding of death, where it is shown that when last heard from the missing man was ill and without funds, and that neither his family nor his parents have heard of him for seven years, although inquiries have been made.

Where it is shown that a man left home in the night with a team of horses, leaving a note stating that he was going "to parts unknown," and that a money order covering the amount of his lodge dues was subsequently received by his family marked "my lodge dues," but that he was never heard of nor seen again notwithstanding inquiries were made among his relatives, the evidence is held sufficient to sustain a finding that he was presumed dead. Mitchell v. Kaufman, 95 Neb. 108, 145 N. W. 247.

Evidence showing the absence for seven years of the missing person, from the city in which he had been employed, should have been submitted to the jury on the question of the presumption, although there was testimony from which the jury might have inferred an intention of not returning to that place. Heagany v. National Union, 143 Mich. 186, 106 N. W. 700.

In Wilcock v. Purchase, 9 Jur. 891, note, a party entitled to a fund in the event of the death of a third person was granted the fund upon proof of the disappearance of such third person fourteen years before, and no knowledge of him since.

The complete disappearance of four persons who left the state twenty years before, together with the reports of their deaths, was held, in Vaughan v. Langford, 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91, to constitute sufficient prima facie evidence of their deaths.

The court would not, in Walsh v. Metropolitan L. Ins. Co. 162 Mo. App. 546, 142 S. W. 815, overturn the finding of the jury that a soldier who had not been heard of for more than seven years was dead, where the evidence showed that, upon being sent

59 Ohio St. 531, 53 N. E. 54; Norwegian Old People's Home Soc. v. Wilson, 176 Ill. 94, 52 N. E. 43; Modern Woodmen v. Comeaux, 79 Kan. 493, 25 L.R.A.(N.S.) 814, 101 Pac. 1, 17 Ann. Cas. 865; Lister v. Lister, 73 Mo. App. 106; Supreme Commandery, U. O. G. C. v. Donaghey, 75 N. H. 197, 72 Atl. 419; Tepper v. Supreme Council, R. A. 61 N. J. Eq. 638, 88 Am. St. Rep. 449, 47 Atl. 460; Supreme Lodge, K. H. v. Nairn, 60 Mich. 44, 26 N. W. 828.

There was no evidence upon which the inference of the death of the brother of deceased could arise.

Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570; Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240; Modern Woodmen v. Graber, 128 Ill. App. 585.

Messrs. **Utterback, Hayes, & MacDonald** for defendant in error.

Sharp, C., filed the following opinion:

The benefit certificate on which plaintiff's action was brought was issued by defendant to Christopher F. Green, March 17, 1908, and was made payable, in case of his death while a beneficial member of said society in good standing, to his beneficiary or beneficiaries, to wit, his legal heirs. The assured died November 23, 1909, while in good standing in said society. Neither the plaintiff, Margaret Ghromley, nor her sisters, Louisa Halley and Mary Elizabeth Halley, were related to the assured

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to Cuba, he expressed an intention of returning to the home of his brothers and sisters, in which he had always lived, where there was no evidence of domestic infelicity, and where his employment was open for him. The court attached very little importance to the fact that the missing man had been dishonorably discharged from the army.

Where it appears that the missing man crossed to an island near his home in a sailboat just before a violent storm, and that he was never seen again; but that his boat with sail set, containing his cap, was subsequently found, the evidence is sufficient to raise the presumption of death, without the statement of an aunt in England to the effect that she had not heard from him. Re Ancient Order, U. W. 18 Ont. L. Rep. 129, on former appeals, 11 Ont. Week. Rep. 1078, 12 Ont. Week. Rep. 153, 13 Ont. Week. Rep. 306.

"Where, however, as in the case at bar, there is a disappearance and silence for seven years, under circumstances from which no reasonable mind could draw the inference that the absence was voluntary; where the absence is wholly unexplained and unaccounted for on any rational theory save that of death; where a man of industrious habits, and attached to his family, leaves it without any provocation, and never communicates with them thereafter; where reasonable search is made immediately after the disappearance, and is kept up for some time without furnishing any clew whatever; where, in fine, all these things concur, the court is justified in instructing the jury that, upon a finding of these facts, they may presume the absentee to be dead after an expiration of seven years." Biegler v. Supreme Council, A. L. H. 57 Mo. App. 419.

In Rhodes's Estate, 10 Pa. Co. Ct. 386, letters of administration were granted upon proof of absence unheard of for seven years from the place of residence.

And in Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108, the court says: "The fact that a person has been absent and not heard from for 7 years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate."

But in Re Jones, 70 Misc. 154, 128 N. Y. Supp. 477, it is held that the common-law presumption of death arising from absence "is not alone sufficient evidence of death to confer jurisdiction upon a surrogate's court to entertain a proceeding for the probate of the absent person's will, or to grant letters of administration upon his estate."

In White v. Emigrant Industrial Sav. Bank, 146 App. Div. 591, 131 N. Y. Supp. 311, affirmed in 205 N. Y. 571, 98 N. E. 1119, however, the court says that "the general rule that an absentee who has not been heard of for seven years may be presumed to be dead at the expiration of that period, for the purpose of administering his estate, is well settled."

See, in this connection, Re Nolting, 43 Hun, 456; Re Smith, 77 Misc. 76, 136 N. Y. Supp. 825; Re Matthews, 75 Misc. 449, 136 N. Y. Supp. 636, I. c, 6, infra.

The matter of the jurisdiction of probate courts to grant administration is, of course, not within the scope of this note.

In Miller v. Beates, 3 Serg. & R. 490, 8 Am. Dec. 658, an early case, Tilghman, Ch. J., says: "I am not for fixing, at present, any precise period after which a presumption of death arises. But I think myself safe in saying that, in the present instance, considering that fourteen years and nine months had elapsed between John G. Schlosser's being last heard of, and the commencement of this action; that when last heard of he was at a place between which and the city of Philadelphia there was a free communication, and it was then his intent to return soon to Philadelphia; his being now in life would be contrary to the usual course of things; that the jury might and ought to presume his death."

Absence does not raise the presumption of a man's death; but it should be considered in connection with surrounding circumstances, such as the failure of his family and friends to learn his whereabouts, his

other than it was claimed they were each members of the family of said Christopher F. Green, and had lived with him as members of his family for many years, and had been during said time, and were at the time of his death, each and all dependent upon him for a livelihood and support.

The by-laws of defendant society, among other provisions, contained the following: "Benefit certificates shall be made payable only to the wife, surviving children, or some other person or persons specifically named in said benefit certificate as beneficiary, who are related to the member as heir, blood relative, or person dependent upon him, or member of his family, whom the applicant shall designate in his application." And further specifically provided that no payment should be made upon any benefit certificate to any person who did not bear to the assured, at the time of his death, the relationship, either of wife, surviving child, heir, blood relative, or person dependent upon, or member of, the family of the member. Thus, it will be seen that while persons dependent upon a member of the society, or who were members of his family, were eligible as beneficiaries, the by-law named further provided that they must be specifically mentioned in the certificate as such beneficiaries. The controlling statute at the time governing beneficiary associations in this state (§ 3889, Comp. Laws 1909) provided that payment of death benefits should be to the families, heirs, blood relatives,

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character and business relations, together with the fact that he was last seen near the place where a murder is supposed to have been committed; and the conclusion of life or death arrived at from the whole facts or circumstances. Sensenderfer v. Pacific Mut. L. Ins. Co. 19 Fed. 68.

In Garwood v. Hastings, 38 Cal. 216, it was held, without discussion of the facts, that one who had left for a foreign country and had not been heard of by his wife for seventeen years should be presumed dead. Sprague, J., dissented upon the ground that the wife, soon after his departure, removed from New Jersey to California under an assumed name, and had always endeavored to conceal herself from her husband.

So, it is held in Thomas v. Thomas, 16 Neb. 553, 20 N. W. 846, on subsequent appeal, 19 Neb. 81, 27 N. W. 84, that where a wife does not remain in the place where she resided with her husband when he disappeared, no presumption of his death arises from her failure to hear from him for seven years.

And where a wife removes from the place where her husband is living, and does not hear from him for seven years, no presumption of his death arises. Com. v. Thompson, 11 Allen, 23, 87 Am. Dec. 685, on former appeal, 6 Allen, 591, 83 Am. Dec. 653.

Where a woman left home under a cloud on her character; where she is not shown to be absent from her new domicil; and where no inquiries were made for her, there is no presumption that she is dead. Schwarzhoff v. Necker, 1 Posey Unrep. Cas. (Tex.) 325.

The presumption was held not to be established concerning an absentee upon mere proof that his sons had not heard from him, without any showing that his wife had not heard from him, in spite of the fact that he had claimed to be leaving to get away from his wife, where it was shown that the wife was rich and that the sons were poor, and that the father owed them money. Re Dancey, 11 Ont. Week. Rep. 833.

Absence for seven years does not raise a presumption of death where the absentee leaves home because his wife refuses to live with him, goes to another town where he represents himself as unmarried, and, on the whole, appears to be wanting in those qualities which usually draw men to their families. Seeds v. Grand Lodge, A. O. U. W. 93 Iowa, 175, 61 N. W. 411.

No presumption of death arises from absence from home for two years although the man is in good standing and repute in the community and friendly with his family. Martin v. Union Mut. L. Ins. Co. 13 Wash. 275, 43 Pac. 53.

b. Louisiana rule.

Under the civil law death is never presumed from absence, but an absentee, in the absence of proof of death, is presumed to live to the age of one hundred years, which is considered the most remote period of the ordinary life of man. Hayes v. Berwick, 2 Mart. (La.) 138, 5 Am. Dec. 727; Sassman v. Aime, 9 Mart. (La.) 257.

And it is held in Boe v. Filleul, 26 La. Ann. 126, that no presumption arises from mere absence for a number of years.

In Vogel's Succession, 16 La. Ann. 140, 79 Am. Dec. 571, the court mentions a possible exception to this rule where the disappearance is "of such a character as to force on the mind the irresistible conviction of death," but holds that a case is not made out within the rule from evidence of the sudden disappearance of a man who was laboring under a depression of mind produced by the belief of a coming crisis in the financial world, although he had not intended taking a trip, did not have sufficient money or clothes for a trip, and enjoyed happy family relations.

And in Martinez v. Vives, 32 La. Ann. 305, it is conceded that "there are occurrences—as a wreck, a battle, or the like—which would authorize a court in presuming the death of one known to have been exposed to the perils of either."

So, in Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 So. 682, in holding that the disappearance of a person *per se* creates no presumption of death, the court says: "We take it that it must first be shown by legal

affianced husband or wife of, or to persons dependent upon, the member.

Plaintiff's action was predicated upon the theory that at the time of the death of Christopher F. Green he had no legal heirs, and that plaintiff and her two sisters being persons dependent upon, and members of, the assured's family, were entitled to the proceeds of the beneficiary certificate, in pursuance of the by-law above quoted.

The three principal grounds upon which a reversal of the judgment below is urged are: (1) That the administratrix was not entitled to sue; (2) that there was no sufficient evidence of the death of Christopher F. Green's brother; (3) that Margaret Ghromley and her sisters were not, in any event, legal beneficiaries under the beneficiary certificate. Our conclusions render unnecessary a determination of the first proposition, and the remaining questions will be considered together.

The application for membership and benefits in the defendant society, signed by the assured on February 20, 1908, as already observed, named as the beneficiaries the assured's legal heirs. In answer to numerous questions contained in the application, the assured stated that he had a living brother, age thirty-nine years, whose then condition of health was good. It was not shown whether he had any living uncles or aunts, or more distant kindred, and the only proof offered as to the death of the brother was the testimony of Margaret Ghromley, concerning statements made to her by the de-

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evidence that the absent person was exposed to certain perils to life, and, since such exposure, has never been heard of, before any presumption of death can arise."

Thus, where a man who was seasick was last seen going out of his stateroom for the avowed purpose of vomiting over the vessel's side, the circumstances of his disappearance, together with the absence of four years, justify a belief that he is dead. Boyd v. New England Mut. L. Ins. Co. 34 La. Ann. 848.

And it is held in Jamison v. Smith, 35 La. Ann. 609, that the presumption of death from absence is justified as to one who leaves the city in which his mother and relatives live, and in which he has spent the whole thirty years of his life, and goes to take part in a war from which he never returns.

"Where a person's home was in the city of New Orleans, where his wife and only child, a girl, resided, and he is shown to have left them on shipboard for a near-by port where yellow fever was raging, and the boat is shown to have left there for some other more distinct port, and neither the boat nor the person ever returned or was heard of again, the lapse of thirty-five years and absence under such circumstances are sufficient to justify the conclusion, in a case like this, that the man is dead." Sterrett v. Samuel, 108 La. 346, 32 So. 428.

c. Under statute.

1. Kentucky, Missouri, and West Virginia.

The Missouri statute provides that "if any person who shall have resided in this state go from, and do not return to, this state, for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time." The Kentucky and West Virginia statutes are similar.

This statute applies only to people who leave the state, and does not operate to exclude evidence which may have the effect of establishing the common-law presumption of death from absence. Bank of Louisville v. Public School Trustees, 83 Ky. 219, 5 S. W. 735.

So, it is held in Ironton Fire Brick Co. v. Tucker, 26 Ky. L. Rep. 532, 82 S. W. 241, rehearing denied in 26 Ky. L. Rep. 1021, 82 S. W. 1009, that the common-law rule, and not the statute, applies to a resident of Ohio who goes to Indiana, where he disappears.

And it is held in Flood v. Growney, 126 Mo. 262, 28 S. W. 860, that the statute has no application to a person who never resided in the state, but that the common-law rule applies to him.

In accordance with this it is held in Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924, that where a woman left her father's home in Missouri and went to Texas, where her disappearance took place, whether she be regarded as resident of Missouri or not, the failure to hear from her for seven years raised the presumption of death under the common-law rule.

The Missouri statute does not apply where there is no proof that the absentee left the state. Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69.

Thus, it does not apply to a person who has been absent from his home in Missouri, unheard of for seven years, where he was in the state when last heard of; but the case comes within the common-law rule. Dickens v. Miller, 12 Mo. App. 408; Biegler v. Supreme Council, A. L. H. 57 Mo. App. 419.

"West" may mean a point within the state as well as without, and mere proof that the missing person intended going "West" does not bring the case within the statute, which applies only to persons who leave the state. Carter v. Metropolitan L. Ins. Co. 158 Mo. App. 368, 138 S. W. 49.

It is held in Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909, that the preceding decisions to the effect that the statute does not apply until it is shown that the absentee left the state "do not mean that the fact must be established by direct and positive

ceased during his lifetime, and which testimony is both meager and unsatisfactory. From it we gather that when Christopher F. Green was about twenty-one years of age he came from somewhere in the state of Texas to the home of the plaintiff, her sisters, and then living brother, at the time residing in said state, and thereafter continued to make his home with the , first in Texas, and afterwards in what is now Oklahoma, until the day of his death twenty-four years thereafter; that Green had told her that when he left his home in Kentucky he left a younger brother in an orphans' home; that he went off and stayed until he was eighteen, when he returned and spent about three days trying to get word from his brother, but failed; that he found out the yellow fever had visited that locality the year before, and he guessed his brother had died, as many other persons had. Treating this testimony as competent, and though contradicted by Green's application, stating that his only brother was living and in good health, was it sufficient to raise the presumption of death arising from an absence of seven years? According to the signed application, the assured was forty-three years of age at the time of the issuance of the beneficiary certificate; his brother four years younger. There is no evidence as to Green's age when he left home and went to Texas, but only that he went off and stayed until he was eighteen, when he returned. It is not shown that during his absence he ever wrote to or received letters

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evidence;" but it is sufficiently established by the reasonable and persuasive inference which arises from his failure to return where, if he was in the state, he must have known of the thorough search made for him by his father, and of the agony of mind which induced it, and also of his rights in his father's estate at his death.

The statute is not limited in its application to cases where the missing person is not shown to have been alive after he has left the state, but applies "where the person leaving the state is absent for seven consecutive years after he is last heard from." Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694.

And it is likewise held in Adams v. New York L. Ins. Co. 158 Mo. App. 564, 138 S. W. 921, that the case is not taken out of the statute by reason of the missing person having been seen after leaving the state, where it has been seven years since he was last heard of. The court says: "It would be a most unreasonable construction of the statute, indeed, which would create a situation so harsh as that involved in requiring plaintiff to prove her husband had actually left the state before the presumption provided for therein would become available, and then declare it repelled because such proof was made."

The statute is not limited to persons having no good reason for staying away from the state, but applies to fugitives from justice, it being the duty of the jury, in determining the question of the absentee's death, to consider the circumstances of his departure. Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694.

Where plaintiffs claim title to land as heirs of their father, and prove his unexplained absence from the state for seven years, they may sue as his heirs. Henderson v. Bonar, 11 Ky. L. Rep. 219, 11 S. W. 809.

And the syllabus in the unreported case of Gell v. DeWitt, 7 Ky. L. Rep. 605, is as follows: "A father having left the state, and nothing having been heard or known of him for about nine years, his only child is entitled to maintain an action as his heir L.R.A.1915B.

for the recovery of land, his death being inferred."

The statute does not, however, authorize the division of the property of a person who has been absent from the state for seven years without any legal adjudication of his death, since opportunity must be given to overcome the presumption of death by evidence showing that he was alive within seven years. Hollowell v. Adams, — Ky. —, 119 S. W. 1179.

Under the Kentucky statute, the presumption of death is raised by allegations that a person has gone from the state and has not returned for more than seven years, and it is not necessary to show failure to hear from him since his departure. Fuson v. Bowlin, 17 Ky. L. Rep. 128, 30 S. W. 622.

The jury should be permitted to consider all the circumstances of the case on the question of the presumption of death arising from absence from the estate; and an instruction is erroneous which gives the jury the impression that if they should find the absentee to have been unheard of for seven years, they must find him dead, unless it is shown that he was living within that time. Dickens v. Miller, 12 Mo. App. 408.

One who leaves the state to go to war, and is not heard from for twelve years, is presumed dead under the statute. Boggs v. Harper, 45 W. Va. 554, 31 S. E. 943.

So, proof of a man's absence from the state for more than seven years without being heard of by his family raises a presumption of his death under the statute. Foulks v. Rhea, 7 Bush, 568; Taylor v. Reisch, 20 Ky. L. Rep. 1599, 49 S. W. 782.

And the nonappearance of bank depositors for eight years, and the nonclaimer of deposits, are circumstances which tend strongly to raise the presumption of the death of the depositors. Bank of Louisville v. Public School Trustees, 83 Ky. 219, 5 S. W. 735.

2. Texas.

The Texas statute provides that "any person absenting himself beyond the sea or elsewhere for seven years successively shall

from his younger brother, or that any form of communication, either between the brothers or others concerning them, passed during said absence. It does not appear that upon his return he made any inquiry as to whether his brother had left the orphans' home, and, if so, when, and to what place he had gone, though it may fairly be inferred that some such information was obtainable, for the testimony is that the yellow fever had visited that locality only the year before. In fact the extent of his inquiry does not appear to have been made the subject of inquiry further than stated. If living at the time, the younger brother would have been fourteen years of age. Had it been shown that he continued to be an inmate of the orphans' home, and was such an inmate on the occasion of the pestilence named, the presumption of death would be greatly strengthened.

It is a rule of common law that a person shown not to be heard of for seven years by those, if any, who, if he had been living, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of, without assuming his death. Jones, Ev. § 61.

The origin and growth of this rule of presumption is learnedly treated in Thayer's Preliminary Treatise on Evidence at Common Law, pages 319–324, where in part it is said: "It is a rule of presumption that, in the absence of evidence to the contrary, a person shall be taken to be dead when he

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be presumed dead in any case wherein death may come in question."

And it is held in Supreme Ruling, F. M. C. v. Hoskins, — Tex. Civ. App. —, 171 S. W. 812, that "elsewhere" in the statute means beyond the confines of Texas.

See also Turner v. Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358; Sovereign Camp, W. W. v. Ruedrich, — Tex. Civ. App. —, 158 S. W. 170; Latham v. Tombs, 32 Tex. Civ. App. 270, 73 S. W. 1060, in the note to Marquet v. Ætna L. Ins. Co. post, 749.

A charge on the question of the presumption of death in the language of the statute, where special instructions are not asked by way of explanation, will not be considered erroneous because the jury is not told that the absence must be from home, and that the missing person must not have been heard of within the seven years. French v. McGinnis, 69 Tex. 19, 9 S. W. 323.

3. *Mississippi.*

The Mississippi statute provides that "any person who shall remain beyond the sea, or absent himself from this state, or conceal himself in this state, for seven years successively . . . shall be presumed to be dead, in any case wherein his death shall come in question."

Where a man embarked on a ship which sailed shortly before a violent storm, and neither the ship nor anyone on board it was heard of during the ten years following, a presumption of death arose under the statute. Learned v. Corley, 43 Miss. 687.

But where children of seven and three years of age living with their mother and stepfather disappear and are not heard of for seven years, no presumption of their death will arise under the statute. Manley v. Pattison, 73 Miss. 417, 55 Am. St. Rep. 543, 19 So. 236. The court bases its decision upon the ground that the statute, "which manifestly refers to persons having volition and the right of free locomotion, does not create the presumption of the death of children incapable, by reason of their tender age, of 'absenting' themselves from the state, or of 'concealing' themselves within it."

4. *New Jersey.*

The New Jersey statute is very similar to that of Mississippi. It provides that "any person, whether a resident of this state or not, who shall remain beyond sea, or absent himself or herself from this state, or from the place of his or her last known residence, or conceal himself or herself in this state, or in the place of his or her last known residence for seven years successively, shall be presumed to be dead in any case wherein his or her death shall come in question, unless proof be made that he or she were alive within that time."

To bring a case within the terms of the statute, it is not necessary to prove specifically that the missing person is either actually beyond the sea, or is absenting himself from the state, or concealing himself within the state, since such would necessarily prove him to be living; but all the proof required is that the party is absent from the state or from his home. Osborn v. Allen, 26 N. J. L. 388.

The statute applies wholly to cases in which property rights are involved, and does not apply to divorce suits against absent persons. Spiltoir v. Spiltoir, 72 N. J. Eq. 50, 64 Atl. 96.

One who absents himself from the state for seven years is presumed dead under the statute. Wambaugh v. Schenck, 2 N. J. L. 229; Burkhardt v. Burkhardt, 63 N. J. Eq. 479, 52 Atl. 296; Smith v. Smith, 5 N. J. Eq. 484.

5. *Indiana.*

The Indiana statute provides that when any resident of the state shall have absented himself from the state and gone to parts unknown for five years, leaving property without provision for the management thereof, and such is made to appear to the probate court, it shall be presumed that such person is dead.

Where it is alleged that a person has been absent from the state for five years,

has been absent seven years, and not heard from. This is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of this time of seven years, and putting it into a rule. The faint beginning of it, as a common-law rule of general application in all questions of life and death, is found, so far as our recorded cases show, in Doe ex dem. George v. Jesson, 6 East, 80, 2 Smith, 236, 8 Revised Rep. 408, in January, 1805. Long before this, in 1604, the 'bigamy act' of James I. had exempted from the scope of its provisions, and so from the guilt and punishment of a felon, (1) those who had married a second time when the first spouse had been beyond the seas for seven years, and (2) those whose spouse had been absent for seven years, although not beyond the seas, . . . 'the one of them not knowing the other to be living within that time.'" The extension of the rule, as well as its limitations, are interestingly treated in the subsequent pages of the above authority, as well as in Lawson, Law of Presumptive Evidence, pp. 246–286, and Chamberlayne's Modern Law of Evidence, pp. 1090–1118. In this country the rule has generally been applied to those who are absentees from their home.

As was said in Hyde Park v. Canton, 130 Mass. 505: "If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes, to those that remain, the presumption of fact that he is dead; but it

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and no tidings have been received by his family, the missing person must be presumed dead under the statute. Baugh v. Boles, 66 Ind. 376.

It is held in Metropolitan L. Ins. Co. v. Lyons, 50 Ind. App. 534, 98 N. E. 824, however, that the statute applies only to the estates of absent persons, and not to actions for insurance on their lives.

6. New York and South Dakota.

The New York statute provides that "a person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time." The South Dakota statute is similar.

The statute does not raise the presumption of death from mere absence for seven years unheard of, but circumstances must be shown which will make such presumption probable. Re Boerum Street, 173 N. Y. 321, 66 N. E. 11, affirming 74 App. Div. 632, 77 N. Y. Supp. 1121.

So it was held in Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195, that where an unmarried man of feeble health and dissipated habits had left home twenty-four years before, the presumption of his death was not sufficient evidence upon which to compel specific performance of a contract to purchase real estate in which the absentee had an outstanding right. The court said: "There must be some point of time, of course, when the presumption of death would arise, but we have been referred to no case in this state in which that presumption has prevailed where the absence was less than forty years."

The presumption of death provided for by the statute has been held to arise in the case of—

—one who had gone to England, where he threatened to commit suicide, and where his friends believed he had executed his threat, and had not been heard of for forty years, M'Comb v. Wright, 5 Johns. Ch. 263;

—one who has disappeared and has not been heard of for thirty-seven years, Barson v. Mulligan, 191 N. Y. 306, 16 L.R.A.(N.S.) 151, 84 N. E. 75;

—one who has not been heard of for fourteen years, where, if living, he would have been impelled by motives of affection, family ties, and hope of pecuniary gain to make himself known, Karstens v. Karstens, 29 App. Div. 229, 51 N. Y. Supp. 795;

—one who was last heard of fourteen years before beyond the sea, where he had no known place of residence, McCartee v. Camel, 1 Barb. Ch. 455;

—a man who has been absent eight years without being seen or heard of, Sheldon v. Ferris, 45 Barb. 124;

—one who was of dissipated habits and impaired health when last seen, forty-three years before, and who knew of the probability of his share in the property in question, McNulty v. Mitchell, 41 Misc. 293, 84 N. Y. Supp. 89;

—a husband who left his wife pregnant with their first child, and went to another city with the intention of making a home for her, and who wrote regularly for three years, and who was last heard from when he was in a hospital very ill and not expecting to recover, Morrow v. McMahon, 35 Misc. 348, 71 N. Y. Supp. 961.

But where the only testimony with respect to the missing legatee is that of the husband of another legatee, who married shortly before the testatrix's death, who says that he has no knowledge as to whether the absentee was missing or not, and that the family, so far as he knew, had no such knowledge, no presumption will arise. Hornberger v. Miller, 28 App. Div. 199, 50 N. Y. Supp. 1079, affirmed without opinion in 163 N. Y. 578, 57 N. E. 1112.

The presumption of death arises from an unexplained absence of ten years, and that inference, taken in connection with the fact that the missing man was last seen leaving the house, following an attack of delirium tremens, and going toward a dock, having

does not authorize him to presume therefore that any one of those remaining in the place which he left has died."

In Chamberlayne's Modern Law of Evidence, § 1096, we find the following statement of the rule: "The presumption of death being based upon an inference of fact that the persons will naturally communicate with their homes, it may be premised that in certain contingencies, where these facts are not shown to exist, the rule of law does not come into operation; for example, it is of no special significance that one who has left home, and is of parts unknown, has failed to hear from or about those whom he has left there." In other words, under such circumstances the expiration of seven years without tidings gives rise to no presumption of law that the person at home is dead.

In the case at bar, an orphan boy left his home in Kentucky, leaving a brother four years younger an inmate of an orphans' home. The record is silent as to whether the latter knew of the whereabouts of the older brother, or ever wrote to, or attempted to communicate with, him. Defendant in error, upon whom rests the burden of establishing that Christopher F. Green died leaving no heirs at law, must recover (if she can do so in any event) upon proof of a state of facts from which the law will fix a presumption of death.

Ordinarily, where it is sought to fix the presumption of death upon one who is absent from home, there must be proof of in-

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expressed an intention of committing suicide, is sufficient to justify the surrogate in issuing letters of administration on the missing man's estate. Re Nolting, 43 Hun, 456.

So, a woman who was last seen in very poor health and about to go to a hospital, sixteen years before, and who has not been discovered by search, will be presumed dead on application to the surrogate for letters of administration on her estate. Re Smith, 77 Misc. 76, 136 N. Y. Supp. 825.

But it is held in Re Matthews, 75 Misc. 449, 136 N. Y. Supp. 636, that courts of probate and administration in general "should not presume the death of any other person than the person whose estate is to be taken in such court to be administered in a succession matter."

Under the statute, however, mere proof that relatives of persons alleged to be dead removed from the home of such persons, and have not heard from them since, does not raise the presumption of death. Burnett v. Costello, 15 S. D. 89, 87 N. W. 575.

And see Re Barr, 38 Misc. 355, 77 N. Y. Supp. 935; Re Jones, 70 Misc. 154, 128 N. Y. Supp. 477; White v. Emigrant Industrial Sav. Bank, 146 App. Div. 591, 131 N. Y. Supp. 311, affirmed in 205 N. Y. 571, 98 N. E. 1119, supra, I. a. In these cases the courts seem to have applied the common law, and not the statute.

II. Circumstances strengthening presumption.

It seems that whatever evidence will increase the probability of death will strengthen the presumption arising from absence.

Thus, the presumption of death from absence is strengthened—

—by evidence of frequent declarations by the missing person of an intent to commit suicide, Sheldon v. Ferris, 45 Barb. 124;

—by the fact that the missing person was fifty years old when last seen, Doe ex dem. Cofer v. Roe, 1 Ga. 538;

—by absence for twenty years instead of seven, Chapman v. Kimball, 83 Me. 389, 22 Atl. 254;

—by proof of an intention on the part of the missing person to return when he left home, Policemen's Benev. Asso. v. Ryce, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764, affirming 115 Ill. App. 95.

And it is held in Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25, that letters written by a husband to his wife, which show their relations to be such as not to be the cause of his disappearance, are competent for the purpose of strengthening the presumption arising from his absence.

The presumption of death from absence is strengthened when it is shown that the departure of the missing person "was from his native place, the seat of his ancestors, and the home of his brothers and sisters and family connections; and still further, when it was to enter upon the perilous employment of a seafaring life, and when he has not been heard of by those who would be most likely to know of him for upwards of thirty years." Loring v. Steineman, 1 Met. 204.

And where nothing is ever heard of a vessel or its crew after it starts on a voyage, the presumption of the captain's death is, after twelve years, strong enough to warrant a charge that his death is to be presumed, in absence of rebutting evidence. King v. Paddock, 18 Johns. 141.

But where the evidence shows the missing man to be neither prosperous in business nor successful in the accumulation of wealth, an instruction is inapplicable which sets forth that "when an honored upright citizen who, through a long life, has enjoyed the fullest confidence of all who knew him, prosperous in business and successful in the accumulation of wealth, . . . journeys from his home to a distant city, and is never afterwards heard of, then a strong, if not conclusive, presumption arises in favor of his death." Northwestern Mut. L. Ins. Co. v. Stevens, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258.

quiry made of the persons and at the places where news of him, if living, would most probably be had. 2 Greenl. Ev. 16th ed. § 278; Chamberlayne, Modern Law of Ev. §§ 1100, 1101; 2 Whart. Ev. § 1274; Posey v. Hanson, 10 App. D. C. 496; Wentworth v. Wentworth, 71 Me. 72; Flynn v. Coffee, 12 Allen, 133; Shriver v. State, 65 Md. 278, 287, 4 Atl. 679. In Wentworth v. Wentworth, supra, it is noted that it must appear that the absent one had not been heard of by those persons who would naturally have heard from him during the time that he had been living. But it was observed that the rule did not confine the intelligence to any particular class of persons. It may be to persons in or out of the family.

2 Greenleaf on Evidence, 16th ed. § 278f, after stating the circumstances material to the issue, such as age, situation of the party against whom the presumption is directed, his habits, employment, state of health, physical constitution, as well as the place or climate of the country whither he went, facilities for communication, habit of correspondence, or other circumstances tending to aid the jury in determining the fact of life or death, says: "There must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who probably would have heard of him, if living." Sustaining the foregoing text are the following cases: Bailey v. Bailey, 36 Mich. 181; State v. Teulon, 41 Tex. 249; Re Smith, 77 Misc. 76, 136 N. Y. Supp. 825; Litch-

III. Necessity of inquiry to raise presumption.

The earlier cases on this subject are collected in notes appended to Modern Woodmen v. Gerdom, 2 L.R.A.(N.S.) 809, and Miller v. Sovereign Camp, W. W. 28 L.R.A. (N.S.) 178.

"Where it is sought to fix the presumption of death upon one who is absent from home, there must be proof of inquiry made of the persons and at the places where news of him, if living, would most probably be had." MODERN WOODMEN v. GHROMLEY.

It is held in Brown v. Grand Lodge, A. O. U. W. 13 Cal. App. 537, 110 Pac. 351, that the death of a husband who disappeared and has not been heard of for seven years must be presumed, where the wife has made inquiries in all the places where her husband might reasonably be expected to be found if alive, and where she has exhausted every source of information in her efforts to locate him.

The wife of a missing man last heard of in the pesthouse cannot be held, as a conclusion of law, to have failed to exercise reasonable diligence in not writing to the pesthouse and in not making personal investigation, where the name of the pesthouse was not known, and where she employed experienced counsel who made all inquiries ordinarily made. Caldwell v. Modern Woodmen, 89 Kan. 11, 130 Pac. 642.

But in Wolff's Estate, 12 W. N. C. 535, the evidence of inquiry was held insufficient to raise a presumption of death, where a single witness testified that he had asked people in New York whether they had ever heard of the absentee, and that he had written to the keeper of a hotel in that city at which the absentee had stayed for a time.

So, where it is shown that about a dozen letters were written to the place where the absentee had acquired a residence after leaving his home state; but it appears that no directories were consulted, no chief of police, postmaster, or sheriff was written to, no one sent to confer with a person believed to know his whereabouts, and no advertisements inserted in newspapers, no presumption of death can arise on the evidence. Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

And where inquiries are not made of the mother, sisters, and son of an absent woman, by the administrator of an estate in which the absentee has an interest, he is not justified in presuming her dead. McCartee v. Camel, 1 Barb. Ch. 455.

The absence of twenty-five years, however, is sufficient to warrant a presumption of death concerning a person of whom nothing has been heard during that time, though no proof of inquiry is made. Innis v. Campbell, 1 Rawle, 373.

IV. Failure to communicate accounted for.

"When the failure of the absentee to communicate with his friends is satisfactorily accounted for on some other hypothesis than that of death, . . . no presumption arises." Re Wagener, 143 App. Div. 286, 128 N. Y. Supp. 164. In this case, however, it was held that, where the absentee would probably have communicated with an aunt, even if he had intentionally deserted his wife, and where it was improbable that he feared arrest for theft or desertion, his failure to communicate for eighteen years was not satisfactorily provided for on any other hypothesis than death.

But where the evidence shows that it was extremely improbable that the missing woman would communicate with her friends and relatives on account of their remonstrance for changing her religion, the presumption of death will not arise from absence for seven years unheard of. Bowden v. Henderson, 2 Smale & G. 360.

And it is held in Wolff's Estate, 12 W. N. C. 535, that no presumption of death will arise where the disappearance is fully accounted for by the fact that the missing man had appropriated trust moneys and had fled to escape the consequences.

And the presumption of death does not arise where, on account of having been placed by her foster mother in a reforma-

field v. Keagy, 78 Ill. App. 398; Somerville v. Ætna L. Ins. Co. 21 Ont. L. Rep. 276, 16 Ont. Week. Rep. 301; Lawson, Presumptive Ev. §§ 264 et seq.

In Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068, it was announced by Mr. Justice Phillips that, in order to enforce the presumption of the death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence and among his relatives, and any others who would probably have heard from him, if living. In Modern Woodmen v. Gerdom, 2 L.R.A.(N.S.) 809, 7 Ann. Cas. 570, many authorities are gathered in a footnote. In the opinion it was held that the inquiry should extend to all those places where information is likely to be obtained, and to all those persons who, in the ordinary course of events, would be likely to receive tidings if the party were living, whether members of his family or not; and, in general, the inquiry should exhaust all competent sources of information, and all other which the circumstances of the case suggest. In Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240, the same court held that the inference of death, to be derived from the unexplained absence of a person from his home for a period of seven years, is, at best, only a presumption, and it cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons, and at the places, where tidings of the person if living would most probably be.

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tory institution, from which she escaped, it is improbable that the missing child would communicate with home. Re Miller, 30 N. Y. S. R. 212, 9 N. Y. Supp. 639.

It is held in Van Buren v. Syracuse, 72 Misc. 463, 131 N. Y. Supp. 345, that absence for ten years does not raise a presumption of death, where the absentee was in good health at the time of disappearance; where there was a warrant out for his arrest; and where it is shown that he abandoned his family upon a previous occasion when he was gone three years.

Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694, however, holds that the fact that the missing person is a fugitive from justice does not prevent the application of the statute providing for the presumption of death from absence, but that the fact is admissible in evidence to rebut the presumption of death.

And in Wills v. Palmer, 53 Week. Rep. 169, where it was objected that it was to the interest of the absconding bankrupt to conceal himself, it was held that the presumption of his death arose, nevertheless.

See also Schwarzhoff v. Necker, 1 Posey Unrep. Cas. (Tex.) 325, and Walsh v. Metropolitan L. Ins. Co. 162 Mo. App. 546, 142 S. W. 815, supra, I. a; Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694, supra, I. c, 1; and Adams v. Jones, 39 Ga. 479.

V. Who must be without tidings.

Mere absence for seven years will raise no presumption in the absence of proof that relatives and others who would naturally hear from absent persons have not so heard. Re Tobin, 15 N. Y. Supp. 749.

And it is held in Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570, that, in order to raise the presumption of death from absence, there must be lack of information on the part of those likely to hear from the missing person.

But the failure of strangers to hear from a person does not establish an absence within the terms of a statute providing for the presumption of death from absence beyond the sea or elswhere for seven years successively. State v. Teulon, 41 Tex. 249.

In Doe ex dem. Floyd v. Deakin, 4 Barn. & Ald. 433, 23 Revised Rep. 335, however, where it was argued that the only evidence of absence was that of a mere stranger who lived in the neighborhood of the absent person's estate, to the effect that he had not seen the absent person for fourteen years, the court was of the opinion that the evidence was sufficient to create the presumption of death.

It was held insufficient in Marquet v. Ætna L. Ins. Co. post, 749, to show that a wife who had divorced her husband, and the son, who had sympathized with his mother therein, had not heard from the husband, without showing that none of his collateral relatives in the same town had heard of him.

The presumption of death is not raised by failure of a missing person to communicate with a sister who cannot read or write, and who does not live in his home town. Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068.

In Smith v. Smith, 49 Ala. 156, it is said that "the evidence of parties having no particular interest in the person whose life or death is in issue, not being relations, friends, or members of the family,—parties with whom the absent person, if alive, would not be likely to have any correspondence; for example, acquaintances merely, or former neighbors,—deposing to the absence of the person, and that there had been no intelligence concerning him; that they had not heard of him for a period of seven years, should have but little weight." In this case an affidavit reciting the receipt of a letter from a person claimed to be the absentee within the seven-year period was held to overcome this evidence.

VI. Presumption rebuttable.

a. In general.

"The presumption of death arising from an unexplained absence of seven years is not a conclusive presumption, but may be re-

In Mississippi a statute created a presumption of death of any person from seven years' absence without being heard of, and it was held in Manley v. Pattison, 73 Miss. 417, 55 Am. St. Rep. 543, 19 So. 236, that the words "any person" referred only to persons having volition and the right of free locomotion, and did not create the presumption of death of children, incapable, by reason of their tender years, of absenting themselves from the state, or of concealing themselves within it. While the case is perhaps not directly in point, it tends to indicate the distinction that should exist in the case of the absence of those of tender years, from the general rule applicable to adults.

In Re Miller (Surr.) 30 N. Y. S. R. 212, 9 N. Y. Supp. 639, a woman eighteen years of age, illiterate, with vicious propensities, and abandoned by her parents when quite young, escaped from an orphan asylum in which she was confined, and it was held that no presumption of death arose from the fact that she had failed to answer advertisements inserted in various newspapers, and that for more than seven years since her escape all trace of her whereabouts had been lost. It was said that the presumption of death did not arise where it was improbable there would have been any communication with home.

If the orphan's home, or the locality in which it was situated, continued to be the asylum of the asured's brother, and if in fact he was not there on the occasion of the assured's visit, it is not shown, neither was an attempt made to prove, that he had been absent therefrom for the period of seven years; hence there is an absence of facts necessary to give rise to the presumption of death.

Not only was the proof insufficient to establish the presumption of death of the assured's brother, but it failed to show that there were no other living heirs at law. It has been said that it is to be presumed that a person proved to be dead left heirs. Lawson, Presumptive Ev. pp. 249, 250; Harvey v. Thornton, 14 Ill. 217. Section 46 of the by-laws of the defendant society provided that if the death of the beneficiary of any member should occur prior to the death of the member, or in event of the disqualification of the beneficiary named, if such member should fail to have another beneficiary named, as provided in another section of the by-laws, then the amount to be

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butted by proof of facts and circumstances inconsistent with, and sufficient to overcome, it." Policemen's Benev. Asso. v. Ryce, 213 Ill. 9, 104 Am. St. Rep. 190, 72 N. E. 764, affirming 115 Ill. App. 95.

The following cases also hold the presumption of death arising from absence rebuttable: Doe ex dem. Cofer v. Roe, 1 Ga. 538; Adams v. Jones, 39 Ga. 479; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; Schaub v. Griffin, 84 Md. 557, 36 Atl. 443; Magness v. Modern Woodmen, 146 Iowa, 1, 123 N. W. 169; Thompson v. Millikin, 93 Kan. 72, 143 Pac. 430; Flynn v. Coffee, 12 Allen, 133; Dowd v. Watson, 105 N. C. 476, 18 Am. St. Rep. 920, 11 S. E. 589; Youngs v. Heffner, 36 Ohio St. 232; Thomas v. Thomas, 124 Pa. 646, 17 Atl. 182; Ancient Order, U. W. v. Mooney, 230 Pa. 16, 79 Atl. 233.

The presumption of death from absence is "wholly rebutted wherever it is made to appear that the person whose death is thus presumed is still living." Youngs v. Heffner, 36 Ohio St. 232.

Under a statute providing for the presumption of death from one's absence for seven years, "unless proof be made that he was alive within that time," the presumption arising from proof of absence can be overcome by countervailing evidence. Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909.

Thus, where property left by the absentee's mother is divided among her heirs, without reference to the absentee's interests therein, he is not prevented from claiming such interests, even in the hands of an innocent purchaser, by the presumption of death arising from his absence at the time

of the division of the property. Grimes v. Miller, 221 Mo. 636, 133 Am. St. Rep. 501, 121 S. W. 21.

And in an action by one of the tenants in common to recover his interest in land from his cotenants, who had partitioned it during his absence, the court holds error, as having no application to the case, an instruction that the cotenants had the right to presume plaintiff dead after five years' absence unheard of. Singer v. Naron, 99 Ark. 446, 138 S. W. 958.

In Biegler v. Supreme Council, A. L. H. 57 Mo. App. 419, it is held that, although the presumption of death is rebuttable, a peremptory instruction to find the absentee dead if certain facts are found is permissible, where no evidence exists in rebuttal of the presumption.

And see Hollowell v. Adams, — Ky. —, 119 S. W. 1179, supra, I. c, 1; Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694, supra, IV.

b. Admissibility of evidence in rebuttal.

In Bradley v. Modern Woodmen, 146 Mo. App. 428, 124 S. W. 69, it is held that evidence that the missing man declared five or six months before his disappearance, that he had endured his family troubles as long as he could, should have been submitted to the jury as tending to dispel the presumption arising from his disappearance.

Testimony of a witness who knew a person bearing the absentee's name, as to his appearance and conversations in which he gave an account of himself and his family connections, is admissible to rebut the pre-

paid under the benefit certificate should be paid to the surviving beneficiaries, if any there were. Or if no beneficiary survived, then to the widow; if no widow, to the children; if no children, to the mother; if no mother, to the father; if no father, to the brothers and sisters; if no brothers and sisters or child of any deceased brother or sister, then to the next of kin, who would be the distributees of the personal estate of the member upon the death of the intestate, according to the laws of the state where the said member resided at the time of his death. So that in no event is provision made for the plaintiff, or either of her sisters, even though of the designated class, not having originally or subsequently been named as beneficiaries, according to the by-laws of the society. Counsel for defendant in error admit that claimants do not come within any of the classes named in the foregoing by-law, and their insistence is that they can recover in virtue of the fact of the absence of any of the persons above designated. Even though the position be correct (a question not necessary to be decided), plaintiff, upon whom rested the burden of proof upon this issue, failed to prove that there were no living heirs, hence for that reason alone is not entitled to recover. The first duty imposed upon those intrusted with the management of the affairs of fraternal benefit societies is to sacredly guard its funds that the benevolent purposes of the organization may be discharged. In § 3 of the constitution of the plaintiff in error, of 1908, it is said that the purposes of said organization shall be the affording of substantial benefits to, and promoting of fraternal relations among, its members during life, and the furnishing of financial aid and indemnity to the beneficiaries of beneficial members after death. Had the assured desired, and the facts warranted, claimant and her sisters could have been named either as original or substitute beneficiaries, but he saw fit not to do so, but instead to name his legal heirs as beneficiaries.

From what has been said, it is obvious that the learned trial judge erred in rendering judgment for the plaintiff. The judgment of the trial court should therefore be reversed.

Per Curiam:
Adopted in whole.

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sumption of death arising from absence. Nehring v. McMurrain, — Tex. Civ. App. —, 45 S. W. 1032.

Likewise, testimony of the absentee's sister, that within seven years she had heard from various persons that he was living in California, should have been admitted to rebut the presumption of death from absence. Flynn v. Coffee, 12 Allen, 133.

Evidence of one witness to the effect that the absentee was a single man who had no near relations in the state, and that he had joined the army and left with it; evidence of a second witness that the general report among the missing man's friends was that he was living and was in the army; and testimony of a third witness that he had been told by another that he had recently seen the absentee in another state,—were admissible for the purpose of rebutting the presumption arising from absence. Dowd v. Watson, 105 N. C. 476, 18 Am. St. Rep. 920, 11 S. E. 589.

c. Sufficiency of circumstances to rebut presumption.

Proof that the missing person was alive at the time of the appointment of an administrator for his estate overthrows the prima facie presumption of his death, and establishes that the court which appointed the administrator had no jurisdiction and the administrator no authority. Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

And it is held in O'Kelly v. Felker, 71 Ga. 775, that testimony of one disinterested witness who saw and talked with the absentee within seven years; the fact of the absentee being a fugitive from justice; and the rumor that he had left with a disreputable woman with whom he was living in another state,—rebut the presumption of death arising from evidence of interested witnesses that he had not been seen or heard from since he left.

Evidence of persons with whom an absent person is not likely to have a correspondence, to the effect that they have not heard from her, is overcome by evidence of one who has, within a period of four years, received a letter from her, in what he knows to be her handwriting. Smith v. Smith, 49 Ala. 156.

Where several uncontradicted and unimpeached disinterested witnesses testify to the return of the missing person within the seven years preceding, a finding of death by the jury will be reversed. Thomas v. Thomas, 19 Neb. 81, 27 N. W. 84, on former appeal, 16 Neb. 553, 20 N. W. 846.

However, it is a question for the jury whether the presumption of death raised by the unexplained absence of a person from his home for seven years is rebutted by testimony of witnesses who testify to having seen the absentee during his absence, although the evidence is not contradicted by direct evidence, where the veracity of one of the witnesses is attacked. Kennedy v. Modern Woodmen, 243 Ill. 560, 28 L.R.A. (N.S.) 181, 90 N. E. 1084.

The syllabus in the unreported case of Chelf v. Isaacs, 6 Ky. L. Rep. 739, says that "a letter purporting to have been written at the request of a person who is presumed to be dead by reason of his absence

from the state for seven successive years is not competent to rebut the presumption of death, being only the barest form of hearsay; nor is a letter purporting to have been written by the person himself competent for that purpose, unless there is some other proof that he wrote it than the mere fact that his name is signed to it."

VII. Burden of proof.

"The common-law rule was that, after the lapse of seven years without intelligence concerning the person, the presumption of life ceased, and the burden of proof devolved on the other party to show that he was alive." Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694.

The following cases are authority for the same rule: Crawford v. Elliott, 1 Houst. (Del.) 465; Prettyman v. Conaway, 9 Houst. (Del.) 221, 32 Atl. 15; Stevens v. McNamara, 36 Me. 176, 58 Am. Dec. 740; Cowan v. Lindsay, 30 Wis. 586.

So it is held in Magness v. Modern Woodmen, 146 Iowa, 1, 123 N. W. 169, that when the absence of the missing person is shown "to have continued for seven years or more, unaccompanied by circumstances which reasonably account for his disappearance on a theory not involving his death, it becomes sufficiently strong to cast the burden of rebutting it upon the party asserting the continuance of life."

Under a statute providing for the presumption of death from absence of a person for seven years, "unless proof be made that he or she was alive within that time," the "presumption of death after continued absence of over seven years successively must be overcome by proof that the person was living," and the burden is on the one asserting that he is still living. Hoyt v. Newbold, 45 N. J. L. 219, 46 Am. Rep. 757.

And under another statute containing the same provision, the onus of the proof is held, in Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694, to be thrown upon the party contending that the absentee is alive.

Although no cases have been found within the scope of the present note which observe the distinction between the presumption of death and the burden of proof as to the issue of death, it would seem that, according to the modern view of the relation between presumption and burden of proof (see 4 Wigmore, Ev. §§ 2485 et seq.), the burden of proof in the sense of the risk of nonpersuasion of the jury, to employ Prof. Wigmore's phrase, remains throughout upon the party whose substantive rights depend upon the fact of the death of the person in question, and that the burden of proof in this sense does not shift as the result of the presumption of death, although the presumption does make it incumbent on the adverse party to go forward with the proof and introduce some evidence tending to rebut the presumption. The practical bearing of the distinction lies in the possibility that the minds of the jury may, as a result of the evidence as a whole, be left in a state of equilibrium on the issue of death; in which event, according to the modern view, the party whose substantive rights depend upon the fact of death must fail, notwithstanding the original presumption in his favor. This modern view has been discussed in its relation to the rule *res ipsa loquitur* in the note to Cleveland, C. C. & St. L. R. Co. v. Hadley, 16 L.R.A.(N.S.) 527. It may be noted here that this view as regards *res ipsa loquitur* has recently been sanctioned by the United States Supreme Court in Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416. The view is discussed in its relation to negligence in bailment cases in the note to Stone v. Case, 43 L.R.A.(N.S.) 1168, and in its relation to insanity in criminal cases in the note to Adair v. State, 44 L.R.A.(N.S.) 119, 121. The point may, of course, be presented in any case where there is evidence tending to overcome a rebuttable presumption.

E. L. D.

NEBRASKA SUPREME COURT.

FRANK E. COE, Guardian of Josephine Ganson,
v.
NATIONAL COUNCIL OF KNIGHTS & LADIES OF SECURITY, Appt.

(96 Neb. 130, 147 N. W. 112.)

Evidence — death — presumption from absence.

1. The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death.

Same — character and habits of absentee.

2. Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred, without regard to the duration of such absence.

(May 4, 1914.)

Headnotes by LETTON, J.

Note. — Abridgment of time necessary to raise presumption of death.

Generally, for the presumption as to the time of death of one presumed to be dead after seven years' absence, see note to Butler v. Supreme Court, I. O. F. 26 L.R.A. (N.S.) 294, which is supplemented by the note to McLaughlin v. Sovereign Camp, W. W. post, 756.

APPEAL by defendant from a judgment of the District Court for Otoe County in plaintiff's favor in an action to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. **John C. Watson**, for appellant:

The presumption of the death of a party does not arise until he has been absent without intelligence concerning him for a period of seven years.

State v. Henke, 58 Iowa, 457, 12 N. W. 477; Ryan v. Tudor, 31 Kan. 366, 2 Pac. 797; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; Sensenderfer v. Pacific Mut. L. Ins. Co. 19 Fed. 68.

Mr. **Paul Jessen**, for appellee:

The presumption that life continues for seven years after an unaccounted-for absence from home and family can be overcome in many ways; such presumption is overcome by showing that when last heard from, he was in a position of specific peril; and the same rule applies when his habits, character, domestic relation, or necessities would make it certain that, if alive, he would have returned to, or communicated with the members of, his family.

Jones, Ev. 2d ed. § 63; Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460; Tisdale v. Connecticut Mut. L. Ins. Co. 26 Iowa, 170, 96 Am. Dec. 136; 2 Greenl. Ev.

In Louisiana, where it is held that no presumption of death arises from absence, and that an absentee is presumed to live to be one hundred years old, it has been held that circumstances similar to those which, in the common-law states, will work an abridgment of the seven-year period, will raise a presumption of death before the absent person has reached one hundred years of age. While this is not, strictly speaking, an abridgment, it operates in much the same way. For cases of that nature, see I. b, of the note to Modern Woodmen v. Ghromley, ante, 728.

As to the presumption of death from absence, generally, see note to Modern Woodmen v. Ghromley, ante, 728.

As to the place from which absence must be shown to raise presumption of death, see the note to Marquet v. Ætna L. Ins. Co. post, 749.

It is doubtful whether any real presumption is involved in the cases included in this note where what is called the presumption arises from the lapse of a longer or shorter period of time, together with circumstances which, of their own force, tend to show death apart from any artificial rule of law. The scope of this note, however, is limited to the cases in which such circumstances are said to raise a presumption,—cases in which the ultimate fact of death is found directly from such circumstances without any mention of a presumption being excluded.

Generally.

It is ordinarily held that a presumption of death arises as to a missing person before the usual seven-year period has expired, where it is shown that such "person has encountered, or probably encountered, such perils as might reasonably be expected to destroy human life." 13 Cyc. 299.

Thus, it is said in White v. Mann, 26 Me. 361: "One who has sailed in a vessel which has never been heard of for such length of time as would be sufficient to allow information to be received from any part of the world to which the vessel or persons on board might have been expected to be carried, and who has never been heard of since the vessel sailed, may be presumed to be dead."

So, where more than four times the time necessary to make a voyage, and more than twice the time necessary to bring tidings, from any part of the world, have elapsed without word from the vessel, a party thereon will be presumed dead, regardless of the fact that less than two years have expired since the ship started on the voyage. Merritt v. Thompson, 1 Hilt. 550.

And in Gibbes v. Vincent, 11 Rich. L. 323, it is held that evidence that the ship of which the missing person was captain sailed preceding a violent storm on its track, and was never heard of again, authorized, after three years had elapsed, a finding of the death of such person.

In Travelers' Ins. Co. v. Rosch, 13–23 Ohio C. C. 491, an action on an insurance policy brought within five years after the insured's disappearance, it is held that a strong presumption of death arises where a passenger on an ocean vessel disappears from the ship in mid-ocean and is never seen again.

And where the evidence points to the single conclusion that a person who was last seen on shipboard disappeared from the vessel during the voyage and was drowned, it is sufficient to raise a presumption of death without regard to the duration of the absence. Lancaster v. Washington L. Ins. Co. 62 Mo. 121.

One's "mental perversion on the subject of suicide, his despair of the future, his declared purpose to jump into the river near which he stood, created a situation which, in connection with the ulterior fact of his complete disappearance thereafter from human view, warranted the inference that he was beset by a particular peril resulting in his death" upon the day of his disappearance. Carpenter v. Supreme Council, L. H. 79 Mo. App. 597.

In Garden v. Garden, 2 Houst. (Del.) 574, the court, in charging the jury, says: "But when the period of his [absentee's] absence without having been seen or heard of is less than seven years, the presumption of his death in law does not arise without further proof of additional facts and circumstances in regard to him of such a character and

§ 278; Angell, Fire & Life Ins. § 351; Doe ex dem. Cofer v. Roe, 1 Ga. 543; White v. Mann, 26 Me. 366; Smith v. Knowlton, 11 N. H. 197; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

Letton, J., delivered the opinion of the court:

This is an action to recover upon an insurance certificate. Plaintiff recovered, and defendant appeals.

Harry F. Ganson on September 8, 1910, was a dentist, residing in Nebraska City, about forty-four years of age. He had been married twice. The family consisted of his second wife with their three children, the oldest being eight and the youngest four years of age. The ward of plaintiff, who is a daughter by the first wife, also lived in the family. Dr. Ganson had lived in Nebraska City for about eight or nine years. At the time of coming there he had but little of this world's goods, but was successful in his business, and by September, 1910, he had fully paid for his office building and fixtures, had purchased and furnished a home, a mortgage upon which was held by a building and loan association and was partly paid. He also had purchased and paid for three or four city lots. His income was from $1,800 to $2,000 a year from his business. He carried $5,000 fraternal life insurance, $3,000 of which was in favor of his daughter Josephine. Eight days before his disappearance he allowed a $2,500 accident insurance policy to lapse. Some bills

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import as to satisfy the jury that, although not actually and positively proved, it is highly probable, and that it would be reasonable to presume his death under such circumstances."

Where the evidence shows "a sudden disappearance and the failure to discover any traces of a man who, if living, could not easily have gone unnoticed, and who was in such a physical and mental condition as to excite the anxiety of his friends upon this very subject," there is sufficient basis for a finding of death before the expiration of seven years. John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41.

In Hutton's Goods, 1 Curt. Eccl. Rep. 595, administration was granted on the estate of a man who embarked on a ship at Manila for England, and was expected to arrive in about four months, where neither the ship nor any person thereon was ever heard of again. Although nothing is said in the case about the length of time necessary to raise the presumption of death, the case seems to have arisen about two years after the disappearance.

And upon proof that a woman sixty-seven years old disappeared from her home in the nighttime, that her mind was affected, that her home was near a river, and that she could not, under the most favorable circumstances, have lived until the application for admission to probate of her will, the surrogate admitted the will to probate within a year after her disappearance. Re Buckham, 22 N. Y. S. R. 361, 5 N. Y. Supp. 565.

But in Rogers v. Manhattan L. Ins. Co. 138 Cal. 285, 71 Pac. 348, where there was no evidence to justify the giving of instructions to the effect that, to lessen the time required by statute to raise the presumption of death, there must be evidence that at some particular time the missing person was in some specific peril, such instructions were properly refused.

And where it is merely shown that a man's business, social, and domestic relations were all of such a character as to refute the theory of abandonment of family, there is nothing which takes the case out of the operation of the general rule requiring seven years' absence to raise the presumption of death. Re Mutual Ben. Co. 174 Pa. 1, 52 Am. St. Rep. 814, 34 Atl. 283.

In Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300, it is held that the dangers of the sea are general, and not specific, and that, consequently, mere evidence that a person was a passenger upon a vessel, and that neither he nor the vessel nor the crew had been heard of for sixteen months, and that the master and the vessel had been given up for lost, is not sufficient to shorten the time necessary to raise the presumption of death.

In State v. Lagoni, 30 Mont. 472, 76 Pac. 1044, it was held that, under a statute fixing a period of seven years as the length of time necessary to raise the presumption, mere proof that the missing person had attempted suicide, and that he lived in a place where a body might lie for a long time undiscovered, did not raise a presumption of death after an absence of five months, where the missing man was under a charge of forgery at the time of his disappearance.

Some of the courts have adopted a more liberal rule with respect to the abridgment of the time necessary to raise a presumption.

Tisdale v. Connecticut Mut. L. Ins. Co. 26 Iowa, 170, 96 Am. Dec. 136, is a leading case on this point. In holding erroneous an instruction to the effect that the death of a missing person could not be presumed from an absence of less than seven years, except upon evidence of exposure to danger which probably resulted in death, the court says: "Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity, and objects in life which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence."

And where the missing man's abandoned wagon, harness, gun, and horse were found on the bank of a river at a point where the ashes of a fire, the used cooking utensils, the fragments of food, and the bed with its

L.R.A.1915B.

he was sending out were found on his desk, and some dental supplies he had ordered on the 17th came in on the 19th. He was a man of domestic tastes and spent most of his spare time with his family. His wife testifies that because his business kept him closely engaged he purchased a bicycle, and it was his custom to take a ride each morning, leaving before the family were up and returning for breakfast. He was fond of fishing and swimming, and was a kind and indulgent husband and father. The family spent part of the summer of 1910 in Ohio, the doctor joining them, staying about two weeks, and coming home with them about the beginning of August. He was a member of the official board of the Methodist church, a member of the choir, and had no bad habits of any kind. He was fond of the open air, and while the family were in Ohio he pitched a tent in Riverside park near the Missouri river, and slept there during their absence, and on their return moved the tent to his back yard and slept there with his little boy. On Saturday, September 17th, the family, with some friends, went to Riverside park for a moonlight picnic. They returned home a little after 9 o'clock. The family soon retired, leaving Dr. Ganson sitting reading. About half past 2 in the morning Mrs. Ganson was awakened by the little boy crying, and found the doctor was not in the tent with him. She testifies he had drunk two cupfuls of coffee at the picnic, and he could not sleep when he drank coffee. His nightgown was hanging on the

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imprint of a sleeper bear testimony that he camped, and footprints leading to the river, but not returning, water buckets at the river's edge, a mark of slipping, and a fractured root all point to but one conclusion, the court did not err in charging that the necessary period of absence to raise the presumption of death "may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with the habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead." Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

In Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460, where the evidence showed that the missing man, who was sober, industrious, and attached to his home, disappeared one morning after leaving the house dressed in his working clothes to go to the village as usual, and that he drew out all his money from the bank in the village that day, the court held that, five years after his disappearance, a jury was justified in finding him dead.

But where a deserter from the United States Army goes to Austria, where he is last heard of on the way back to the United States, the circumstances of his disappearance are not sufficient to raise the presumption of his death within two years, according to the opinion of the court in Czech v. Bean, 35 Misc. 729, 72 N. Y. Supp. 402. It was held, however, that sufficient proof was before the surrogate to warrant his finding of death and appointment of an administrator.

And it is held in Straub v. Grand Lodge, A. O. U. W. 2 App. Div. 138, 37 N. Y. Supp. 750, affirmed without opinion in 158 N. Y. 729, 53 N. E. 1132, that mere proof that a man left the vessel upon which he was steward at a port where the vessel was stopping, and never returned, is not sufficient to raise a presumption of death before the usual period has elapsed.

Time of death of one presumed dead in the abridged period.

In these cases seven years has not elapsed since the absentee was last heard of. In many cases in which the seven-year period has elapsed, the time of the death is established by evidence independently of the presumption. Such cases are within the scope of the note upon the presumption as to the time of death of one presumed dead after seven years' absence, appended to Butler v. Supreme Court, I. O. F. 26 L.R.A.(N.S.) 294, which is supplemented by the note to McLaughlin v. Sovereign Camp, W. W. post, 756.

Where a person has been exposed to some peril which might reasonably have been expected to destroy human life, he may be presumed to have died at a time dependent upon the circumstances, and altogether independent of the usual seven-year period.

Where neither a ship upon which an absentee sails, nor any of the crew, is heard of again, a presumption, amounting almost to a certainty, arises that death occurred within the period usually assigned as the longest required for the voyage. Gerry v. Post, 13 How. Pr. 118.

So, it is held in Oppenheim v. Wolf, 3 Sandf. Ch. 571, that where the longest passage between the port of departure and that of destination is twenty-four days, a passenger thereon will be presumed to have died within fifty days from sailing.

Where it is shown that at the time of his disappearance, a missing man was sixty-six years old, that his health was impaired, that he was suffering from three progressive, incurable diseases which, in the opinion of the physician, would have proved fatal in three months, and that since his disappearance he had never applied for the payment of his annuity, upon which he was dependent for support, the evidence is sufficient to raise a reasonable presumption that he died within three months of his disappearance. Re Ackerman, 2 Redf. 521.

Where the period of absence of the missing man was less than seven years, the court charged the jury that, in order to

side of the bed where he had hung it. All of his clothing, except a pair of khaki trousers, a shirt, and a pair of bicycle shoes, were in the places where they were usually kept. About 6 in the morning the doctor's bicycle was found at Riverside park on the crest of the bluff overlooking the river. A stick was stuck in the mud on the bank of the river and the clothing taken by him was hanging upon this stick. His bicycle shoes and his socks were on the ground beside it. Tracks of a barefooted man led from this point to the water's edge, and there were other tracks coming from the water and leading to a drift or log that was lying partly in the water, and which had been used by boys to jump into the river. The bank of the river was muddy, but there were no footprints leading back to the solid ground. The sheriff, who reached the scene about 7 o'clock in the morning, with others, went up and down the river bank for a distance of between a half mile and a mile to see if they could find any fresh tracks leading out of the river, but were unable to find any. In the afternoon the river, which was from 6 to 9 feet deep at that point, was dragged and afterwards on Sunday and Monday dynamite was used in the attempt to raise the body. Search was also made for footprints for about a mile on the other side of the stream, but none were found, though the character of the bank was such that an imprint would have been left if a man had walked over it. The following Tuesday some men who were working at a brickyard at a point about a mile below testified they saw an object which they believed to be a naked body coming down the river. When asked as to the color of the object, a witness answered, "Why, he was white and shining,—you could see hair, you know; it looked like a man's or woman's body." This object was out about 150 yards. Some of the men went after a boat, but before they got it launched and reached the spot the object had disappeared. Another witness watched the body while the men went for the boat. He says it was rolling along on the edge of a sand bar, and sank before the boat reached the spot.

Notices were printed and distributed along the river and elsewhere. Mrs. Ganson wrote to many of his relatives and old school friends, and caused many inquiries to be made, but neither she nor anyone else ever received any communication from him, or from any other persons who saw him afterwards.

No evidence was introduced by the defendant. This action was begun about a year after the disappearance. The principle governing this case is well expressed, as follows, by Judge Sanborn in a case from this state, citing Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460, and other cases: "The established presumption of fact from the disappearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance. If this presumption was un-

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establish death before a certain date, the absence would have to be corroborated by other testimony. Tisdale v. Mutual Ben. L. Ins. Co. Fed. Cas. No. 14,059, reversed on other grounds in 91 U. S. 238, 23 L. ed. 314.

There is no error in an instruction to the effect that "the death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which might probably result in his death." Northwestern Mut. L. Ins. Co. v. Stevens, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258.

To establish death at a time less than seven years after disappearance, it is not indispensable that the proof offered for that purpose show that the absentee was subject to a specific peril at that time, but evidence of absentee's character, habits, and attachments may be sufficient. Springmeyer v. Sovereign Camp, W. W. 144 Mo. App. 483, 129 S. W. 273, on subsequent appeal, 163 Mo. App. 338, 143 S. W. 872. Upon the evidence in this case that absentee was a steady, sober, and industrious workman, with regular employment, of domestic turn of mind and pleasant family relations, but that he was subject to moody spells during which he was quarrelsome, threw dishes at members of his family, and talked of suicide, the court, on the subsequent appeal, was of the opinion that the verdict placing the time of his death within the seven-year period ought not to be disturbed. L.R.A.1915B.

Where a man disappeared from home and was heard of the next day at a city where he expected to be for three days, but was never heard of again, the circumstances were not sufficient to raise the presumption that he was dead within four years of his disappearance. Groff v. Groff, 36 App. D. C. 560.

Burden of proof.

The burden of proof is on the party attempting to show facts which will constitute grounds for an abridgment of the time necessary to raise the presumption. Carpenter v. Supreme Council, L. H. 79 Mo. App. 597; Springmeyer v. Sovereign Camp, W. W. 163 Mo. App. 338, 143 S. W. 872, on former appeal, 144 Mo. App. 483, 129 S. W. 273. E. L. D.

affected by countervailing facts, it would continue in the case at bar until August 22, 1899; but this presumption of fact is not conclusive. It may be overcome, not only when the testimony of those who saw the insured die or saw his body after his death is produced, or when he was last seen in a peril that might probably cause his death, but also when all the facts and circumstances of the case—the possible motives, if any, of the lost one to absent and conceal himself in view of approaching failure, disgrace, or punishment, his possible motives, if any, for returning to his family and occupation, his attachments to the members of his family and his friends, his interest and prospects in his business or occupation, and the extent of the unavailing search that has been made for him—are such that they would take the case out of the category of an ordinary disappearance, and would lead the unprejudiced minds of reasonable men, exercising their best judgment, guided by the established rule that life is presumed to continue seven years after an unexplained disappearance, to the conviction that death had intervened at an earlier date." Northwestern Mut. L. Ins. Co. v. Stevens, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258. See also Winter v. Supreme Lodge, K. P. 96 Mo. App. 1, 69 S. W. 662; Id. 101 Mo. App. 550, 73 S. W. 877.

While there is a possibility that Dr. Ganson may still be alive, we are of the opinion that a consideration of his whole history, his tastes, his habits, his occupation, and his manner of life, when taken in connection with the facts that all the clothing which he is known to have been possessed of has been accounted for; that it was not shown that he was in possession of any money at the time of his disappearance; that his last known appearance in life was when he stood unclad upon the bank of the treacherous Missouri river; that what was believed by several witnesses to be the naked body of a human being a few days afterwards was seen in the river at a point below,—was sufficient to justify the district court in finding that he died as alleged in the petition. We have been cited in defendant's brief to numerous instances of the disappearance of persons who were afterward found to be alive, but in none that have been called to our attention are the circumstances similar to those in this case.

The judgment of the District Court was warranted by the evidence, and it is therefore affirmed.

Barnes, Rose, and Sedgwick, JJ., not sitting.

L.R.A.1915B.

TENNESSEE SUPREME COURT.

REBECCA L. MARQUET
v.
ÆTNA LIFE INSURANCE COMPANY, Appt.

(— Tenn. —, 159 S. W. 733.)

Insurance — insurable interest — divorce.

1. That the wife, who is beneficiary in a renewable term insurance policy upon the life of her husband, has been divorced from him when the time arrives for renewing the policy, does not render the policy void for lack of insurable interest, if it is not in fact renewed, but merely continued for an additional term by attaching a rider thereto, because the surplus accumulated during the first term is sufficient to carry the policy at the old premium rate for the next period.

Death — presumption from absence — place of inquiry.

2. To raise a presumption of death of one from seven years' absence, inquiry must be made at the last known domicil of the absentee, and where he has become estranged from his family and removes to a town different from its place of residence, inquiry at the latter place is not sufficient.

(October 4, 1913.)

Note. — Place from which absence must be shown in order to raise presumption of death.

This note does not include cases discussing the question of what constitutes an absence from the state, arising under statutory provisions making absence from the state the ground for the presumption. Cases of that nature may be found in subdivision I. c, of the note on the presumption of death from absence, generally, appended to Modern Woodmen v. Ghromley, ante, 728.

For presumption as to time of death of one presumed to be dead after seven years' absence, see note to Butler v. Supreme Court, I. O. F. 26 L.R.A.(N.S.) 294, which is supplemented by the note to McLaughlin v. Sovereign Camp, W. W. post, 756.

As to necessity of inquiry to raise presumption of death from seven years' absence, see notes to Modern Woodmen v. Gerdom, 2 L.R.A.(N.S.) 809; Miller v. Sovereign Camp, W. W. 28 L.R.A.(N.S.) 178; which are supplemented by division III. of the note to Modern Woodmen v. Ghromley, ante, 728.

And as to the abridgment of time necessary to raise presumption of death from absence, see note to Coe v. National Council, K. L. S. ante, 744.

Place of residence in general.

In order to raise the presumption of death from absence at common law, the absentee must have been absent from his home or place of residence. Ironton Fire Brick Co.

APPEAL by defendant from a judgment of the Chancery Court for Hamilton County in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. **Allison, Lynch, & Phillips**, for appellant:

A policy of life insurance taken out by one person on the life of another is a void contract and unenforceable as against public policy, unless the one so taking out the policy has an insurable interest in the life of the insured.

25 Cyc. 702; Bendet v. Ellis, 120 Tenn. 277, 18 L.R.A.(N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795.

Rebecca L. Marquet, divorced, had no right to the benefits and privileges the law gave to Rebecca L. Marquet, the wife; and under color of a relation that had ceased, she cannot be permitted to make and enforce a contract.

Johnson v. Van Epps, 110 Ill. 561.

The cessation of complainant's insurable interest, and the full performance by the insurance company of its contract toward her during the ten years of her vested rights, relieved the insurance company of any further duty to her.

First Nat. Bank v. Fidelity & G. Co. 110 Tenn. 25, 100 Am. St. Rep. 765, 75 S. W. 1076; Pacific Mut. L. Ins. Co. v. Galbraith, 115 Tenn. 478, 112 Am. St. Rep. 862, 91 S. W. 204; Lantz v. Vermont L. Ins. Co. 139 Pa. 546, 10 L.R.A. 577, 23 Am. St. Rep. 202, 21 Atl. 80.

The presumption of death at the expiration of seven years does not arise where it is improbable that the absentee would have communicated with his people if he had been alive.

Wentworth v. Wentworth, 71 Me. 74.

Defendant had the right, and has the right, before being required to pay the amount of the policy sued on upon the presumption of death, to demand of complainant that she produce evidence that inquiry has been made for Gus Marquet at those places and from those people where intelligence of him could be obtained, if anywhere.

Shown v. McMackin, 9 Lea, 601, 42 Am.

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v. Tucker, 26 Ky. L. Rep. 532, 82 S. W. 241, rehearing denied in 26 Ky. L. Rep. 1021, 82 S. W. 1009.

The mere fact of absence from a city in which the absentee never lived does not raise the presumption of death. Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068.

And it is held in Litchfield v. Keagy, 78 Ill. App. 398, that the mere absence of a person from a place where his relatives reside, but which is not shown to have been his residence, is not sufficient to raise a presumption of death.

Mere evidence of absence from a particular town for twenty years, without proof of an established residence there, will not raise a presumption of the absentee's death. Stinchfield v. Emerson, 52 Me. 465, 83 Am. Dec. 524.

And it is held in McRee v. Copelin, 2 Cent. L. J. 813, that no presumption of death arises as to a resident of Louisiana on account of his absence from Missouri.

And the absence required by statute providing for the presumption of death of a person from absence means absenting himself from his last place of residence which was known to his family or relatives, who would be likely to know where he was living. McCartee v. Camel, 1 Barb. Ch. 455.

It is likewise held in Spurr v. Trimble, 1 A. K. Marsh. 278, that under a statute providing for the presumption of death from absence, no presumption arises where it is not proved that the missing person is absent from the country of his residence.

And Sprague, J., in Garwood v. Hastings, 38 Cal. 216, dissented from the holding of the majority of the court on the ground that the absence upon which the presumption was based should have been shown to be from the last known place of residence, and L.R.A.1915B.

that, in that case, there was no showing of the place of residence.

In Prettyman v. Conaway, 9 Houst. (Del.) 221, 32 Atl. 15, it is held that inquiry for an absent person must be made at his home, or, if he has no fixed place of residence, or has two homes and the scale is almost evenly balanced between them, at the domicil of origin.

Thus, where a young man with no family or business to induce a permanent absence leaves his father's home to go West to seek labor, the home of his father is still considered his home. Chapman v. Kimball, 83 Me. 389, 22 Atl. 254.

And it was held in McLaughlin v. Sovereign Camp, W. W. post, 756, that a statement in a letter to his family, written by a young unmarried man who had no fixed home or place of residence other than that of his parents, to the effect that "you will see by the postmark of this letter that I have exchanged my place of residence," was plainly not intended as a declaration that he had established a residence there, where the evidence showed that he was there for the temporary purpose of prospecting or securing work in the mining region.

And under a statute providing that "any person absenting himself beyond the sea or elsewhere for seven years successively shall be presumed dead," one who disappears from his home within the state may be presumed dead, although there is no proof of his leaving the state. Sovereign Camp, W. W. v. Ruedrich, — Tex. Civ. App. —, 158 S. W. 170.

However, a charge on the question of presumption of death from absence, in the language of the statute, will not be considered erroneous because the jury is not told that the absence must be from home.

Rep. 680; Puckett v. State, 1 Sneed, 356; Ferrell v. Grigsby, — Tenn. —, 51 S. W. 114; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; 13 Cyc. 300; Renard v. Bennett, 76 Kan. 854, 93 Pac. 261, 14 Ann. Cas. 240; Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570; Miller v. Sovereign Camp, W. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126; Hansen v. Owens, 132 Ga. 652, 64 S. E. 800; Wentworth v. Wentworth, 71 Me. 74; Norris v. Edwards, 90 N. C. 383, 47 Am. Rep. 526; Lawson, Presumptive Ev. p. 251; Hitz v. Ahlgren, 170 Ill. 63, 48 N. E. 1068.

Messrs. **Sizer, Chambliss, & Chambliss** for appellee.

Buchanan, J., delivered the opinion of the court:

This suit is based upon an insurance contract. The breach relied on is the failure to pay $2,000, the amount of the policy, upon proofs of death of the insured.

The defenses are two: First, that the payee or beneficiary in the policy sued on, at the date of its issuance, had no insurable interest in the life of the insured, and the contract sued on is therefore a wagering one and unenforceable; second, that the proofs do not show the death of the insured, and therefore no breach is shown justifying a recovery.

There was a decree below for $2,132.50 and costs, from which the insurance company appealed, and has here assigned errors based on the defenses above.

At the time of the issuance of the policy sued on, complainant was the lawful wife of Gus Marquet, and his was the life insured. The policy was issued April 7, 1893, and soon thereafter it was delivered to complainant, who paid all premiums which became due upon it after its issuance. Three years and over after its issuance, on, to wit, April 21, 1898, at the suit of complainant, she was granted an absolute divorce from Gus Marquet by the chancery court of Hamilton county upon the ground of habitual drunkenness by Gus Marquet after his marriage to her, failure by him to provide for her and her children by him, etc. There

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where no special instructions are asked by way of explanation of the statute. French v. McGinnis, 69 Tex. 19, 9 S. W. 323.

In Doe ex dem. Cofer v. Roe, 1 Ga. 538, where the lower court had held that, in the absence of proof that the absentee lived in a certain county, evidence of his absence therefrom did not raise a presumption of death, the supreme court was of the opinion that, inasmuch as he had been seen in the locality of the land in question more than seven years before, but had not been seen there since that time, his death should be presumed.

Effect of change of residence by missing person.

"Where a person removes from his domicil in . . . [one] state to establish a home for himself in another state or country, at a place well known, this is a change of residence, and absence from the last domicil is that upon which the presumption must be built. If alive when last heard from at his last domicil, the presumption is that life continues." Francis v. Francis, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; Gorham v. Settegast, 44 Tex. Civ. App. 254, 98 S. W. 665.

This is in accordance with the rule laid down in MARQUET v. ÆTNA L. INS. CO.

Thus, it is held in Smith v. Smith, 49 Ala. 158, that the presumption of death will not be made concerning one who is known to have acquired a domicil by marriage in another state during her absence.

So, evidence of absence from one's original place of residence will not raise the presumption of death, where it appears that he has removed to another place. Hansen v. Owens, 132 Ga. 648, 64 S. E. 800.

And it is held in Renard v. Bennett, 76 Kan. 848, 73 Pac. 261, 14 Ann. Cas. 240, that the presumption of death cannot arise from a change of residence or a removal from the place where the family or relatives reside.

Absence of a person who has acquired a new place of residence, from a former place of residence, will not raise a presumption of death. Donovan v. Twist, 105 App. Div. 171, 93 N. Y. Supp. 990, on subsequent appeal not involving this point, 119 App. Div. 734, 104 N. Y. Supp. 1.

Mere proof that a person moved away to another state and has not been heard from, without proof of absence from the new domicil, will not raise a presumption of death. Barr v. Chapman, 11 Ohio Dec. Reprint, 862, 30 Ohio L. J. 264.

Where a person leaves one state and takes up his residence in another, it must be shown that he has been absent and unheard of in the latter place for seven years, to raise the presumption of death. Wright v. Jones, 23 N. D. 191, 135 N. W. 1120.

Thus, it is said *obiter* in Metropolitan L. Ins. Co. v. Lyons, 50 Ind. App. 534, 98 N. E. 824, that if an absentee has established a fixed residence abroad, to raise a presumption of his death it must be shown not only that his family and friends have not heard of him, but also that inquiry was made at the place of his established residence.

So, one who has left Ireland to reside in America cannot be presumed dead because of the failure of a sister left in Ireland to hear from him for seven years, without proof of inquiries made in America. McMahon v. McElroy, 5 Ir. Eq. Rep. 1.

And it is held in Ross v. Blount, 25 Tex. Civ. App. 344, 60 S. W. 894, that the presumption of death does not arise from the

followed an entire estrangement between Gus Marquet and complainant and her children. The latter were two sons, respectively, about twenty-one and twenty years of age, and a daughter about eighteen years old at the time of the divorce. The children were in sympathy with the mother in that suit.

Prior to the divorce, for many years, the home of the family and of Gus Marquet had been in Chattanooga, Tennessee, but soon after the divorce, or during the years 1898 or 1899, he left Chattanooga, and took up his residence at Oakdale, Tennessee, where he remained until about the year 1900, when he left Oakdale for a trip to New Orleans, and has not, as complainant insists, been heard from directly since that time, except through a letter supposed to have been from him, addressed to one of his nephews residing in Chattanooga in the year 1904. By one rumor he is said to have been seen in Detroit, Michigan, by another in Memphis, Tennessee, but the persons said to have seen him are not examined as witnesses; nor do the dates appear when they claim to have seen him.

The policy in suit, by its terms, was to

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absence of one who goes to another state and acquires a residence, but that it must be shown that search and inquiry were made at the new place of residence.

In Latham v. Tombs, 32 Tex. Civ. App. 270, 73 S. W. 1060, the court, referring to a statute raising the presumption of death from absence "beyond the sea or elsewhere for seven years successively," says: "While the statute does not expressly so read, we think it must be construed to mean that the person referred to must absent himself from his home; and proof of change of residence from one state to another, and the party not having been heard of in the former state for a period of seven years, does not make a case within the purview of the statute."

And in Turner v. Sealock, 21 Tex. Civ. App. 594, 54 S. W. 358, it is held that the statute does not apply to one who leaves another state and goes to Texas, where he disappears, where there is no evidence of an absence from his home in Texas.

So, in State v. Teulon, 41 Tex. 249, it is held that the fact that a man's whereabouts are unknown to an acquaintance in a former place of residence, who has made no inquiry about him in his subsequent place of residence, does not establish absence within the terms of the statute in the preceding case.

So, the Kentucky statute providing for the presumption of death from absence from the state was held in Gray v. McDowell, 6 Bush, 475, not to apply where a man removed from Kentucky with his family and joined the Mormons.

But in Winship v. Conner, 42 N. H. 341, where a missing man left the part of the country where his wife, father, and friends were living, and removed to the West with the intention of not returning to his former home, and resided there for six years, the court held that the absence necessary to raise the presumption was from his former home, and not from his new residence, giving as its reason that under any other rule "the longer he was absent, the stronger would be the proof that he had changed his domicil, and therefore the proof that he was absent from home would be diminished."

It is said *obiter* in Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341, that "it is true that proof of a change of his residence from one state to another, and that he has not been heard of in the former state for a

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period of seven years, does not create the presumption; and some of the cases go so far as to hold that, where a party leaves his domicil with the avowed intention of establishing some specific new abode, the inquiry must follow him to such new domicil."

In the two following cases, in which there appears to be no evidence of a change of domicil other than that of setting out with the intention of acquiring a new residence, no mention is made of the distinction suggested in the preceding case:

Thus, it is held in Doe ex dem. Hurdle v. Stockley, 6 Houst. (Del.) 447, that no presumption of death arises from seven years' absence by a person who removes from the state with a family of children with the intention of taking up a new domicil in another place.

And in Keller v. Stuck, 4 Redf. 294, where the evidence showed that two young children were removed from the state of their residence for the purpose of settling in some western state, it was held that proof of their absence without being heard of in the state of their original residence did not raise the presumption of death.

Place from which absence must be shown, as affected by change of residence by third persons.

Where the wife leaves the place where her husband had his domicil, no presumption of his death arises from her failure to hear from him for seven years. Com. v. Thompson, 11 Allen, 23, 87 Am. Dec. 685, on former appeal, 6 Allen, 591, 83 Am. Dec. 653; Thomas v. Thomas, 16 Neb. 553, 20 N. W. 846, on subsequent appeal, 19 Neb. 81, 27 N. W. 84.

So, where a wife leaves her husband's domicil in England and comes to America, no presumption of his death arises from the fact that she has not heard of him for seven years. Williams's Estate, 13 Phila. 325.

And under a statute providing for the presumption of death from absence "in the state or elsewhere," mere proof that relatives of persons alleged to be dead have removed from the home of such persons, and have not heard from them, does not raise a presumption of their death. Burnett v. Costello, 15 S. D. 89, 87 N. W. 575.

E. L. D.

live for a period of ten years from its date, in consideration of a fixed semiannual premium to be paid the company. But it provided that at its expiration it might be renewed by the issuance of a new policy, as follows:

"Sec. 2. At the expiration of the term of ten years under this policy and others of a similar form which may be issued to succeed it, said company will issue a new one of an equal amount without medical reexamination, subject to the premium for the age then attained by the insured, providing such expiring policy is returned to the office of the company for this purpose before its expiration, and the surplus under the latter will be applied toward reducing the premium in the new one to the rate charged in the first policy; but, should such surplus be insufficient to reduce the premium to said rate, it shall be optional with the insured to pay the premium required for the said new policy after the surplus from the expiring one has been applied, or reduce the amount of the insurance and continue previous payments. The said new policy will be dated and the first premium thereon become due at the expiration of the term of the last preceding policy, and will be written for a term of ten years from such date, unless the insured has attained the age of seventy, in which case the new policy will be written for the remainder of life."

The policy sued on was never renewed by the issuance of a new one, as provided by § 2 above set out, but on the last day of its life as originally written, its life was prolonged or extended by agreement between complainant and the company by attaching to the policy sued on and originally issued what is called a "rider" signed by one of the officers of the company, thereunto authorized in the following words and figures:

Form No. 222.

M. G. Burkeley, Pres.

J. L. English, Secy.	H. W. St. John, Actuary.
Frank Bushnell, Agency Secy.	C. E. Gilbert, Ass't Sec'y.

Ætna Life Insurance Company.

Hartford, Conn., April 7, 1903.

Renewable-Term Policy No. 216,338, issued by the Ætna Life Insurance Company, on the life of Gus Marquet, having this day completed a term of ten years, and the surplus existing under it having been found sufficient to reduce the tabular premium for the present age during the ensuing term of ten years to the amount named as premium in said policy, therefore it is unnecessary to return said policy for the issue of a new policy until the expiration of ten years from the date of this instrument, provided the premium expressed in said policy continues to be paid in each and every year before 5 o'clock P. M. of the days therein named for such payment, and that all the other conditions, provisions, and requirements of said policy continue in force.

J. L. English, Secretary.

Nash.

If there had been a renewal under § 2, the old policy would have been returned to the office of the company before its expiration, to the end that the company might issue a new one. This was not done. Complainant retained the old policy, and the company sent the rider to be attached to the old policy. Moreover, by the plain terms of the rider, the company waives the return of the old policy, and prolongs its life, or makes it the measure of rights between complainant and the company for ten years from the date when it would otherwise have expired. The legal effect of the rider was to make the original policy operative for twenty instead of ten years from its date.

A question much similar in some respects to the one here was presented to this court in First Nat. Bank v. Fidelity & G. Co. 110 Tenn. 25, 100 Am. St. Rep. 765, 75 S. W. 1080, where it was said: "Now, it is true that the renewal certificate is a new contract, but it is only a new contract as respects time; that is to say, it extends the indemnity provided by the old contract to a new period of time,—May 1, 1899, to May 1, 1900. The parties themselves understood there was only one bond and one penalty."

The question in the present case is clearly distinguishable from that presented to the court in Pacific Mut. L. Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862, 91 S. W. 204. There the insurance company defended upon the ground that the insured had made fraudulent misrepresentations in respect of his health, in an application to the company to reinstate a policy which had lapsed on account of his failure to pay a premium, and this court held: "By his failure to comply with the condition upon which it could be kept alive, he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued," etc.

But in the present case, there was no forfeiture during the first ten years of the policy sued on. All the premiums called for by it were paid at maturity; and out of these a surplus was created in favor of the

beneficiary sufficient to reduce the premium required by the company during the second term of ten years, even considering the ten years increase in the age of the insured, to the same amount, semiannually, as was required during the first ten-year period.

Upon the issuance of the policy for the first ten-year period, the complainant, then being the wife of the insured, had an insurable interest in his life. Husband and wife, beyond all question under the authorities, have each a reciprocal insurable interest in the life of the other. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Cooley, Briefs on Ins. 185, and cases cited.

The policy as originally issued was payable to complainant, or, in the event of her death before that of the insured, to his heirs, executors, administrators, or assigns; and, under it, her rights were so far vested that they could not, during her life, be devested without her consent. Gosling v. Caldwell, 1 Lea, 455, 27 Am. Rep. 774; Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 625, 134 S. W. 311.

Though the insurance evidenced by the policy had been originally accomplished by a contract between the company and Gus Marquet, yet it is clear upon this record that he, she, and the company regarded that transaction as a settlement upon his wife of the proceeds of that contract whatsoever they might be, for he delivered the policy to his wife; she paid the premiums upon it; and the company, with knowledge of the facts, by the extension contract, treated with and recognized her as having the sole *jus disponendi* of the surplus which had been created by the payments she had made during the first ten-year term. The company was clearly well warranted in so treating with her. The contract was a settlement by the husband upon the wife, and created in her a separate estate. Hughey v. Warner, 124 Tenn. 726, 37 L.R.A.(N.S.) 582, 140 S. W. 1058 and cases there cited.

The policy covering the first ten years was not extinct or discharged so far as the company was concerned after expiration of that period until some arrangement was made satisfactory to the complainant respecting her rights in the surplus aforesaid; and, by the execution of the rider that arrangement was effected by extending the obligations of the company for an additional ten-year term. The rider did not renew a dead contract; it only extended the time for the performance of a living one.

It is true, as insisted by the company, that the rule is well established that a lack of insurable interest by the beneficiary in the life of the insured, where the insurance is taken out and paid for by the beneficiary as a speculation, vitiates the contract. In such case the contract creates the sole interest of the beneficiary in the life insured. He has nothing at stake except the premiums he pays under the policy. All such contracts are wagering pure and simple. Bendet v. Ellis, 120 Tenn. 277, 18 L.R.A.(N.S.) 114, 127 Am. St. Rep. 1000, 111 S. W. 795; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; 1 Cooley, Briefs on Ins. pp. 246–249, and cases cited.

Section 2 of our act of 1895, chapter 160, as amended by act of 1899, chapter 31, defines a contract of insurance to be an "agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss, or damage of something in which the other party has an insurable interest." See also § 3159, Shannon's Code.

But the insurable interest of the complainant in the life of Gus Marquet is not to be tested as of the date of the rider, but as of the date of original contract, because that contract was never discharged, but was extended in the time for its performance while executory, and, tested as of the former time, her interest in his life was that of a wife, and clearly insurable, as we have seen. The divorce did not invalidate the preexisting valid contract of insurance. Connecticut Mut. L. Ins. Co. v. Schaefer, supra; Snyder v. Supreme Ruler, F. M. C. 122 Tenn. 248, 45 L.R.A.(N.S.) 209, 122 S. W. 981.

The first assignment of error, based on the first defense above stated, is therefore overruled.

The second assignment of error, based on the second defense above, is that the court was in error in decreeing complainant a recovery of the amount of the policy sued on, because the evidence in this case does not justify the presumption in law that Gus Marquet was dead when this suit began.

"Positive proof is always required where, from the nature of the case, it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take place, for where the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily or usually attend such facts, and these are called presumptions, which are only to be relied upon till the contrary be actually proved. *Stabitur præsumptioni donec probetur in contrarium.* Violent presumption is many times equal to full proof, for there those circumstances appear which necessarily attend the fact." 2 Bl. Com. bk. 3, p. 371.

Presumption is no magic or short-cut

way by which proof of the essential and determinative fact may be dispensed with, for we see from the above quotation that "positive proof is always required where, from the nature of the case, it appears that it might possibly have been had." And, evidently, by the next sentence in the quotation, it is meant to be said that a presumption is only a name for a conclusion reached by means of the weight of proven circumstances; and, before a presumption can exist, the circumstances which attend must be in evidence. Proof of the essential fact must be had, either direct or positive by witnesses who know the fact, or circumstantial by witnesses who know and testify to facts which tend to establish or prove the essential fact; and only when the circumstances are, in the judgment of the court or jury, such as usually or necessarily attend the essential fact, are they sufficient in law to warrant a verdict, judgment, or decree establishing as a fact that which has not been proved by direct or positive evidence. This principle was applied by us in Dunlap v. State, 126 Tenn. 415, 41 L.R.A.(N.S.) 1061, 150 S. W. 86, Ann. Cas. 1913E, 264.

The essential fact in the present case is the death of Gus Marquet. Upon satisfactory proof of his death, the contract sued on binds the insurance company to pay. There is no direct or positive proof of his death, no witness who testifies that he saw him die, or that he saw his body after death. It is then clearly a case where proof of the essential fact must be made by circumstantial evidence.

The main insistence for the complainant is that, under the proof offered by her in this record, a presumption that Gus Marquet is dead arises.

"The general rule undoubtedly is that 'a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.'" Davie v. Briggs, 97 U. S. 633, 24 L. ed. 1088, and authorities there cited.

"It is necessary that the person as to whose death it is sought to raise a presumption shall have been absent from his home or the place where he has established a residence. Thus, where a person has changed his residence from one state or country to another, the fact that he has not been heard of in the place of his former residence for seven years raises no presumption of his death, at least in the absence of evidence that inquiries have been made for him at his last known place of residence without success; and the mere absence of a person from a place where his relatives reside, but which is not his own place of residence, and the fact that his relatives have not received letters from him for seven years, does not raise any presumption of his death." 13 Cyc. 300.

"The inference of death to be derived from unexplained absence is, at most, only a presumption, and it cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of the absentee, if living, would most probably be had." Renard v. Bennett, 76 Kan. 854, 93 Pac. 263, 14 Ann. Cas. 240, and authorities cited.

"According to the weight of modern authority, diligent inquiry among friends and relatives, and any others who would probably hear of an absentee, is necessary to raise a presumption of the latter's death, after an unexplained absence of seven years from home or place of residence." Modern Woodmen v. Gerdom, 2 L.R.A.(N.S.) 809–812, note; Miller v. Sovereign Camp, W. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126.

"Mere absence is not sufficient to raise the presumption. . . . Evidence of absence from his original place of residence will not raise the presumption of death, where it appears that he has moved to another place." Hansen v. Owens, 132 Ga. 652, 64 S. E. 800; Wentworth v. Wentworth, 71 Me. 74.

"But the presumption of death at the expiration of seven years from being last heard of does not arise where it is improbable that the absentee, even if alive, would or could have been heard of at, or would or could have communicated with, his residence, home, or domicil." Lawson, Presumptive Ev. p. 251; Hitz v. Ahlgren, 170 Ill. 63, 48 N. E. 1068, and authorities cited.

"The rule as to the presumption of the death of a person after seven years' absence was not correctly stated in the charge of the court. This presumption of law, independent of the verdict of the jury upon the facts, does not attach, unless it appear that the person has been absent from his domicil, or last place of residence, without intelligence concerning him for the period of seven years, though a jury may find the fact of death, if the circumstances of the case concur, from the lapse of a shorter period than seven years." Puckett v. State, 1 Sneed, 356.

"Obviously, the courts should be cautious in acting upon the presumption alone, and, as the general rule, diligent inquiry at the place where the party was last heard from should be required." Shown v. McMackin, 9 Lea, 601, 42 Am. Rep. 680.

According to the averment in complain

ant's bill, and her proof, it is clear that Chattanooga ceased to be the residence place of Gus Marquet on or about the years 1898 or 1899, at which time Oakdale, Tennessee, became his residence place, which he left about the year 1900, with the statement that he intended to take a trip to New Orleans. A letter supposed to be from him was received in 1904 by one of his nephews residing in Chattanooga. What domicil or place of residence he established after he left Oakdale does not appear, but clearly the latter place was his last known place of residence. This record fails to disclose any inquiry whatsoever made by her at Oakdale, Tennessee, relative to the whereabouts of Gus Marquet. The mere fact that he has not been heard from in Chattanooga, either by any member of his immediate family or others, within the past seven years, is of little weight when considered in connection with the complete estrangement between himself and the complainant and his children, resulting from the divorce proceedings. He was enjoined by solemn decree of the court from attempting to have any relations with complainant or with his minor children. All of the children of this unfortunate marriage are shown to have sympathized with the mother in the divorce proceedings, and the father during the seven years of unexplained absence was an outcast from his family.

The complainant calls as witnesses none of the collateral relatives of Gus Marquet who resided in Chattanooga. Her sole evidence to establish the presumption of death in this case is made by herself and her son, W. L. Marquet, who, as shown by the divorce bill, had refused to reside under the same roof with his father before the bill was filed.

Without going into the evidence touching inquiries made by the complainant in further detail, it suffices to say that, in our opinion, the evidence here does not warrant a finding that Gus Marquet was dead when this bill was filed. Complainant testified that he was, up to the time she last saw him, always in good health, and that she had never known him to be sick as much as one day. His application for the original policy shows that he was born in France on the 8th day of October, 1855.

Wherefore the decree appealed from must be reversed. We think that we can see from this record that justice will in all probability be done by remanding this cause, with leave to each side to take further proof, and it is so ordered. Bank of Winchester v. White, 114 Tenn. 73, 84 S. W. 697.

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NEBRASKA SUPREME COURT.

BRIDGET McLAUGHLIN
v.
SOVEREIGN CAMP OF WOODMEN OF THE WORLD, Appt.

(— Neb. —, 149 N. W. 112.)

Evidence — presumption of death.

1. A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him.

Same — presumption as to time.

2. In such case, the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period.

Insurance — absence of insured — violation of by-law.

3. In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted.

(Rose, J., dissents.)

(October 16, 1914.)

Headnotes by SEDGWICK, J.

Note. — Presumption as to time of death of one presumed to be dead after seven years' absence unheard of.

This note supplements one on the same subject appended to Butler v. Supreme Court, I. O. F. 26 L.R.A.(N.S.) 294.

As to abridgment of time necessary to raise presumption of death from absence, see note to Coe v. National Council, K. L. S. ante, 744.

See also, on the question of the presumption of death from absence, generally, the note to Modern Woodmen v. Ghromley, ante, 728; on the question of the place from which absence must be shown to raise presumption of death, the note to Marquet v. Ætna L. Ins. Co. ante, 749; and, on the question of the necessity of inquiry to raise presumption of death from seven years' absence, the note to Modern Woodmen v. Geraom, 2 L.R.A.(N.S.) 809, which is supplemented by the note to Miller v. Sovereign Camp, W. W. 28 L.R.A.(N.S.) 178 and subdiv. III. of the note to Modern Woodmen v. Ghromley, supra.

McLAUGHLIN v. SOVEREIGN CAMP, W. W. is in accordance with what seems to be the best rule, as shown in the earlier note, in holding that the law makes no presumption

APPEAL by defendant from a judgment of the District Court for Holt County in plaintiff's favor in an action to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. **Brome & Brome** and **A. H. Burnett**, for appellant:

The evidence is not sufficient to warrant the finding that James W. McLaughlin is dead.

2 Greenl. Ev. 16th ed. § 278; Francis v. Francis, 180 Pa. 644, 57 Am. St. Rep. 668, 37 Atl. 120; Dunn v. Travis, 56 App. Div. 317, 67 N. Y. Supp. 743; Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460; Tisdale v. Connecticut Mut. L. Ins. Co. 26 Iowa, 170, 96 Am. Dec. 136; Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A. (N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570; Renard v. Bennett, 76 Kan. 348, 93 Pac. 261, 14 Ann. Cas. 240.

The contract was terminated by the failure of the assured and his beneficiary to comply with the by-law enacted in 1907.

Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 926; Hall v. Western Travelers' Acci. Asso. 69 Neb. 601, 96 N. W. 170; Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224, 110 N. W. 1110.

Mr. **M. F. Harrington** for appellee.

Sedgwick, J., delivered the opinion of the court:

This is an action on a fraternal benefi-

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as to the time of death of one presumed dead after an absence of seven years.

The following cases are also authority for the same point: Carpenter v. Modern Woodmen, 160 Iowa, 602, 142 N. W. 411; Re Benjamin, 77 Misc. 434, 137 N. Y. Supp. 758, reversed in 155 App. Div. 233, 139 N. Y. Supp. 1091, infra; Re Smith; 77 Misc. 76, 136 N. Y. Supp. 825; McCausland's Estate, 213 Pa. 189, 110 Am. St. Rep. 540, 62 Atl. 780; Security Bank v. Equitable Life Assur. Soc. 112 Va. 462, 35 L.R.A. (N.S.) 159, 71 S. E. 647, Ann. Cas. 1913B, 836; Somerville v. Ætna L. Ins. Co. 21 Ont. L. Rep. 276, 16 Ont. Week. Rep. 301.

And the rule was held to be the same under a statute providing that "if any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question." Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909; Johnson v. Sovereign Camp, W. W. 163 Mo. App. 728, 147 S. W. 510; Springmeyer v. Sovereign Camp, W. W. 144 Mo. App. 483, 129 S. W. 273 (*obiter*).

"In some cases it becomes material to prove the death of such an absentee at some particular time within the seven years, or to prove the fact that he died before the presumption would arise from absence. In such cases it is necessary to prove his death as a fact, and when this cannot be done by direct evidence, it may be shown by proof of circumstances from which such death may be rightly and reasonably inferred. A court or jury in such a case is not warranted in finding death as a fact from facts and circumstances in evidence which would be sufficient only to create a presumption of death after the lapse of seven years; but additional facts and circumstances may be shown which will warrant such a finding. Some authorities have held that, in order to justify a finding of the death of an absent person, it must appear that when last seen or heard from he was in a situation of particular peril, calculated to shorten or destroy life. . . . There are cases, however, which hold that circumstances other than that of particular peril calculated to destroy life may be sufficient to justify the inference of death." Metropolitan L. Ins. Co. v. Lyons, 50 Ind. App. 534, 98 N. E. 824.

And it was held in Caldwell v. Modern Woodmen, 89 Kan. 11, 130 Pac. 642, that an instruction was correct which stated in substance that actual death of one presumed dead from seven years' absence "might be proved, like any other fact, by direct or circumstantial evidence."

In Re Benjamin, 77 Misc. 434, 137 N. Y. Supp. 758, it is held that there is no presumption as to the time of death of one presumed dead after an absence of seven years; but it is said that in a proper case the time of death may be established by evidence. On subsequent appeal (155 App. Div. 233, 139 N. Y. Supp. 1091), in which the earlier decision is reversed, it is held that "under the facts in this case" the absentee "must be presumed to have been dead at the expiration of seven years from the date of her disappearance." The court, however, does not say anything about a presumption as to the time of death.

According to Security Bank v. Equitable Life Assur. Soc. 112 Va. 462, 35 L.R.A. (N.S.) 159, 71 S. E. 647, Ann. Cas. 1913B, 836, there is no presumption that a person who has been missing for seven years "has continued to live or that he is living at any particular time during the seven years: but the burden is on the party asserting such a claim to prove it by testimony satisfactory to the jury."

But, after quoting with approval Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248, where it is said that the presumption arising from absence for seven years "establishes not only the fact of death, but also the time at which the person shall first be accounted dead," it is held in Donovan v. Major, 253 Ill. 179, 97 N. E. 231, reversing on another point, 160 Ill. App. 195, that one must be presumed to have died on the day seven years after his disappearance, "unless evidence of facts and circumstances appear to justify the inference that he died at any earlier date." E. L. D.

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ciary certificate for $1,000, issued by defendant to James W. McLaughlin. Plaintiff is the mother of assured, and is named in the certificate or insurance contract as beneficiary. In the petition it is alleged that assured is dead, and that he and plaintiff performed all of the conditions of the contract on their part. These allegations and the liability of defendant are denied in its answer. From judgment in favor of plaintiff for the full amount of her claim, defendant has appealed.

1. There is no direct evidence that assured is dead. To establish that fact and the resulting liability of defendant, plaintiff relied on proof of assured's absence without tidings for more than seven years. The beneficiary certificate became effective as an insurance contract May 2, 1900. At that time assured was an unmarried man about twenty-four years of age, and resided with his father and mother and other members of their family at O'Neill, Nebraska. Shortly afterwards he went to Park City, Utah, and worked in a mine. While there he wrote and posted family letters regularly and sent money to his mother. Early in 1904 he left Utah and went to Lima, Peru. His father and mother received from him a letter dated at that place March 30, 1904, in which he said he had changed his residence because he thought he could do better down there, and stating: "I am going up to a place called Cerro de Pasco, so I cannot give you any address with letter, but will write you when I get settled."

A companion, who went with him to Lima, but who promptly returned to Park City, wrote to assured's father as follows: "We stayed in the city of Lima, Peru, a couple of weeks, and I, not seeing any favorable chances for work, and not liking the climate, started for home. Jim refused to come with me, saying that he would try the mines first. On the day that I left there I saw him at the train, starting for the mines of the Cerro de Pasco Mining Company, which are located about 60 miles from the city."

Assured has never since been heard of.

The first question is whether the evidence entirely fails to establish the presumption of death of the insured. The findings of the trial court in actions at law, like the verdict of a jury, will not be disturbed if the evidence is substantially conflicting. The rule now thoroughly established and always acted upon is that the verdict of the jury or findings of the court in jury cases will be sustained by this court upon appeal, unless upon the whole record found to be clearly wrong. Other forms of expression sometimes adopted in opinions are not intended by the court to vary or modify the rule now so well established and uniformly acted upon.

The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case. Upon this point the supreme court of Kansas, which has perhaps required as strict proof to raise this presumption as has any court in this country, said: "It is conceived, however, that the character of the inquiry, the persons of whom it must be made, and the place or places where it must be made, are all to be determined by the circumstances of the case." Modern Woodmen v. Gerdom, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570.

In that case and in Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 Ann. Cas. 240, the court appears to adopt the rule that when a young unmarried man leaves the home of his parents and goes from place to place for some time, corresponding regularly with his parents, and suddenly ceases corresponding, and nothing is heard from him for more than seven years, inquiry must be made at all places and of all people where there was any probability that information might be obtained. But in general the courts of this country have held, as did the supreme court of Wisconsin, that it "does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years." Miller v. Sovereign Camp, W. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126. The supreme court of Minnesota approved this instruction: "If you find from the evidence that on the 17th day of July, 1901, Behlmer—that is, Fred—left his home, wife, and children, and that he has never returned, and that no tidings from him have ever been received by his family, a presumption arises after seven years that he is dead." Behlmer v. Grand Lodge, A. O. U. W. 109 Minn. 305, 26 L.R.A. (N.S.) 305, 123 N. W. 1071; Magness v. Modern Woodmen, 146 Iowa, 1, 123 N. W. 169; Oziah v. Howard, 149 Iowa, 199, 128 N. W. 364.

This question has frequently been before this court, and, so far as its application to the case at bar is concerned, seems to have been definitely settled by our former decisions.

In Cox v. Ellsworth, 18 Neb. 664, 53 Am. Rep. 827, 26 N. W. 460, it was held: "The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those

showing his exposure to danger which probably resulted in his death."

In Holdrege v. Livingston, 79 Neb. 238, 112 N. W. 341, it was held: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him."

This seems to be in line with the holdings of the Wisconsin, Minnesota, and Iowa decisions above cited. The evidence in this case was that the assured was a young, unmarried man. He had no home or fixed place of residence other than with his family at O'Neill, Nebraska. Soon after he was insured he was employed in Utah, but his sister testified, as quoted in the defendant's brief, "He was home about twice or three times a week." Several years after he was insured, he went to Lima, Peru, with a young companion, and, after they had remained there about two weeks, he concluded to go into the mining regions prospecting or to find some occupation. He had been in the habit of writing home to his family once each month during all of this time, and had regularly and monthly sent money to his parents, who were very aged and apparently needed his assistance. When he conclued to go into the mining regions, he wrote a letter to his parents, telling them of his intention, and saying that as soon as he had located he would write and give them his address. This was the last that was ever heard in regard to him. His parents caused letters to be written addressed to him at Lima, and also letters addressed to him in care of the mining corporation which he intended to visit, and these letters were returned uncalled for. If he had established a residence in Utah or at some foreign country, it might have been necessary to make further inquiries in such places of residence. His statement in his letter that "you will see by the postmark on this letter that I have exchanged my place of resedent" was plainly not intended as a declaration that he established a residence there, which the evidence shows beyond question was not the fact.

In Thomas v. Thomas, 16 Neb. 553, 20 N. W. 846, it was held that a wife could not rely upon the presumption of the death of her husband because of his absence from her for a period of seven years, when she, after he had left her, removed from state to state, establishing new places of residence, and had made no inquiry at her place of residence at the time her husband left her. And, when the same case was before this court upon a subsequent appeal (19 Neb. 81, 27 N. W. 84), the court held that the fact that the husband had been seen alive within the seven years overcame the presumption of his death. But upon the first appeal it was definitely decided that if he had been absent for a period of seven years, and during that time had not been heard from "by those who, were he living, would naturally hear from him," this was sufficient to raise the presumption of death. Surely it cannot be said that, under the evidence in this case, the finding of the trial court is so unsupported that we must say, as matter of law, that it is clearly wrong.

2. The defendant contends that under its by-laws the insured has forfeited his certificate. His original contract of insurance contained the provision that the assured should comply with the laws, rules, and regulations in force when he became a member, or which might thereafter be enacted. In July, 1907, when the insurance had been in force more than seven years, and about three years after assured was last heard from in Peru, the defendant alleges that it adopted the following by-law: "Any member who shall abscond, remove or depart from his home or last place of residence, and remain away for a period of one year, and not report to the clerk of his camp, or if a member at large, to the sovereign clerk, of his location, with postoffice address, shall thereby forfeit his membership, and his beneficiary certificate shall become null and void. The absence or disappearance of a member from his last known place of residence for any length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate or membership to a beneficiary or beneficiaries, nor shall any benefits be paid until satisfactory proof has been made of the death of the member while in good standing. No beneficiary or other person shall have the right to pay assessments and dues for a member who has been absent for one year and whose location is unknown, but in such case the clerk of the camp shall notify the person offering to make such payments that no further payments will be accepted until proof of the member's location and residence is made within the time hereinafter provided, and such clerk shall record such member as suspended and report such action to the sovereign clerk, together with the residence and postoffice address of the beneficiary or beneficiaries and the last known address of the member; also such further information respecting the absence of the member as he possesses. Upon satisfactory proof of the member's whereabouts, the sovereign commander may order him reinstated in his camp upon payment of all arrearages in assessments and dues. In

case of the failure of the member, his beneficiary or other persons interested in his certificate, to make proof of the member's whereabouts within six months after such notification by the clerk, his suspension shall remain and become permanent and binding and he cannot be reinstated except as above provided, and neither the member, his beneficiary, nor any other person shall have any right to benefits under his beneficiary certificate."

About three months after the adoption of this by-law, the clerk of the local camp notified Thomas McLaughlin, the father of the assured, in writing as follows: "I hereby notify you that I must refuse any more money in payment for your son, G. W. McLaughlin as assessments on his certificate No. 15326, W. O. W., on account of his disappearance over one year ago, and will send him in suspended in my Oct. '07 report, by instruction from Sov. Camp. Am sorry but can't help it."

During the seven years prior to that time the mother of the assured, who had received regular remittances from her son, paid regularly the dues as they matured, and afterwards, until the full seven years had expired, she tendered or caused to be tendered to the clerk of the local camp all dues and assessments. These tenders were refused and were afterwards kept intact by the assured's mother and brought into court on the trial.

It sometimes happens that one whose life is insured abandons his home and parents for more than seven years and afterwards returns or is known to be living. Insurance companies no doubt may adopt reasonable regulations to guard against payment of unjust claims in such cases. Whatever may be thought of the reasonableness of the rule adopted by defendant, as a general proposition, it cannot have the effect claimed for it in this case. When the assured went to South America, there was no such provision in his contract. If he lost his life in the mining regions within two weeks after he arrived there, it would, of course, not be insisted that several years thereafter a by-law could be adopted which would cancel his certificate. It is alleged as a defense in this case that he has violated this by-law. Unless he was living when the by-law was adopted, he could not violate it. This the defendant has wholly failed to prove. There is no presumption that he was then living. In Lawson, Law of Presumptive Evidence, 2d ed. p. 255, the author states that the rule in this country is different from the rule in England, and that in this country he is presumed to be alive until the end of seven years. The text and the notes seem to be in conflict on this point, and the authorities cited appear to be very conflicting.

In Coe v. National Council, K. & L. of S. 96 Neb. 130, ante, 744, 147 N. W. 112, there is a quotation from the opinion of Sanborn, J., in Northwestern Mut. L. Ins. Co. v. Stevens, 18 C. C. A. 107, 36 U. S. App. 401, 71 Fed. 258, in which it is said: "The established presumption of fact from the disappearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance."

The question whether the presumption related to the particular time of death was not involved either in the case in the Federal court or in our decision in which the language was quoted. In both cases the question was whether, under the special circumstances involved, the presumption of death arose before the expiration of seven years. The language used by the eminent jurist was apparently inadvertent. He intended to express the same idea which he stated in the syllabus where the points of law are supposed to be accurately stated. "Seven years is the period at which the presumption of continued life ceases." The quotation in our decision discusses somewhat at large the special circumstances under which the presumption will arise in less than seven years, and it is that part of the quotation which applied in our case and which is approved. The Federal court also cited Minnesota and Iowa decisions, where it is held that there is no presumption of the particular time of death, and in the Coe Case we also cited Winter v. Supreme Lodge, K. P. 96 Mo. App. 1, 69 S. W. 662, in which the law is stated in the syllabus: "The presumption of death, arising from unexplained absence for seven years, does not necessarily imply that the person died at the end of that period."

This case was again before the appellate court (101 Mo. App. 550, 73 S. W. 877), and from both opinions it appears that it was determined upon the special circumstances in the case, and the question now before us was not necessarily determined or considered.

In 4 Encyclopedia of Evidence, 47, 48, the rule is stated "that the date on which the death of such an absentee occurred is a matter of proof," and "the burden of proof is on the party asserting that death occurred at a particular time." This statement of the law is well supported by authorities there cited. It is peculiarly applicable to this case. There is a strong probability that, if he had lived to adopt a postoffice address in Peru, he would have informed his parents of that fact, as he

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promised in his last letter that he would do. Even if the law were otherwise, and if the presumption ordinarily were that the absentee lived to the end of the seven years, the circumstances of this case are such that we could not say that the trial court erred in not finding from the evidence that the assured lived until this by-law was enacted, and that he so violated the same and forfeited his beneficiary certificate. It is alleged that he was subject to this by-law, and that he has violated it. This could not be true, unless he was living when the by-law was enacted, and this defendant has not proved.

The findings and judgment of the trial court are not so unsupported by the evidence that we can say they are clearly wrong.

The judgment is therefore affirmed.

Rose, J., dissents.

Petition for rehearing denied.

TENNESSEE SUPREME COURT.

SOUTHERN RAILWAY COMPANY
v.
CHARLES P. McNABB, Plff. in Err.

(— Tenn. —, 169 S. W. 757.)

Carrier — refusal to carry local passenger on detoured train.

1. A rule of a railroad company not to carry local passengers on detoured trains is reasonable even when applied to a physician whose business requires him to reach his destination as soon as possible, and who will be delayed nearly two hours by the lateness of the local train if he is not carried on one which has been detoured.

Same — acceptance of passengers — invitation to board train.

2. One is not accepted as a passenger by being told by the conductor of a detoured train upon which local passengers are not entitled to ride under the rules of the company to get aboard, under the mistaken belief that he had a ticket for that train.

(October 12, 1914.)

ERROR to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Knox County in plaintiff's favor, for a less amount than demanded, in an action brought to recover damages for wrongfully refusing to carry plaintiff as a passenger on a certain train, and for wrongfully ejecting him therefrom. Affirmed.

The facts are stated in the opinion.

Mr. Jerome Templeton for plaintiff in error.

Messrs. **L. D. Smith** and **Roscoe Word**, for defendant in error:

The rule of the Southern Railway Company not to carry local passengers on detoured trains is a reasonable regulation, and, if reasonable, is enforceable.

Louisville & N. R. Co. v. Turner, 100

Note. — Carriers: reasonableness of rule as to train or route by which passengers shall be carried.

Only those cases are in point in this note which pass directly upon the question of the reasonableness of the rules here involved; so that it has not been attempted to collect the many cases that may inferentially sustain the reasonableness of such rules. Neither is it the purpose of this note to consider any of the many cases involving the question of the duty of a carrier of passengers to stop its trains at particular places or stations (see, in this connection, note to Walker v. Vicksburg, S. & P. R. Co. 7 L.R.A. 111); and cases involving time limitations upon the use of tickets, and regulations as to stops-overs, have likewise been excluded.

While the rule is well established that, "without regard to any statutory authority, a carrier of passengers has, under the common law, the right to make reasonable rules and regulations for the conduct of its business" (6 Cyc. 545), a careful search has revealed but few cases passing directly upon the question of the reasonableness of a rule attempting to fix the train or route by which passengers shall be carried. It would seem, however, that the reasonableness of such a rule is hardly to be questioned so long as it is not in contravention of some statute, and does not enable the carrier to escape the performance of any of those duties which are imposed upon it by its public character. Generally, it may be said, the reasonableness of such rules has been sustained.

A railroad company may lawfully make reasonable rules and regulations for the running of its trains and the carriage of its passengers. Ohage v. Northern P. R. Co. 118 C. C. A. 302, 200 Fed. 128. And whether the particular regulation is reasonable is a question of law, when the circumstances which bring it about are not in dispute. Ibid.

A regulation may reasonably permit the discharge of passengers from a train at a certain locality, and prohibit the taking on of other passengers at that place. Ibid. The character of the patronage at such place may often warrant such a rule.

When adequate facilities for local passenger traffic between two localities is otherwise provided, a regulation of a railroad company that another train shall not engage therein is a reasonable one. Ibid. The importance and propriety of such regulations in the conduct of the railroad business are recognized in the cases in which it is held that, when a railroad company has provided adequate service for localities with-

Tenn. 213, 43 L.R.A. 140, 47 S. W. 223; Nashville Street R. Co. v. Griffin, 104 Tenn. 88, 49 L.R.A. 451, 57 S. W. 153; Ohage v. Northern P. R. Co. 118 C. C. A. 302, 200 Fed. 128.

The fact that the train was from one and a half to two hours late gave the plaintiff no legal right to demand passage on this detoured train.

Louisville & N. R. Co. v. Brown, 1 Tenn. Civ. App. 269; Gordon v. Manchester & L. R. Co. 52 N. H. 596, 13 Am. Rep. 97; Mulligan v. Southern R. Co. 84 S. C. 171, 65 S. E. 1040; Cormack v. New York, N. H. & H. R. Co. 196 N. Y. 442, 24 L.R.A.(N.S.) 1209, 90 N. E. 59, 17 Ann. Cas. 949.

The right of plaintiff to recover, if any, is only to recover compensatory damages; and as he was not damaged in any way, either financially or professionally, there can be no recovery.

Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea, 151; Louisville, N. & G. S. R. Co. v. Guinan, 11 Lea, 98, 47 Am. Rep. 279; Pennsylvania Co. v. Scofield, 58 C. C. A. 176, 121 Fed. 814.

Faw, J., delivered the opinion of the court:

This suit was brought before a justice of the peace of Knox county by Dr. Chas. P. McNabb, against the Southern Railway Company, for damages. The cause of action is stated in the warrant of the justice of the peace as follows, to wit: "On, to wit, the 29th day of March, 1912, the defendant failed and refused, as a common carrier, to sell the plaintiff a railroad passenger ticket from Clinton to Knoxville, Tennessee, and further refused to transport plaintiff as a passenger from Clinton to Knoxville, Tennessee, schedule time, or within reasonable time; and wrongfully and unlawfully compelled plaintiff to leave its passenger coach and train at Clinton, thereby delaying plaintiff for, to wit, two hours, and after notice that plaintiff was a practising physician, and under the necessity of reaching Knoxville, where he resided, at the earliest possible moment, to give professional attention to his patients."

The justice of the peace rendered judgment in favor of the plaintiff for $499.99

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in a state, a state law requiring it to add to such service a through or limited train engaged in interstate commerce may be void. Such cases, however, are not included in this note, as they are not considered as directly in point.

Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 157, holds that a railroad company has the power, subject to damages for any breach of contract involved, to determine for itself what trains shall take passengers to a particular place.

Church v. Chicago, M. & St. P. R. Co. 6 S. D. 235, 26 L.R.A. 616, 60 N. W. 854, holds that it is a reasonable regulation for a company operating direct, indirect, and circuitous lines of road between two points, to require that through passengers, traveling upon a simple contract to carry from one point to the other, shall go by the most direct route.

And Bennett v. New York C. & H. R. R. Co. 69 N. Y. 594, 25 Am. Rep. 250, affirming 5 Hun, 599, supports the same rule. In that case the plaintiff purchased a through ticket from "Lockport to Troy;" between Rochester and Syracuse the company operated two lines, one 23 miles shorter than the other; by a rule of the company all through trains passed over the shorter route; the plaintiff—innocently, it would seem—took a train passing over the more indirect route, and, upon refusal to pay the additional fare demanded, was ejected. The question was, What was the contract on the part of the defendant, created by the ticket purchased by the plaintiff? The court said: "It seems to me that it was a contract to carry the plaintiff over the usual, through, and most direct route, and nothing more. The defendant is restricted to a charge of 2 cents a mile. It does not appear that the plaintiff paid any more than that sum for the 81 miles over the usual route. The through train from Lockport passes over the direct route, and the plaintiff must have changed cars at Rochester and taken another train. He may have supposed that the ticket entitled him to go by any road which the defendant owned, however indirect, and regardless of the distance traveled. In this I think he was mistaken. The ticket was a through ticket, and impliedly over the through route. The company were not bound to take him over any and all their roads which might terminate at the same point. A ticket from Albany to Buffalo would not entitle the holder to go by the way of Niagara Falls, although the company owns the road all the way round, and I do not see why the company would not be liable to a penalty for charging by the way of the Falls for a ticket to Buffalo, unless on notice or by specific agreement, and when sued for the penalty, it would not avail to allege that the passenger was entitled to go either way. . . . Here it must be presumed that the company were ready and willing to perform the contract as made, but the plaintiff desired to go over the Auburn road, and must have changed cars at Rochester for that purpose; and the claim for additional compensation was both lawful and just."

SOUTHERN R. Co. v. MCNABB is in accord with these cases.

Roberts v. Smith, 5 Ariz. 368, 52 Pac. 1120, holds that railroad companies have the right to designate on what trains passengers may ride, and that it is not the right of persons seeking passage over railroads to elect for themselves on what trains they will ride.

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and all costs, whereupon defendant appealed to the circuit court.

In the circuit court the cause was heard by the circuit judge, without the intervention of a jury, and resulted in a verdict in favor of the plaintiff for $10 (as nominal damages) and the costs of the cause.

The defendant railway company appealed to the court of civil appeals, and later the plaintiff below filed the record for a writ of error in the court of civil appeals, and the case was there heard upon the assignments of error by both parties.

Upon the trial of the case in the circuit court, the trial judge made and filed a special written finding of facts, upon request of the railway company, which finding of facts was made a part of the record, and, so far as necessary to be quoted in order to present the questions before this court, is as follows: "The plaintiff was a physician of high professional standing and reputation, and had been practising his profession in Knoxville, Tennessee, for the past twenty-six years; that he was very busy professionally, and was, at the time of the matters complained of, attending very sick patients in and near Knoxville, Tennessee; that on March 28, 1912, was called to Clinton, Tennessee, and went there on one of defendant's trains, leaving Knoxville late in the afternoon of said date; that he remained at Clinton overnight, expecting to return to Knoxville the following morning, March 29th, on defendant's regularly scheduled and advertised train No. 112, run by defendant for the accommodation of local travel, said train being due to leave Clinton at 5:45 A. M.; that plaintiff went to the depot at Clinton in time to meet said train, and upon arriving at the depot was told by the depot agent, or person in charge, that said train was an hour and a half late, at which plaintiff expressed regret, because of the delay it would cause him in arriving at Knoxville, in view of the fact that he had some important engagements in Knoxville to meet early that morning; that said depot agent thereupon told plaintiff that a detoured train from Chattanooga would pass Clinton about the time No. 112 was regularly scheduled to pass there, but that

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So, a regulation that persons purchasing tickets for an excursion train shall return by that train, and none other, is reasonable. McRae v. Wilmington & W. R. Co. 88 N. C. 526, 43 Am. Rep. 745.

But in Maroney v. Old Colony & N. R. Co. 106 Mass. 153, 8 Am. Rep. 305, it is held that a rule restricting to special trains the holders of a class of tickets which nevertheless purport to entitle them to carriage on any regular train does not warrant the exclusion from a regular train of the holder of such a ticket, taking passage thereon by virtue of it, without notice of the rule.

St. Louis Southwestern R. Co. v. McCullough, 18 Tex. Civ. App. 534, 45 S. W. 324, supports the right of a railroad company to so arrange its trains that passengers on some of them can go through to their destination without change of cars, while on others it would be necessary for them to change cars at a junction, and proceed later on another or other trains.

The reasonableness of a rule or regulation against the carriage of passengers on freight trains is well established. Burlington & M. River R. Co. v. Rose, 11 Neb. 177, 8 N. W. 433, 8 Am. Neg. Cas. 492; Hobbs v. Texas & P. R. Co. 49 Ark. 357, 5 S. W. 586; Houston & T. C. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98, 10 Am. Neg. Cas. 282; Thomas v. Chicago & G. T. R. Co. 72 Mich. 355, 40 N. W. 463; Reed v. Chicago, B. & Q. R. Co. 84 Neb. 8, 120 N. W. 442.

And the reasonableness of rules prohibiting the carriage of passengers on freight trains is assumed in many cases; but, as already pointed out, only such cases as pass directly upon the question are included here; and cases involving the reasonableness of rules requiring passengers to secure tickets or special permission before taking passage on freight trains are not in point here; but see note to McGowen v. Morgan's L. & T. R. & S. S. Co. 5 L.R.A. 817.

In Houston & T. C. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98, 10 Am. Neg. Cas. 282, the court said: Nor can it be controverted, when the carrier has made other suitable provisions for passenger travel, that no one has the right to demand that he shall be allowed to ride in its trains devoted exclusively to the carriage of freight; and if a party, in violation of such regulation, and without the consent of the company, forces himself into one of its freight trains, the company is surely not liable to him in its character as a carrier of passengers.

So, a railroad company may properly designate on what trains passengers may be carried, and may exclude them from an unscheduled extra freight train. Reed v. Chicago, B. & Q. R. Co. 84 Neb. 8, 120 N. W. 442. The court said: "It is generally recognized that a railroad company may make and enforce reasonable rules with reference to carrying passengers on freight trains, and that it may properly exclude passengers from certain of its freight trains. Railroad companies may properly designate on what trains passengers may ride, and, generally speaking, persons seeking passage have not the right to elect for themselves what train they may ride on. Burlington & M. River R. Co. v. Rose, 11 Neb. 177, 8 N. W. 433, 8 Am. Neg. Cas. 492; Chicago, B. & Q. R. Co. v. Mann, 78 Neb. 541, 111 N. W. 379; Roberts v. Smith, 5 Ariz. 368, 52 Pac. 1120. There can be no doubt of the propriety of railroad companies refusing to carry passengers on certain of their freight trains, and, under some circumstances, consideration of public pol-

he, said depot agent, could not sell plaintiff a ticket for said detoured train, it being contrary to the rules of said company to do so, but thought the conductor in charge of said detoured train would carry plaintiff thereon to Knoxville, to which plaintiff replied he would board said train and see if the conductor would put him off; that said detoured train stopped at both Clinton and Knoxville; that when said detoured train arrived and stopped at Clinton, plaintiff met the conductor coming from said train toward the depot, and plaintiff asked the said conductor if he would take him, plaintiff, to Knoxville, on said detoured train; that if he did not go on said train, he would miss some important engagements in Knoxville, to which said conductor replied, 'Get aboard,' which plaintiff did, taking a seat in a day coach half filled with passengers; that said conductor, upon returning to said train, asked plaintiff if he had a ticket, to which plaintiff replied he did not; that the agent had informed him that he could not sell tickets for that train; that plaintiff then and there told said conductor that he, plaintiff, would pay cash fare, to which said conductor replied that said train was not a regularly scheduled, but a detoured, train, and it would be a violation of the company's rules to carry plaintiff thereon, and politely told plaintiff that he would have to get off said train, which plaintiff did without refusal of resistance, but was somewhat angered for being thus refused transportation, and threatened to sue defendant company upon his arrival in Knoxville, which threat he carried out; that something was said by and between plaintiff and said conductor, as plaintiff was leaving the train, about the payment of extra fare, the conductor saying to plaintiff, 'You would object to paying 15 cents extra,' or something to that effect, to which plaintiff replied, 'I would pay two or three fares to be taken to Knoxville on this train;' that plaintiff got off of said train before it started, and then bought a ticket and came to Knoxville on the regular scheduled train No. 112, upon which he originally intended coming, arriving in Knoxville about 9 o'clock A. M., something like two hours later than the regular schedule time of the arrival of said train in Knoxville; that plaintiff had some important professional engagements in Knoxville for that morning, which he was not able to keep or meet as early in the day as he could and would have met them had he not been thus delayed, but he met all of said engagements during the day, though somewhat delayed; that plaintiff did not sustain any financial loss or damage, nor did he suffer any loss or damage to his professional character and standing by reason of being thus refused transportation on said detoured train, and delay in making his professional calls by reason of reaching Knoxville an hour and a half or two hours later than the schedule time for the arrival of said train No. 112; that there was a rule, custom, or practice of defendant company, at least said conductor was under orders not to carry local passengers on detoured trains along the line of road over which such trains are detoured, or rather there was a rule, order, or custom of the company to carry local passengers only upon regularly scheduled and advertised trains provided for the accommodation of local passengers or travel, and such depot agent was under orders not to sell tickets to local travel for passage on such detoured trains, or rather he was under orders to sell only for trains duly and regularly provided for local travel; that plaintiff was informed and knew of the latter before and at the time he boarded said detoured train, and was advised of the former by said conductor before and at the time plaintiff was asked to and did get off of said train, before said train left Clinton; that plaintiff was fully and duly advised that he could not be carried as a passenger on said detoured train, and got off of same upon request of conductor, which request was made in a quiet and gentlemanly manner. . . .

"The proof fails to show that plaintiff sustained any loss or damage, either financially or to his professional character and standing, by reason of the matters complained of, and that the proof further fails to show a proper case for exemplary damages."

The opinion of the circuit judge upon the

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icy would require them to refuse to carry passengers; as, for instance, where the trains were carrying large quantities of highly inflammable or explosive substances which might render the lives and limbs of passengers extremely hazardous."

Goodman v. New York R. Co. 86 Misc. 43, 148 N. Y. Supp. 279, holds that a street railway company may lawfully run short and long-service cars on the same line or route, and if they are adequately marked, or the conductor notifies the passenger on boarding the car, passengers may be required, if they wish to go beyond the short-service terminal, to take only long-service cars.

But a regulation whereby a passenger entering a short-service car, and entitled to a transfer to a car of a line intersecting the line at a point beyond, must use such transfer on an indirect route, rather than on a long-service car of the same line, is unreasonable: so he is entitled to a transfer by the most direct route. Ibid. And see Charbonneau v. Nassau Electric R. Co. 123 App. Div. 531, 108 N. Y. Supp. 105.

facts found was, in effect, that, although the railway company had a right to make and enforce a rule forbidding local passengers to travel on such detoured trains as that involved in this case, the enforcement of such rule should be modified to meet conditions and circumstances which might arise in the course of the performance of the duty which the railway company, as a common carrier, owed to the traveling public, and that, inasmuch as the local passenger train between Clinton and Knoxville was two hours late, it was the duty of the railway company, if reasonably possible to do so, to carry plaintiff on any other of its passenger trains, stopping at both Clinton and Knoxville, and that although the rule forbidding local passengers to travel on detoured trains was ordinarily reasonable, it became unreasonable in case the regularly provided and scheduled train for local travel was not run in reasonable compliance with its schedule, and that the rule with reference to detoured trains was improperly invoked in the present case. The circuit judge said: "Plaintiff could and should have been carried as a passenger on said train, and he having boarded same without a ticket, said depot agent having advised him that tickets could not be sold for said train, and, after boarding same, having offered to pay cash fare, or showing his willingness and readiness to do so, he thereby became a passenger on said train, and entitled to be carried as such, and was wrongfully ejected therefrom."

The court of civil appeals agreed with the trial judge that:

(1) The railway company was not liable in damages to plaintiff below on account of the delay of two hours in the local passenger train from Clinton to Knoxville; it not appearing that the delay was caused by negligence of the railway company.

(2) The rule of the railway company that it would not carry any local passengers on detoured trains (and incidentally its rule forbidding the depot agent at Clinton to sell tickets for such trains) was a reasonable rule, and one which the railway company had a right to make and enforce.

But in the majority opinion of the court of civil appeals, it is said, *viz.*: "We are of opinion that there can be no recovery if the defendant refused to carry the plaintiff on said special or detoured train. This train was not operated for the carriage of local passengers. This fact plaintiff knew when he boarded it. We know of no rule of law that required the defendant to carry the plaintiff on this special train. We think the rule or regulation of the company was a reasonable one. We think it is reasonably clear from the finding of facts—at least, it is inferable—that the conductor was laboring under the mistaken belief that the plaintiff had a ticket entitling him to passage on said train when he told him to get aboard. When he ascertained that the plaintiff did not hold a ticket for said train, he told him that he would have to get off. We are of opinion that the plaintiff was never in fact accepted as a passenger on said train, and the relation of passenger and carrier was never established."

The judgment of the circuit court was therefore reversed, and the plaintiff's suit dismissed.

The minority of the court of civil appeals held to the opinion that, under the facts, the relation of passenger and carrier was established, and could not be severed by the conductor without subjecting the railway company to liability. However, they were of opinion that the plaintiff was entitled to recover only nominal damages, and that the judgment of the circuit court should be affirmed.

We think the conclusion of the majority of the court of civil appeals is correct.

Railroad companies may adopt, and in a lawful and proper manner enforce, reasonable rules and regulations, not in contravention of any law or public policy, for the carriage of freight and passengers and the transaction of their business generally. Louisville & N. R. Co. v. Turner, 100 Tenn. 213, 43 L.R.A. 140, 47 S. W. 223, and cases there cited.

The general principles to be applied in determining whether or not the relation of passenger and carrier existed are stated in Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L.R.A. 521, 37 N. E. 105, and repeated in the case of Hogner v. Boston Elev. R. Co. 198 Mass. 260, 269, 15 L.R.A.(N.S.) 960, 962, 84 N. E. 464, 465, as follows, to wit: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger, by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for. . . . A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place, to

be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner, and condition that the railroad company must be deemed to have accepted him as a passenger."

It is a necessary corollary to the rule that a railway company may make and enforce reasonable rules and regulations with reference to the reception of persons as passengers; that the railway company may decline to receive or accept as a passenger a person who refuses or fails to comply with such reasonable rules and regulations of the railroad company.

It is well established that one who procures a ticket and procures passage upon a railroad train by means of fraudulent misrepresentations does not occupy the status of a passenger, but is a trespasser. Fitzmaurice v. New York, N. H. & H. R. Co. 192 Mass. 159, 6 L.R.A.(N.S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 20 Am. Neg. Rep. 564, and cases there cited.

In the present case, it appears that when the conductor told Dr. McNabb to "get aboard," he, the conductor, was under the impression that Dr. McNabb had procured a ticket for passage on that train. This, however, was not the case, and Dr. McNabb not only knew that he had no ticket, but had been warned by the station agent that it was contrary to the rules of the company for local passengers to ride on that particular train; but, notwithstanding such knowledge on his part, Dr. McNabb carried out the purpose, theretofore announced by him, that he "would board said train and see if the conductor would put him off."

Although Dr. McNabb was not guilty of any fraudulent misrepresentation, it is manifest that the conductor, in the first instance, expressed a willingness to accept him as a passenger under a mistake of fact, to wit, that a ticket had been sold to McNabb for passage on that train; but before the train left the station, and before it moved from the place where McNabb boarded it, the conductor discovered his mistake, and thereupon politely requested McNabb to leave the train, which he did without resistance.

We are of the opinion that, under the facts found by the trial judge, the railway company had a right to decline to accept Dr. McNabb as a passenger on the train in question, and that the legal relations of the parties were not changed by the conductor's invitation to McNabb to "get aboard," made, as it was, under a mistake of fact.

The judgment of the Court of Civil Appeals will be affirmed.

TENNESSEE SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
STATE OF TENNESSEE.

(— Tenn. —, 169 S. W. 1173.)

Nuisance — trestle over street — change of grade.

A railroad company is not subject to indictment for the maintenance of a nuisance because a municipality has raised the grade of a street passing under one of its trestles which when constructed was sufficiently elevated to accommodate traffic, so as to diminish the space and obstruct the free use of the road.

(October 17, 1914.)

ERROR to the Criminal and Law Court for Anderson County to review a judgment convicting defendant of obstructing a certain public road in the town of Clinton. Reversed.

The facts are stated in the opinion.

Messrs. **Sawyer & Underwood** and **L. D. Smith** for plaintiff in error.

Messrs. **J. H. Wallace** and **J. B. Burnett** for the State.

Green, J., delivered the opinion of the court:

The plaintiff in error was indicted for obstructing a certain public road or street in the town of Clinton, a municipal corporation, was found guilty, and fined $50, and the obstruction ordered to be removed in pursuance of the requirements of the statute (Shannon's Code, § 6871). The case has been brought to this court for review, and a number of errors are assigned to the action of the court below. It will be necessary to consider only that error which questions the sufficiency of the evidence to support the verdict and judgment of the trial court.

While there was some conflict in the proof, the preponderance of the evidence is

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Note. — Duty of railroad to conform crossing to change of grade of street.

This note excludes cases where the change involves either the abolition of a grade crossing, or the construction of a grade crossing in place of one where the highway passed above or below the railroad.

As to liability for cost of changing grade

to the effect that in 1887 and 1888 a certain trestle was constructed by the Walden Ridge Railway, the predecessor of plaintiff in error, over what was then known as the Jacksboro road in the town of Clinton. At the time of its construction, this trestle was of sufficient height over the street to permit free travel and use of the said road. The said crossing was in the town of Clinton, but at the time the trestle was built, Clinton was not incorporated. Later the town of Clinton was incorporated, just when it does not appear from this record. In 1903 the first charter of this town was abolished, and it was reincorporated under chapter 92 of the Acts of 1875, and chapter 133 of the Acts of 1903.

The preponderance of the testimony is that the level of this trestle has not been changed since it was first built by the Walden Ridge Railway Company in 1888. After the town of Clinton was incorporated, however, that municipality, by its agents, filled in the Jacksboro road or street, so as to raise its level, at the point where it is crossed by the trestle, between 2 and 2½ feet. The result is that the trestle is not now high enough above the road to permit of the passage under it of loads of hay, fodder, and vehicles loaded in this manner. In other words, under present conditions, the trestle is an obstruction to the free use of this road, and the railway company has accordingly been indicted for obstructing the public highway, and the trestle found by the court to be a nuisance.

To a number of propositions contained in the brief for the state, we fully agree.

Under its charter, the town of Clinton has full control of its streets and railroad crossings over the streets. The municipality can alter the grade of its streets, and there can be no doubt under our cases but that it has the power to require railroad companies maintaining overhead crossings to reconstruct said crossings to conform to any change made in the level of the streets thereunder. Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; Chattanooga v. Southern R. Co. 128 Tenn. 399, 161 S. W. 1000.

Moreover, the town of Clinton alone has

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of street to prevent the crossing of a railroad at grade, see the note to Kelly v. Minneapolis, 26 L.R.A. 92.

For power to compel railroad to establish or maintain at its own expense overhead or underground crossing, as affected by the fact that the street or highway is opened subsequently to construction of railroad, see the note to State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 28 L.R.A. (N.S.) 298.

For power of municipality to compel change of grade of railway in street generally as distinguished from crossings, see the note to Houston & T. C. R. Co. v. Dallas, 70 L.R.A. 850.

For power of municipal corporation to require railroad company to keep highway in repair at overhead or underground crossing, see the note to People ex rel Chicago v. Illinois C. R. Co. 18 L.R.A.(N.S.) 915.

Few cases have been found within the scope of this note.

The leading case on the subject is Cleveland v. Augusta, 102 Ga. 233, 43 L.R.A. 638, 29 S. E. 584, where, after a railroad had been laid out across a highway near a city, the city was extended so as to include the place of the crossing, and thereafter the city raised the highway to protect it from floods. It was held that the railroad company must raise its track to the new level of the highway at its own expense. The court declared that the railroad was constructed subject to the pre-existing general statute requiring railroad companies to keep in good order, at their expense, the public roads or private ways established pursuant to law where crossed by their several roads, and build suitable bridges, and make proper excava-

tions or embankments, according to the spirit of the road laws, and prescribing the extent of such crossings. The court said: "The presence of the railroad necessitates a certain character of crossings and safeguards which otherwise would not exist. . . . When the corporation constructed its track across the public highway in question, it did so subject to the right of the public authorities to require such changes in the crossing, from time to time, as the public safety and welfare might demand, or to readjust its track and crossings to a change of grade of the street, demanded for the safety and convenience of travelers upon the highway, and that in doing so the expense incurred is involved in its compliance with a police regulation of the statute; and we know of no law whereby a corporation or natural person can recover damages on account of being compelled to render obedience to a public regulation designed to secure the common welfare."

Where a city had granted a railroad company a franchise to run along a street upon its water front so as to connect with the wharves, and pending the rebuilding of the railroad track, which had been destroyed by fire, the city raised the grade of cross streets so that it would be impossible for the company to conform thereto, if at all, without the destruction of its franchise, it was held that the railroad company would not be restrained from crossing the streets at the former level, as the city, if it were necessary to destroy the franchise, might exercise the power of eminent domain upon making compensation. The court said: "Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this in-

control over its streets and crossings within the corporate limits, and neither the county court nor any other authority can interfere with the municipality in the exercise of this control. Shannon's Code, § 1679; State v. Loudon, 3 Head, 263; De Tavernier v. Hunt, 6 Heisk. 599.

If, however, the municipality permits its streets to get so out of repair or obstructed as to become a public nuisance, the said municipality and its officers are liable to indictment. State v. Barksdale, 5 Humph. 154; Chattanooga v. State, 5 Sneed, 578; State v. Murfreesboro, 11 Humph. 217; Hill v. State, 4 Sneed, 443; State v. Shelbyville, 4 Sneed, 177.

So, while it must be conceded that the municipality has full power over its streets and can change the grades thereof, and likewise has full power to regulate the manner in which railroads shall cross these streets, and can require crossings to be altered and reconstructed, nevertheless none of these considerations are determinative here.

Although the town of Clinton might have required the Southern Railway Company to change the level of this crossing over Jacksboro road or street, it has not seen proper to attempt any such thing. The municipality has filled up the street under the trestle, but so far as this record shows, has been content that the trestle remain as it was before the level of the road was changed. The railway company has done nothing whatever to its trestle, and it was without power to interfere with the action of the municipality in raising the level of this road.

Under these circumstances, we are of opinion that the railway company is not liable to indictment for obstructing the public highway. We think the obstruction was caused by the act of the town of Clinton, and the town of Clinton is liable to indictment if anyone is.

Ordinarily one is not civilly liable for a nuisance caused or promoted by others over whom he has no control; nor is one bound to go to expense or litigation to abate such a nuisance.

An owner of land upon a declivity who has no control of the property lying above

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stance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well-recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted, and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation: and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents." Seattle v. Columbia & P. S. R. Co. 6 Wash. 379, 33 Pac. 1048.

While there seems to have been no change in the grade of the streets in Atlantic Coast Line R. Co. v. Goldsboro, 155 N. C. 356, 71 S. E. 514, it was there held that long after a city with its streets had grown up along a railroad, the city might lawfully require the railroad company to lower its tracks at street crossings to conform to street grade, this apparently requiring changes of from 6 to 18 inches. The court construed the railroad company's charter as applying to roads laid out after the railroad, as well as to those laid out before, where it provided that "it shall be lawful for the said railroad company in the construction of its said road to intersect or cross any public or private way established by law; and it shall be lawful for them to run their road along the route of any such road; Provided, whenever they intersect and cross such public or private road the president or directors shall cause the railroad to be so constructed as not to impede the passage of travelers on said public road or private way aforesaid." The court also said: "The plaintiff took its charter expecting that towns and cities would grow up along the line of its road, and knowing that with the development of the country new roads and, in the cities and towns, that new streets would be laid out across its right of way. And it took its charter knowing, too, that the state would have the right to lay out such roads and new streets, and to require the railroad to make such alterations as would prevent the passage over its track by the public being impeded."

It was also held in the same case that the charter power of the city was not impaired by the statute giving the corporation commission the power to require the raising or lowering by a railroad of its track or highway at any crossing, and to designate who shall pay for the same, as this was merely supplementary to the power of the city, and not in derogation thereto.

So there was no change in the grade of the street, in Houston & T. C. R. Co. v. Dallas, 98 Tex. 396, 70 L.R.A. 850, 84 S. W. 648, a proceeding to compel a railroad company to eliminate, at various crossings, its embankment, which was above the streets of a city from about 1 to 5 feet. It was there held that, while the statutory power of the city and its ordinance were sufficiently broad, the courts would not compel the company to eliminate its embankment at the crossings (which were of various levels) at great expense and inconvenience where no material advantage to the public appeared.

It was claimed in the same case that the

his own, nor over the people who occupy it, is not liable to the owner of the property next below his own for damages arising from offensive matter thrown, without any fault of his, upon the upper lot and flowing naturally across his premises onto the lot below. Brown v. McAllister, 39 Cal. 573.

Where a turnpike company built a drain into which an owner of land through which it flows, without the knowledge or consent of the company, turned foul matter, causing a nuisance and damage to another upon whose premises the drainage was cast, under these circumstances the landowner contributing the foul matter to the drain was held to be alone liable for the resulting damage. Magee v. Pennsylvania-Schuylkill Valley R. Co. 13 Pa. Super. Ct. 187.

Likewise it was held that where a railroad company had constructed a ditch along its track through which polluted water flowed into a pond on adjacent premises, depositing garbage and filth on said premises, and creating a nuisance, the railroad company was not liable to the owner of the premises for resulting damages where said pond was the natural outlet of the water originally flowing through the ditch, and the increase of flow after the building of the railroad and ditch and the pollution of the water was caused by drains and ditches and embankments on the lands of others over which the company had no control. Brimberry v. Savannah, F. & W. R. Co. 78 Ga. 641, 3 S. E. 274.

We think the rule to be deduced from the foregoing cases is that no one is civilly answerable for a nuisance, even though that nuisance be immediately promoted by his own property, if this result is occasioned by the act of others, over whom he has no control, so affecting his property as to make it an agency contributing to the nuisance. In other words, the proximate cause of every nuisance must be ascertained in fixing liability therefor, and when one's property is, by the act of independent third parties, made the instrumentality of a nuisance, such act of such parties is the proximate cause, and the innocent owner of the property is not responsible.

The same principle would apply to a crim-

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change proposed by the city in the grade of the crossings was in reality an attempt on its part to regrade its streets at the expense of the railroad company, and thus evade the statute requiring the city to pay its proportion of the expense of regrading its streets, and also that the city was attempting to take or damage the property of the company without compensation. But the court held that these claims were untenable, as the suit of the city was not an attempt to assert the power of local taxation by local assessment, nor the power of eminent domain, but was an assertion of police power over crossings, and must be ruled by the principles applicable to that power.

It may be observed that it does not appear that there was any change in grade in the two cases cited to the particular point in SOUTHERN R. CO. v. STATE, *viz.*, Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943 (concerning a crossing in the country), and Chattanooga v. Southern R. Co. 128 Tenn. 399, 161 S. W. 1000 (a city street crossing); the holding in each of these cases was that the railroad company was liable for the cost of a new bridge carrying the highway over the railroad.

It is possible that a situation within the scope of this note was involved in the second of the petitions considered in Boston & L. R. Corp. v. Middlesex County, 198 Mass. 584, 85 N. E. 108, but the report is not clear in this respect, and the proceeding failed on account of the insufficiency of the plans of the proposed work.

The following cases, while without the scope of this note, are of interest in connection with the subject:

Where a railroad intersected a highway near a bridge by which the highway crossed a creek running parallel with the railroad, and long after the construction of the railroad the municipality built a new bridge at a higher level so that the approach to the railroad was less steep, it was held that the railroad company was not responsible for the cost of the new bridge and approach, the court considering that the company when its road was originally constructed had restored the highway to its former condition as near as might be, "so as not to materially impair its usefulness." Ohio & M. R. Co. v. Bridgeport, 43 Ill. App. 89.

In Chicago v. Pittsburg, C. C. & St. L. R. Co. 244 Ill. 220, 135 Am. St. Rep. 316, 91 N. E. 422, long after a railroad company had constructed viaducts as required by a city, it carried out a new agreement with the city by which it was to elevate its tracks, remove the viaducts, and lay out certain streets, and was to be released from any damages arising to third parties from the construction of such viaducts. It was held that the city could not repudiate its release, and that it could not be claimed that the city might arbitrarily compel a change from viaducts to elevation of the railroad's tracks, unless there was some connection between such a change and the public safety, welfare, or convenience; nor was the contract invalid as a bartering away of the city's police power.

It may be noted that in People ex rel. Denver v. Union P. R. Co. 20 Colo. 186, 37 Pac. 610, it was held under a sufficiently broad statute and ordinance that a city might require railroads crossing a certain street at grade to carry part of the width of the street over their roads by a viaduct, leaving the rest of the width at grade.

B. B. B.

inal prosecution of a nuisance. One who so uses his property as that it becomes a nuisance to the public is subject to indictment and conviction. If his use thereof injures an individual, he is subject to an action for damages. In neither case is the defendant responsible for a nuisance not proximately resulting from some act or omission of his own with respect to his property.

In a South Carolina case, the defendant was indicted for a nuisance occasioned by an overflow from the head of a mill pond which he maintained. The proof showed defendant's dam had been erected in the stream for many years without causing an overflow or damage to the neighborhood. Landowners undertook to deepen and alter the channel of the stream above the mill pond for drainage purposes, and there was evidence that, as a result of this work, large quantities of sand and *débris* came down and accumulated at the head of the pond, and that the obstruction thus formed occasioned the overflow. The supreme court of South Carolina reversed a judgment of conviction, and, among other things, said: "While it is true that the defendant would be liable if his obstruction of the creek, by his pond and dam, was in itself the cause of the injuries complained of, yet, if the consequences are to be attributed to the acts of others, so affecting his property that it becomes a public nuisance, it would not appear consistent with justice or propriety that he should be held to responsibility. The mere erection of the mill and dam on his own land was no nuisance; and if results, though injurious, yet not proximate and direct, followed, because set in motion by the acts of others, either in cutting the ditch, which by the accumulation of sand choked the channel and raised it higher than the adjacent banks, thus forcing the water over the edges of the ditch or banks, and collecting it in pools or holes, or from the increased cultivation in the neighborhood, it would seem that the consequences are to be referred to an agency operating on the property of the defendant, for which he should not be liable, because not employed by him. They were not proximate or direct, in the legal sense in which those terms are understood. He must be held accountable for the unlawful effects which naturally or directly proceeded from his acts." State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

So in this case, we think that the act of the town of Clinton in raising the level of this street was the proximate cause of the obstruction. Until the railway company is directed by the municipal authorities to reconstruct its trestle, the maintenance thereof at its present level is not unlawful. The nuisance has resulted from the act of the municipality, and plaintiff in error is not responsible for the same.

The evidence preponderates against the verdict and judgment below, and the case will be reversed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

GEORGE A. WILLS
v.
NANCY V. WILLS, Appt.

(— W. Va. —, 82 S. E. 1092.)

Divorce — discourtesy.

1. Uniform and continued discourtesy of one spouse to the other, manifested in various ways, such as denial of social intercourse, coolness of manner, disavowal of love, expression of hatred, and refusal of company at church and elsewhere, while both reside together, the husband providing support and the wife performing the ordinary household duties, is not alone ground for divorce.

Same — denial of sexual intercourse.

2. Nor is such discourtesy, combined with exclusion of the husband from access to the wife's bed and refusal of sexual intercourse, while the marriage relation remains otherwise unimpaired, ground of divorce.

(September 15, 1914.)

Headnotes by POFFENBARGER, J.

Note — Refusal of marital intercourse as ground for divorce.

This note is supplementary to the one appended to Fritts v. Fritts, 14 L.R.A. 685, where the earlier cases will be found.

Cases involving impotency existing at the time of marriage or occurring thereafter are not included in this note.

For misrepresentation or concealment as to one's physical or mental condition as ground for annulment of marriage, see Lyon v. Lyon, 13 L.R.A.(N.S.) 996, and note.

In general.

While divorce is sometimes granted for refusal of marital intercourse, it is not recognized as a distinct ground, but only as evidence of some statutory ground, such as desertion or cruelty. While the weight of authority is probably in accord with WILLS v. WILLS, the tendency of the later cases seems to be to look with more favor upon the granting of a divorce because of the refusal of marital intercourse, the courts being apparently influenced somewhat by the contentions of Mr. Bishop in his work on Marriage and Divorce, which are discussed in the earlier note.

APPEAL by defendant from a judgment of the Circuit Court for Monroe County in plaintiff's favor in an action for a divorce. Reversed.

The facts are stated in the opinion.

Mr. John W. Arbuckle, for appellant:

Neither the refusal of sexual intercourse nor the fact that the parties occupy separate homes or apartments will alone constitute good grounds for desertion.

Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537; Fritz v. Fritz, 138 Ill. 436, 14 L.R.A. 685, 32 Am. St. Rep. 156, 28 N. E. 1058; Reid v. Reid, 21 N. J. Eq. 331; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; 14 Cyc. 612; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289; Reed v. Reed, 62 Ark. 611, 37 S. W. 230.

Where the evidence of a husband seeking a divorce on the ground of cruelty shows

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As desertion.

See also cases cited in note in 14 L.R.A. 685.

The California statute on divorce makes persistent refusal to have reasonable matrimonial intercourse evidence of desertion, when health and physical condition do not make such refusal reasonably necessary.

Under this provision, it was held in Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19, that evidence that for three weeks following the marriage plaintiff's wife refused to have marital intercourse with him, without any evidence to explain the refusal or to show that the physical condition or health of the wife was such as to make the refusal unreasonable, was not sufficient to warrant the granting of a divorce.

In Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694, divorce was granted to the wife upon this statutory ground, where it appeared that the husband left the marriage bed and never thereafter sought a renewal of the intercourse, it being held that it was not necessary to show that the wife solicited his return.

Refusal by a wife to permit sexual intercourse, the parties continuing to live together, is not ground for divorce under a statute allowing divorce where one spouse wilfully deserts the other and remains absent for two years. There must be a complete separation of the parties. Pfannebecker v. Pfannebecker, 133 Iowa, 427, 119 Am. St. Rep. 608, 110 N. W. 618, 12 Ann. Cas. 543; Snouffer v. Snouffer, 150 Iowa, 58, 129 N. W. 326; Lambert v. Lambert, — Iowa, —, 145 N. W. 920.

The mere refusal of a wife to allow marital intercourse is not of itself such desertion as will authorize the husband to secure a divorce on the statutory ground of wilful, obstinate, and continued desertion for one year. Prall v. Prall, 58 Fla. 496, 26 L.R.A. (N.S.) 577, 50 So. 867.

The fact that a wife, without physical excuse, for three consecutive years, refuses to have sexual intercourse with her husband, while fulfilling all the other duties of the relation, does not entitle him to a divorce "for wilful desertion for three consecutive years." Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86.

Refusal by a husband to have intercourse with his wife does not constitute "wilful desertion" within the meaning of a divorce statute. Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

And in Anonymous, 52 N. J. Eq. 349, 28 Atl. 467, it was held that the withdrawal of a wife from sexual intercourse with her husband, though without just cause, would not alone constitute such desertion as would authorize the granting of a divorce.

But in Raymond v. Raymond, — N. J. Eq. —, 79 Atl. 430, a carefully considered case, the court holds that refusal by a husband to consummate the marriage by having sexual intercourse constitutes desertion for which a divorce will be granted, though the parties continued to live together as husband and wife in other respects. The court, in reaching its decision, distinguished Reid v. Reid, 21 N. J. Eq. 331, and Anonymous, supra, on the ground that in those cases it did not appear that there had been any effort on the part of complainants to secure a resumption of the marriage relation.

In Rector v. Rector, 78 N. J. Eq. 404, 79 Atl. 295, where, after the husband and wife had lived together for a number of years and had had children, the wife withdrew from all marital intercourse and from all family life of any sort except that she continued to live in the same house with, and be supported by, the husband, it was held that her conduct amounted to desertion, though she did continue to live under the same roof with her husband.

In Yawger v. Yawger, — N. J. Eq. —, 86 Atl. 419, where it appeared that shortly after the marriage of plaintiff and defendant (both being twenty-four years of age at the time of their marriage), it was discovered that the husband was incapable of having sexual intercourse because of a defect which could easily be remedied by a surgeon, but that he refused to have it remedied, and the parties lived together for ten years without having intercourse, when plaintiff left him, and it appeared from the testimony that about one year before plaintiff left, defendant had the defect remedied, but never made plaintiff aware of that fact, it was held that there was such a desertion on his part as would authorize a divorce.

In Oertel v. Oertel, — N. J. Eq. —, 90 Atl. 1006, it is held that, assuming that the Rector Case, supra, is authority for the contention that cessation of intercourse on the part of the wife, without more, is sufficient to constitute desertion, the husband, to take advantage of it, must be able to show that he performed the equally important marital duty of furnishing his wife, according to his means, with sufficient food and clothing, and a divorce was refused when it appeared

nothing more than a lamentable state of domestic infelicity, and it is apparent that much of which he complains has been the result of his own fault, and would have been different had he shown his wife some kindness and consideration, he cannot succeed.

Crounse v. Crounse, 108 Va. 108, 60 S. E. 627.

Mr. J. A. Meadows for appellee.

Poffenbarger, J., delivered the opinion of the court:

The decree of absolute divorce in this cause, from which an appeal has been taken, is founded upon evidence proving or tending to prove the following facts:

The parties were married September 9, 1880, and have ever since resided together, and continue to do so. Unto them have been born seven children, all of whom except two are above the age of twenty-one years and away from home, doing for themselves. The two remaining at home were, at the time of the filing of the bill, eleven and nineteen years old, respectively. Since the date of the birth of the last child, the wife's conduct and demeanor toward her husband have been radically different from her former attitude toward him. Although she has re-

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that the wife's refusal was not final, but was grounded upon his failure of duty in the matter of support, and that the husband did not use any proper effort by advances and concessions to terminate the condition under which they were living.

It is desertion for a wife to deny her husband all his conjugal rights, persistently, and without justification, with the intention of casting him off as a husband completely and forever. Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543.

But this conduct must be persisted in for the statutory period of three years. Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73.

Refusal to permit intercourse, though the husband and wife continue to live together, does not constitute desertion under a statute providing for divorce if one of the parties absents himself or herself without reasonable cause for the space of one year. Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42. In order to come within the statute, a husband who has been denied intercourse must leave and live apart from the wife, unless she has left, which he would have a right to do under such circumstances. Gruner v. Gruner, — Mo. App. —, 165 S. W. 865.

But in Graves v. Graves, 88 Miss. 677, 41 So. 384, it is held that complete refusal by a wife of marital intercourse for the period provided for desertion constitutes a ground for divorce, though the parties continued to reside in the same house.

In Evans v. Evans, 93 Ky. 510, 20 S. W. 605, the court held that desertion for a year on the part of the husband was shown though he continued to reside in the same house with the wife till four months before the wife instituted the suit, but refused to recognize her as his wife, or to live and cohabit with her.

And in Rie v. Rie, 34 Ark. 37, it appeared that the wife left the husband's residence and did not thereafter live with him as his wife, but returned occasionally for a few days at a time to assist her daughter, at which times there was but little said between her and her husband and they occupied different rooms at night. The court granted a divorce to the husband on the ground that the wife had deserted and absented herself from him for the space of one year without reasonable cause. Apparently, the court based its decision upon the cessation of marital intercourse, for it says: "There was doubtless an actual cessation of matrimonial cohabitation between the parties for the period alleged in the bill, which appears to have been intentional on the part of the wife, and this was cause of divorce, notwithstanding she made occasional visits to the house of her husband, to look after her children, and while there engaged in domestic duties, unless she had reasonable cause for such abandonment of the matrimonial cohabitation," and cites Bishop on Marriage and Divorce.

As cruelty.

See also cases cited in note in 14 L.R.A. 685.

Mere proof that a wife declined to cohabit with her husband will not authorize the granting of a divorce to him on the ground of cruel treatment. Pinnebad v. Pinnebad, supra.

Refusal of a wife to cohabit with her husband, except for a period of about six weeks after their marriage, does not constitute "extreme and repeated cruelty." Severns v. Severns, 107 Ill. App. 141.

Charges that a husband sixty-seven years of age refused to occupy the same bedroom with his wife after they had been married about a week, claiming he was obliged to do so because of his health, together with charges that he used indecent language to her, and concerning her to her relatives and friends, were insufficient to support a decree for divorce on the ground of extreme cruelty. Disborough v. Disborough, — N. J. Eq. —, 26 Atl. 852.

In Johnson v. Johnson, 31 Pa. Super. Ct. 53, it is held that persistent refusal by a wife to have sexual intercourse with her husband does not authorize a divorce under a statute providing for divorce "where a wife shall have, by cruel and barbarous treatment or indignities to his person, rendered the condition of her husband intolerable, or life burdensome." And that case is followed in Platt v. Platt, 38 Pa. Super. Ct. 551.

So, refusal by a wife to have unrestrained

mained under his roof, taken care of the children, done the housework, cooking, mending, and washing, and presided at the table, just as she had previously performed these services, she has uniformly and persistently denied her husband all social intercourse as well as access to her bed. Visitors at the house, as well as members of the family, say she treats him coldly and snappishly in their presence, and does not demean herself toward him as wives usually and ordinarily treat their husbands. She refuses to accompany him to church or elsewhere, and passes him on the road without recognition. She has repeatedly declared she does not love him, and never can, and hates him, and says she wants a man she can love and of whom she would not be ashamed. The husband establishes his good character and proves his repeated and persistent efforts to effect a reconciliation with her. The ministers and members of the religious society to which both belonged have used every possible effort to reconcile them, but without avail. They finally severed the wife's membership in the church on account of her conduct toward her husband.

These charges, supported by evidence, are not admitted by the defendant. On the contrary, she denies many of them, and has en-

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sexual intercourse with her husband does not constitute such barbarous and cruel treatment. Hexamer v. Hexamer, 42 Pa. Super. Ct. 226.

Refusal of a husband to have intercourse with his wife does not constitute "cruel and inhuman treatment" within the divorce law, at least in the absence of any showing of mental or bodily injury resulting to the wife from such refusal. Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

A mere showing of a persistent refusal by plaintiff's wife to permit sexual intercourse is not sufficient to establish a right to divorce under a statute authorizing a divorce in case of "excesses, cruel treatment, or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable," without any showing that, because of the physical condition of the husband, such refusal amounted to the cruelty described. Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386.

Refusal by a wife to have sexual intercourse with her husband except under conditions that will safeguard her health is not a ground for divorce, under the statutory provision quoted in the preceding case. Lohmuller v. Lohmuller, — Tex. Civ. App. —, 135 S. W. 751.

But in Campbell v. Campbell, 149 Mich. 147, 119 Am. St. Rep. 660, 112 N. W. 481, in which a divorce was granted on the ground of extreme cruelty, the principal evidence being of a refusal of cohabitation, the court said: "Refusal of cohabitation has repeatedly been held to be a ground for divorce," citing Menzer v. Menzer, 83 Mich. 319, 21 Am. St. Rep. 605, 47 N. W. 219, in which refusal to cohabit was one of the charges proven against the wife, from whom a divorce was granted on the ground of extreme cruelty, and Whitaker v. Whitaker, 111 Mich. 262, 69 N. W. 1151, a memorandum opinion in which a divorce was granted on the ground of extreme cruelty alleged to consist of refusal of cohabitation.

In Case v. Case, 159 Mich. 491, 122 N. W. 538, 124 N. W. 565, it is held that continuous refusal on the part of a wife to cohabit with her husband, the only basis of

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the refusal being that she came to dislike him, constitutes extreme cruelty warranting the granting of a divorce.

In Waldhorn v. Waldhorn, 165 Mich. 130, 130 N. W. 199, evidence that a wife continually called her husband opprobrious names and accused him of improperly associating with other women, and that for a number of years she refused to cohabit with him, was held sufficient to justify a decree of divorce on the ground of extreme cruelty.

As indignity.

See also cases cited in note in 14 L.R.A. 685.

In Casey v. Casey, 180 Mo. App. 605, 163 S. W. 569, it was held that refusal by a wife to speak to her husband or have marital intercourse with him unless he would give her large sums of money, together with other acts set out in the opinion, constituted indignities warranting the granting of a divorce.

But the refusal by a wife of marital intercourse does not alone constitute an indignity within the divorce statute. Gruner v. Gruner, — Mo. App. —, 165 S. W. 865.

As gross neglect of duty.

In Dunbar v. Dunbar, 4 Ohio Dec. Reprint, 237, in which refusal by a wife to sleep or cohabit with her husband was alleged, together with numerous other matters, a demurrer to the petition was sustained on the ground that the facts stated did not constitute gross neglect of duty for which a divorce should be granted.

In Leach v. Leach, 46 Kan. 724, 27 Pac. 131, it is held that refusal of a wife to cohabit with her husband for five years is sufficient to warrant the granting of a divorce on the ground of "gross neglect of duty."

In McKinney v. McKinney, 9 Ohio S. & C. P. Dec. 655, it is held that refusal by one of the parties to consummate the marriage by having sexual intercourse does not constitute "gross neglect of duty," and the court expressed its further opinion that such conduct would not constitute "wilful absence" or "cruelty." R. I. S.

deavored to refute them by her own testimony and that of other witnesses. She would justify her denial of his privilege of access to her bed upon two grounds: (1) A false accusation by him as to the paternity of her last child, made some time before its birth; and (2) her inability, by reason of a cancerous affliction, to afford the privilege of intercourse without injury and pain. A short time before the institution of this suit she was relieved by a surgical operation, of a fibroid tumor of considerable size, and her physician testifies its growth was probably of several years' duration.

The facts alleged, other than nonintercourse, which is not denied, do not amount to cruel and inhuman treatment, nor do they alone constitute grounds for divorce. Huff v. Huff, — W. Va. —, 51 L.R.A.(N.S.) 282, 80 S. E. 846; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083; Latham v. Latham, 30 Gratt. 307. Nor does the fact of nonintercourse, although the same can be regarded as not justified by the physical condition of the wife, constitute ground for divorce. Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889.

But, treating the disputed facts as having been established, the argument proceeds upon the theory of desertion. Rather admitting insufficiency of nonintercourse alone, it combines this circumstance with the others alleged, and urges that all taken together constitute legal desertion. However, all of these circumstances do not completely sever the marriage relation. The wife remains under the husband's roof, supervises his household, cares for the children, and performs all the duties incident to the marriage relation, except those mentioned. In this state, mere incompatibility constitutes no ground for divorce, as the authorities cited already show, and the circumstances relied upon, other than nonintercourse, do not tend to prove anything more than that.

The soundness of the ruling in Reynolds v. Reynolds is questioned, and it conflicts with some decisions in other jurisdictions. But it is clearly sustained by the weight of authority and the reasons of public policy entering into and underlying the marital relation. The policy of the law opposes and denies the allowance of divorces except for weighty and very substantial reasons. To make this a cause for divorce would render the procurement of divorces easy, and afford a means of separation to all who desire it, whatever the motive might be. The law may well deem the natural passion of the parties, accompanied by legal and rightful opportunity of gratification, a sufficient inducement to the performance of marital duty in this respect. And ordinarily it is, for the complaint made here by one spouse against the other is seldom heard. The rules of law are made to conform to and answer the purposes of ordinary situations, not extraordinary or exceptional cases. In other words, the trouble here complained of will ordinarily arise in but few cases, say one in a thousand. To make it a ground of divorce would likely bring forth divorces in hundreds of instances in which they would not otherwise occur. Some of the authorities relied upon liken the wife's refusal to a case of impotency of one of the parties to the marriage, but the two cases are not analogous. Pre-existing incurable impotency of one of the parties to a marriage renders impossible the procreation of children, and thus defeats one of the chief purposes of marriage. Mere aversion to the performance of the act of intercourse is not a physical obstacle to the accomplishment of this high and sacred purpose. Impotency is. In cases of normal persons, the aversion may be overcome, and generally is. The parties to this cause are not exceptions from the general rule. The wife's hope of posterity has induced her to bear seven children. Procreative power of both parties to the marriage relation is essential to the achievement of one of its chief purposes, wherefore the law deems it a matter of the highest importance. But when the act by which procreation is effected is regarded as mere indulgence, no known principle of law dignifies one form of indulgence or pleasure above another. Moreover, impotency is not a ground of divorce, unless it existed at the time of the marriage. The aversion complained of here is subsequent.

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For the reasons stated, the decree is erroneous, and will be reversed, and the bill dismissed, with costs to the appellant in both this court and the court below.

UNITED STATES SUPREME COURT.

UNITED STATES OF AMERICA, Plff. in Certiorari,
v.
LEXINGTON MILL & ELEVATOR COMPANY.

(232 U. S. 399, 58 L. ed. 658, 34 Sup. Ct. Rep. 337.)

Food — adulteration — poisonous ingredients.

1. The addition of poisonous substances

Note. — What constitutes adulteration within the food and drugs act.

I. Introduction, 775.
II. Dilution or depreciation of quality, 775.

to an article of food in such minute quantities that the health of consumers cannot possibly be injured is not condemned by the provisions of the food and drugs act of June 30, 1906, § 7, subdiv. 5, that for the purposes of the act an article shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health."

Evidence — burden of proof — adulteration.

2. The government, when proceeding to condemn, under the pure food and drugs act of June 30, 1906, § 10, an article of food which it claims is adulterated under § 7, subdiv. 5, of that act, because it contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," is charged with the burden of proving that the added poisonous or deleterious substance is such as may render such article dangerous to health.

(February 24, 1914.)

CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the Western District of Missouri, condemning certain flour as adulterated. Affirmed.

The facts are stated in the opinion.

Messrs. **James C. McReynolds**, Attorney General, and **Francis G. Caffey**, for plaintiff in certiorari:

The seized flour was adulterated within

III. Bleaching, 778.
IV. Preservative, 778.
V. Accidental adulteration or contamination, 779.
VI. Color or flavor, 780.
VII. Entire substitution, 781.
VIII. As affected by import of descriptive term, 781.
IX. As dependent upon poisoning effect, 782.
X. Abstraction of valuable constituent, 782.
XI. Mere failure to fulfil statutory standard, 783.
XII. Other tests, 785.
XIII. Miscellaneous, 785.

I. Introduction.

This note includes cases under the Federal acts, and also those under state statutes and under the English statutes.

As to applicability of oleomargarin statutes where resemblance to butter results from choice of ingredients, and not from the introduction of foreign coloring matter, see 14 L.R.A.(N.S.) 1062.

As there is some ambiguity as to the exact import of the statutory words "addition" and "substitution," as mutually exclusive terms, it has been deemed advisable, in classifying the cases, to include under the heading "substitution" only cases of entire substitution, and to avoid altogether the use of the term "addition" for the purposes of classification.

II. Dilution or depreciation of quality.

Some cases hold that there is an adulteration where the substance is diluted, or is depreciated in quality. Thus, a manufacturer licensed to sell a stock food product made of wheat middlings and corn, guaranteed to contain 13.81 per cent of protein and 3.15 per cent fat, is guilty of adulteration where he manufactures and sells a product that does not contain the percentage of protein guaranteed, but a larger percentage of fat, and 30 per cent of corn cob, a substance entirely worthless for food purposes. W. H. Small & Co. v. Com. 134 Ky. 272, 120 S. W. 361.

The Kentucky statute involved in the W. H. Small & Co. Case provided that "an article of food shall be deemed to be adulterated: (1) If any substance or substances be mixed or packed with it so as to reduce, lower or injuriously affect its quality or strength: (2) if any substance is substituted wholly or packed with it so as to reduce, lower or injuriously affect its quality or strength; (3) if any valuable constituent of the article has been wholly or in part abstracted; or if the product is below that standard of quality represented to the purchaser or consumer."

In Pierre Viaus Maple Co. v. Dairy & Food Comr. 154 Mich. 73, 117 N. W. 553, it was held that under vol. 2 of the Compiled Laws, § 5007, making it unlawful for any person to manufacture or sell maple syrup that is any wise adulterated with common sugar, beet sugar, glucose, or any other foreign substance, the word "adulteration" meant a mixture of any foreign substance, wholesome or unwholesome, with maple sugar.

And the addition of a dilute solution of alcohol and water in terpeneless lemon extract, so as to reduce the amount of citral to .05 per cent by weight instead of .2 per cent, as required by the standard established by the Secretary of Agriculture under circular number 19, issued by the authority of the act of March 3, 1903, constitutes an adulteration by the mixing and packing with the extract of a substance "so as to reduce or lower or injuriously affect its quality and strength." United States v. Frank, 189 Fed. 195.

So, under a statute providing that an article shall be deemed to be adulterated "if it is an imitation of or is sold under the name of another article," an article of food composed of liquid chicory and coffee, offered for sale and sold as liquid coffee, is adulterated. State v. Dreher, 55 Ohio St. 115, 44 N. E. 510.

The mixing of water with milk offered for sale constitutes an adulteration of the milk by adding to it a substance of less value. Com. v. Farren, 9 Allen, 489.

And in St. Louis v. Meyer, 235 Mo. 699, 139 S. W. 438, it was held that the defend-

subd. 5, § 7, of the food and drugs act, relating to food.

United States v. 1950 Boxes of Macaroni, 181 Fed. 427; United States v. Koca Nola Co. (N. D. Ga.) Notice of Judgment, 202; United States v. Mayfield, 177 Fed. 765; United States v. Rosebrock & Co. (S. D. N. Y.) Notice of Judgment, 825; Friend v. Mapp, 68 J. P. 589; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824.

Messrs. **Edward P. Smith, Bruce S. Elliott, Edward L. Scarritt, C. J. Smyth,** and **W. C. Scarritt,** for defendant in certiorari:

The language used in the act in question is not susceptible of the interpretation placed thereon by the trial court.

Post Master General v. Early, 12 Wheat. 136, 6 L. ed. 577; Monclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824; Friend v. Mapp, 68 J. P. 589; Hull v. Horsnell, 68 J. P. 591.

The act as construed by the trial court is arbitrary, and an unreasonable interference with the rights of property.

Jew Ho v. Williamson, 103 Fed. 10; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep.

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ant could be convicted of the adulteration of skim milk by the addition of water, under ordinance 2,497, although ordinance 24,582 provided a standard for salable skim milk with reference to milk solids, as the two ordinances were not in conflict.

And the mixing of water with skim milk is an adulteration of milk within ordinance 24,297, § 2, of the city of St. Louis, providing that milk shall be deemed to be adulterated if any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect the strength, quality, or purity. St. Louis v. Ameln, 233 Mo. 669, 139 S. W. 429; St. Louis v. Kruempeler, 235 Mo. 710, 139 S. W. 446.

The court further held in the Kruempeler Case, supra, which involved a violation of an ordinance of the city of St. Louis, that the Revised Statutes of 1909, § 6595,—providing that food should be deemed to be adulterated if any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its strength, quality, or purity, or if it does not conform to the standard of strength, quality, and purity established by the United States Department of Agriculture,—should not be construed as making the statutory standard for skim milk the same as that of the Department of Agriculture, *viz.*, 9.25 per cent of milk solids, but that the mere mixing of water with skim milk constituted an adulteration thereof by lowering or depreciating its strength or quality.

And in People v. West, 44 Hun, 162, 7 N. Y. S. R. 843, affirmed in 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610, it was also held that the mixing of water with milk constituted adulteration.

And in Com. v. Darlington, 9 Pa. Dist. R. 700, it was held that the addition of water to milk was the mixture of a substance which lowered, depreciated, or injuriously affected the quality, strength, and purity of the milk, thus constituting an adulteration within the meaning of the statute.

See also St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909, as to adulteration of milk by the addition of water or any other fluid, or any other foreign substance.

In Pearks v. Knight, 70 L. J. K. B. N. S. 1002 [1901] 2 K. B. 825, 85 L. T. N. S. 379, 50 Week. Rep. 104, 65 J. P. 822, 20 Cox, C. C. 46, 17 Times L. R. 771, it was held that the sale of butter to which milk had been added for the purpose of increasing its weight, so that the butter contained at least 6 per cent more water than normally, was a sale of an article of food which was not "of the nature, substance, and quality of the article demanded by such purchaser," within § 6 of the sale of food and drugs act of 1875.

It appears from Fitzpatrick v. Kelly, L. R. 8 Q. B. 337, 42 L. J. Mag. Cas. N. S. 132, 28 L. T. N. S. 558, 21 Week. Rep. 681, although decided upon the question of intent, that butter may be adulterated by mixing therewith lard, tallow, dripping, palm oil, and the fat from certain seeds.

And gin, to which is added water, so that it is 44 per cent under proof, and contains 26 per cent pure alcohol, 70 per cent water, and 4 per cent sugar, is adulterated where the lowest form in which it is ordinarily sold is 20 per cent under proof. Pashler v. Stevenitt, 35 L. T. N. S. 862.

In Crofts v. Taylor, L. R. 19 Q. B. Div. 524, it was held that the mixing of two beers of different qualities amounted to a dilution of the stronger within the customs and inland revenue act of 1885, § 8, subsec. 2, providing that "a dealer in, or retailer of beer, shall not adulterate or dilute beer or add any matter or thing thereto except finings for the purpose of clarification."

Other cases hold that there is no adulteration because of dilution or depreciation in quality. Thus, sausage made of pork, beef, and veal, together with salt and spices, and from 2 to 10 per cent of cereal, is not an adulterated food within the Compiled Laws, § 5012, providing in part that any article shall be deemed to be adulterated if it is an imitation of or is sold under the name of another article, or if it contains any added substance or ingredient which is poisonous or injurious to health. Armour & Co. v. State Diary & Food Comr. (Armour

L.R.A.1915B.

768; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; State v. Layton, 160 Mo. 474, 62 L.R.A. 163, 83 Am. St. Rep. 487, 61 S. W. 171; State v. Addington, 12 Mo. App. 219; State v. Fisher, 52 Mo. 174; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 Ann. Cas. 898.

The interpretation placed upon the act of June 30, 1906, by the circuit court of appeals, is reasonable, gives effect to all the language contained in the act, and is the only interpretation under which its constitutionality can be sustained.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; Interstate Drainage & Invest. Co. v. Freeborn County, 85 C. C. A. 532, 158 Fed. 270; Martin v. United States, 168 Fed. 201, 93 C. C. A. 484; Maillard v. Lawrence, 16 How. 251, 14 L. ed. 925; Levy v. M'Cartee, 6 Pet. 110, 8 L. ed. 337; Parsons v. Hunter, 2 Sumn. 422, Fed. Cas. No. 10,778; Bernier v. Bernier, 147 U. S. 246, 37 L. ed. 154, 13 Sup. Ct. Rep. 244; Washington Market Co. v. Hoffman, 101 U. S. 115, 25 L. ed. 783; Lake County v. Rollins, 130 U. S. 670, 32 L. ed. 1063, 9 Sup. Ct. Rep. 651; Hamilton v. Rathbone, 175 U. S. 421, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; Swarts v. Siegel, 54 C. C. A. 399, 117 Fed.

& Co. v. Bird) 159 Mich. 1, 25 L.R.A. (N.S.) 616, 123 N. W. 580.

In People v. Jennings, 132 Mich. 662, 94 N. W. 216, it was held that the provision of vol. 2 of the Compiled Laws, § 5012, defining an article as adulterated if any inferior or cheaper substance or substances had been substituted wholly or in part, should be construed with a subsequent provision stating that an article should be deemed adulterated if any valuable or necessary constitutent or ingredient had been wholly or in part abstracted from it, and that so construed a provision prohibiting a substitution of any inferior or cheaper substance wholly or in part for it meant the substitution for an essential ingredient of such cheaper or inferior substance; and that where it appeared to be to advantage to exclude the terpenes wholly from lemon extracts, and to reduce the amount of alcohol prescribed by the United States Pharmacopœia, then the essential ingredients of lemon extract had not had substituted for them anything inferior or cheaper.

And the addition of pure water to the acetic acid of cider vinegar so as to reduce the acidity to the minimum amount required by law does not constitute adulteration (where the vinegar would otherwise be unpalatable and unmarketable) within the agricultural law, § 50, defining as adulterated vinegar "all vinegar which contains any proportion of lead, copper, sulphuric acid, or other ingredients injurious to health or any artificial coloring matter, or which has not an acidity equivalent to the presence of at least 4½ per centum by weight of absolute acetic acid, or cider vinegar which has less than such amount of acidity, or less than 2 per centum of cider vinegar solids on full evaporation over boiling water," and further defining cider vinegar as meaning vinegar made exclusively from pure apple juice. People v. Henry J. Heinz Co. 90 App. Div. 408, 86 N. Y. Supp. 141.

In Hall-Baker Grain Co. v. United States, 117 C. C. A. 318, 198 Fed. 614, it was held that there was no adulteration by mixing with another substance "so as to reduce, lower or injuriously affect its quality or strength," where a grain dealer, in pursuance to an order for wheat of a specified grade, subject to state inspection, without personally inspecting wheat, ordered the public elevator company to ship wheat of a specified grade to the buyer, and the wheat passed inspection in the state of shipment, but did not pass in the state of its destination because it contained a large percentage of hard wheat than belonged in such a grade, in the absence of evidence that hard wheat had ever been actually mixed with the specified grade, as the contract was for a specified grade, subject to state inspection at point of shipment.

The mere addition to a compound, known and branded as "Corno Horse and Mule Feed," of oat hulls in excess of the amount that would be naturally and normally present in case whole ground oats were used in lieu of the same amount of oat feed, a by-product of oatmeal factories, consisting of the entire residue of the oats after the manufacture of the oats into food for human consumption, and containing the middlings, nubbings, oat dust, and hulls, does not constitute an adulteration by the addition of a substance so as "to reduce or lower or injuriously affect its quality or strength," where the label upon the sacks shows the constituent parts and the relative percentage thereof. United States v. One Car Load of Corno Horse & Mule Feed, 188 Fed. 453.

In Com. v. Boston White Cross Milk Co. 209 Mass. 30, 95 N. E. 85, Ann. Cas. 1912B, 386, it was held that under Revised Laws, chap. 66, § 55, making it an offense to sell adulterated milk, or milk to which water or any foreign substance had been added, the word "milk," as used in the phrase, "or milk to which water or any foreign substance has been added," meant the whole or natural milk of the cow, and that it did not include concentrated milk manufactured with artificial appliances, involving some chemical changes, and which was sold after adding as much water as had been taken out during the process of manufacture, especially, where the diluted mixture was fully up to the prescribed standard. The court stated that the substance itself

18; Glover v. United States, 164 U. S. 298, 41 L. ed. 441, 17 Sup. Ct. Rep. 95; Harless v. United States, 31 C. C. A. 397, 59 U. S. App. 745, 88 Fed. 102; United States v. Fisher, 109 U. S. 145, 27 L. ed. 886, 3 Sup. Ct. Rep. 154; Lake Superior Ship Canal, R. & Iron Co. v. Cunningham, 155 U. S. 380, 39 L. ed. 192, 15 Sup. Ct. Rep. 103; Rhodes v. Iowa, 170 U. S. 423, 42 L. ed. 1095, 18 Sup. Ct. Rep. 664.

Mr. **Ralph S. Rounds**, *amicus curiæ:*

The phrase must be construed strictly, as the food law is a penal statute.

United States v. 84 Boxes of Sugar, 7 Pet. 453, 463, 8 L. ed. 745, 749; United States v. A Lot of Silk Umbrellas, 12 Fed. 412; United States v. 1150½ Pounds of Celluloid, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; United States v. Johnson, 177 Fed. 313, affirmed in 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627.

The purpose of the food law is to prevent the sale of fraudulent and unhealthful products.

United States v. Morgan, 222 U. S. 274, 281, 56 L. ed. 198, 200, 32 Sup. Ct. Rep. 81; United States v. Johnson, 177 Fed. 315, affirmed in 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627; United States v. One Car Load of Corno Horse & Mule Feed, 188

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was not milk, just the same as butter and cheese and condensed milk were not themselves milk. The court further stated that a different case would be presented if such a product, after having been extended into the form in which it was intended to be sold and used, had been further altered by the addition of water or any foreign substance.

And in Banks v. Wooler, 81 L. T. N. S. 785, 64 J. P. 245, 19 Cox, C. C. 432, it was held that the addition of 10 per cent water to milk was permissible under § 6 of the sale of food and drugs act, 1875, where, after such addition, the milk was exceptionally good, the butter fat being above normal.

In Karlem v. Hadinger, 147 Wis. 78, 132 N. W. 591, it was held that it was a question for the jury as to whether or not milk was adulterated where a chemical test showed that there was 17 per cent of water in the milk, but the defendant and his wife and son, who attended to the milking and delivery of the milk, testified that no water was added to the milk.

III. Bleaching.

The combination of sulphur dioxide with gelatine in the bleaching process constitutes the adulteration of food by the addition of sulphur dioxide where the gelatine as bleached is combined with sugar and other constituents to compose candy. Com. v. Pflaum, 236 Pa. 294, 84 Atl. 842, Ann. Cas. 1913E, 1287, affirming 50 Pa. Super. Ct. 55.

In Shawnee Mill. Co. v. Temple, 179 Fed. 517, it was held that it was a question for the jury, or for the court, where a jury is waived, as to whether flour, bleached by artificial processes by the use of nitrogen peroxide gas, is flour adulterated "whereby inferiority is concealed," or by containing "added poisonous ingredients which may render such article injurious to health."

IV. Preservative.

The use of a poisonous or deleterious preservative has been held to constitute an adulteration.

Thus, in State v. Schlenker, 112 Iowa, 642, 51 L.R.A. 347, 84 Am. St. Rep. 360, 84 N. W. 698, it was held that under § 4990 L.R.A.1915B.

of the Code, providing that the addition of water or any other substance or thing to whole milk or skim milk, or partly skimmed milk, is an adulteration, the addition of a quantity of boracic acid for the purpose of the prevention of decomposition is an adulteration, although it would have no harmful effect on the consumers, and would not operate as a fraud upon them.

And in Com. v. Gordon, 159 Mass. 8, 33 N. E. 709, it was held that cream to which boracic acid had been added was adulterated milk within a statute making it an offense to have in one's possession, with intent to sell, milk to which a foreign substance had been added.

And in St. Louis v. Wortman, 213 Mo. 131, 112 S. W. 520, the court, after holding that a city ordinance relative to adulteration of milk was inconsistent with a state statute, and that there could be no prosecution for adulteration of milk under the ordinance, remarked that under the statute in question, act of 1907, § 4, providing that food shall be deemed to be adulterated if it contains any added substance which is poisonous or injurious to the health, the addition of formaldehyde, a well-known poison, to milk in any quantity, would be a violation of the statute.

And in Lansing v. State, 73 Neb. 124, 102 N. W. 254, it was held that the mixing of milk sweet, containing formaldehyde, a poison, with milk, constituted an adulteration within the pure food act (Laws of 1897, chap. 99), providing that an article of food should be deemed to be adulterated if any substance or substances had been mixed with it so as to lower or depreciate or injuriously affect its quality, strength, or purity, or if it contained any added substance or ingredient which is poisonous or injurious to the health, or any deleterious substance not a necessary ingredient in its manufacture.

And evidently, formaldehyde, a poison, is a "foreign substance," the presence of which constitutes an adulteration of milk. People v. Bowen, 182 N. Y. 1, 74 N. E. 489.

The addition of salicylic acid, a poison, in however small amount, to raspberry syrup, constitutes an adulteration by the addition of a "substance or ingredient which is poisonous or injurious to health." Com. v.

Fed. 463; United States v. Five Boxes of Asafoetida, 181 Fed. 565; United States v. 1950 Boxes of Macaroni, 181 Fed. 427; United States v. Buffalo Cold Storage Co. 179 Fed. 866; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824; Ex parte Kohler, 74 Cal. 42, 15 Pac. 436.

Where the purpose of a statute is in general the same as that of the common law, it will be presumed that the legislature intended to re-enact, in statute form, the common rules.

Standard Oil Co. v. United States, 221 U. S. 1, 59, 60, 55 L. ed. 619, 644, 645, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; Kepner v. United States, 195 U. S. 100, 125, 132, 49 L. ed. 114, 122, 125, 24 Sup. Ct. Rep. 797, 1 Ann. Cas. 655; United States v. Sanges, 144 U. S. 310, 311, 36 L. ed. 445, 446, 12 Sup. Ct. Rep. 609; United States v. Wong Kim Ark, 169 U. S. 649, 653, 42 L. ed. 890, 892, 18 Sup. Ct. Rep. 456; Moore v. United States, 91 U. S. 270, 274, 23 L. ed. 346, 347; 8 Cyc. 386.

Unwholesomeness was a necessary element of the offense at common law, and it

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Kevin, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594.

In Bissman v. State, 9 Ohio C. C. 714, 6 Ohio C. D. 712, the court remarked that the addition of salicylic acid, a substance injurious to the health, and not a necessary ingredient in the manufacture of tomato ketchup, constituted an adulteration.

In Com. v. New England Maple Syrup Co. 217 Mass. 432, 105 N. E. 453, it was held, under a statute providing that an article of food shall be deemed to be adulterated "if it contains any added antiseptic or preservative substance except common table salt, saltpeter, cane sugar, alcohol, vinegar, spices, or, in smoked food, the natural products of the smoking process," and under an amendment prohibiting the use of "cane sugar in maple syrup, maple sugar, honey, cocoa or any other food product in which the presence of cane sugar as a preservative is unnecessary," that a syrup sold as "Golden Tree Syrup," consisting of a compound of maple sugar, cane sugar, and water, was adulterated, as the statute, as amended, prohibited the use of cane sugar as a preservative in maple syrup and the other designated foods.

But, in Curtice Bros. Co. v. Barnard, 126 C. C. A. 411, 209 Fed. 589, it was held that the terms "common table salt" and "cane sugar," in the Laws of Indiana of 1907, chap. 104, § 2, ¶ 7, providing that an article shall be deemed adulterated if it contains "any added substance except common table salt, saltpeter, cane sugar, vinegar, spices," or "other harmless preservatives whose use is authorized by the state board of health," were used generically so as to apply to and include beet sugar and rock salt.

V. Accidental adulteration or contamination.

Food may be adulterated where it accidentally contains a filthy or decomposed substance, or other harmful substance.

Thus, in Dade v. United States, 40 App. D. C. 94, writ of certiorari denied in 229 U. S. 610, 57 L. ed. 1351, 33 Sup. Ct. Rep. 771, it was held that milk containing vegetable bacteria such as colon bacilli and streptococci in large numbers, due to direct deposit of fecal matter in the milk, causing destruction of the sugar in the milk and decomposition, was adulterated within the meaning of the Federal act of 1906.

And under Rev. Laws [Mass.] chap. 56, § 55, one is guilty of the violation of the statute where he has in his possession, with intent to sell the same, milk in which cow dung is present, although it was not added or caused by his previous voluntary act. Com. v. Graustein & Co. 209 Mass. 38, 95 N. E. 97.

In Galt v. United States, 39 App. D. C. 470, it was held that the presence of worms, insects, and beetles, together with the husks and excreta of the worms, in flour, rendered it filthy within the meaning of the Federal act. The court went further and stated that, even conceding that the worms, insects, and beetles could be separated therefrom, the flour would still be contaminated by reason of its contact with them, and it would still contain more or less husks and excreta from the worms, and would still be filthy within the meaning of the act.

In United States v. Sprague, 208 Fed. 419, it was held that oysters which were sold without being taken from the shell, and which contained bacilli liable to cause disease to such an extent as to make them dangerous for food purposes, were adulterated in that they consisted "in part of a filthy, decomposed, and putrid animal and vegetable substance," even though the presence of such bacilli was not due to an addition by the hand of man, but by the course of nature.

In United States v. 443 Cans of Frozen Egg Product, 113 C. C. A. 457, 193 Fed. 589, reversed in 226 U. S. 172, 57 L. ed. 174, 33 Sup. Ct. Rep. 50, on other grounds, it was held that a frozen egg product made out of seconds and checks, and mixed with 10 per cent sugar, the presence of which aided in retaining the flavor of the eggs while frozen, but in hastening decomposition when melted, was adulterated by containing "a decomposed" substance, where the product, when thawed and beaten, gave out a strong odor of rottenness, and cakes made of the product, if broken while hot, gave off a strong odor of rotten eggs, and, when distilled, gave off an odor of decomposed fish, and, when injected into guinea pigs, pro-

must be held to be a necessary element, under the section in question, of the definition of the words used in the present statute.

Bishop, Crim. Law, 8th ed. ¶ 491; 19 Cyc. 1086, note 3; State v. Norton, 24 N. C. (2 Ired. L.) 40; Goodrich v. People, 19 N. Y. 578; State v. Buckman, 8 N. H. 205, 29 Am. Dec. 646; State v. Smith, 10 N. C. (3 Hawks) 378, 14 Am. Dec. 594; Craft v. Parker, W. & Co. 96 Mich. 245, 21 L.R.A. 140, 55 N. W. 812.

Mr. Justice Day delivered the opinion of the court:

The petitioner, the United States of America, proceeding under § 10 of the food and drugs act (34 Stat. at L. 768, chap. 3915, U. S. Comp. Stat. Supp. 1911, p. 1354), by libel filed in the district court of the United States for the western district of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the district court, upon verdict in favor of the government, was reversed by the circuit court of appeals for the eighth circuit (121 C. C. A. 23, 202 Fed. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen peroxide gas, generated by electricity, was mixed with

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duced sickness and death, while the injection of fresh egg products had no harmful effect.

And in United States v. 13 Crates of Frozen Eggs, 208 Fed. 950, affirmed in 215 Fed. 584, it was held that eggs which have been released from the shells and frozen, but which, by reason of decay, have become so far decomposed that they are not fit for human food or consumption, are adulterated for the reason that they consist "of a filthy and decomposed or putrid animal" substance.

And in Goulder v. Rook, 70 L. J. K. B. N. S. 747 [1901] 2 K. B. 290, 84 L. T. N. S. 719, 49 Week. Rep. 684, 65 J. P. 646, 19 Cox, C. C. 725, 17 Times L. R. 503, it was held that beer which accidentally contained added arsenic, a poisonous noningredient of beer, which was injurious to health, to the extent of ¼ grain per gallon, was beer which "was not of the nature, substance and quality of the article demanded by the purchaser," within § 6 of the sale of food and drugs act of 1875.

In United States v. 200 Cases of Adulterated Tomato Catsup, 211 Fed. 780, it was held that tomato catsup which was manufactured from pulp screened from peelings, cores, and by-products of tomatoes, obtained in the course of their preparation for canning, and which contained bacteria, yeast, and mold in very large and unusual quantities, was "decomposed" and "adulterated," whether injurious to health or not.

VI. Color or flavor.

For earlier cases on use of coloring matter in foodstuffs, oils, etc., as adulteration, see 25 L.R.A.(N.S.) 1234.

The addition of a coal-tar dye known as "martius yellow," a poison, in macaroni, to change its natural color and make its appearance more inviting, constitutes an adulteration, especially where the use thereof tends to mislead and deceive the public, and the accumulative effect of the poison will be injurious to health. United States v. 1,950 Boxes of Macaroni, 181 Fed. 427.

In French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824, the court, in construing the clauses, "or other mineral substance or poisonous color or flavor or other ingredients deleterious or detrimental to health," in § 7 of the pure food act of 1906, providing that in the case of confectionery an article shall be deemed to be adulterated "if it contain terra alba, barytes, talc, chrome yellow or other mineral substances or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt or spirituous liquor, or compound of narcotic drug," held that as the purpose of the statute was to prevent deceit and false pretenses in the sale of food and drugs, and to safeguard the public health, such clauses should be construed as meaning that the use in confectionery of chrome yellow, or other poisonous mineral substances, or poisonous color or flavor, made it unlawfully adulterated; that the use in confectionery of terra alba, barytes, talc, or other mineral substance, whether injurious to health or not, for purposes of deception, made it unlawfully adulterated; that the use in confectionery of any ingredient whatsoever which is deleterious or detrimental to health made it unlawfully adulterated; but that the use of pure silver simply for a decorative coloring, inasmuch as the silver was not used for purposes of deception, and was not detrimental to health, did not constitute an adulteration.

In State v. Intoxicating Liquors, 106 Me. 142, 76 Atl. 267, the court held that there was no adulteration of intoxicating liquors where the only evidence as to adulteration was that the liquors were colored and slightly sweetened by burnt sugar, and there was no evidence as to the extent of the coloring or the quantity or percentage of sugar used, or that it was harmful, and no evidence that it increased the residuum above that permitted by the pure food act.

In Friend v. Maap, 2 L. G. R. 1317, 68 J. P. 589, it was held that there was no delivery to a purchaser of an article of food which was "not of the nature, substance and quality of the article demanded" by the purchaser where the purchaser asked for

atmospheric air, and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of § 7 of the act; namely, (1) in that the flour had been mixed, colored, and stained in a manner whereby damage and inferiority were concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid, and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of § 7, and was misbranded; but the government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of § 7, but in the view we take of the case as to the instruction of the court under subdivision 5 need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated, and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The

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preserved peas and received preserved peas containing a small amount of copper, which was used for coloring, it appearing that the copper was not present in sufficient quantities to injure health, nor in greater quantities than usually found in preserved peas.

VII. Entire substitution.

In Knight v. Bowers, L. R. 14 Q. B. Div. 845, it appears that there is no adulteration by substitution of an entirely different article for that demanded by the purchaser, but that § 6 of the food and drugs act of 1875, providing that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser," covers such a substitution, and, accordingly, it was held in this case that the substitution of savin for saffron constituted a violation of the act.

In People v. Lewis, 131 App. Div. 336, 115 N. Y. Supp. 909, it was held that a complaint was sufficient which alleged that the defendant, at a specified time and place, exposed for sale, offered for sale, and sold adulterated and misbranded food, in violation of the agricultural law as enacted by chapter 524 of Laws 1903, and amended by chap. 100 of Laws of 1905 (relating to adulterated and misbranded food, and prohibiting the exposure for sale, offer for sale, and actual sale thereof), "in that the said defendant did then and there expose for sale, offer for sale, and sell a certain substance or compound as and for lard, which was not in fact lard, and was an imitation of lard, and an adulterated and misbranded article of food, within the provisions of the aforesaid sections."

VIII. As affected by import of descriptive term.

In People v. Park, 60 App. Div. 255, 69 N. Y. Supp. 1120, it was held that there was an adulteration by the substitution of "an inferior or cheaper substance," where an article sold as "Eiffel Tower Lemonade," and purporting by its label to be made of concentrated lemons, contained tartaric acid, a cheaper substance than lemon juice, and citric acid, in place of lemon juice, and oil of lemon, made from the rind of lemons, together with sugar.

And in White v. Bywater, L. R. 19 Q. B. Div. 582, 36 Week. Rep. 280, 51 J. P. 821, it was held that tincture of opium containing less than one third of the proportion of opium and a little more than one half the proper quantity of alcohol prescribed by the British Pharmacopœia was not of the "nature, substance and quality" of tincture of opium demanded by the purchaser, although the purchaser did not ask that the preparation be compounded according to such standard.

And where a customer asks a druggist for mercury ointment, a drug included in the British Pharmacopœia, and is supplied with mercury ointment that is deficient in mercury, there is a violation of § 6 of the sale of food and drugs act of 1875 by selling, to the prejudice of the purchaser, a drug which is not "of the nature, substance and quality of the article demanded by the purchaser," although the druggist is not specifically asked by the purchaser to prepare the ointment in accordance with the standard of quality prescribed by the British Pharmacopœia. Dickins v. Randerson, 70 L. J. K. B. N. S. 344 [1901] 1 K. B. 437, 84 L. T. N. S. 204, 65 J. P. 262, 19 Cox, C. C. 643, 17 Times L. R. 224.

In Adams v. New England Maple Syrup Co. 210 Mass. 475, 97 N. E. 85, it was held that there was not a sale of adulterated maple sugar where the buyer ordered a quantity of blended maple sugar, a well-known article in the trade, which should contain "as much maple sugar as the sellers could put into the compound for the price," and he received a compound composed of maple sugar and granulated sugar, known in the trade as blended maple sugar.

The statute involved in the Adams Case, supra (Revised Laws, chap. 75), § 18, states in substance that food shall be deemed to be adulterated if any substance has been

case was taken to the circuit court of appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The circuit court of appeals held that the testimony was insufficient to show that by the bleaching process the flour was so colored as to conceal inferiority, and was thereby adulterated, within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that "the possibility of injury to health due to the added ingredient, and in the quantity in which it is added, is plainly made an essential element of the prohibition." It did not pass upon the constitutionality of the act, in view of its rulings on the act's construction.

The case requires a construction of the food and drugs act. Parts of the statute pertinent to this case are:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: . . .

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. . . .

"Fourth. If it be mixed, colored, pow-

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mixed with it so as to reduce, depreciate, or injuriously affect its quality, strength, or purity, if an inferior or cheaper substance has been substituted for it, wholly or in part, or if it is an imitation of or sold under the name of another article; but that such provision should not apply to mixtures or compounds, not injurious to health, and which are recognized as ordinary articles or ingredients of articles of food, if every package sold or offered for sale is distinctly labeled as a mixture of compound with the name and per cent of each ingredient therein.

But, there is no adulteration of "Grenadine Syrup" by the substitution of a compound sugar syrup made out of sugar, citric and tartaric acids, and the juices of certain fruits, wholly or in part therefor, where the common acceptation of the term means not that the syrup is actually made from pomegranates, but that it possesses a certain characteristic flavor and color desired by consumers. United States v. 30 Cases of Syrup, 199 Fed. 932.

Marmalade to which is added 13 per cent of starch glucose is not an article of food "which is not of the nature, substance and quality demanded by the purchaser," within § 6 of the English sale of food and drugs act, where there is no legal standard for marmalade, and it is the custom of manufacturers to use starch glucose in the manufacture thereof, especially where the glucose has no harmful effect, but, on the contrary, prevents the marmalade from crystallizing, and has a tendency to prevent mildewing and fermentation. Smith v. Wisden, 20 Cox, C. C. 135, 66 J. P. 150, 85 L. T. N. S. 760, 18 Times L. R. 92.

And it has been held that the word "adulteration" in the Federal act means "to corrupt, debase, or make impure by any mixture of a foreign or vicious substance," and that an article sold as "Nectar Choice Flavor of Vanilla" is not adulterated simply because it does not contain any extract of vanilla, it not appearing that "extract" and "flavor" are synonymous in meaning. United States v. St. Louis Coffee & Spice Mills, 189 Fed. 191.

L.R.A.1915B.

IX. As dependent upon poisoning effect.

The introduction of salicylic acid, an ingredient which is injurious to health, in any quantity, in beer which is sold as food, constitutes an adulteration. State v. Hutchinson, 55 Ohio St. 573, 45 N. E. 1043.

In United States v. 40 Barrels and 20 Kegs of Coca Cola, 215 Fed. 535, affirming 191 Fed. 431, it was held that a compound food product known in the market as Coca-Cola, and consisting of a sweet syrup colored with caramel, phosphoric acid, lemon juice, and other minor ingredients, including ingredients derived from coca leaves and cola nuts, and containing, as an essential ingredient, caffeine, was not adulterated merely because the caffeine was poisonous or deleterious to health, where it was properly labeled, as such ingredient was not "an added" poisonous or deleterious ingredient which might be dangerous to the health.

But in UNITED STATES v. LEXINGTON MILL & ELEVATOR CO. the court held that the addition of poisonous substances to flour did not constitute an adulteration, where added in such small quantities as not to injure health, under § 7, subdiv. 5 of the pure food act, providing that an article shall be deemed to be adulterated "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health." In Com. v. Kevin, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594, it is the addition of a poisonous substance that is prohibited, while in the principal case no offense is committed unless the poison is present in the article in such quantities that it may injure health.

And, in People v. Bischoff, 14 N. Y. S. R. 581, it was held that there is no adulteration of canned peas unless they contain poison, within the Laws of 1881, chap. 407, defining adulteration of food to be the addition of any poisonous ingredient or any ingredient which renders it injurious to the health of persons using it.

X. Abstraction of valuable constituent.

Some cases hold that the abstraction of a

dered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. . . .

"Sec. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can

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valuable constituent constitutes an adulteration.

Thus, it has been held that where the effect of the removal of a part of the cream from milk was to reduce the milk solids below 13 per cent, the defendant could be convicted upon a complaint charging him with selling adulterated milk, to wit, milk containing less than 13 per cent of milk solids, unless he sold it, not as pure milk, but as skim milk, and out of a vessel, can, or package marked as required by law. Com. v. Tobias, 141 Mass. 129, 6 N. E. 217.

Milk from which cream has been removed is adulterated milk within the Laws of 1893, chap. 338, § 322, defining adulterated milk as milk from which any part of the cream has been removed, although the milk complies with the law in other respects, containing no more than 88 per cent of water and the requisite percentage of solids in fats, and is in fact wholesome. People v. Koster, 121 App. Div. 852, 106 N. Y. Supp. 793.

See also St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909, as to adulteration of milk by abstraction of cream.

See also W. H. Small & Co. v. Com. 134 Ky. 272, 120 S. W. 361, under Dilution or depreciation of quality, as to adulteration of a commercial stock food product.

Other cases hold that, under the circumstances, there is no adulteration by removal of a valuable constituent.

Thus, the removal in the course of manufacture of cocoa from the cocoa bean, of a large percentage of the fat, does not constitute an adulteration by the removal of a valuable or necessary constituent or ingredient, where the product would otherwise be too greasy to be salable, and, as sold, is wholesome, and, as thus manufactured, has for twenty-five years been known under the name of cocoa. Rose v. State, 11 Ohio C. C. 87, 5 Ohio C. D. 72.

The mere fact that more cream is removed by the centrifugal process than by the old method of skimming by hand does not result in the abstraction of a valuable or necessary constituent or ingredient, so as to constitute the adulteration of milk sold as "skimmed milk." Com. v. Hufnal, 185 Pa. 376, 39 Atl. 1052, reversing 4 Pa. Super. Ct. 301.

In Lane v. Collins, 54 L. J. Mag. Cas. N. S. 76, L. R. 14 Q. B. Div. 193, 52 L. T. N. S. 257, 33 Week. Rep. 365, 49 J. P. 89, it was held that a milk seller was not guilty under § 6 of the food and drugs act of 1875, 38 and 39 Vict. chap. 63, of selling, to the prejudice of the purchaser, an article of food "which was not of the nature, substance, and quality of the article demanded by such purchaser," where the buyer asked for milk and was supplied with skimmed milk which was deficient in butter fat to the extent of 50 per cent. The court stated that the purchaser was supplied with "milk," although it had been skimmed, and that it was not shown that what was so supplied was other than what, according to the ordinary use of the term, a purchaser might reasonably have expected to get from the vendor under the designation of "milk."

In Hall-Baker Grain Co. v. United States, 117 C. C. A. 318, 198 Fed. 614, it was held that there was no adulteration by abstraction of a "valuable constituent of the article," wholly or in part, where a grain dealer, in pursuance to an order for No. 2 red wheat, subject to state inspection, without inspecting the wheat, ordered the public elevator to ship wheat of the specified grade to the buyer, and the wheat passed inspection in the state of shipment, but did not pass in the state of its destination, because it contained a larger percentage of hard wheat than belonged in such a grade, in the absence of evidence that part of the red wheat had been in fact abstracted, as the contract was for No. 2 red wheat, subject to state inspection at point of shipment.

XI. Mere failure to fulfil statutory standard.

It has generally been held that the mere failure of the article, whether a food or a drug, to come up to the standard set by law as to ingredients, is an adulteration.

Thus, in People v. Worden Grocer Co. 118

in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court—after stating the claims of the parties, the government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health—gave certain instructions to the jury. Part of the charge, excepted to by the respondent reads:

"The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the government need not prove that this flour, or foodstuffs made by the use of it, would injure the health of any consumer. It is the character—not the quantity—of the added sub-

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Mich. 606, 77 N. W. 315, it was held that, under the Public Acts of 1897, act No. 71, § 1, providing that all cider vinegar should contain not less than one and three fourths per cent by weight of cider vinegar solids, and § 2, providing that all fermented vinegar not distilled should contain not less than one and three fourths per cent by weight of solids, and not less than two and one half tenths of one per cent of ash or mineral matter, cider vinegar which did not come up to the standard was adulterated.

Whisky is a drug within a statute defining the term "drug" as including all medicines for internal or external use, and it is adulterated where it falls below the standard of strength, quality, or purity required by statute. State v. Hutchinson, 56 Ohio St. 82, 46 N. E. 71.

And in American Linseed Oil Co. v. Wheaton, 25 S. D. 60, 4 L.R.A.(N.S.) 149, 125 N. W. 127, it was held that where the statute fixed the standard as to the purity of linseed oil, all oil below the standard was to be deemed adulterated, whether anything injurious had been added or not.

And also in People v. Kibler, 106 N. Y. 321, 12 N. E. 795, it was held that the violation of a statute was proven where the milk was below standard, and that the motive was immaterial.

See also St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909, as to adulteration of milk where the milk is naturally deficient in certain substances.

And where a statute prescribes a standard as to the percentage of water and of solids and milk fats in milk, an excess of water or deficiency of solids or milk fats constitutes an adulteration. State ex rel. Smith v. Smith, 69 Ohio St. 196, 68 N. E. 1044; Com. v. Hough, 1 Pa. Dist. R. 51; State v. Luther, 20 R. I. 472, 40 Atl. 9; Vandegrift v. Meihle, 66 N. J. L. 92, 49 Atl. 16; People v. Butler, 140 App. Div. 705, 125 N. Y. Supp. 556; People v. Laesser, 79 App. Div. 388, 79 N. Y. Supp. 470; People v. Beaman, 102 App. Div. 151, 92 N. Y. Supp. 295; People v. McDermott Dairy Co. 122 N. Y. Supp. 294; People v. Tsitsera, 138 App. Div. 446, 122 N. Y. Supp. 915.

And where milk is not up to the statutory standard, it is immaterial that it was sold just as it came from the cow. People v. Bowen, 182 N. Y. 1, 74 N. E. 489; People v. McDermott Dairy Co. 132 N. Y. Supp. 329; People v. Cipperly, 101 N. Y. 634, 4 N. E. 107; People v. Bosch, 129 App. Div. 660, 114 N. Y. Supp. 65; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344.

A complaint alleging that the defendant, at a time and place named, did have in his "custody and possession a certain quantity, to wit, one pint of adulterated milk, to wit, milk then and there containing less than 13 per cent of milk solids, with intent then and there unlawfully to sell the same," is sufficient under the Public Statute, chap. 57, § 5, providing that no person shall sell, or have in his possession with intent to sell, "adulterated milk, or milk to which water or any foreign substance has been added, or milk produced from cows fed on the refuse of distilleries, or from sick or diseased cows." Com. v. Keenan, 139 Mass. 193, 29 N. E. 477.

In Com. v. Bowers, 140 Mass. 483, 5 N. E. 469, a complaint similar to that in the Keenan Case, supra, was upheld, and the court further held that it was immaterial in what manner the quantity of milk solids had been reduced below 13 per cent, if the intent was to sell the milk as pure milk, and not as skim milk.

In Splinter v. State, 140 Wis. 567, 123 N. W. 97, it was held that the possession with the intent to sell of 17 cans of milk, 6 of which were below the statutory standard as to milk fats, constituted an offense against the statute prohibiting any person to sell, offer to sell, or have in his possession for the purpose of sale, any adulterated milk," although the average test of the entire lot was above the legal standard. This case seems rather questionable. The milk was sold under contract to a dairy company. Whether or not the milk in the condemned cans would reach the consumer without being mixed with the other milk does not appear. The court seems to place stress upon the fact that the defendant had in his possession "any adulterated milk." Manifestly, if the milk was sold to a creamery where it would be all mixed together, or if it was the practice of the dairy com-

stance, if any, which is to determine this case."

On the other hand, the respondent insisted that the law is, and requested the court to charge the jury:

"That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

"And in this connection you are further instructed that it is incumbent upon the government to prove that any such added poisonous or other added deleterious ingredients, if any, contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions, and amounts as may render said flour injurious to health; and unless you find that all of such facts are so proven you cannot find against the claimant, or condemn the flour in question under that charge in the libel; and if you fail to so find, your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

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"The law does not prohibit the adding of nitrites or nitrite reacting material to

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pany to mix the milk before reselling, the average of the milk would be above standard, and there would be no adulteration.

In Preston v. Redfern, 107 L. T. N. S. 410, 76 J. P. 359, 10 L. G. R. 717, 28 Times L. R. 435, it appears that the court, if the sample of milk taken had been a fair sample, would have held that milk which did not meet the standard set by the board of agriculture, because of the addition of water, was adulterated, as not being "of the nature, substance and quality of the article demanded" by the purchaser, within § 6 of the sale of food and drugs act of 1875.

In Smithies v. Bridge, 71 L. J. K. B. N. S. 555, [1902] 2 K. B. 13, 87 L. T. N. S. 167, 50 Week. Rep. 686, 66 J. P. 740, 20 Cox, C. C. 342, 18 Times L. R. 575, it was held that where the milking was done at intervals of sixteen hours and eight hours, respectively, and the milk drawn after the sixteen-hour interval was abnormally deficient in butter fat, containing 30 per cent less than the required amount, the milk sold was not "of the nature, substance, and quality of the article demanded."

But, in Wolfenden v. M'Culloch, 92 L. T. N. S. 857, 3 L. G. R. 561, 69 J. P. 228, 20 Cox, C. C. 864, 21 Times L. R. 411, it was held that where milk was sold as it came from the cow, but contained only 2.81 per cent of butter fat, instead of 3 per cent, the minimum provided by regulation of the board of agriculture, partly due to the fact that the cows had absorbed some of the fat, because they had been milked after the lapse of fourteen hours, it could not be maintained that the milk produced was "different in nature, substance and quality" from that asked for, under § 6 of the sale of food and drugs act of 1875, as it was the customary practice in the vicinity to milk cows at ten and fourteen-hour intervals, and as there was only such a slight deficiency.

XII. Other tests.

In United States v. 100 Barrels of Vinegar, 188 Fed. 471, it was held that as there was no statutory standard for the determination of pure cider vinegar made by the generator process, the government was not limited to standards mentioned in bulletin 65 of the Department of Agriculture, Bureau of Chemistry, entitled, "Provisional Methods for the Analysis of Food, Adopted by the Association of Official Agricultural Chemists Nov. 14 to 16, 1901," containing a statement relative to the determination of a source of a vinegar, and giving some tests by which the genuineness of cider vinegar could be known, nor to circular number 19 of the Department of Agriculture, issued on June 26, 1906, establishing a standard for vinegar, but that it could make use of any test which was an accurate one for deciding the question. The court held that the glycerin test experiments which had been made by the government, extending through several months, in hundreds of samples, and which showed that they found no sample with less than .24 nor more than .46 of glycerin, were a proper test, and that vinegar which contained only .11 to .16 of glycerin was adulterated.

And where the statutory definition also includes milk drawn from cows within a stated period before or after parturition, or from those fed on certain kinds of food, or kept in unhealthy places, the milk may not be sold as pure, provided the cows have been fed or kept in the manner specified, even if the milk conforms to the statutory standard as to water, fats, and solids. People v. Bowen, 182 N. Y. 1, 74 N. E. 489.

And milk may be considered adulterated where drawn from cows within fifteen days before and five days after parturition, or where drawn from cows fed on distillery waste, or any substance in a state of fermentation or putrefaction, or on any unhealthy food, or where drawn from cows kept in a crowded or unhealthy condition. See St. John v. New York, 201 U. S. 633, 50 L. ed. 896, 36 Sup. Ct. Rep. 554, 5 Ann. Cas. 909, construing the Laws of New York of 1893, chap. 38, § 20, defining adulteration of milk.

XIII. Miscellaneous.

In Crescent Mfg. Co. v. Mickle, 216 Fed. 246, it was held that the presence of egg albumen in baking powder compound did not constitute an adulteration by making the compound to "appear better or of greater

flour, and a jury cannot find for the government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour."

It is evident from the charge given and refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least, such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that, in order to prove adulteration, it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour, and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury, they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155.

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Furthermore, all the words used in the statute should be given their proper signification and effect. Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. ed. 782, 783:

"We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be super-

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value than it really is," where the compound had the same leavening quality without the egg albumen as with it, and the only advantage of its use was, when treating the baking powder with water, to hold the bubbles of carbon dioxid, and to cause it to foam for a much longer time than it otherwise would, demonstrating that the leavening quality was there, and that the product had not become stale and unfit for use.

In State v. Manhattan Oil Co. 155 Iowa, 453, 136 N. W. 197, it was held, under the Code Supplement, § 2510e, providing that no person, firm, or corporation should manufacture for sale, or expose for sale, or sell within the state, any flaxseed or linseed oil, unless the same answered a chemical test for purity recognized in United States Pharmacopœia, or any flaxseed or linseed oil as boiled linseed oil, unless the same should have been put in its manufacture to a

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temperature of 225 degrees Fahrenheit, that one who sold as boiled linseed oil a mixture of boiled raw linseed oil and petroleum, containing 45 per cent of petroleum, was not guilty under the statute, because the section did not provide a test of purity for boiled linseed oil, as linseed oil only was mentioned in connection with the defined test, and the United States Pharmacopœia contained no test therefor, the only test prescribed by the statute being, not one of purity, but the temperature at which it had been boiled.

In Rex v. Dixon, 3 Maule & S. 11, 4 Campb. 12, 15 Revised Rep. 381, it was held that the mixing of alum, a somewhat noxious substance, with bread, so that lumps of the material appeared therein, was indictable. This case was apparently not decided under a statute, but under the principles of the common law.

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fluous, void, or insignificant.' This rule has been repeated innumerable times."

Applying these well-known principles in considering this statute, we find that the fifth subdivision of § 7 provides that food shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient *which may render such article injurious to health.*" The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended, the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food injurious to the health. Congress has here, in this statute, with its penalties and forfeitures, definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the government in order to make out a case to establish that fact. The act has placed upon the government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . . contingency or liability or possibility or probability." In thus describing the offense, Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words, and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

"As to the use of the term 'poisonous,' let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists, as to whether or not it is dangerous to take into the human system."

And such is the view of the English courts construing a similar statute. The English statute provides (§ 3, of the sale of food and drugs act 1875):

"No person shall mix, color, . . . or order or permit any other person to mix, color, . . . any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in Hull v. Horsnell, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, L. C. J., in reversing and remitting the case on appeal, said:

"In my opinion, if the justices convicted the appellant of an offense under § 3 of the sale of food and drugs act 1875, on the ground that the ingredient mixed with the article of food was injurious to health,—that the sulphate of copper was injurious to health, and not on the ground that the peas, by reason of the addition of sulphate of copper, were rendered injurious to health, the conviction is clearly wrong. To constitute an offense under the latter part of § 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the circuit court of appeals did not err in reversing the judgment of the district court for error in its charge with reference to subdivision 5 of § 7.

The circuit court of appeals reached the conclusion that there was no substantial proof to warrant the conviction under the

fourth subdivision of § 7, that the flour was mixed, colored, and stained in a manner whereby damage and inferiority were concealed. As the case is to be retried to a jury, we say nothing upon this point.

As to the objection on constitutional grounds, it is not contended that the statute, as construed by the circuit court of appeals and this court, is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals, reversing the judgment of the District Court, must be affirmed, and the case remanded to the District Court for a new trial.

CALIFORNIA SUPREME COURT.
(In Banc.)

PEOPLE OF THE STATE OF CALIFORNIA, Respt.,
v.
JOSEPH MUELLER, Appt.

(— Cal. —, 143 Pac. 748.)

Evidence — judicial notice — result of local-option election.

Judicial notice cannot be taken of the result of a local-option election to determine whether or not intoxicating liquors shall be sold in a particular locality.

(October 5, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Tehama County convicting him of unlawfully selling alcoholic liquor in no-license territory, and from an order denying a motion for new trial. Reversed.

The facts are stated in the opinion.

Mr. **James T. Matlock, Jr.**, for appellant.

Messrs. **U. S. Webb**, Attorney General, and **J. Charles Jones**, for the People:

When the Wyllie law has gone into effect by an election, the result of which is open and known to all, including the judge, the court then takes judicial notice that the law is in operation in a particular district, and takes judicial notice of the election which produced such effect.

People v. Mayes, 113 Cal. 618, 45 Pac. 860; Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81; Ex parte Davis, 115 Cal. 445, 47 Pac. 258.

Note — Judicial notice of adoption of local-option law.

As stated in PEOPLE v. MUELLER, courts will, of course, take judicial notice of the existence and terms of a local-option statute.

In Ball v. Com. 30 Ky. L. Rep. 600, 99 S. W. 326, a prosecution for unlawful sale of liquor, it was contended that the court should have given a peremptory instruction to the jury to find for defendant, as the commonwealth failed to prove that the local-option law was in force in that county. The court said that this would have been fatal if prohibition had been in force in that county under the general local-option law, which could only be enforced by a vote of the people of the county, but prohibition was in force in that county by virtue of a special act of the legislature, applicable to that county and four others, passed in 1884. It did not require a vote of the people to put this act of the legislature in force; it did not require any proof to show that this act was in force. Of the existence of this act of 1884 and the operation of the general local-option law, as it affects territory governed by special acts, courts must take judicial notice. To the same effect is Crigler v. Com. 120 Ky. 512, 87 S. W. 276, and Combs v. Com. 31 Ky. L. Rep. 822, 104 S. W. 270.

In State v. Arnold, 80 S. C. 383, 61 S. E. 891, a prosecution for the violation of a dispensary act making it a misdemeanor to carry or transport intoxicating liquors to any place or county where the manufacture and sale of alcoholic liquors is prohibited, the court stated that it would take notice of the fact that it was unlawful to manufacture or sell intoxicating liquors anywhere within Greenwood county.

It is stated in Badgett v. State, 157 Ala. 20, 48 So. 54, that "courts take judicial knowledge of prohibition statutes; and we judicially know that general prohibition throughout Jefferson county became effective January 1, 1908, and that prior to that time it was not in force in towns or cities in that county having police regulations 'both by day and night.' . . . We also judicially know that Brookside—averred in the affidavit as the place where the offense was committed—is, and has been since February 18, 1897, an incorporated town; but we do not know whether it had or had not, at the time in question, police regulations 'both by day and night,' and therefore cannot have judicial cognizance that prohibition prevailed within its corporate limits prior to January, 1908, nor that license to carry on the business of retail liquor dealer within such limits could not be legally issued."

Where an indictment for selling liquor in violation of statute was held fatally defective because of failure to allege that the statute was submitted to the voters of the county, the court in Com. v. Throckmorton, 17 Ky. L. Rep. 550, 32 S. W. 130, states: "The offense charged in the indictment is the violation of a local or special statute. The allegation is that the sale was made 'contrary to the form of the statute providing against the sale, vending, and bartering of liquors in said Robertson county, Kentucky.' While the legislative act

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Shaw, J., delivered the opinion of the court:

The defendant was convicted of an unlawful sale of alcoholic liquors in "no-license" territory under the provisions of the act generally known as the "Wyllie law" (Stat. 1911, p. 599). His appeal is from the judgment and from an order denying his motion for a new trial. It will be necessary to consider but one point arising in the case.

The court below instructed the jury, as a matter of law, that the city of Red Bluff was "no-license territory" by reason of an election held under the Wyllie act. There was no evidence on the subject. The charge was that the liquor was sold within the city of Red Bluff, the same being "no-license" territory.

The act provides for the calling of an election in any city or town, or in that part of a supervisorial district not within a city or town, to vote for or against licensing the sale of alcoholic liquors within such territory, and declares that unless the poll at such election shows a majority vote in favor of license, sales of alcoholic liquors within the territory shall thereupon be forbidden and shall be punishable as a misdemeanor. There are certain exceptions not here involved, and which it is unnecessary to notice. It appears, then, that the question whether or not the city, town, or district is "no license territory" as defined in the act, will depend on the result of such election. It is claimed that the court may take judicial notice of the vote so given, and of its effect, if not in favor of license, to make the territory "no-license territory" and to put the law in force therein.

Upon this question the courts of this state have not heretofore spoken. In other states having laws of this kind there is a sharp conflict in the decisions. The courts of Georgia, Idaho, Indiana, Maryland, and Virginia hold that judicial notice may be taken of the result of the election and its effect to put the law in operation in the territory. Combs v. State, 81 Ga. 783, 8 S. E. 318; Woodard v. State, 103 Ga. 496, 30 S. E. 522; Oglesby v. State, 121 Ga. 602, 49 S. E. 706; State v. Schmitz, 19 Idaho. 566, 114 Pac. 1; State v. Ade, 178 Ind. 588, 99 N. E. 983; Jay v. O'Donnell, 178 Ind. 282, 98 N. E. 355; Slymer v. State, 62 Md. 237; Jones v. State, 67 Md. 258, 259,

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relied on is not set forth in terms, and is only referred to in this general way, yet this court will presume that, like all such acts applicable to a single county, and regulating or restricting the sale of liquors within a certain limited district, it was only to become operative after being submitted to a vote of those who were to be affected by its provisions, or after the will of the voters within the district embraced by its terms had been, in some manner, expressed concerning it. In other words, this court will take judicial notice of the fact that such enactments are not self-operative, and do not take effect by virtue of their own terms, and without being in some form submitted to those most deeply concerned in them, for their approval or rejection."

In Ex parte Davis, 115 Cal. 445, 47 Pac. 258, it is held that in a proceeding raising only the question of jurisdiction with respect to the violation of a municipal ordinance regulating saloons, it must be presumed that there was such an ordinance, of which the recorder's court took judicial notice.

But while there is a conflict, the weight of authority appears to be that in the absence of a statute to that effect, the courts will not take judicial notice that such a law has been put in force in a particular district as the result of an election contemplated by it. Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Ex parte Reynolds, 87 Ala. 138, 6 So. 335; Gifford v. Falmouth, 4 Ky. L. Rep. 902; Slymer v. State, 62 Md. 238; Mackin v. State, 62 Md. 244; Jones v. State, 67 Md. 256, 10 Atl. 216, 7 Am. Crim. Rep. L.R.A.1915B. 294; Whitman v. State, 80 Md. 410, 31 Atl. 325; Mitchell v. Maryland, 115 Md. 360, 80 Atl. 1020; State v. Mackin, 41 Mo. App. 99; People v. Edwards, 174 Mich. 445, 140 N. W. 473; State v. O'Brien, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006; Gue v. Eugene, 53 Or. 282, 100 Pac. 254; Gay v. Eugene, 53 Or. 289, 100 Pac. 306, 18 Ann. Cas. 188; Woodward v. State, 58 Tex. Crim. Rep. 411, 126 S. W. 270; Pointer v. State, 60 Tex. Crim. Rep. 355, 132 S. W. 136; Lowery v. State, — Tex. Crim. Rep. —, 34 S. W. 956; Stewart v. State, 35 Tex. Crim. Rep. 391, 33 S. W. 1081; Craddick v. State, 48 Tex. Crim. Rep. 385, 88 S. W. 347; Hailes v. State, 9 Tex. App. 170; Allen v. State, — Tex. Crim. Rep. —, 98 S. W. 869; Bills v. State, 55 Tex. Crim. Rep. 541, 117 S. W. 835; Dorman v. State, 64 Tex. Crim. Rep. 104, 141 S. W. 526; Kinnebrew v. State, — Tex. Crim. Rep. —, 150 S. W. 775. See also PEOPLE v. MUELLER.

In PEOPLE v. MUELLER it was held that the declaration of the court that it would take judicial notice of the adoption of local option was not prejudicial where there was no dispute as to the result of the election, and defendant testified that the "town was dry" at the time of the violation.

And in a majority of the cases it is held necessary to allege in the indictment the adoption of the law in the county where the offense was committed. Butler v. State, 25 Fla. 347, 6 So. 67; Randall v. Tillis, 43 Fla. 43, 29 So. 540; Com. v. Adair, 6 Ky. L. Rep. (abstract) 306; Com. v. McCarthy, 25 Ky. L. Rep. 585, 76 S. W. 173; Com. v. Howe, 17 Ky. L. Rep. 551, 32 S. W. 133; Com. v. Boyd, 17 Ky. L. Rep. 538,

10 Atl. 216, 7 Am. Crim. Rep. 294; Mitchell v. State, 115 Md. 360, 80 Atl. 1020; Savage v. Com. 84 Va. 582, 5 S. E. 563; Thomas v. Com. 90 Va. 95, 17 S. E. 788. In Alabama, Michigan, Mississippi, Missouri, Montana, Oregon, and Texas, the decisions are that although the court will take notice of the terms and effect of the law, as a general law, it cannot take notice of the result of the local election by which it is put in operation, or prevented from operation, in the local territory. Grider v. Tally, 77 Ala. 427, 54 Am. Rep. 65; Ex parte Reynolds, 87 Ala. 142, 6 So. 335; People v. Murphy, 93 Mich. 45, 52 N. W. 1042; People v. Edwards, 174 Mich. 450, 140 N. W. 473; Norton v. State, 65 Miss. 297, 3 So. 665; Bryant v. State, 65 Miss. 435, 4 So. 343; West v. State, 70 Miss. 598, 12 So. 903; State v. O'Brien, 35 Mont. 500, 90 Pac. 514, 10 Ann. Cas. 1006; Gue v. Eugene, 53 Or. 282, 100 Pac. 254; Gay v. Eugene, 53 Or. 289, 100 Pac. 306, 18 Ann. Cas. 188; State v. Wilson, 161 Mo. App. 301, 143 S. W. 534; State v. Hall, 130 Mo. App. 170, 108 S. W. 1077; Shively v. Lankford, 174 Mo. 546, 74 S. W. 835; Craddick v. State, 48 Tex. Crim. Rep. 385, 88 S. W. 347; Bills v. State, 55 Tex. Crim. Rep. 543, 117 S. W. 835; Kinnebrew v. State, — Tex. Crim. Rep. —, 150 S. W. 775; Dorman v. State, 64 Tex. Crim. Rep. 104, 141 S. W. 526.

We believe the decisions last mentioned are more in accord with general principles. In respect of this question, the Wyllie law view that the court cannot take judicial notice of the adoption of local option. That that, however, is not an inevitable inference, is apparent from People v. Bates, 61 App. Div. 559, 71 N. Y. Supp. 123, which, while questioning whether the court could take judicial notice that the electors of the district had voted that no certificates for the sale of liquor should be issued, held that in any event the fact in that respect must be alleged.

There are also certain cases which, without referring to the question of judicial notice, undertake to determine what averments are essential to constitute a valid indictment under the local-option law, and so carry a probable, though not necessarily an inevitable, inference that the court cannot take judicial notice: Gunning v. State, — Tex. Crim. Rep. —, 98 S. W. 1057; Silvey v. State, — Tex. Crim. Rep. —, 98 S. W. 1058; Luck v. State, — Tex. Crim. Rep. —, 98 S. W. 1058; Carnes v. State, 50 Tex. Crim. Rep. 282, 99 S. W. 98; Powell v. State, — Tex. Crim. Rep. —, 99 S. W. 1002; Peeples v. State, — Tex. Crim. Rep. —, 99 S. W. 1002; Loving v. State, — Tex. Crim. Rep. —, 100 S. W. 154; Covington v. State, 51 Tex. Crim. Rep. 48, 100 S. W. 368; Patton v. State, — Tex. Crim. Rep. —, 100 S. W. 778; King v. State, — Tex. Crim. Rep. —, 100 S. W. 924; Smith v. State, — Tex. Crim. Rep. —, 100 S. W. 953; Rogers v. State, — Tex. Crim. Rep. —, 101 S. W. 803; Parr v. State, — Tex. Crim. Rep. —, 101 S. W. 803; Curlee v. State, — Tex. Crim. Rep. —, 101 S. W. 1197; McGrew v. State, — Tex. Crim. Rep. —, 101 S. W. 1198; Killman v. State, — Tex. Crim. Rep. —, 102 S. W. 404; Green v. State, — Tex. Crim. Rep. —, 102 S. W. 416; Doyal v. State, — Tex. Crim. Rep. —, 102 S. W. 1123; Graf v. State, — Tex. Crim. Rep. —, 102 S. W. 1133; Burrier v. State, — Tex. Crim. Rep. —, 103 S. W. 1196; Key v. State, 37 Tex. Crim. Rep. 77, 38 S. W. 773; Williams v. State, 44 Tex. Crim. Rep. 235, 70 S. W. 213; Loveless v. State, — Tex. Crim. Rep. —, 49 S. W. 601; Shilling v. State, — Tex. Crim. Rep. —, 51 S. W. 240; Willis v. State, 32 S. W. 132; Tatum v. Com. 23 Ky. L. Rep. 1533, 65 S. W. 449; Com. v. Green, 98 Ky. 21, 32 S. W. 169; Com. v. Shelton, 99 Ky. 120, 35 S. W. 128; Throckmorton v. Com. 18 Ky. L. Rep. 130, 35 S. W. 635; Com. v. Pippin, 19 Ky. L. Rep. 270, 40 S. W. 252; Com. v. Cope, 107 Ky. 173, 53 S. W. 272; Blackwell v. Com. 21 Ky. L. Rep. 1240, 54 S. W. 843; Mahan v. Com. 21 Ky. L. Rep. 1807, 56 S. W. 529; Dowdy v. Com. 31 Ky. L. Rep. 33, 101 S. W. 338; People v. Whitney, 105 Mich. 622, 63 N. W. 765; State v. Hanley, 25 Minn. 429; Norton v. State, 65 Miss. 297, 3 So. 665; Loughridge v. State, — Miss. —, 3 So. 667; Bryant v. State, 65 Miss. 435, 4 So. 343; Norton v. State, 65 Miss. 297, 3 So. 665; McDonald v. State, 68 Miss. 728, 10 So. 55; Harris v. State, — Miss. —, 12 So. 904; West v. State, 70 Miss. 598, 12 So. 903; State v. Watts, 39 Mo. App. 409; State v. Hutton, 39 Mo. App. 410; State v. Prather, 41 Mo. App. 451; State v. Dugan, 110 Mo. 138, 19 S. W. 195; State v. Searcy, 111 Mo. 236, 20 S. W. 186, affirming 39 Mo. App. 393, 46 Mo. App. 421; State v. Foreman, 121 Mo. App. 502, 97 S. W. 269; State v. Hitchcock, 124 Mo. App. 101, 101 S. W. 117; State v. Hall, 130 Mo. App. 170, 108 S. W. 1077; State v. Chambers, 93 N. C. 600; Stewart v. State, 35 Tex. Crim. Rep. 391, 33 S. W. 1081; Henry v. State, — Tex. App. —, 16 S. W. 342; Carnes v. State, 23 Tex. App. 449, 5 S. W. 133; Hall v. State, 37 Tex. Crim. Rep. 219, 39 S. W. 117; Alford v. State, 37 Tex. Crim. Rep. 386, 25 S. W. 657; Morton v. State, — Tex. Crim. Rep. —, 38 S. W. 1019; Crowder v. State, — Tex. Crim. Rep. —, 49 S. W. 375; Stephens v. State, — Tex. Crim. Rep. —, 97 S. W. 483; Lowery v. State, — Tex. Crim. Rep. —, 34 S. W. 956; Reg. v. Bennett, 1 Ont. Rep. 445; Reg. v. Walsh, 2 Ont. Rep. 206; Reg. v. Elliott, 12 Ont. Rep. 5241; Ex parte White, 20 N. B. 552; Ex parte McDonald, 20 N. B. 542; Ex parte Doherty, 27 N. B. 405.

In general, it is not necessary to aver facts of which the courts will take judicial notice (22 Cyc. 303). And doubtless in many, if not most, of the cases just cited, the decisions were really referable to the

is not essentially different from other laws operating upon specific classes of things. It is general, in that its force extends throughout the state. But it is in actual operation only, where the subjects, or the prescribed conditions, upon which alone it is to operate, exist. The people of a city, town, or district do not, by voting against license, enact the law in that territory. The law, in substance, declares that no liquor licenses shall be issued in any city, town, or district in which the sentiment is not in favor of it. The election is authorized solely to afford a means whereby this sentiment may be conclusively determined, and it merely establishes the local status or condition. This is the gist of the decision in Ex parte Beck, 102 Cal. 701, 124 Pac. 543, holding that the act is not invalid as a delegation of legislative power to the voters of the territory. This local status or condition, therefore, is not established by the law; it remains to be determined from time to time, as the electors desire. It is not a fact "established by law," within the meaning of subdivision 2 of § 1875 of the Code of Civil Procedure, and is not a subject of judicial notice under that section. It depends on the result of a local election, manifested by the local record. The law establishes a method whereby the condition necessary to its local operation may be brought into existence, but the condition so produced is not "established by law;" it is a simple fact to be established by evidence. The fact that

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37 Tex. Crim. Rep. 82, 38 S. W. 776; English v. State, — Tex. Crim. Rep. —, 38 S. W. 778; Zollicoffer v. State, — Tex. Crim. Rep. —, 38 S. W. 775; Dollins v. State, — Tex. Crim. Rep. —, 38 S. W. 775; Kelley v. State, 37 Tex. Crim. Rep. 220, 38 S. W. 779, 39 S. W. 111.

In a number of jurisdictions, however, the rule prevails, even in the absence of statute to that effect, that the court will take judicial notice that local option has been put into operation in a particular district. Bass v. State, 1 Ga. App. 790, 57 S. E. 1054; Combs v. State, 81 Ga. 780, 8 S. E. 318; Woodard v. State, 103 Ga. 496, 30 S. E. 522; Oglesby v. State, 121 Ga. 602, 49 S. E. 706; Young v. Com. 14 Bush, 161 (overruled by Com. v. Shelton, 99 Ky. 120, 35 S. W. 128); State v. McFadden, 151 Mo. App. 479, 132 S. W. 267; Rauch v. Com. 78 Pa. 490; Savage v. Com. 84 Va. 582, 5 S. E. 563; Thomas v. Com. 90 Va. 92, 17 S. E. 788; Hargrave v. Com. 2 Va. Dec. 139, 22 S. E. 314.

Under statute, Idaho courts will take judicial notice as to whether or not the local-option statute is in force in any particular county, and will advise the jury accordingly in the case of a prosecution for a violation of such statute. State v. Schmitz, 19 Idaho, 566, 114 Pac. 1.

So, in Indiana, the courts are compelled by statute to take judicial notice of the result of a local-option election. Jay v. O'Donnell, 178 Ind. 282, 98 N. E. 349; State v. Ade, 178 Ind. 588, 99 N. E. 983.

And in 1902 the Mississippi courts were required by law to take judicial notice of the result of local-option elections. Irby v. State, 91 Miss. 542, 44 So. 801; State v. Bertrand, 72 Miss. 516, 17 So. 235; Puckett v. State, 71 Miss. 192, 14 So. 452.

And upon the ground that the court will take judicial notice of the adoption of a local-option law, it has been expressly held unnecessary to allege that fact in the indictment. Combs v. State, 81 Ga. 780, 8 S. E. 318, and cases generally, supra, sustaining the proposition that the court will take judicial notice that local option has been put into operation in a particular district.
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So there are cases which, without expressly, at least, placing their decision on the ground of judicial notice, hold that such an allegation in the indictment is not necessary.

Thus, it was held in State v. Funk, 27 Minn. 318, 7 N. W. 359, sufficient to allege in the indictment that defendant sold liquor without a license. But in State v. Hanley, 25 Minn. 429, under a special law it was held necessary to allege that the liquor was sold "after a vote against license."

Under a statute prohibiting the sale of intoxicating liquors in certain districts, an indictment charging a sale of intoxicating liquors without first having procured a license therefor in the manner and as provided by law is held sufficient in State v. McIlvenna, 21 S. D. 489, 113 N. W. 878.

It has also been held that the statute, by prescribing the character of proof of the adoption of local option, has in effect negatived the right to take judicial notice of it.

Thus, in the prosecution of a druggist for the violation of a local-option law (People v. Murphy, 93 Mich. 41, 52 N. W. 1042), it is contended by the prosecution that the court was authorized to take judicial notice that prohibition was in force in a certain county. Without passing upon the question of whether it would be competent for the legislature to provide that the resolution or enactment of the board of supervisors be treated as a general law, of which the court might take judicial cognizance, the court states it is sufficient to say that, by the very clear provisions of the act in question, the legislature negatived any such purpose, but has prescribed what shall constitute the evidence of the fact that the provisions of the law are enforced in a particular county, namely, the record, or a certified transcript thereof, of the preamble and resolution of the board of supervisors of such county, required by a certain section of the act; that dealing with the resolution as it was, with the preamble omitted, it was sufficient evidence to warrant the court in finding that the prohibitory act was enforced in the county named.

it is produced by proceedings authorized by the law does not, of itself, require the court to take judicial notice of it. The case is not different from any other where, the law operating only upon certain things, the existence of the thing must be made to appear.

The courts take judicial notice of the existence and bounds of a city (Stat. 1889, p. 372; Pasadena v. Stimson, 91 Cal. 256, 27 Pac. 604; People v. Potter, 35 Cal. 112), but not of the boundaries of supervisorial districts. Such districts are laid out by the supervisors of the particular county, and the proceedings of such county boards are governed by the same rule as those of a city council in this respect; their orders and ordinances are not subjects of judicial notice. 1 Greenl. Ev. 16th ed. § 44; 4 Wigmore, Ev. § 2572, p. 3608; 2 Dil. Mun. Corp. 5th ed. § 639; Lucas v. San Francisco, 7 Cal. 474; Carpenter v. Shinners, 108 Cal. 359, 41 Pac. 473. There is an exception, immaterial here, with regard to judicial notice of ordinances by local inferior courts established to enforce local ordinances. Ex parte Davis, 115 Cal. 445, 47 Pac. 258; Ex parte Hansen, 158 Cal. 497, 111 Pac. 528. But the precise fact of which it is here claimed that judicial notice must be taken is the result of the vote taken in the territory, pursuant to the act. This vote does not make the territory in which it is taken a political subdivision of the state, constituted for the purpose of carrying on a part of the governmental functions of the state. It does not become a governmental agency similar to a municipal corporation, or a county, of which the courts, for that reason largely, are bound to take notice. The only effect of the election is to produce a status or condition upon which the law may operate. It does not give the territory any power, or erect it into a corporation or body politic. The holding of the election and the record of the result are matters in all essentials similar to the records of the votes and resolutions of city councils and county boards by which ordinances are adopted and passed. These, as we have seen, are not matters of judicial knowledge, but must be proven as other facts.

The act itself contains a strong implication that the character of the territory is not to be judicially noticed, but must be shown by evidence. The last clause of § 10 provides that in any prosecution under the act, the record of the governing body of the city, town, or district, showing the number of votes cast at the election, or a duly certified copy thereof, shall be prima facie evidence that the territory in which the election was held is "no-license" territory. If the courts must take judicial notice of the fact, this provision would be

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Miscellaneous.

In the state of Washington the law designates the territory in which the sale of intoxicating liquor has been prohibited as a "unit." So, where one was convicted of bringing intoxicating liquor into a local-option territory, the court, in State v. Muller, — Wash. —, 141 Pac. 910, stated that it would take judicial notice of the fact that in the larger and more populous counties of the state there are many units.

It is held in Moore v. State, 126 Ga. 414, 55 S. E. 327, that judicial cognizance is to be taken by the court that the territory now embraced in the county of Crisp was, before the creation of that county, within the boundaries of Dooly county, wherein the sale of intoxicating liquors was prohibited by law. Under the express provisions of the act of 1905, authorizing the organization of new counties, the local prohibition law prevailing in Dooly county immediately became of full force and effect in the county of Crisp, and has, since its creation, undergone no change. To the same effect is Parker v. State, 126 Ga. 443, 55 S. E. 329.

The question whether judicial notice will be taken of the result of a local-option law is not passed upon in American Fork City v. Charlier, — Utah, —, 134 Pac. 739. The court, in citing People v. Edwards, 174 Mich. 445, 140 N. W. 473, as holding that Michigan courts cannot take judicial notice of the result of local-option elections, states that whether such should be held to be the law of Utah need not now be decided. We do take judicial notice that an election was held under the mandatory provisions of the law in June, 1911. What the result of that election was is immaterial here, since the validity of the ordinance in question would not necessarily depend upon what the result of the election was. Under our statute a person could be guilty of an illegal sale of intoxicating liquors if sold as charged, regardless of whether the people of American Fork City voted wet or dry. This being so, it is quite immaterial to determine the result of the election in this case.

It is stated in Bills v. State, 55 Tex. Crim. Rep. 541, 117 S. W. 835, that to say that there is a local-option law in a certain county is not of necessity to affirm that there is, throughout the entire county, or in the particular portion where this alleged offense was committed, a law prohibiting the sale of intoxicating liquors, since there might be a local-option law in some political subdivision of the county less than the whole. Besides, local elections may be held for other purposes than to prevent the sale of intoxicants. Again, the fact that a witness testifies that there is a local-option law in force in a county does not carry with it the proof that such law was in existence at the date of the alleged offense. J. D. C.

L.R.A.1915B.

wholly useless. The necessary inference is that the legislature believed that proof would be required, as of ordinary matters *in pais*, and that this provision was intended to facilitate such proof.

Furthermore, it is to be observed that the condition of "no-license" territory, produced by an election under the act, is not intended to be stable or fixed; it remains only until, at a subsequent election under the act, a different result is produced; and this may occur every two years (§§ 6 & 11). The election itself may be contested by any voter of the territory, and in such case the force and effect of the election is not changed until the contest is finally decided (§ 9). Thus the character of the territory is subject to change at any time, if there is a contest. It is obvious that the "no-license" territory, so created, is not intended to be a permanently established institution, as in the case of a municipal corporation, and there is not the same reason for making it the subject of judicial notice.

Upon all these grounds our conclusion is that the courts do not take judicial notice that a given city, town, or district is "no-license territory" under this law, that it must be proven by evidence, as provided in the act itself, or by other sufficient evidence, and that the court below erred in giving the instruction complained of.

The judgment and order are reversed.

We concur: **Sloss**, J.; **Henshaw**, J.; **Lorigan**, J.; **Melvin**, J.

IOWA SUPREME COURT.

LIZZIE KEITH
v.
MODERN WOODMEN OF AMERICA, Appt.

(— Iowa, —, 149 N. W. 225.)

Insurance — seven years' absence — estoppel to rely on by-law.

1. An insurer who advises a beneficiary upon the disappearance of insured that it is customary to pay claims after an absence of seven years, and who accepts dues from her for that period without notifying her of a change of by-laws postponing the time for payment, is estopped to rely upon the change.

Pleading — reply — part of petition.

2. An unnecessary reply attempting to set up an estoppel in an action upon a life insurance policy in which a demurrer to defendant's answer of change of by-laws, so that the amount is not due, has been sustained, may be treated as part of the petition if it is permitted to remain in the record.

(November 5, 1914.)

APPEAL by defendant from a judgment of the District Court for Clinton County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

Statement by **Preston**, J.:

Action on a benefit certificate issued to Nathan Keith and payable to Lizzie Keith, plaintiff, who was his wife. Judgment for plaintiff. Defendant appeals.

Messrs. **Truman Plantz, George G. Perrin**, and **E. L. Miller** for appellant.

Messrs. **Carroll Brothers** and **Wolfe & Wolfe**, for appellee:

The alleged by-law, having been adopted about four and one-half years after the disappearance of Keith, is not enforceable as against the plaintiff in this action.

Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; Pierson v. Modern Woodmen, 125 Minn. 150, 145 N. W. 806; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622.

The defendant is estopped, by its letter of February 1, 1905, from claiming that it is not liable to pay the policy at the present time.

Mannheimer v. Independent Order, A. I. 83 Misc. 455, 145 N. Y. Supp. 74; Marshall Field & Co. v. Sutherland, 136 Iowa, 218, 13 L.R.A.(N.S.) 576, 113 N. W. 770; Lyon v. Aiken, 70 Iowa, 16, 29 N. W. 785;

Note. — Insurance: validity of by-law of mutual benefit society, refusing to pay indemnity upon presumption of death from seven years' absence.

There would appear to be no valid objection to a by-law providing that a member's absence, although continued for seven years or more, should not constitute sufficient proof of his death, in so far as such by-law applies to those who became members after its passage. But where the right to change the by-laws has not been reserved by the association, such provision undoubtedly would be invalid as to those who were already members when it became effective. The right to change the by-laws of mutual benefit associations, however, is ordinarily reserved by their contracts with the members. But this right is held to be subject to the condition that the change must be a reasonable one, and a change which virtually makes a new contract is not authorized by such reservations.

Generally as to reasonableness of new by-laws as implied condition of consent to

St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287; Hoeger v. Chicago, M. & St. P. R. Co. 63 Wis. 100, 53 Am. Rep. 271, 23 N. W. 435.

If a man leaves his home, and goes to parts unknown, and remains unheard from for the space of seven years, the law authorizes to those that remain, the presumption of fact that he is dead.

Tisdale v. Connecticut Mut. L. Ins. Co. 28 Iowa, 12; Sherod v. Ewell, 104 Iowa, 253, 73 N. W. 493.

In objecting to the request to submit to the jury, and have them find the date of death of Nathan Keith, the defendant is estopped from asking for a new trial.

Wasson v. American Patriots, 148 Iowa, 142, 126 N. W. 778; Van Atten v. Modern Brotherhood, 131 Iowa, 232, 108 N. W. 313.

A by-law adopted subsequent to the acceptance of the assured and issuing to the benefit certificate cannot have the effect of taking away a substantial right secured by such certificate. The amount to be paid cannot be diminished.

Fort v. Iowa, L. H. 146 Iowa, 183, 123 N. W. 224; Pokrefky v. Detroit Firemen's Fund Asso. 121 Mich. 456, 80 N. W. 240; Newhall v. Supreme Council, A. L. H. 181 Mass. 111, 63 N. E. 1.

The circumstances under which a policy shall be paid cannot be materially altered.

People ex rel. Pulford v. Fire Dept. 31 Mich. 458; Weber v. Supreme Tent, K. M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258; Starling v. Supreme Council, R. T. T. 108 Mich. 440, 62 Am. St. Rep. 709,

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change of by-laws, see note in 8 L.R.A. (N.S.) 521, and see also Index to L.R.A. notes "Insurance," § 47.

There is as yet little authority upon the question under consideration, and it cannot be said that the cases which have considered the point are in harmony.

In Samberg v. Knights of Modern Maccabees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25, where the application provided that the insured's statements, with the application and the constitution, should form the basis of the contract, and the certificate was payable on condition that the agreement in the application was true and the insured continued "to comply with the laws, rules, and regulations of the Great Camp for Michigan, which are now or may hereafter be in force," and "upon satisfactory proof of the death of the said member," it was held that it could not be said that the insured, in subscribing to his application, contemplated the subsequent adoption of a by-law that would have the effect of rendering a statutory provision, raising a presumption of death from a seven years' absence without intelligence concerning the person, nugatory, and have the effect of making it practically impossible to make proofs of death in cases within the occasional experience of men.

And a by-law providing that "the absence or disappearance of a member of this order from his last-known place of residence for any length of time shall not be presumptive evidence of the death of the member, and no right shall accrue under the certificate of membership to the beneficiary, nor shall any benefits be paid until satisfactory proof has been made of the death of the member, aside from any presumption that might arise by reason of his absence," was held unreasonable and void in so far as the case at bar was concerned, where it appeared that it was adopted fifteen years after the insured became a member, four years after his disappearance, and three years before the beneficiary ceased paying assessments. Ibid.

In Pierson v. Modern Woodmen, 125 Minn. L.R.A.1915B.

150, 145 N. W. 806, where it was sought, in an action to recover on a benefit certificate, to prove death by disappearance and absence for seven years, a by-law providing that continued absence or disappearance should not be regarded as evidence of death, or give any right to recover until the expiration of the full term of the member's expectancy of life according to certain mortality tables, was held to have been properly excluded where it was not shown or claimed that such by-law existed when the member disappeared. It does not appear in this case, however, whether or not the right to change the by-laws had been reserved by the insurer.

But in McGovern v. Brotherhood of Locomotive Firemen & Engineers, 31 Ohio C. C. 243, it was held that a by-law of a mutual benefit association that no death losses should be paid when the only evidence of death was that the member had disappeared, was for the mutual benefit of all the members, and not contrary to public policy, and that where a member by his contract agreed to conform to all by-laws, rules, and regulations of the society then existing or that might thereafter be enacted, such by-law was valid and operative in an action brought by the member's beneficiary, although the by-law was not effective until fifteen days before the expiration of the seven years' period relied upon by the beneficiary to establish the presumption of death.

And such by-law was held not invalid on the ground that it attempted to control the rules of evidence which should be applied by the courts, it being held that the mutual interests of the members of fraternal benefit associations warranted their regulating their own affairs to the entire exclusion of the courts. Ibid.

And it was further held in this case that the fact that the beneficiary had paid dues for seven years, which had been accepted by the insurer, had no bearing upon the case, the court remarking that this was merely a concession on her part that the member was still alive. Ibid. J. T. W.

66 N. W. 340; Tebo v. Supreme Council, R. A. 89 Minn. 3, 93 N. W. 513; Wheeler v. Supreme Sitting, O. I. H. 110 Mich. 437, 68 N. W. 229; Behlmar v. Grand Lodge, A. O. U. W. 109 Minn. 305, 26 L.R.A.(N.S.) 305, 123 N. W. 1071.

Preston, J., delivered the opinion of the court:

It is alleged by plaintiff, substantially: That the certificate was issued to deceased June 21, 1899. He had paid all assessments and dues to April 11, 1904, and thereafter plaintiff paid such assessments and dues to and including the year 1911 for and on behalf of said Nathan. That on April 11, 1904, Nathan absented himself from his family and from his usual place of residence, and has concealed his whereabouts, without known cause, and such absence has continued for a period of seven years, and that by reason of said absence said Nathan Keith is deemed to be dead, and said plaintiff herein now alleges the fact to be that said Nathan Keith is dead,—the exact time and place of his death being unknown to plaintiff. It is further alleged: That at the expiration of the seven years' absence of said Nathan a right of action accrued to plaintiff under the certificate, and that thereafter she furnished to said defendant satisfactory evidence of the death of said Nathan, and demanded payment of the amount due her as beneficiary. That at the time of the death of said Nathan he had performed every condition required of him under said certificate, and that he was at the time of his death a member in good standing in said society. Plaintiff also pleaded an estoppel, as follows: That after the disappearance of the said Nathan Keith, the plaintiff, as beneficiary under the insurance certificate, or policy, through her son, D. W. Keith, notified the defendant of the disappearance of said Nathan Keith and asked for advice as to what she, as beneficiary, had best do under the circumstances, and that the defendant answered by a letter dated February 1, 1905, as follows:

In reply to your inquiry of the 28th January, hereby advise that it is customary to consider a member dead, and to pay his claim, after continuous disappearance of seven years' duration. If you have reason to believe that your father is dead, it would probably be worth your while to keep his certificate in force for the next six years; but if you have any reason to think that he is still alive, and is concealing his whereabouts, I can hardly advise you to do so, as, no matter how much money you may expend in this way, he would be at liberty, should he return, to alter the certificate in a manner compatible with the provisions of our by-laws, as your payment would give you absolutely no claim on the certificate during the lifetime of the member.

Yours truly,
C. W. Hawes,
Head Clerk M. W. A.

Plaintiff further alleges: That her said request for advice was in writing, and the same is in the possession of defendant; hence she cannot attach a copy hereto. That, acting upon the contents of said letter, the plaintiff kept said certificate, or policy, in force, by paying the assessments and camp dues, for more than six years mentioned in said letter, and up to the time of the commencement of this suit, and by reason of her so paying said assessments and camp dues, as advised in said letter, and relying upon the representations set forth therein, keeping said certificate, or policy, in force for the period stated therein, the defendant is now estopped from denying its liability on the certificate, or policy, sued upon, and is estopped from setting up or relying upon the defenses, or any one thereof, set out in its answer.

Three affirmative defenses were pleaded by the defendant. The third is, in substance that said benefit certificate issued by this defendant to the said Nathan Keith, and the said application of the said Nathan Keith for said benefit certificate, by their terms, both provide that the by-laws of this defendant then in force, or that thereafter might be enacted, shall be binding upon the said Nathan Keith and his beneficiary. It was further averred: That its said by-laws from and after September 1, 1908, contain, among other things, a provision to the effect that no lapse of time or absence or disappearance, on the part of any member heretofore or hereafter admitted into the socitety, without proof of the actual death of such member while in good standing, shall entitle his beneficiary to recover, except as hereinafter provided. That the disappearance or long-continued absence of any member unheard of shall not be regarded as evidence of death, or give any right to recover on any benefit certificate heretofore or hereafter issued, until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate.

To this defense plaintiff demurred on the ground that the by-law set out in said third affirmative defense in said answer, as amended, as shown by said pleading, was passed and adopted by said defendant society long subsequent to the issuance of the benefit certificate sued hereon, and is an at-

tempt on the part of said defendant society to change and modify the terms of said insurance contract and the time and manner of payment thereof, from the date of the death of the insured, as presumed by law, until the full term of his life expectancy, as shown by the National Fraternal Congress Table of Mortality, shall have expired, and is unreasonable and invalid as a defense. (2) That at the time of the issuance of the benefit certificate herein sued on, and particularly at the time of the passage of the by-law set out in said third affirmative defense and amendment in said answer of said defendant, upon disappearance, and continuous absence of the insured for a period of seven years as set out in the petition of said plaintiff, the laws of the state of Iowa permitted letters of administration to be issued on the estate of such absentee under the presumption that such absentee is dead. Therefore the attempted passage and adoption of said by-law is in contravention of law, unreasonable, and void, and no defense to said action.

The demurrer was sustained, to which ruling the defendant duly excepted. On December 10, 1912, the defendant withdrew its general denial contained in the answer, also withdrew the first and second affirmative grounds of defense in its answer, and elected to stand on the balance of its answer, to which the demurrer had been filed and sustained. No further pleadings were filed by defendant.

On the same day, December 10, 1912, the cause came on for further hearing and trial before the court, upon the request of the plaintiff, asking the right to go to the jury on the question as to the date of Nathan Keith's death, and that the jury be requested to make special findings as to the date of his death; and the court, having heard said request and arguments of counsel, and being fully advised, overruled said request of the plaintiff, on the ground that there is no issue made by the pleadings presenting that question; and thereafter, and upon the same day, the cause came on for further hearing and trial upon the pleadings in this cause, and the court, having examined the records and being advised, and the defendant having refused to plead or answer further, finds for the plaintiff on the pleadings for the sum of $2,000, with interest and costs.

1. First, as to the estoppel: We are clearly of the opinion that, from the facts stated in the pleadings, appellant is estopped from claiming that it is not liable for the payment of the certificate at this time. Some cases are cited by appellee, which we think are not quite in point, though principles of estoppel are therein discussed. It is unnecessary to discuss their cases. Defendant cites no authorities on this point. The letter from defendant, and upon which plaintiff acted, is, to a certain extent, advisory; but plaintiff was told in it that it was customary to consider a member dead and to pay his claim after continuous disappearance for seven years' duration. Then follows, in effect, an invitation or request to keep up the payment of assessments and dues, by saying that it would probably be worth her while to keep the certificate in force if she believed her husband was dead. The clear implication is that, if she did keep it in force until the end of seven years, the claim would be paid. She would be justified in so construing the letter. True, the letter advised her to not keep the certificate in force if she did not believe her husband was dead; but even this suggestion was for her protection, and there is no intimation that even under such circumstances the certificate would not be paid if she kept it in force. Relying upon these statements, she did keep it in force, and paid the assessments and dues, for more than six years, or until more than seven years had elapsed after the disappearance. Defendant kept the money, and still keeps it, and has not even offered to return it. She paid the money both before and after the change in the by-laws, supposing the certificate would be in force. She was not notified to the contrary, even after the change in the by-laws. Defendant continued to receive the payments after such change. Good conscience requires that defendant be not allowed to now say it is not liable for this claim.

2. But it is said by appellant that plaintiff is not in a position to rely upon the estoppel, because it is pleaded in a reply. It is true that this matter is set up in what is denominated a reply. We should, perhaps, refer to the state of the record more particularly in regard to this matter. The demurrer to the third ground of the answer was filed October 30, 1911, and sustained January 24, 1912. The so-called reply was not filed until September 25, 1912. At that time the third ground of the answer had been disposed of by the ruling on demurrer. But the two other grounds of the answer had not then been withdrawn. These two counts or defenses were withdrawn December 10, 1912, at which time the defendant elected to stand on the third ground of its answer, and the cause was submitted and decided by the court on the pleadings. So that, after the other defenses had been withdrawn, the only question was as to the third count of the answer. As to this, as before stated, the demurrer was sustained, and defendant refusing to plead further, it was in default for want of a plea. Under the statute (§§

3575 and 3565) the court was authorized to enter judgment without the introduction of evidence. The so-called reply was not withdrawn, and there was no motion by defendant to strike it from the files. The court and counsel proceeded to treat it as though it was a part of the record, as it was.

The question at this point really is, though not argued by counsel for either side, whether under the circumstances of this case the allegations as to estoppel contained in the so-called reply are denied by operation of law, as though it was in fact a reply and the matters therein properly pleaded as such, or whether it should be treated as a part of, or in connection with, plaintiff's petition. It is urged by appellant that, after the demurrer to count 3 of the answer had been sustained and the other counts withdrawn, there was nothing in defendant's pleadings to which a reply could apply, and this, we think, is true. But, as before stated, this so-called reply still remained a part of the record and of plaintiff's case.

Section 3576 of the Code provides that there shall be no reply, except where a counterclaim is alleged, or where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer. Section 3622 provides that every material allegation in a pleading, not controverted by a subsequent pleading, shall, for the purposes of the action, be taken as true; but the allegations of the answer, not relating to a counterclaim, and of the reply, are to be deemed controverted. An allegation of value, or amount of damage, shall not be held true by a failure to controvert it, etc.

Under this, in order to be deemed controverted, the reply must have been such. But, as shown, no reply was then necessary, and there was no purpose to be served by a reply. The matter of estoppel could have been properly set up in the petition or an amendment thereto. We think it does amplify to some extent some of the allegations in the petition, wherein it is alleged that after April 11, 1904, plaintiff continued to pay and has paid all assessments and dues since then, and that deceased had performed every condition required by him under the certificate. We think the statements in the so-called reply may be considered as explanatory of such allegations in the petition as to why plaintiff continued to pay assessments, and to show how the conditions required by the certificate had been performed. This, of course, would not by itself necessarily plead an estoppel. It has been held that whether or not a pleading shall be treated as a reply depends upon its allegations, and not upon the name given it. 31 Cyc. 248. Hunt v. Johnston, 105 Iowa, 311, 320, 75 N. W. 103, 106, has a bearing. It was there held that a motion to strike a reply which sets up a new cause of action should be sustained. Such a motion was made in that case, but overruled by the trial court. The cause was triable *de novo* in this court, and in the opinion and decision here the court held that the motion to strike should have been sustained, and said: "With this out of the record, there was no prayer for cancelation of the mortgages, and no reference of any kind made to them in the petition."

The inference is that, had there been no motion to strike, the allegations of the reply, though irregular, would have been considered.

Under the record in the instant case, we are of opinion that there was no denial, by operation of law or otherwise, of the allegations in the so-called reply, but that we must consider such allegations in connection with, and as a part of, the petition. It was plaintiff who demanded a jury, and of the court's refusal to call a jury she does not, of course, now complain. The trial court very properly ruled that, under the pleadings and record as they then stood, there was no issue for the jury.

Our holding on the question of estoppel decides the case, and it is not necessary to discuss the other questions.

The judgment is affirmed.

Ladd, Ch. J., and **Evans** and **Weaver**, JJ., concur.

KANSAS SUPREME COURT.

CHARLOTTE B. DOUGLASS, Exrx., etc., of John C. Douglass, Deceased, Appt.,
v.
MARY LOFTUS, Admrx., etc., of Mathew Ryan, Sr., Deceased, et al.

(85 Kan. 720, 119 Pac. 74.)

Contract — judgment for tort — impairing obligation.

1. A judgment for damages for a trespass

Headnotes by PORTER, J.

Note. — Alteration of stockholders' liability as impairment of the obligation of contract.

I. Substantive liability.
  a. In general, 798.
  b. As affecting stockholders.
    1. In general, 798.
    2. Liability in nature of penalty, 799.
    3. Double or additional liability, 800.

to real estate, where the tort benefited the tort feasor's estate to the full extent of the actual damages recovered by the injured party, is not a judgment upon a tort, pure and simple, but upon a cause of action so far contractual as to bring the judgment within the protection of the provisions of the Federal Constitution against legislation impairing the obligation of a contract.

Same — judgment creditor of corporation — changing remedy.

2. Where such a judgment was rendered against a corporation June 30, 1906, upon a cause of action which accrued prior to 1899, neither the statute of 1898 (Laws Sp. Sess. 1898, chap. 10, § 14), which took effect January 11, 1899, changing the remedy of a stockholder from a single action to an action by a receiver, nor the act of 1903 (Laws 1903, chap. 152), repealing all provisions for enforcing the liability of stockholders, nor the constitutional amendment of 1906 (article 12, § 2), limiting the stockholder's liability to the amount of the stock owned by him, deprived the judgment creditor of the right to maintain a suit on such judgment against a stockholder under the statute as it existed at the time the cause of action accrued.

Corporation — judgment creditor — preservation of remedy.

3. The right of the judgment creditor in the case mentioned in the preceding paragraph to maintain such an action is preserved by the general saving clause (§ 9037, subdiv. 1, Gen. Stat. 1909), which provides that the repeal of a statute shall not affect any right which accrued under it, although no action or proceeding was commenced for the enforcement of such judgment until after the repeal of the statute.

Same — revivor of judgment — necessity.

4. The revivor of a judgment against a corporation is unnecessary in order to maintain a suit to collect the amount thereof from a stockholder. It is still evidence of the validity, character, and amount of the creditor's claim.

Same — deceased stockholder — liability of estate.

5. The estate of a deceased stockholder is liable upon stock held and owned by him

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I.—continued.
  c. As affecting creditors.
    1. In general, 800.
    2. Double or additional liability, 801.
II. Remedies.
  a. In general, 802.
  b. As affecting stockholders, 802.
  c. As affecting creditors, 806.
III. Effect of reserved power to alter or amend, 810.

I. Substantive liability.

a. In general.

The present note is not concerned with indirect alterations in the liability of stockholders, such as result from a consolidation of corporations, a modification in the charter, or any general law changing the rights of corporations. In fact, indirect modifications of every kind have been excluded, and only such alterations as deal directly with the stockholders are discussed.

It may be broadly stated that the liability of a stockholder cannot be increased after he becomes such without conflicting with the constitutional provision against the impairment of the obligation of contract, nor may it be decreased as against creditors after they have become such without again conflicting with this constitutional provision. The cases all proceed upon this theory; the difficulty arises in determining what is an increase or decrease of liability within the rule.

The Federal government is not included in the prohibition against impairing the obligation of contracts. Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496.

See note to Franklin County Grammar School v. Bailey, 10 L.R.A. 405, as to laws impairing the validity of contracts.

As to whether the statutory liability of the stockholder or officer for debts of the corporation includes liability for torts, see notes to B. F. Avery & Sons v. McClure, 22 L.R.A.(N.S.) 256.

b. As affecting stockholders.

1. In general.

As has been stated above, the liability of stockholders cannot be increased after such relation has come into existence without impairing the contract obligation.

It has been stated that the liabilities of a stockholder are fixed by the law in force when he becomes such, and cannot be changed to his disadvantage by any subsequent enactment. Fairchild v. Masonic Hall Asso. 71 Mo. 526.

A stockholder who has become such after the alteration of liability cannot complain of such alteration. Merchants' Ins. Co. v. Hill, 86 Mo. 466. See Stanley v. Stanley, 26 Me. 191, infra.

Where the law provides that the stockholder may be made liable to an amount indicated, but does not make him liable, a subsequent law fixing his liability at the amount indicated is not an impairment of his contract. Griley v. Barnes, 103 Ill. 211; Arenz v. Weir, 89 Ill. 25.

Imposing the same personal liability upon stockholders of foreign corporations doing business within a state as upon stockholders in domestic corporation does not impair the obligation of the contract of a stockholder in a foreign corporation which was organized long after the enactment of the law in question. Pinney v. Nelson, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52.

A provision in a charter of a banking corporation that the shareholders shall not be

in the same way and to the same extent that he was liable in his lifetime. The heirs at law or devisees of a deceased stockholder are liable, in a suit upon a judgment rendered against the company after the stockholder's death, to the extent of the property inherited by or devised to them.

Same — limitation of action — when runs.

6. A judgment was rendered against a corporation June 30, 1906. Execution issued February 15, 1907, and was returned unsatisfied for want of property on which to levy. Held: (1) There was no unreasonable delay in the issuance of an execution; (2) the right to maintain an action against a stockholder upon the judgment accrued upon the return of the execution unsatisfied; (3) the judgment creditor had three years thereafter in which to begin an action to enforce the judgment against a stockholder; (4) the claim of a judgment creditor of the corporation against the estate of a deceased stockholder is not provable in the probate court until it has been reduced to judgment against the estate, and the limitation contained in the executors' and administrators' act has no application to such a claim.

(November 11, 1911.)

APPEAL by plaintiff from a judgment of the District Court for Leavenworth County in defendants' favor in an action brought to recover the amount of a judgment against a coal company, rendered in favor of plaintiff's husband in his lifetime. Reversed.

The facts are stated in the opinion.

Messrs. **Frank Doster** and **A. E. Dempsey**, for appellant:

The amendment to the stockholders' liability statute and its subsequent repeal did not affect the case, because the right of recovery is founded on contract.

Woodworth v. Bowles, 61 Kan. 582, 60 Pac. 331; Henley v. Myers, 76 Kan. 736, 17 L.R.A.(N.S.) 779, 93 Pac. 168; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211;

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liable in their individual capacity for any contract or engagement of the association, which is a mere re-enactment of the provision of the general banking law to the same effect, is stated in Sherman v. Smith, 1 Black, 587, 17 L. ed. 163, not to be a contract in any legal sense of the term, and therefore not within the protection of the provision of the Constitution as to the impairment of contracts.

Nothing is said as to the impairment of contract obligations in Cooper v. Frederick, 9 Ala. 738, nor does it clearly appear that the creditor's debt was contracted previous to the change. A reduction of the stock of the shareholders, and of their consequent liability to creditors, was there held valid as against a surviving partner of one who was alleged to have been a stockholder in the company, and present at the meeting at which the reduction was made, and who made no dissent therefrom.

There is the mere statement in Com. v. Reinecke Coal Min. Co. 117 Ky. 885, 79 S. W. 287, that a statute requiring corporations to pay their employees at certain stated times does not impair the obligation of contract, but it does not appear that this objection was raised on the ground that it increased the liability of the stockholders.

The obligation of the contract of stockholders is not unconstitutionally impaired by a statute requiring, as a condition of a binding transfer of stock so as to relieve stockholders of liability for corporate debts, that the transfer be recorded by the corporate officers in the office of the secretary of state, although at the time the became stockholders the stock was transferable by record upon corporate books only. Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148, affirming 76 Kan. 723, 17 L.R.A.(N.S.) 779, 93 Pac. 168.

So, a statute which made the original subscriber to corporate stock liable until his subscription was paid up, whether he retained or assigned his stock, was held not to unconstitutionally impair contract rights of stockholders in a corporation whose charter antedated the statute, and made no such provision. Marr v. Bank of West Tennessee, 4 Lea, 578.

In the absence of authorization either by the articles of incorporation or by statute, assessments cannot be levied upon fully paid-up stock, nor can the legislature authorize an assessment; since to do so would change contractual rights. Enterprise Ditch Co. v. Moffitt, 58 Neb. 642, 45 L.R.A. 647, 76 Am. St. Rep. 122, 79 N. W. 560.

See note to case last cited on assessments on paid-up stock, 45 L.R.A. 647, and supplement thereto to case of Wall v. Basin Min. Co. 22 L.R.A.(N.S.) 1013.

2. Liability in nature of penalty.

A additional liability by way of a penalty may be imposed upon stockholders without impairing the obligation of contract.

Thus, where a corporation was not authorized to commence business until the capital stock was paid in, a statute providing that the trustees and incorporators shall be severally liable for debts to the amount of stock by them subscribed until the whole amount of capital stock shall have been paid in does not impair the obligation of the contract, as it is in the nature of a penalty for failure to pay in stock subscriptions as provided by law. Weidenger v. Spruance, 101 Ill. 278.

In following this case the court, in Shufeldt v. Carver, 8 Ill. App. 545, states that no constitutional right is impaired by imposing a liability upon stockholders by legis-

Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Willetts v. Jeffries, 5 Kan. 470; Jenness v. Cutler, 12 Kan. 511; School Dist. v. State, 15 Kan. 43.

Revivor of judgment against the coal company is not necessary.

Freeman, Executions, chap. 8, § 81; Frierson v. Harris, 5 Coldw. 146, 94 Am. Dec. 222; Scroggs v. Tutt, 23 Kan. 189; Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 128 Fed. 209; Halsey v. Van Vliet, 27 Kan. 478.

The estate of Mathew Ryan, Sr., is liable in virtue of his stockholder's interest in the coal company.

1 Cook, Corp. 5th ed. § 248; Matteson v. Dent, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; Bailey v. Hollister, 26 N. Y. 112; Mechanics' Sav. Bank v. Fidelity Ins. Trust & S. D. Co. 87 Fed. 113, 91 Fed. 456, 56 L.R.A. 228, 38 C. C. A. 193, 97 Fed. 297; McLean v. Webster, 45 Kan. 644, 26 Pac. 10; Rohrbaugh v. Hamblin, 57 Kan. 393, 57 Am. St. Rep. 334, 46 Pac. 705.

Messrs. **W. W. Hooper, W. Littlefield,** and **Thomas J. White,** for appellees Ryan et al.:

If the appellant has any remedy at all, such action must be maintained by a receiver duly appointed for that purpose under the statutes of 1898.

Henley v. Stevenson, 67 Kan. 4, 72 Pac. 518.

This is purely a statutory cause of action enacted subsequent to the granting of a charter in which there is no reservation of the power to alter or amend, nothing being said as to whether the liability imposed is in the nature of a penalty. The same statute apparently was involved in each case, however, and it seems clear that the Shufeldt Case did not intend to go beyond the Weidenger Case in the limitations there placed upon the right of the legislature to alter the liability of the stockholder.

The same position is taken in Fogg v. Sidwell, 8 Ill. App. 551, where it is stated that the legislature may amend the charter of a corporation, although no power of amendment is reserved in the charter.

A vigorous dissenting opinion appears in the Weidenger Case, supra.

The substitution of an assessment by a receiver under the supervision of the court, and after due notice to the stockholders, in place of a bill in equity by creditors, and the imposition of a penalty for neglecting to pay the assessment at the time and place appointed, do not unconstitutionally increase the liability of the stockholders, since it is the stockholder's own default if he becomes chargeable with a penalty for his negligence or refusal to pay his assessment. Com. v. Cochituate Bank, 3 Allen, 42.

See Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367, 12 Mor. Min. Rep. 19, infra, I. c, 1, as to alteration of liability in nature of a penalty as it affects creditors.

3. Double or additional liability.

A double liability cannot be imposed upon stockholders who became such when none existed, where the charter of the corporation reserved the power to the corporation to accept or reject any act of the legislature altering or amending the liability. Steacy v. Little Rock & Ft. S. R. Co. 5 Dill. 348, Fed. Cas. No. 13,329.

That a double liability could not be imposed was also held in Ireland v. Palestine, B. N. P. & N. W. Turnp. Co. 19 Ohio St. 369, although there was no reservation such as was found in the Steacy Case.

It is the view of the latter case that the contract of a stockholder in a corporation upon whom it imposed no liability beyond the amount of his subscription is to pay the amount of his subscription and no more; and when he has fully paid this amount, to require him to contribute an additional amount is to violate the contract between him and the corporation. He becomes a stockholder by virtue of his contract with the company, and has a right to stand upon the terms of that contract, interpreted and limited by the law under which it was made. No additional liability, therefore, for the debt of the company, can be imposed upon him without impairing the obligation of such contract.

The view has been taken, however, that stockholders may be made liable for debts incurred after the enactment of the statute altering the liability. Gray v. Coffin, 9 Cush. 192; Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559, approved in Hathorn v. Calef, 53 Me. 471. This is especially true where the complaining stockholder purchased his stock after the enactment of the statute. Stanley v. Stanley, 26 Me. 191.

c. As affecting creditors.

1. In general.

As has been stated above, the liability of stockholders cannot be decreased as against creditors whose debts have been incurred while the increased liability was in force.

But the liability of stockholders may be changed as to creditors whose contract rights accrued subsequent to the alteration, without impairing the obligation of any contract. Richardson v. Akin, 87 Ill. 138; Rowland v. Forest Park Creamery Co. 79 Kan. 134, 99 Pac. 212.

There is no unconstitutional impairment of the obligation of a contract in reducing the par value of stock and the consequent liability of the shareholders from $50 to $25 a share, as against one who has garnished the company, and, after the act in question has been passed, obtains a judgment against the company, and thereupon garnishees a

tion, penal in its nature, and the legislature would have the right at any time to repeal it, and by so doing would not in any way impair the obligation of any contract.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763.

The judgment being dormant, no action could be maintained upon it, and the same not having been revived within a year, no revivor thereof can be had without the consent of the coal company.

Mawhinney v. Doane, 40 Kan. 676, 681, 17 Pac. 44, 20 Pac. 488; Seeley v. Johnson, 61 Kan. 337, 78 Am. St. Rep. 314, 59 Pac. 631; Manley v. Mayer, 68 Kan. 394, 75 Pac. 550, 1 Ann. Cas. 825; Chenault Bros. v. Chappell, 8 Kan. App. 807, 57 Pac. 553.

The liability of a stockholder is one created by statute, the period of the enforcement of which is three years; a creditor cannot extend such period by proceeding to obtain judgment against the dissolved corporation or its trustee, and execution against the stockholders, instead of proceeding by direct action against the latter.

Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519; First Nat. Bank v. King, 60 Kan. 733, 57 Pac. 952; Brigham v. Nathan, 62 Kan. 243, 62 Pac. 319; McGlinchy v. Bowles, 68 Kan. 190, 75 Pac. 123; Fox v. First Nat. Bank, 9 Kan. App. 18, 57 Pac. 241.

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stockholder. Woodhouse v. Commonwealth Ins. Co. 54 Pa. 307.

But if a creditor becomes such by assignment of contract rights that were created before the repeal, alteration of the stockholders' liability is an impairment of his contract. Blakeman v. Benton, 9 Mo. App. 107 (*dictum*).

As against existing creditors, the legislature cannot relieve stockholders of the payment of a part of their stock, making the part that has been paid payment in full. Williams v. Watters, 97 Md. 113, 54 Atl. 767.

So, a liability of stockholders for debts owing laborers and servants for services performed for the corporation cannot be taken away without impairing the contract obligation of those whose rights accrued previous to repeal. Conant v. Van Schaick, 24 Barb. 87.

In Union Iron Co. v. Pierce, 4 Biss. 327, Fed. Cas. No. 14,367, 12 Mor. Min. Rep. 19, an action to recover a penalty under a statute making the officers of the corporation liable for debts of the company, contracted while they were stockholders or officers thereof, for failure to make and publish a report, it is held that the defendant's liability arose out of a statute highly penal, and therefore the right of action might be taken away by the legislature without impairing the obligation of any contract. A similar holding appears in Breitung v. Lindauer, 37 Mich. 217, and Stieffel v. Tolhurst, 67 App. Div. 521, 73 N. Y. Supp. 1034,—actions against directors. See I. b, 2, supra, as to alteration in nature of a penalty as it affects stockholders.

2. Double or additional liability.

A creditor cannot complain of the repeal of the double-liability provision, as it affects stockholders who became such after the repeal. Ochiltree v. Iowa R. Contracting Co. 21 Wall. 249, 22 L. ed. 546, affirming 54 Mo. 117.

And a double-liability law imposed subsequent to the creation of a debt may be repealed without impairing the obligation of the creditor's contract when he has taken no action to enforce it until after the repeal. Jerman v. Benton, 79 Mo. 148.

But where a double liability is imposed upon stockholders, it enters into and becomes a part of the contract of subscription, and forms a part of the security of the creditors of the corporation when the debts are contracted; hence it cannot be taken away without impairing such contract. McDonnell v. Alabama Gold L. Ins. Co. 85 Ala. 401, 5 So. 120; Stocker v. Davidson, 74 Kan. 214, 118 Am. St. Rep. 315, 86 Pac. 136 (*dictum*); Walterscheid v. Bowdish, 77 Kan. 665, 96 Pac. 56; Provident Sav. Inst. v. Jackson Place Skating & Bathing Rink, 52 Mo. 552; Jerman v. Benton, 79 Mo. 148 (*dictum*); St. Louis R. Supplies Mfg. Co. v. Harbine, 2 Mo. App. 134.

The contrary view has been taken that the legislature may repeal the provision as to the double liability of stockholders as against creditors whose claims have not been reduced to judgment, without impairing the obligation of the contract. Coffin v. Rich, 45 Me. 507, 71 Am. Dec. 559. The view is taken in this case that there is no privity of contract between the creditors of the corporation and the individual members; that the individual members are not therefore personally liable unless liability is expressly imposed by statute; and since the liability does not arise from any contract, but is given only by positive statute, a repeal of the statute does not impair the obligation of any contract. The statute repealed in this case provided for the liability of the stockholders for corporate debts to the amount of stock held by them.

This view was followed in Carroll v. Hinkley, 46 Me. 81, and Hathorn v. Towle, 46 Me. 302.

A subsequent case in the state, decided in accordance with this decision, was reversed by United States Supreme Court, Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776, on the theory that there was an impairment of the obligation of contract in such an alteration. In a subsequent hearing on this case before the supreme court of Maine (53 Me. 471), it is stated by that court that

Porter, J., delivered the opinion of the court:

In this suit Mrs. Douglass, as executrix of her husband's estate, seeks to recover from certain stockholders of the Leavenworth Coal Company the amount of a judgment against the company in favor of her husband, rendered in his lifetime. The petition recites that for a long time prior to 1899 the Leavenworth Coal Company, by means of subterranean and hidden tunnels and underground workings, had secretly trespassed upon and into the coal beds on the land of John C. Douglass, and had carried away and converted his coal to its own use; that in 1899 and 1900 he had brought two actions against the company for damages for such trespass and conversion; that these actions were consolidated, and a trial was had, resulting in a judgment in his favor, on June 30, 1906, for sixty-seven thousand, three hundred eighty-seven and 50/100 dollars ($67,387.50) damages and costs, and that on February 15, 1907, an execution on the judgment issued against the coal company, which was returned unsatisfied.

The petition then alleges that Mathew Ryan, Sr., who died on the 20th day of June, 1893, was a large stockholder in the coal company, owning nineteen hundred and fifty-three (1,953) shares, of the aggregate par value of ninety-seven thousand, six hundred and fifty dollars ($97,650); that he died testate, and devised his property, including the shares of stock aforesaid, to the defendants, who are his children and grandchildren; that the shares of stock constitute a part of his unsettled estate which has not been distributed or administered. The petition further alleges that in his lifetime John C. Douglass commenced a suit in the district court of Leavenworth county on the identical cause of action herein set forth, and against the same defendants or their privies and predecessors in interest, which suit was pending at the time of his death, and was afterward revived in the name of the plaintiff, as executrix of his estate; that the suit so revived was thereafter, upon a change of venue, removed to the court of common pleas of Wyandotte county, where it remained pending until February 5, 1910, at which time, upon leave of court, it was dismissed without prejudice. The present action was commenced January 28, 1910. A copy of the entry of judgment in favor of John C. Douglass against the coal company was attached to and made part of the petition. The prayer is for judgment against the administratrix as such, and against the heirs and devisees, for the amount of the judgment against the coal company, and that the same be charged as a lien upon the property of the Ryan estate.

The defendants filed demurrers to the petition, on the ground that it fails to state a cause of action. The court sustained the demurrers. Mrs. Douglass appeals, and assigns the ruling as error.

A number of reasons are advanced which,

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the legislature has power to alter the liability of stockholders for the debts of the corporation, provided due regard is had to existing contracts, and the laws are made prospective in operation.

A joint and several liability of corporate stockholders to creditors to an amount equal to the amount of the stock held by them respectively for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid cannot be altered so as to substitute the personal liability merely of the holder of capital stock not fully paid, to an amount equal to the amount unpaid on the stock held by him, for debts of the corporation contracted while such stock was so held. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24.

The double liability of stockholders, imposed without limitation at the time, cannot be changed so that it is limited to the time when the whole amount of stock is paid in as to existing creditors' rights. Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176.

An insolvency law cannot be enacted relieving from liability the stockholders of a corporation which has taken advantage of it. Van Hook v. Whitlock, 26 Wend. 43, 37 Am. Dec. 246 (*dictum*).
L.R.A.1915B.

See Re Warren, 52 Mich. 557, 18 N. W. 356, infra, Remedies—c. As affecting creditors.

II. Remedies.

a. In general.

An alteration which has to do only with the remedy for the enforcement of the stockholder's liability, without affecting the substantive liability of the stockholder, does not unconstitutionally impair the obligation of a contract.

It was held in Ex parte Northeast & S. W. Ala. R. Co. 37 Ala. 679, that the legislature may change a summary remedy against a stockholder so as to delay the hearing thereon until a subsequent term of court; but there is no discussion and no question of the impairment of contract is raised.

Changing the place where shares of stock are to be sold upon forfeiture for nonpayment does not unconstitutionally interfere with the rights of the shareholder. Yadkin Nav. Co. v. Benton, 9 N. C. (2 Hawks) 10. The change in this case is stated to be altogether beneficial to the subscribers.

b. As affecting stockholders.

A change in the remedy of the corporation

it is contended, furnish sufficient grounds for sustaining the demurrers. The main question to be decided is whether the amendment to the stockholder's liability law, or its subsequent repeal, defeats the plaintiff's right of recovery. To enforce the Constitution as it stood previous to the constitutional amendment of 1906, the legislature enacted two provisions. One authorized a judgment creditor of a corporation to issue execution, or he might proceed by action against any stockholder; the other authorized a creditor to sue a stockholder, if the corporation had been dissolved, leaving debts unpaid. Under these statutes, the remedy of the creditor was by a single action against a single stockholder. At the special session of 1898, the legislature, by a law which took effect January 11, 1899 (Laws 1898, chap. 10, § 14, Gen. Stat. 1901, § 1302), changed the remedy to one of a suit by a receiver against the stockholders generally, in favor of the creditors generally. In 1903 all provisions for the enforcement of stockholders' liability were repealed, and at the general election of 1906, article 12, § 2, of the Constitution, was amended, abrogating the double liability of stockholders, and leaving each stockholder liable only to the amount of stock owned by him. The question is whether either the statutory amendment, providing a different remedy, or the subsequent repeal of all provisions for enforcing a stockholder's liability, or the subsequent amendment to the Constitution, bars the plaintiff's right to maintain this action under the statute as it existed prior to January 11, 1899. A judgment founded on a tort is not a contract, and for that reason is not protected by the provisions of the Federal Constitution against the impairment of contract obligations by state legislation. Louisiana ex rel Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; Henley v. Stevenson, 67 Kan. 4, 72 Pac. 518. In the case last cited, the record failed to disclose the nature of the litigation which resulted in the judgment against the corporation, and whether or not any contractual liability existed between the judgment creditor and the corporation prior to the time the act of 1898 took effect; and it was therefore held that it did not appear that the creditor was entitled to pursue the remedy under the earlier statute.

The defendants claim that in the original action John C. Douglass sued the coal company for a statutory trespass, that his action was in tort, and the judgment now sought to be enforced must be classed as one for a tort, pure and simple. The character of the action upon which the judgment is founded must be determined solely from what is stated concerning it in the petition in this case. Obviously it was brought under the provisions of the statute (Gen.

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against the stockholder, to collect an unpaid subscription, which has to do alone with the remedy, and does not alter any rights of the stockholder, is allowable.

Thus, a statute which gives the corporation a lien upon stock of shareholders for amounts which may be due upon the subscriptions, and the right to proceed to collect what may remain unpaid of the original subscription by suit, so that, under the latter power, it could have maintained a suit in chancery for the enforcement of the lien, may be altered so as to provide for the advertisement and sale by the corporation of stock of a stockholder in default, the proceeds to be applied to the unpaid balance of the stock subscription. Tutwiler v. Tuskaloosa Coal, Iron & Land Co. 89 Ala. 391, 7 So. 398.

That a change which affects the remedy against the stockholders for corporate debts merely is not unconstitutional is the view taken in Hirshfeld v. Bopp, 145 N. Y. 84, 39 N. E. 817; but the statute involved in this case was one which has usually been interpreted by the courts of this state as one which changed the substantive liability.

The liability of stockholders under a statute which rendered them liable for their proportion of all debts contracted during the time of their ownership of the stock, regardless of whether the shares owned had been paid in full or not, may be altered so that the board of directors is authorized to levy assessments for the purpose of paying the liabilities even after the par value of the stock has been paid in full, since this affects only the method of enforcing payment, and does not in fact alter the liability. Sparks v. Lower Payette Ditch Co. 3 Idaho, 306, 29 Pac. 134.

A statute merely changing the remedy against the stockholders of a corporation so that they may be made parties to an action against the corporation before execution issues against it, instead of afterwards, does not impair their contract, where it is not provided that execution may issue against the stockholders until the assets of the corporation have been exhausted. Smith v. Bryan, 34 Ill. 364.

A statute providing a remedy for the more speedy enforcement of an obligation was held, in Citizens' Bank v. Deynoodt, 25 La. Ann. 628, not to affect in any manner the obligation of the contract; but the facts in this case are very meagerly stated, and its relation to this question does not clearly appear.

A statute providing, contrary to the rule theretofore existing, that the release of the corporation in insolvency proceedings shall not release the stockholders, does not impair the obligation of contracts. Willis v.

Stat. 1868, chap. 113, § 1, Gen. Stat. 1909, § 9692) authorizing treble damages in certain kinds of trespass, since treble damages were claimed. However, the plaintiff either failed in his proof, as to the allegations entitling him to more than compensation, or (what seems more probable) waived all claim to damages under the statute, because it appears from the entry of judgment, a copy of which is attached to and made a part of the petition in this case, that no such damages were allowed. On the contrary, the court first found the actual value of the coal taken and converted, and gave judgment for the value, and no more. That part of the entry of judgment reads: "The court, after hearing the evidence and argument of counsel thereon, and being fully advised in the premises, finds that said defendant, as alleged in the petition, wrongfully took and converted to its own use all of the coal underlying the lots mentioned in plaintiff's petition, as amended, and from under the streets and alleys adjoining said lots, tracts, pieces, and parcels of ground. That at the times said coal was taken and converted it was of the value of $67,387." The court then rendered judgment for the actual value of the coal wrongfully taken and converted.

Notwithstanding the adoption of the Code, the substantive distinction between actions on contract and those in tort still exists. In cases which are often found occupying the "twilight zone" between the two forms, it is difficult to determine whether they belong strictly to the one class or the other. These are cases where, upon substantially the same facts, the law permits a recovery in the same action of damages for the breach of an implied contract, or for the wrongful act of the defendant. "Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings." Smith v. McCarthy, 39 Kan. 308, syl. ¶ 1, 18 Pac. 204. Previous to the adoption of the Code, the tort was waived by bringing an action in assumpsit upon the implied promise to pay. Under the Code system of pleading, whether the tort is waived is to be determined ordinarily from the facts stated in the complaint. Ibid. The only facts stated in the petition which would indicate that the tort was not intended to be waived is that treble damages were claimed. The statute, authorizing treble damages for certain kinds of trespass, provides as follows: "If any person shall dig up, quarry or carry away any . . . mineral . . . in which he has no interest or right, standing, lying or being on land not his own, . . . the party so offending shall pay to the party injured treble the value of the thing so injured . . . or carried away, with costs, and shall be deemed guilty of a misdemeanor, and shall

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Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110.

A statute requiring a stockholder, in order to relieve himself from liability for corporate debts upon a sale of his stock, to see that the transfer is noted by its officer upon its books, may be changed so as to impose the additional duty upon the stockholder to see that a similar notation is made upon a public record. Henley v. Myers, 76 Kan. 723, 17 L.R.A.(N.S.) 779, 93 Pac. 168, affirmed in 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148.

A statute authorizing the receiver of a corporation to enforce the statutory double liability relates merely to the remedy, and does not impair the obligation of contract. Johnson v. Libby, 111 Me. 204, 88 Atl. 647.

A statute taking from the creditors of a corporation the cause of action against a stockholder, and transferring it to a trustee, to be by him enforced, does not unconstitutionally impair the contract of the stockholder, especially where the doctrine prevails that the stockholder's liability constitutes a fund for the payment of all the corporate debts, and if it is insufficient to pay all the debts, it must be distributed among the creditors upon equitable principles, and that no single creditor will be allowed to acquire priority of or exclusive payment. Story v. L.R.A.1915B.

Furman, 25 N. Y. 214. See Walker v. Crain, infra.

The substitution of a procedure by which an assessment is levied upon the stockholders in the insolvency proceeding for an action in equity to enforce the shareholders' double liability does not impair the obligation of contract. Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36. "No substantial right is affected by the law in question," says the court, "for in no manner does it increase the liability of the stockholder." This decision was approved upon a reargument of the question in London & N. W. American Mortg. Co. v. St. Paul Park Improv. Co. 84 Minn. 144, 86 N. W. 872, and was followed in Robinson v. Brown, 126 Fed. 430.

This act was also sustained in Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755. In the last-named case, the specific objection that the stockholder was held liable in a proceeding to which he was not a party was discussed and held invalid, since no personal judgment was rendered against him. The fact that expenses incident to the enforcement of stockholders' liability in other states would add to the expense of the stockholders was also held no valid objection to the validity of the act. Converse v. Ætna Nat. Bank,

be subject to a fine not exceeding five hundred dollars." Section 1, chap. 113, Gen. Stat. 1868, § 9692, Gen. Stat. 1909. It would seem difficult, if not impossible, to state a cause of action under the statute, entitling a plaintiff to treble damages, without at the same time stating facts which would permit him to waive the tort and recover on the implied promise the actual value of the property converted.

In Wright v. Brown, 5 Kan. 600, the petition set up a claim for treble damages against the defendant for cutting down and carrying away trees growing upon plaintiff's land. The court refused to compel the plaintiff to elect as to whether he would proceed for the actual damages or for treble damages. It was held that the trial court ruled rightly, because the petition was obviously intended for treble damages, "and was good for either, so that there was nothing to elect." p. 603. The Code has abolished the forms of actions. While the substantive distinction between actions on contract and those in tort remain, there is not much of substance left by which to distinguish an action on contract from one in which the plaintiff, upon the same statement of facts, may recover on contract or in tort, and without being subject to a motion to compel him to elect which course he will take.

Whether an action is *ex contractu* or *ex delicto* cannot always be determined from the character of the damages claimed, though the relief demanded has in some cases been considered controlling. 1 Enc. Pl. & Pr. 147, and cases cited in note 1. It is of no importance what the plaintiff calls his action. "Under our Code, a plaintiff is not required to state whether his cause of action is founded upon contract or on tort; and generally, if he should make such a statement, and be mistaken, the statement would be immaterial." Akin v. Davis, 11 Kan. 580, syl. ¶ 6. This necessarily follows from the provision that all that is required in a petition is "a statement of facts constituting the cause of action, in ordinary and concise language, and without repetition." Civ. Code, § 92 (Gen. Stat. 1909, § 5685).

It is well settled that where a petition contains a good cause of action for a breach of contract, express or implied, the addition of averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and where a doubt exists the courts are inclined against construing the pleading as stating a cause of action for a tort. Where the petition otherwise states a cause of action on contract, the courts generally regard the averments which are appropriate to an action in tort as mere surplusage. Bernhard v. Wyandotte, 33 Kan. 465, 467, 6 Pac. 617; Smith v. McCarthy, supra; Chase v. Atchison, T. & S. F. R. Co. 70 Kan. 546–554, 79 Pac. 153; Missouri, K. & T. R. Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; Delaney v. Great

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79 Conn. 603, 65 Atl. 1064, 1065, following decision in the same case in 79 Conn. 163, 64 Atl. 341, 7 Ann. Cas. 75, holding the statute open to objection on the latter ground, was subsequently reversed by the United States Supreme Court on the authority of Bernheimer v. Converse, supra. Bernheimer v. Converse was followed by the Massachusetts supreme court in Converse v. Ayer, 197 Mass. 443, 84 N. E. 98.

The case of Bernheimer v. Converse is approved in Irvine v. Elliott, 203 Fed. 82, where it is stated that a remedy for the enforcement of an existing double liability of nonresident stockholders who acquired their stock before the creation of such remedy may be provided by legislature.

A similar statute substituting an assessment by the receivers of the corporation under the approval of the court, and upon due notice given to the parties, upon the stockholders, of an amount sufficient to make up any probable deficiency in the assets, for a bill in equity by the bill holders or some one of them, in behalf of himself and all the bill holders, against the stockholders, was sustained as a constitutional exercise of legislative power in Com. v. Cochituate Bank, 3 Allen, 42.

But a difference of opinion arises in case of the substitution of an action by the receiver of an insolvent corporation, to enforce the liability of stockholders, for actions by the individual creditors.

The court in Evans v. Nellis, 101 Fed. 920, an action to recover a stockholder's additional liability, held a statute making this change to be unconstitutional for the reasons: That it made the additional liability of a stockholder an asset of the corporation for the benefit of all the creditors, while under the former law the additional liability was an obligation to pay the judgment creditor, who was unable to collect his debt of the corporation; that it cut off defenses which the stockholder might have against the pursuing creditor; that the entire amount of the additional liability was by the act required to be paid, although it was not needed to pay debts; and that it compelled the stockholder to pay a part of the expenses of receivership.

But the United States Supreme Court has held that the substitution for individual actions to enforce the statutory liability of stockholders of a suit in equity by a receiver appointed after judgment against the corporation does not unconstitutionally impair the obligation of the contract under which the stockholders acquired their stock. Henley v. Myers, 215 U. S. 373, 54 L. ed. 240, 30 Sup. Ct. Rep. 148, thus overruling Evans v. Nellis.

The creation of a supplementary proceed-

Bend Implement Co. 79 Kan. 126–129, 98 Pac. 781. In the latter case it was held: "In determining whether a petition states a cause of action *ex contractu* or *ex delicto*, it must be considered in its entirety, but with special reference to its prominent and leading allegations. Where the averments make it doubtful whether the action is on contract or in tort, every intendment must be made in favor of construing it as an action on contract." Syl. ¶ 1. In the opinion a case is cited where the action was held to be *ex contractu*, and one of the reasons stated for so holding was that an action *ex delicto* would have been barred by limitation. St. Louis, I. M. & S. R. Co. v. Sweet, 63 Ark. 563, 40 S. W. 463, 2 Am. Neg Rep. 295.

This court, in Chase v. Atchison, T. & S. F. R. Co. 70 Kan. 546–554, 79 Pac. 153, went quite as far. There the plaintiff, who was a passenger, brought suit against the company for damages for being ejected from a train. The petition was framed on the theory that the right to recover was for the wrongful act of the conductor in expelling her from the train; but the petition stated facts sufficient to show that the company had violated its contract of carriage, entered into with the plaintiff. It was held that the action was one of contract, and that the averments respecting the tortious acts of the conductor should be treated as surplusage. In the opinion it was stated that if the action were held to be in tort, and not on contract, the plaintiff could not recover, and the judgment which the trial court rendered against her on a demurrer to the evidence in that event would be affirmed. The court, however, disregarded all the averments of the petition which were appropriate to an action in tort, and, finding therein sufficient facts stated to constitute a cause of action on contract, held the other averments to be surplusage, and reversed the judgment. The court held that she might ignore the tortious acts of the conductor, and all reference thereto, in her petition, and recover upon a contract which was not in terms declared upon, but which the law took cognizance of from the statement of fact in the petition, from which it appeared that the relation of carrier and passenger existed between her and the company.

Here the tort was one which benefited the tort feasor's estate to the full extent of the actual damages sustained by the injured party. In such cases, where the recovery may be had upon either theory, upon the facts stated in the petition, and it appears that the judgment was rendered only for the actual value of the property converted, precisely as though the action had in fact been based upon the implied contract alone, and as though the tort had been waived when the action was filed, we think, within the principle of the foregoing cases, the action might well be held as one upon the implied contract, and not as an action in tort. At all events, the judgment was not for a tort,

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ing available to the creditor of the corporation against a stockholder for the collection of an unpaid balance on his subscription does not impair the obligation of the stockholder's contract, where, without the remedy thus created, the creditor must resort to an original proceeding against solvent stockholders of whom the court could acquire jurisdiction. Merchants' Ins. Co. v. Hill, 86 Mo. 466, affirmed in 134 U. S. 515, 33 L. ed. 994, 10 Sup. Ct. Rep. 589. See Lamar v. Taylor, infra.

c. As affecting creditors.

The courts have guarded the remedies affecting creditors with more care than those affecting stockholders. See statement from court in Henley v. Myers, infra.

The remedy provided by a statute in force when a debt was contracted cannot be repealed so as to leave the contract itself valueless. Walterscheid v. Bowdish, 77 Kan. 665, 96 Pac. 56.

Nor can the legislature of a state deprive the creditor of a foreign corporation of the right to enforce his obligation against a stockholder of such corporation, residing within the state, where there is a constitutional provision prohibiting the legislature from passing any law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made. Western Nat. Bank v. Reckless, 96 Fed. 70.

The remedy of a creditor against stockholders can be changed, and the time within which the action must be brought can be limited. Cummings v. Maxwell, 45 Me. 190.

Thus, a statute giving a creditor two years within which to enforce a stockholder's statutory liability may be altered so as to give the creditor only six months. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24.

Imprisonment of the stockholders of a corporation for debts of the corporation may be abolished by the legislature so as to relieve a stockholder who has already been imprisoned under the former law for a debt of the corporation. Penniman's Petition, 11 R. I. 333, affirmed in 103 U. S. 714, 26 L. ed. 602.

It is stated in Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757, that a statute which modifies in no other respect the remedies against stockholders than by abolishing the right to take the person of the stockholder for the debt of the corporation: by substituting for the taking of his property on attachment and execution against the corporation, an action of debt against him upon a judgment obtained against the corporation, and by authoriz-

pure and simple, but upon a cause of action essentially contractual. It was for a trespass, by which the wrongdoer (the coal company) had appropriated to its own use the property of another, and the cause of action was so far contractual as to bring the judgment within the protection of the Federal Constitution against the impairment of the obligation of a contract.

Neither the statute of 1898, which took effect January 11, 1899, and changed the remedy to enforce the stockholders' liability from a single action against a single stockholder to an action by a receiver against the stockholders generally for the benefit of all the creditors, nor the act of 1903, repealing all provisions for enforcing the liability of stockholders, nor yet the change in the Constitution in 1906, could deprive the plaintiff of the right to maintain a suit against a stockholder under the statute as it existed at the time the cause of action upon which the judgment is founded accrued to John C. Douglass, which the petition avers was long prior to 1899. The petition alleges facts which show that the liability of the coal company arose prior to the 1st day of January, 1899, and this was eleven days before the statute took effect, changing the remedy.

The general saving clause (Gen. Stat. 1868, chap. 104, § 1, subdiv. 1, Gen. Stat. 1909, § 9037, subdiv. 1) provides that the repeal of a statute shall not affect any right which accrued under it. This has been repeatedly held to preserve rights accrued, although no action or proceeding had been commenced for their enforcement. Willetts v. Jeffries, 5 Kan. 470; Jenness v. Cutler, 12 Kan. 500, 511, 512; Ayres v. Probasco, 14 Kan. 175; School Dist. v. State, 15 Kan. 43–49; Henley v. Myers, 76 Kan. 736, 17 L.R.A.(N.S.) 779, 93 Pac. 173. In the latter case it was applied to the holder of a judgment rendered against a corporation, in an action founded upon tort, upon which an execution had been issued and returned *nulla bona*, before the repeal of the act changing the remedy from a single action to a suit by a receiver.

In Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331, it was held that the effect of the statute for the enforcement of a stockholder's liability is to make the relation between the creditors and stockholders contractual in its nature, and therefore within the protection of the same clause of the Federal Constitution. The particular statute construed there was an act which vests in receivers of insolvent banks a right of action for the enforcement of the statutory liability of stockholders, but the same principle is involved as in the present case. The liability of the corporation to the creditor in that case was on contract. Conceding that in the present case the liability was for a tort, the tort was of a character which benefited the tort feasor's estate to the same extent that it diminished the estate of the injured party. It was a tort which the per-

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ing him, when so sued, either in equity or at law, to make any defense that the corporation might have made, merely modifies the former remedy and the rules of evidence, and is a constitutional exercise of the power of the legislature even as applied to debts contracted by the corporation before its enactment.

In an action by a creditor (Walker v. Crain, 17 Barb. 119), a statute vesting the right of action to enforce the stockholders' liability for corporate debts in a trustee was held not to unconstitutionally impair the obligation of contract. See Story v. Furman, 25 N. Y. 214.

When statutes which substitute a single action for the action of the various creditors, similar to those discussed in II. b, supra, as affecting stockholders, affect the creditors' contracts, the courts have been more inclined to hold them void. The court in Henley v. Myers, 76 Kan. 723, 17 L.R.A. (N.S.) 779, 93 Pac. 168, states that the constitutional prohibition against legislation impairing the obligation of a contract protects a creditor from a change of procedure that makes his remedy substantially less effective, but does not protect a debtor against a change that merely affords better facilities for compelling him to perform his engagement.

In Pusey & J. Co. v. Love, 6 Penn. (Del.) L.R.A.1915B. 80, 11 L.R.A.(N.S.) 953, 130 Am. St. Rep. 144, 66 Atl. 1013, the court had for construction the Kansas act of 1898–99, chap. 10, p. 27, substituting an action by the receiver for the benefit of all creditors for the action by the individual creditors. The court quotes extensively from the opinion in Evans v. Nellis, 101 Fed. 920, supra, holding the act an impairment of contract, and approves of this holding. The Kansas statute was again declared unconstitutional in Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314, certiorari denied in 199 U. S. 607, 50 L. ed. 331, 26 Sup. Ct. Rep. 747, and also in Webster v. Bowers, 104 Fed. 627.

A previous Kansas statute, suspending for one year the pursuit by the creditor of the special remedy afforded by the laws in existence at the time of the making of the contract, and, in case the receiver of the corporation, at the end of the year, institutes an action for him and for the other creditors, depriving the creditor of such remedy altogether, in which last-mentioned case the fund collected by the receiver is to be distributed *pro rata* among all the creditors, was held a violation of the constitutional provision against impairing the obligation of the contract, in Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331.

son injured might waive, and recover the full amount of his loss, upon a contract which the law in such cases raises by implication. We think, therefore, that the obligation of the stockholder to respond to a suit for damages resulting from the commission of a tort of this character is as fully protected by the Federal Constitution as though it rested wholly on contract.

In the opinion in Henley v. Myers, supra, the case of Woodworth v. Bowles, supra, is cited in support of the settled doctrine "that a corporate creditor who became such while the earlier statute was in force could not be deprived of his right to proceed thereunder by the enactment of the new law." 76 Kan. 741. In the Henley Case, it was the stockholder who was claiming a vested right in the remedy, and asserting that the creditor was obliged to proceed against him, if at all, under the earlier statute, which had been superseded, and which the creditor had not followed. The stockholder contended that any change in the remedy as to him was in violation of the obligation of his contract. The questions determined by the decision were that the law of 1898, substituting for all other remedies a suit by a receiver, applies to a stockholder who became such before the change in the remedy, even though the new remedy might be more efficient than the old, and incidentally more burdensome to the stockholder, so long as it involved no actual increase of his liability. It was further decided that the word "dues," as used in article 12, § 2, of the Constitution before the amendment of 1906, is broad enough to cover a judgment rendered against a corporation in an action for a tort; and that the same section of the statute which the plaintiff in this case is seeking to invoke (Gen. Stat. 1868, chap. 23, § 32, Gen. Stat. 1889, § 1192, repealed by Laws 1898, chapter 10, § 14) applies to judgments founded on a tort, as well as upon contract.

Whether the legislature might not, by changing the remedy to one of a suit by a receiver, or by repealing all provisions for enforcing such liability, destroy the creditor's right to pursue the stockholder upon a judgment founded upon a tort, was not before the court, and was not passed upon. Nor was there anything determined in that case from which it necessarily follows that such a change in the remedy or the repeal of all remedies for enforcing such a judgment against the stockholders would constitute an impairment of the obligations of any contract. We deem it wholly unnecessary to determine that question, in view of the conclusion we have reached respecting the nature of the judgment sought to be enforced in this proceeding.

This disposes of the principal contention in the case. Other reasons are suggested in support of the demurrer, but few of them require extended comment. This is not a suit upon a judgment, but to enforce a stockholder's liability for the debts of the

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On the contrary, a statute requiring all creditors to unite in one suit against all stockholders for equitable distribution of the double liability fund among the creditors, and abating pending actions under the former law, was held not to unconstitutionally impair the obligation of the contract of a creditor who had begun a suit against a stockholder to enforce the statutory liability for corporate debts prior to the enactment of the statute, but had not secured judgment, in Miners' & M. Bank v. Snyder, 100 Md. 57, 68 L.R.A. 312, 108 Am. St. Rep. 390, 59 Atl. 707, approved in Murphy v. Wheatley, 100 Md. 358, 59 Atl. 704. The court distinguishes the statute here involved from that involved in Woodworth v. Bowles, supra, on the ground that the Kansas statute deprived the creditor of any remedy at all for an entire year, and then left the prosecution under the control of the receiver, and its result subject to the expenses of the receivership, and the net sum realized from all the stockholders was to be divided *pro rata* among all of the creditors, while no such result followed the operation of the Maryland statute involved in this case. A subsequent statute having a similar operation was sustained in Pittsburg Steel Co. v. Baltimore Equitable Soc. 113 Md. 77, 77 Atl. 255, an action to recover an unpaid balance on the subscription, and this decision was affirmed by the United States Supreme Court in 226 U. S. 455, 57 L. ed. 297, 33 Sup. Ct. Rep. 167. A similar view is taken in Bettendorf Axle Co. v. Field, 114 Md. 487, 79 Atl. 724; Myers v. Knickerbocker Trust Co. 1 L.R.A.(N.S.) 1171, 71 C. C. A. 199, 139 Fed. 111, and Knickerbocker Trust Co. v. Cremen, 140 Fed. 973, which follows it, both holding to the contrary, can no longer be regarded as unshaken authority. The United States Supreme Court in Pittsburg Steel Co. v. Baltimore Equitable Soc. supra, points out that Myers v. Knickerbocker Trust Co. proceeded upon the mistaken view that the bringing of an action by the creditor gave him a lien on the amount due from the stockholder. The Supreme Court, however, did not notice the fact that Myers v. Knickerbocker Trust Co. and presumably Knickerbocker Trust Co. v. Cremen were actions to enforce the statutory liability of the stockholders, and not to recover an unpaid subscription, as was Pittsburg Steel Co. v. Baltimore Equitable Soc. In Republic Iron & Steel Co. v. Carlton, 189 Fed. 126, sustaining the Maryland statute, the court distinguishes the case at bar from Harrison v. Remington Paper Co. supra, on the ground that the Harrison Case was one to recover on the statutory liability of the stockholders, and under the Kansas law the

corporation. Revivor of the judgment was unnecessary. The failure to revive it prevents its enforcement against the coal company, the judgment debtor; but it is still evidence of the validity, character, and amount of the creditor's claim, and *res judicata* as to all these matters, in a suit to enforce the liability of the stockholder under the law as it stood prior to 1899. Scroggs v. Tutt, 23 Kan. 181–189; Van Vliet v. Halsey, 37 Kan. 116, 14 Pac. 482. The only purpose of revivor is to keep the judgment alive, so that it may be enforced by execution against the "representatives, real or personal, or both, as the case may require." Civ. Code, § 436 (Gen. Stat. 1909, § 6031). To the same effect is the case of Atlantic Trust Co. v. Dana, 62 C. C. A. 657, 128 Fed. 209, involving the construction of § 436 of the Civil Code and the Kansas laws, relating to the liability of stockholders for debts of the corporation.

It can hardly be seriously contended that the estate of a deceased stockholder is not liable upon stock owned by him to the same extent that the stockholder was liable in his lifetime. In § 248 of volume 1 of the 5th edition of Cook on Corporations, it is said: "The estate of a deceased person is liable upon stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. Accordingly an executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased. The cause of action against a stockholder, arising from his statutory liability, is not defeated by his death. The action may proceed against his estate." To the same effect is Richmond v. Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788. See also Fidelity Ins. Trust & S. D. Co. v. Mechanics' Sav. Bank, 38 C. C. A. 193, 97 Fed. 297, and authorities cited in a note to the same case in 56 L.R.A. 228. Counsel for defendants practically concede this to be the law, but insist that the demurrers of all the defendants, other than Mary Loftus, administratrix, were properly sustained. The purpose of the suit, if judgment be obtained, is to have such judgment declared a lien upon the real property of the estate, and upon any undistributed portion of the personal property of the devisees. The heirs at law or devisees are personally liable for the debts of the ancestor to the value of the property received by them. McLean v. Webster, 45 Kan. 644, 26 Pac. 10; Rohrbaugh v. Hamblin, 57 Kan. 393, 57 Am. St. Rep. 334, 46 Pac. 705; Cooper v. Ives, 62 Kan. 395–401, 63 Pac. 434. In the case last cited, the heir of a deceased stockholder was held liable to the extent of the property inherited by her upon a judgment rendered against the company after the stockholder's death. In Matteson v. Dent, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419, a stockholder in a na-

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first creditor who began proceedings acquired a lien which could not be affected by proceedings of another creditor, and therefore there was some reason for the claim that the taking of this right of the creditor impaired the obligation of his contract, while in the case at bar, which was to recover an unpaid subscription, no lien was acquired. The court adds, after making this distinction, that the authority of Harrison v. Remington Paper Co. is not unshaken, and regards the case of Henley v. Myers, supra, as, at least, impairing its authority.

It is thus seen that statutes such as the Maryland statute are clearly constitutional, even as against creditors, and the tendency of the courts is against the earlier decisions on the Kansas form of statute, and in favor of sustaining the constitutionality of such statutes also.

A statute providing that only the receiver shall enforce the double liability of stockholders unless he shall refuse to do so, in which event such an action may be maintained by a creditor, does not unconstitutionally impair the obligation of the creditor's contract. Persons v. Gardner, 42 App. Div. 490, 59 N. Y. Supp. 463.

A statute relating to the remedy for the enforcement of the obligations of stockholders, which takes away the right of creditors as to stockholders who are non-residents unless they voluntarily come to the state, so that process may be served upon them, and also enables any resident stockholder to escape liability by absenting himself from the state, so that process may not be served, and which apparently takes away such liability as to all estates of deceased stockholders, unconstitutionally impairs the obligation of the contract of creditors whose claims arose previous to the passage of the statute, and who, at the date of the statute, had a right to recover their demands of the stockholders. Re Warren, 52 Mich. 557, 18 N. W. 356.

An act of the state legislature, providing that no action shall be maintained against a bank after the appointment of receivers therefor, but all its creditors shall have their remedy under the provisions of the statute, was held invalid as against a creditor who had brought an action against the bank in the Federal court, in Demeritt v. Exchange Bank, Brunner, Col. Cas. 598, Fed. Cas. No. 3,780. But in Leathers v. Shipbuilders' Bank, 40 Me. 386, the same statute was held constitutional.

It is held in Moore v. Ripley, 106 Ga. 556, 32 S. E. 647, followed in Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626, that a statute vesting in the receiver of a corporation the right to enforce the statutory liability of stockholders did not take away any vested

tional bank died intestate. The shares in final settlement of the estate were distributed among his heirs. It was held that the stock could be followed into the hands of the distributees for the purpose of subjecting it to an assessment, made for the purpose of meeting the liabilities of the bank arising out of its insolvency, although the bank became insolvent subsequent to the death of the stockholder.

The judgment against the coal company was rendered June 30, 1906. Execution issued February 15, 1907, and was returned unsatisfied ninety days thereafter. John C. Douglass died February 27, 1908, after commencing suit against these defendants upon the same cause of action. That suit was revived in the name of his executrix, and dismissed without prejudice eight days after the present suit was filed. Section 22 of the Civil Code (§ 5615, Gen. Stat. 1909) gives a plaintiff whose action fails otherwise than upon the merits one year after such failure to commence a new action. Plaintiff's contention is that she commenced the present suit in anticipation of the failure of the former. We see no good reason why this may not be done. It seems to accord with the spirit and intention of the statute under which she might have brought the second suit eight days later. If the bringing of it before the dismissal of the former be regarded as premature, the conditions as they existed from and after the failure of the other suit permitted her to maintain it, and to appropriate the benefits of § 22.

But, if the present suit be regarded as an independent action, it is not barred, because it was brought within three years from the return of the execution against the coal company. The right to maintain an action against the stockholder upon the judgment accrued upon the return of the execution unsatisfied, provided, of course, the issuance of the execution was not delayed for an unreasonable time. Atchison, T. & S. F. R. Co. v. Burlingame Twp. 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271; Kulp v. Kulp, 51 Kan. 341, 21 L.R.A. 550, 32 Pac. 1118; First Nat. Bank v. King, 60 Kan. 733, 57 Pac. 952; Henley v. Myers, 76 Kan. 736, 17 L.R.A.(N.S.) 779, 93 Pac. 158. The execution was issued in less than eight months after the judgment was obtained, and the delay cannot be held unreasonable.

Another contention is that the claim, not having been presented for probate and allowed as a claim against the estate, is barred by the limitation provided in the executors' and administrators' act. The statute as it stood prior to 1899 provided a special procedure for enforcing the liability of stockholders for corporate debts. We are not aware of any cases where it has ever been held that a claim of the character sued

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right of the creditors, and therefore the receiver might maintain the action against stockholders in a corporation organized before the enactment of the statute in question. No question, however, was raised as to the impairment of contract, but in following this case, the court, in Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085, treats Moore v. Ripley as disposing of the contention that there was any impairment of the obligation of contract by this statute. It is stated, however, in Lamar v. Taylor, that no creditor who was such at the time of the enactment of the statute was objecting, nor did it appear that the stockholders who were sued were such when the act was passed.

III. Effect of reserved power to alter or amend.

A reserved power to alter or amend corporate charters prevents an alteration in the stockholders' liability from being an impairment of contract.

Thus, under a constitutional provision that corporations shall be formed under general laws, and that all such laws may be altered from time to time or repealed, both the legislature and the people have power to change the law in regard to the liability of stockholders without impairing the obligation of contract.

McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; Perkins v. L.R.A.1915B. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188 (*dictum*); Bailey v. Hollister, 26 N. Y. 112 (*dictum*); Close v. Noye, 2 Misc. 226, 23 N. Y. Supp. 751 (but see Close v. Noye, 4 Misc. 616, 26 N. Y. Supp. 93, infra, where different statutes are discussed and a different view of the question to be decided in this case taken); Berwind-White Coal Min. Co. v. Ewart, 11 Misc. 490, 32 N. Y. Supp. 716 (*dictum*), affirmed in 90 Hun, 60, 35 N. Y. Supp. 573.

The alteration may be made because the contract itself authorizes it. Re Empire City Bank, 18 N. Y. 199. The stockholders cannot say that their liability has been increased without their consent. South Bay Meadow Dam Co. v. Gray, 30 Me. 547.

It has accordingly been held that under a reserved power to alter or amend, the legislature may impose a double liability upon stockholders. Williams v. Nall, 108 Ky. 21, 55 S. W. 706; Bissell v. Heath, 98 Mich. 472, 57 N. W. 585; Hirshfeld v. Bopp, 27 App. Div. 180, 50 N. Y. Supp. 676, reversed on other grounds in 157 N. Y. 166, 46 L.R.A. 839, 51 N. E. 997; Barnes v. Arnold, 45 App. Div. 314, 61 N. Y. Supp. 85, affirmed in 169 N. Y. 611, 62 N. E. 1093; Hagmayer v. Alten, 36 Misc. 59, 72 N. Y. Supp. 623; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

Although the act creating the corporation leaves it to the election of the stockholders to determine whether they will embark in

upon here must be probated. Cases will be found holding that, before the estate of an heir or devisee can be held liable upon an unpaid subscription to stock by the decedent, the claim must be proved against the estate; but this follows from the nature of the claim, which is upon a direct liability of the decedent, the same as upon an unpaid promissory note or account. The plaintiff had no claim provable in the probate court, until it was reduced to a judgment against the estate. All plaintiff had was a judgment against the coal company. Now, the probate court could not allow it as a demand against the estate until the right to collect it from the estate had been determined in an action brought by the judgment creditor in some court of competent jurisdiction, under the provisions of the statute which authorized the creditor to maintain such action.

Nor is the petition subject to demurrer on the ground that it fails to show service of summons on the coal company in the original action. The presumption is, in the absence of anything to the contrary, that the court and its officers proceeded regularly. None of the other grounds urged in support of the ruling are of sufficient importance to require comment.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrers.

MONTANA SUPREME COURT.

J. C. SOMERVILLE et al., Appts.,
v.
ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Respt.

(46 Mont. 268, 127 Pac. 464.)

Corporation — change of policy — two-thirds vote — treasury stock.

1. Unissued treasury stock is not to be counted in determining whether or not the necessary two-thirds stock of a corporation has assented to a proposed change of policy.

Same — reserved power — providing for assessment of stock.

2. A legislature which has reserved power to alter every corporate power granted by it may, without unconstitutionally impairing the obligation of the contract, authorize corporations to make their stock assessable, although at the time it was issued both the certificate of incorporation and certificates of stock themselves declared that it should not be assessable.

(October 26, 1912.)

APPEAL by plaintiffs from an order of the District Court for Lewis and Clark County, refusing to enjoin defendant

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the business upon the personal liability of the stockholders or upon corporate liability only, and they declare by their articles that they will not incur any individual responsibility, a personal liability may be imposed upon them under a general law reserving to the legislature the right to alter or amend the corporate charter. Re Gibson, 21 N. Y. 9, approved in Re Reciprocity Bank, 22 N. Y. 9, and affirmed under name of Sherman v. Smith, 1 Black, 587, 17 L. ed. 163.

Receivers may be authorized to lay assessments on premium notes instead of directors, as provided in charter. Hyatt v. McMahon, 25 Barb. 457. Or the remedy for enforcing stockholders' liability may be changed. Persons v. Gardner, 42 App. Div. 490, 59 N. Y. Supp. 463.

There is a dispute as to whether assessments may be authorized under the reserved power.

Under a statutory reservation of power subject to which a charter of the corporation is granted, to amend or repeal all acts of incorporation, the legislature may authorize the levying of assessments to fill up the capital stock of a corporation to its original amount whenever such capital stock shall be diminished by reason of losses or from any other cause, although the charter of the corporation provided that the stockholders should not be liable to any responsibility further than the amount of their respective shares and interest thereon L.R.A.1915B.

for or on account of any damage or loss sustained by the company, or for or on account of any debts due thereon. Gardner v. Hope Ins. Co. 9 R. I. 194, 11 Am. Rep. 238.

See SOMERVILLE v. ST. LOUIS MIN. & MILL CO.

On the contrary, the court in Garey v. St. Joe Min. Co. 32 Utah, 497, 12 L.R.A. (N.S.) 554, 91 Pac. 369, treats the corporate charter as a dual contract; that is, one between the state and the corporation and its stockholders; the other between the corporation and its stockholders; and holds that under the reserved power the state may alter or amend the former, but not the latter. It was accordingly held that where, in the original articles of incorporation, each stockholder agreed that his full-paid capital stock should be nonassessable, and where, under the law, this could not be changed except by the unanimous consent of the stockholders, the legislature could not change the law so as to make the stock assessable upon a vote of two thirds of the stockholders of the outstanding capital stock.

It has been held also that the legislature cannot authorize the assessment of paid-up stock in a corporation the charter of which conferred no power to assess stock, and which was organized at a time when there was no statutory authority to assess paid-up stock. Enterprise Ditch Co. v. Moffit, 58

from selling corporate stock to enforce payment of a delinquent assessment. Affirmed.

The facts are stated in the opinion.

Messrs. **Walsh & Nolan** and **Gunn, Rasch, & Hall**, for apepllants:

The defendant entered into a contract with each of the plaintiffs and each of the other stockholders, by which it is precluded from levying assessments against the stock held by them.

Wall v. Basin Min. Co. 16 Idaho, 313, 22 L.R.A.(N.S.) 1013, 101 Pac. 733; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968.

If, however, § 511 of the Civil Code authorized the defendant to repudiate the contract thus made with stockholders, and to render its stock assessable, it is in violation of the prohibition in the Constitution of the United States against laws impairing the obligation of contracts.

Garey v. St. Joe Min. Co. 32 Utah, 497, 12 L.R.A.(N.S.) 554, 91 Pac. 369.

Messrs. **H. G. McIntire** and **S. H. McIntire**, for respondent:

Where the state has reserved the power to alter, repeal, or amend the charter, it may authorize the corporation to levy assessments on its stockholders, in addition to the subscription of their stock.

1 Cook, Corp. 5th ed. § 242, p. 521; Gardner v. Hope Ins. Co. 9 R. I. 194, 11 Am. Rep. 238; South Bay Meadow Co. v. Gray, 30 Me. 547.

The reserved power of the legislature extends not only to altering the charter for any purpose connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves.

1 Thomp. Corp. § 90; Looker v. Maynard, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21; C. H. Venner Co. v. United States Steel Corp. 116 Fed. 1013; Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 229; Williams v. Nall, 108 Ky. 21, 55 S. W. 706; Allen v. Ajax Min. Co. 30 Mont. 506, 77 Pac. 47; Missouri P. R. Co. v. Kansas, 216 U. S. 274, 54 L. ed. 477, 30 Sup. Ct. Rep. 330; McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; Dow v. Northern R. Co. 67 N. H. 1, 36 Atl. 521; Ireland v. Palestine, B. N. P. & N. W. Turnp. Co. 19 Ohio St. 369; Weeks v. Silver Islet Consol. Min. Co. 23 Jones & S. 1; Synnott v. Cumberland Bldg. Loan Asso. 54 C. C. A. 553, 117 Fed. 379; Kent v. Quicksilver Min. Co. 78 N. Y. 186, 4 Mor. Min. Rep. 47.

Neb. 642, 45 L.R.A. 647, 76 Am. St. Rep. 122, 79 N. W. 560. It is stated by the court that, in the absence of authorization by either the statute or charter, the directors could not enact a by-law by which provision was made for assessment; especially not to be enforced by a sale or practical forfeiture of the stock,—a thing which was attempted in this case. This case is stated in Garey v. St. Joe Min. Co. supra, to have been decided under a constitutional provision reserving power to alter or amend, but nothing appears to this effect in the opinion.

The court was of the opinion in Barnes v. Arnold, 23 Misc. 197, 51 N. Y. Supp. 1109, affirmed in 45 App. Div. 314, 61 N. Y. Supp. 85; Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893, that stockholders could not be made liable for debts that had been incurred prior to the enactment of the law imposing a liability, where no liability existed before, but construed the law in question as prospective in operation to avoid the unconstitutional feature. This is the theory also of Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335, supra.

It has been held that, as against creditors, the liability of a stockholder to an amount equal to the amount of stock held by him for every debt of the corporation until the whole amount of capital stock is fully paid cannot be altered to a liability for corporate debts only until the whole amount of capital stock "issued and outstanding at the time such debt was incurred shall have been fuly paid," even though there is a reserved power to alter or amend. Close v. Noye, 4 Misc. 616, 26 N. Y. Supp. 93. This decision, however, seems to have misconstrued the case of Hawthorne v. Calef, 2 Wall. 10, 17 L. ed. 776, upon which the court relied. Close v. Noye was subsequently reversed in 147 N. Y. 597, 41 N. E. 570, on grounds that made the decision of this question unnecessary.

The alteration may be made where the reservation is contained in a general law as well as where contained in the act creating the corporation. Re Gibson, 21 N. Y. 9.

The alteration may also be made where the corporation is organized under general law. Barnes v. Arnold, 23 Misc. 197, 51 N. Y. Supp. 1109, case affirmed in 45 App. Div. 314, 61 N. Y. Supp. 85.

The court in Re Gibson, supra, was of the opinion that an alteration could be effected by a constitutional amendment although the power was reserved to the legislature. There was, however, in this case, an act of the legislature which is stated by the court to add the legislative sanction, if any were necessary.

Although a corporation was created when there was in force a constitutional provision requiring the assent of two thirds of the members in each branch of the legislature to pass an act altering or amending powers of any body corporate, such alteration or amendment may be effected by a majority vote under a constitution in force when the vote was taken, not requiring a two-thirds vote on such question. Re Reciprocity Bank, 22 N. Y. 9, affirming 29 Barb. 369, 17 How. Pr. 323, on this point. W. A. E.

L.R.A.1915B.

Holloway, J., delivered the opinion of the court:

The St. Louis Mining & Milling Company is a domestic corporation, organized under the provisions of chapter 25, division 5, General Laws, Compiled Statutes of 1887, with a capital stock of $5,000,000, represented by 500,000 shares of the par value of $10 each. The certificate of incorporation and every stock certificate issued prior to 1901 recites that the stock of the corporation is nonassessable. In 1901 a meeting of the stockholders of the corporation was held, at which 304,680 shares were represented in person, and 52,590 shares by proxy. William Mayger was present, representing in person 152,780 shares, and, with proxies held by him, voted 184,020 shares. Charles F. Mayger was present, representing in person 151,900 shares, and, with proxies held by him, voted 173,050 shares. At the time 44,000 shares of the capital stock were held in the treasury of the company. At this meeting 357,070 shares were voted by William and Charles F. Mayger, in person and by proxies, in favor of changing the capital stock from nonassessable to assessable stock, and there were not any votes cast against the proposition. William Mayger, as the holder of 184,020 shares in person and by proxy, gave his consent in writing, spread upon the corporation's records, to the change, and Charles F. Mayger, as the holder of 173,050 shares in person and by proxy, gave the like consent. Due notice was given of the meeting, and the proper certificates were prepared and filed, certifying to the change. Assuming to act upon the authority thus conferred, several assessments were levied and collected without protest. On June 6, 1912, another assessment was levied. These plaintiffs, as stockholders, refused to pay the assessment, and brought this action to restrain the officers, directors, and agents of the company from selling their stock upon which the assessment was delinquent. The district court refused to grant an injunction after a hearing, and plaintiffs appealed from the order.

At the time the defendant corporation was organized, there were in force chapters 25 and 26, Division 5, Compiled Statutes, above. Chapter 25 deals with the formation and government of industrial corporations generally, while chapter 26 deals with the subject, "Assessments upon the Stock of Corporations." Section 466 of chapter 25 provides: "The legislature may at any time alter, amend or repeal this chapter." Chapter 26 provides generally for levying and collecting assessments upon corporate stock. Section 512 of that chapter declares: "The provisions of this chapter shall only apply to such corporations hereafter formed, as shall specify in its articles of incorporation the fact that the stock of such corporation shall be assessable; and any company or corporation hereafter formed, that wishes to avail itself of the provisions of this chapter, and render its stock assessable, shall specify in its articles of incorporation, in addition to the statement now required by law, a statement to the effect that the stock of such corporation is assessable." Section 2, article 15, of our state Constitution, reads as follows: "No charter of incorporation shall be granted, extended, changed or amended by special law, . . . but the legislative assembly shall provide by general law for the organization of corporations hereafter to be created: provided, that any such laws shall be subject to future repeal or alterations by the legislative assembly." Section 394, Civil Code 1895 (Rev. Codes, § 3809), declares: "Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the legislative assembly." By an act approved March 7, 1893 (Laws 1893, p. 92), it is provided: "Any corporation heretofore formed under the laws of this state, may, by and with the consent of the stockholders holding two-thirds of the stock of the company, in writing, spread upon the records of such corporation, render its stock assessable, under the provisions of this chapter." This last act was brought forward into the Codes of 1895 as § 511 (Rev. Codes, § 3888), and was in full force and effect at the time the stockholders' meeting was held in 1901.

1. The proceedings of the stockholders' meeting are attacked, and it is said that the consent of the holders of two thirds of the capital stock was not given to the change: (a) Because the proxies held by William and Charles F. Mayger only authorized the holders to vote the stock, and did not authorize them to consent to this change; and (b) if this be so, then the holders of only 304,680 shares gave such consent. It is unnecessary to determine the effect of the proxies; for at the time the meeting was held 44,000 shares of the capital stock were in the treasury of the corporation, leaving only 456,000 shares outstanding. When the statute (§ 511, Civil Code) speaks of two thirds of the stock of the corporation, it refers to outstanding, votable stock. Market Street R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; 2 Cook, Corp. 6th ed. § 613. The two Maygers represented in person more than two thirds of the 456,000 shares outstanding, and each voted his stock in favor of the change and consented in writing to the change. So far as disclosed by the record, the proceedings

taken to render the stock assessable were taken in compliance with the law and were effective for the purpose, if the statute under which the change was sought to be made was valid.

2. Certain principles of the law relating to corporations are so well settled that, as to them, there is not any difference of opinion. (1) The charter granted by a state to a corporation, when accepted, becomes a "contract" within the meaning of the contract clause of the Federal Constitution. Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629. (2) Such contract operates in a threefold relationship, *viz.*: (a) Between the state and the corporation; (b) between the corporation and its stockholders; and (c) between the stockholders *inter sese*. (3) A state may reserve the right to alter or amend the charter of a corporation, or to alter, amend, or repeal the laws under which the corporation was organized. And (4) the provisions of our state Constitution and the statutes referred to above constitute such a reservation of power and authority.

Counsel for appellants insist, however, that this reserved power can be invoked to affect the contract only as it exists between the state and the corporate entity, and that if, by enacting § 511, Civil Code above, it was the purpose of the legislature to provide for a change in the contract so far as it exists between the corporation and its stockholders, or between the stockholders *inter sese*, then the act operates to impair the obligation of such contract, and is void as contravening the provisions of § 10, article 1, of the Constitution of the United States. Few questions have vexed the courts and text writers more than the one arising over the construction to be given the reservation which the states make respecting corporations organized under their respective laws. If the question was an open one in this jurisdiction, its discussion might lead to fruitful results; but in Allen v. Ajax Min. Co. 30 Mont. 490, 77 Pac. 47, the contention here made was considered at length and the entire subject fully discussed. Our conclusion in that case was that the reserved power may be exercised, not only to alter the contract as it exists between the state and the corporate entity, but as well to alter the contract existing between the corporation and its stockholders, and the stockholders *inter sese*, to the extent that the authority to dispose of all the corporate property—which was denied the corporation at the time it was organized—may be conferred by subsequent legislation. With all due respect to the authorities holding differently, we see no reason for changing our position, and the decision in that case is conclusive against the appellants here, unless a distinction is to be drawn between the facts in that case and this one; for upon a parity of reasoning, if the legislature may confer upon a corporation the authority to dispose of all of its property,—a right denied to the corporation at the time it was organized,—it may likewise provide for a change in the limited liability of the stockholders by authorizing nonassessable stock to be made assessable upon such reasonable terms as the legislature may prescribe.

3. But counsel for appellants insist that a distinction is to be drawn between the facts in the Allen Case and the facts in this one, in this: That, whereas neither the charter of the Ajax Mining Company nor its stock certificates contained any assurance that the entire property of the company would not be sold without the unanimous vote of its stockholders, the certificate of incorporation of the St. Louis Mining & Milling Company, and every stock certificate issued by it prior to the meeting in 1901, contains the solemn assurance that the stock shall be nonassessable. If our view of reserved power is correct, then we think the difference between the facts in the two cases is one of form only, and does not affect the ultimate question involved. The legislation in force at the time of the organization of a corporation enters into and becomes a part of the contract, to the same extent as if set forth at length in the contract; and, upon the theory which we have adopted, there was read into the charter of the Ajax Mining Company this statement, in effect: This corporation shall not, without the unanimous consent of its stockholders, dispose of all the corporate property, until such time as the legislature may authorize it to do so. And, upon the same theory, the recital in the charter of the St. Louis Mining & Milling Company that its stock should be nonassessable is to be read, in the light of the reserved power, to mean: This stock shall be nonassessable until such time as the legislature shall provide that it shall be assessable, or until such time as it is rendered assessable pursuant to legislation authorizing such change. If our theory of the reserved power is correct, and these stipulations are to be read into the charters of these companies, it follows, as of course, that § 511, Civil Code, above, does not impair the obligation of the contract entered into when the St. Louis Mining & Milling Company accepted its charter.

Upon the authority of Allen v. Ajax Min. Co. above, the order denying plaintiffs an injunction is affirmed.

Brantly, Ch. J., concurs. **Smith**, J., being absent, did not hear the argument, and takes no part in the foregoing decision.

KANSAS SUPREME COURT.

GRAND LODGE OF KANSAS, ANCIENT ORDER OF UNITED WORKMEN, Appt.,
v.
STATE BANK.

(92 Kan. 876, 142 Pac. 974.)

Bank — payment of check — liability.

1. The general rule is that, in order to charge the account of a depositor, a bank must pay a check only to the payee to whose order it is drawn, and payment made otherwise is at its peril unless it can claim protection upon some principle of estoppel or negligence chargeable to the depositor.

Same — forgery by agent — knowledge of depositor.

2. Where the claim of negligence of the depositor is based upon previous forgeries of his agent, who forged the indorsement of the payee upon which the check in question is paid, knowledge of the depositor or notice to him of the former misconduct or other fraudulent acts of the agent must be shown, in order to charge the depositor with negligence in intrusting the check to the agent for delivery to the payee.

Same — agent of lodge — notice of forgeries.

3. The financier of a subordinate lodge of a beneficiary association at different times sent in to the grand lodge false reports of the death of members, and forged proofs of death, and by these means obtained possession of checks or orders on the depositary of the grand lodge, drawn to the order of the beneficiary, and thereupon, by forging the indorsements of the payees, received and appropriated the proceeds. He continued, however, to enter upon a ledger of his lodge the regular payment of dues and assessments by the members so reported dead. Afterwards by like forgeries he obtained payment of another check or order which had been sent to him by the grand lodge for delivery to the payee named in it. In this action of the grand lodge against the depositary to recover the amount so paid on the forged indorsement of the payee, it is held, that the grand lodge is not chargeable with notice of the former forgeries, by the entries so made in the financier's ledger which were never reported to, and never came to the knowledge of, the grand lodge or any of its officers.

Principal and agent — forgeries by agent — notice.

4. The knowledge of the agent, of forgeries committed by him in the circumstances stated in the last paragraph, does not charge the grand lodge with notice of such forgeries.

Same — duty to examine books.

5. In the absence of any knowledge or suggestion of misconduct of the financier, the grand lodge was not bound to examine his books to detect fraud of which its officers had no suspicion, but might rely upon the regular reports of the auditing committee of the local lodge which afforded no clue to the forgeries or misconduct of the financier.

Bank — forgery by depositor's agent — duty.

6. The forgery of the indorsement of the name of the payee upon a bank check is not within the scope of the employment or duty of an agent of the drawer to whom the check is intrusted for delivery only to the payee.

Headnotes by BENSON, J.

(July 7, 1914.)

Note. — Various phases of the general subject discussed in the foregoing opinion have been treated in notes in this series. Thus, the general question as to the drawee's duty to know the signature of the drawer is treated in the note to Germania Bank v. Boutell, 27 L.R.A. 635; and the general question as to the duty of a depositor in respect to forged checks charged to him by the bank in the notes to First Nat. Bank v. Allen, 27 L.R.A. 426, and Traders' Nat. Bank v. Rogers, 36 L.R.A. 539. Specifically, as to the depositor's right to recover the amount of forged or raised checks as affected by the fact that he intrusted the examination of vouchers to the employee, who was guilty of the original fraud, see note to First Nat. Bank v. Richmond Electric Co. 7 L.R.A.(N.S.) 744. As to payment by bank of checks fraudulently raised by employee of drawer, see note to Otis Elevator Co. v. First Nat. Bank, 41 L.R.A.(N.S.) 529.

The question as to who must bear the loss when a check is issued or indorsed to an impostor, including both cases where the impostor assumed to be the person by whose name the payee was described in the check, and those where he assumed to be the agent of such a person, is discussed in the notes to Land Title & T. Co. v. Northwestern Nat. Bank, 50 L.R.A. 75; Harmon v. Old Detroit Nat. Bank, 17 L.R.A.(N.S.) 514, and McHenry v. Old Citizens' Nat. Bank, 38 L.R.A.(N.S.) 1111; and see later cases in this series, Goodfellow v. First Nat. Bank, 44 L.R.A.(N.S.) 580, and Simpson v. Denver & R. G. R. Co. 46 L.R.A.(N.S.) 1164.

The question as to who must bear the loss where a check or draft is purchased or paid upon the spurious indorsement of one who bears the same name as the payee or indorsee is treated in the note to S. Weisberger Co. v. Barberton Sav. Bank Co. 34 L.R.A.(N.S.) 1101, and see later case, Thomas v. First Nat. Bank, 39 L.R.A.(N.S.) 355.

A question which is distinct from those referred to, but closely allied thereto, is that treated in the note to Seaboard Nat. Bank v. Bank of America, 22 L.R.A.(N.S.) 499, as to when a negotiable instrument is deemed payable to the order of a fictitious person within the rule regarding such an instrument as payable to bearer.

L.R.A.1915B.

APPEAL by plaintiff from a judgment of the District Court for Cowley County in defendant's favor in an action brought to recover money paid by it on the forged indorsement of a check. Reversed.

The facts are stated in the opinion.

Messrs. **Edgar Bennett, A. M. Jackson,** and **A. L. Noble,** for appellant:

The order was not drawn in favor of a fictitious payee.

Maloney v. Clark & Co. 6 Kan. 82; Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141.

Plaintiff was not guilty of any act or omission which would excuse the defendant for paying out its money on the forged indorsement.

Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336; Russell v. First Nat. Bank, 2 Ala. App. 342, 56 So. 868; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648; Second Nat. Bank v. Guarantee Trust & S. D. Co. 206 Pa. 616, 56 Atl. 72; Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Guaranty State Bank & T. Co. v. Lively, — Tex. Civ. App. —, 149 S. W. 211; United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; Brixen v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; Tolman v. American Nat. Bank, 22 R. I. 462, 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480; Western U. Teleg. Co. v. Bi-Metallic Bank, 17 Colo. App. 229, 68 Pac. 115; Houser v. National Bank, 27 Pa. Super. Ct. 613; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; De Feriet v. Bank of America, 23 La. Ann. 310, 8 Am. Rep. 597.

Knowledge of an agent of his own wrong is not the knowledge of his principal.

Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; 2 Morse, Banks & Bkg. § 472; United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433; Vanbibber v. Louisiana Bank, 14 La. Ann. 486, 74 Am. Dec. 442; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; Welsh v. German American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Citizens' Nat. Bank v. Importers & T. Bank, 119 N. Y. 195, 23 N. E. 540; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617.

The defendant was not damaged by any act of plaintiff.

Wellington Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. Rep. 523, 81 Pac. 487; First Nat. Bank v. Farmers' & M. State Bank, — Tex. Civ. App. —, 146 S. W. 1034; Brixen v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43; Critten v. Chemical Nat. Bank, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969; Second Nat. Bank v. Guarantee Trust & S. D. Co. 206 Pa. 616, 56 Atl. 72.

Messrs. **Hadley, Cooper, & Neel,** with Messrs. **G. H. Buckman, A. L. Cooper,** and **S. C. Bloss,** for defendant:

If the defendant under the facts has the right to charge the forged order to the account of plaintiff upon its presentation for payment, then in case it repaid the amount to it, it could not recover the amount from the First National Bank of Atchison nor any of the intervening banks.

Wellington Nat. Bank v. Robbins, 71 Kan. 748, 114 Am. St. Rep. 523, 81 Pac. 487; Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420.

The state bank, under the facts proven, was not negligent in paying the warrant.

Wellington Nat. Bank v. Robbins, supra.

Plaintiff is estopped from setting up the forgery, by its negligence.

16 Cyc. 681; Pennsylvania R. Co's. Appeal, 86 Pa. 84; O'Connor v. Clark, 170 Pa. 321, 29 L.R.A. 607, 32 Atl. 1029; Orme v. Baker, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439; National Bank v. Tacoma Mill Co. 104 C. C. A. 441, 182 Fed. 1; Ancient Order of Pyramids v. Drake, 66 Kan. 538, 72 Pac. 239; Whiteside v. Supreme Conclave, I. O. H. 82 Fed. 275; Schunck v. Gegenseitiger Wittwen und Waisen Fond, 44 Wis. 369; McMahon v. Supreme Tent, K. M. W. 151 Mo. 522, 52 S. W. 384.

Plaintiff is not only charged with a knowledge of what its books showed as to the receipt of dues and assessments, but with the knowledge of Mishler that dues and assessments were being received every month.

National Bank v. Tacoma Mill Co. 104 C. C. A. 441, 182 Fed. 1.

Since the ordinary risk of the bank was increased by the grand lodge, in this transaction the case is not to be governed by the ordinary rule that the bank can only

charge to the depositor money paid out in accordance with his exact order.

Iron City Nat. Bank v. Ft. Pitt Nat. Bank, 159 Pa. 47, 23 L.R.A. 615, 28 Atl. 197; Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915, —, 101 N. E. 871.

Constructive knowledge of Mishler's unfitness is sufficient.

Thomp. Neg. § 4893; Johnson v. St. Paul & W. Coal Co. 126 Wis. 492, 105 N. W. 1048.

Benson, J., delivered the opinion of the court:

This action is to recover money paid by the defendant bank on the forged indorsement of a check. The forgery is admitted, and the defense is based upon the alleged negligence of the drawer in intrusting the check to its agent for delivery, who forged the indorsement and received the payment.

The plaintiff is a fraternal order having subordinate lodges, and issuing beneficiary certificates. The defendant bank is its depositary. At the time of the transactions involved in this action, M. M. Mishler was financier of Mulford lodge at Atchison. Charles H. Thompson was, and still is, a member of that lodge, holding a beneficiary certificate. On March 5, 1912, Mishler sent to the grand lodge a notice that Thompson had died on March 2d; that Cyrus Thompson was the beneficiary; and that the certificate had been misplaced. The notice was signed by Mishler as financier and purported to be signed by the master workman and recorder of the local lodge whose names were forged. Blanks for proofs of death were sent to Mishler. On March 8th the grand recorder received at his office in Emporia purported proofs of death consisting of forged affidavits, certified to by Mishler as sworn to before him, and reports of death purporting to be signed by the local lodge officers. The papers were in due form, were approved by the medical examiner, and a check for $2,000, dated March 12th, was drawn upon the grand receiver payable out of the beneficiary fund at the defendant bank, to the order of Cyrus H. Thompson, describing him as the brother of Charles H. Thompson, deceased. The check and a blank form of affidavit of loss of the certificate and blank receipt were mailed by the grand recorder with instructions to Mishler as financier of Mulford lodge. On March 15th, Mishler presented the check at the First National Bank of Atchison, bearing the purported indorsement of Cyrus Thompson, and also his own indorsement, and received payment. The check was forwarded through other banks in the usual course of business and was paid by the defendant bank through the clearing house at Winfield, where it is located. The check was returned as a voucher to the grand lodge in a statement made by the defendant March 25, 1912. The signature of Cyrus Thompson was forged upon the indorsement and to the affidavit of loss of the certificate, and to the receipt. The forged affidavit and receipt were returned to the grand lodge by Mishler, who committed all these forgeries. On June 28th, the grand lodge found that Charles H. Thompson was living, its officers accused Mishler of the forgeries, and he then killed himself. It was soon discovered that by means of like forgeries Mishler had received and appropriated the amounts of four other certificates of living members between February 10, 1910, and the date of the Thompson check. Collections were made twice on one of these certificates, the vouchers designating the holder in one set of vouchers by the initials of his Christian name and in the other by the name in full. In the same manner Mishler received the amount of the certificate of another living member after the Thompson transaction. After receiving payment on these forged vouchers, Mishler, as financier of Mulford lodge, regularly entered the payment of the dues and assessments of the members so reported dead upon the ledger, a record of Mulford lodge, kept pursuant to a rule of the grand lodge. He did not, however, report or pay over such dues and assessments to the receiver of Mulford lodge, although a by-law required him to do so at each meeting. A by-law also provided for an examination and audit of the books of the financier, recorder, and receiver of the local lodge in June and December of each year, by the auditing committee, and a written report thereof at the next stated meeting. These reports were regularly made, but the committee did not examine the financier's books, accepting instead a statement submitted by Mishler, which did not show the payments entered upon his books after the reported deaths of members. As these amounts so entered were not paid over to the receiver, the reports of that officer did not show them. The by-laws also required reports from the local lodge to the grand lodge in January and July of each year, showing, among other things, the dates of the death of members since the last report, the number of beneficiary certificates held by each, and the receipts and disbursements of beneficiary fund and general fund.

The following provisions are in the by-laws of the grand lodge:

"Upon the death of any member in good standing, it shall be the duty of the subordinate lodge of which he was a member

to prepare and forward immediately to the grand recorder proofs of such death, which shall be attested by the seal of the subordinate lodge and signed by the master workman, financier, and recorder of said lodge.

. . .

"The grand recorder shall furnish to the recorder of any subordinate lodge, free of charge, blank death proofs, on receipt by him of notice from said recorder of the death of a member of that lodge. . . .

"In transmitting orders on the beneficiary fund the grand recorder shall send the same to the recorder of the subordinate lodge to which the deceased member belonged, with full instructions as to the disposition thereof. . . .

"The recorder of said lodge shall see that the warrants so transmitted are at once placed in the hands of those entitled to receive the same, and that the beneficiary certificate held by the deceased member is properly receipted and attested by two witnesses who shall give their postoffice address, and shall then take up said certificate and immediately forward it to the grand recorder. . . ."

The contract with the depositary contained the following:

"No moneys placed to the credit of the Grand Lodge of Kansas with such depositary will be withdrawn except in payment of orders issued on the grand receiver in accordance with the rules of the order, which orders will be payable at such depositary, and will be charged to the account of the grand receiver, provided that on the joint order of the grand master workman, grand recorder, and grand receiver the entire amount in hands of such depositary may be withdrawn at any time, when they deem it necessary for the best interest of the order."

The contract provided for the payment of interest to the grand lodge on daily balances, and for monthly statements by the bank.

Among the instructions sent by the grand recorder to Mishler with the check were the following:

"You will please deliver the same (the check for $2,000) to Cyrus Thompson on payment of the assessment for the month of March if not paid, and on receipt of original beneficiary certificate of Brother Charles H. Thompson duly receipted on the back by Cyrus Thompson in the presence of two witnesses, who will subscribe their names thereto as such and give their place of residence. . . .

"In addition to the usual letter of advice (accompanying this letter), we wish to state that if the beneficiary certificate of Brother Thompson has not been found, I inclose you an affidavit which have filled up, signed, and sworn to by Cyrus Thompson, the beneficiary named in the certificate issued to our late brother, Charles H. Thompson. I inclose you receipt for him to sign also properly witnessed. On receipt of the affidavit and the receipt properly signed, you are authorized to deliver to him the order issued in payment of the death loss."

Mishler was the most active member of Mulford lodge, and assumed to take charge of its interests and welfare more than any other person. He attended to most of the correspondence of the lodge. He was well known in Atchison and by the officers of the First National Bank where he had good credit. The bank knew that he was financier of Mulford lodge, and knew his signature. At different times he had a personal account with the bank and until June, 1912, had an account as lodge treasurer. He took two drafts payable to his own order and credit for $100 on his account as treasurer, in payment of the check.

The grand recorder testified that in the majority of cases the local recorder sends in notice of death, and that blank proofs are sent to him, but when the notification comes from some other member the blank proofs are sent to that other member; that there was no absolute rule in such cases; and that when sufficient proof is received the draft is generally sent to the person in the local lodge who conducts the correspondence.

The grand lodge keeps a list of members, and, when a member is reported dead, the fact is recorded in its books.

The Atchison bank did not know Cyrus Thompson or his signature, and when it advanced payment upon the check it made no inquiry as to the genuineness of the indorsement of the payee, but recognized the signature of Mishler below it. The defendant bank paid the check on the guaranty of the previous indorsements.

There is no dispute about the facts. The plaintiff contends that it was the duty of the defendant bank to pay only on the indorsement of the payee, who was a real person. Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336. It was held in the case cited: "Where a draft or bill of exchange is made payable to a real person, known at the time to exist, and present to the mind of the drawer when he makes it, as the party to whose order it is to be paid, such draft or bill must bear the genuine indorsement of such payee in order that a bona fide holder may recover thereon, although the bill is drawn without the knowledge or consent of the payee through the false representations of a party obtaining it from the drawer by fraud." (Syl. ¶ 1.)

Commenting on that decision afterwards,

it was said in Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141: "There, the draft was sent to Watkins to his correspondent, McLain, to be delivered to the payee thereof, Michael A. Becker. McLain forged the name of Becker upon the draft, then indorsed his own name thereon, and negotiated the same. The draft was never delivered as Watkins had given instructions. He never intended it to be paid to McLain, to whom it was sent. McLain, the correspondent, was solely responsible for the fictitious application and the forgery." p. 374.

The general rule that in order to charge the account of the depositor a bank must pay only to the payee named in the check, or to his order when so drawn, is conceded (2 Morse, Banks & Bkg. 3d ed. § 432), but the defendant contends that it should have credit for the payment in this instance under an exception to that rule recognized in the common law and expressed in § 30 of the negotiable instruments law (Gen. Stat. 1909, § 5276). It is declared in substance, in that section, that no rights of discharge can be acquired by payment of a forged instrument, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. The rule appears to be that payments upon forged indorsements are at the peril of the bank making them unless it can claim protection upon some principle of estoppel or negligence chargeable to the depositor. Shipman v. Bank of State, 126 N. Y. 318, 327, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. The negligence relied upon here is the conduct of the grand lodge in sending the check to Mishler for delivery to the payee, instead of the recorder, as the by-laws provided. This charge is predicated on the previous forgeries of Mishler from which, it is argued, that a like criminal course with respect to this check should have been anticipated and guarded against. The application of the principle contended for must depend upon knowledge of the grand lodge or notice of the previous forgeries. It is undisputed that no officer or agent of the grand lodge had any actual knowledge of any of these forgeries until some time after the payment of this check, when it came to them as a great surprise. The knowledge of Mishler himself of his own criminal acts is not binding upon the grand lodge. Shipman v. Bank of State, supra, 126 N. Y. 329, 330. Such acts, being in fraud of the principal and not within the scope of his agency, are not notice to it. United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433. Knowledge of an agent of his own wrong is not the knowledge of his principal. 2 Morse, Banks & Bkg. 3d ed. § 472. It is argued that the entries in the ledger of Mulford lodge of payments by men reported dead were notice to the grand lodge that the men were still living, and notice of Mishler's previous forgeries. It may be conceded that the entries of such payments would be notice to the grand lodge as between the order and the member, and possibly in other cases (Ancient Order of Pyramids v. Drake, 66 Kan. 538, 72 Pac. 239); but can the rule be stretched to the extent necessary to protect the bank from liability for the unauthorized payment in this case? It was formerly held that a depositor owed a bank no duty to examine his pass book and vouchers to detect forgeries, although the means of detection were thus afforded. Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731. But recent decisions hold otherwise. Morgan v. United States Mortg. & T. Co. 208 N. Y. 218, L.R.A. 1915, —, 101 N. E. 871; case note in 7 L.R.A.(N.S.) 744. The modern rule is stated by Judge Harlan, in Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 97, 29 L. ed. 811, 815, 6 Sup. Ct. Rep. 657: "The sending of his pass book to be written up and returned with the vouchers is therefore, in effect, a demand to know what the bank claims to be the state of his account. And the return of the book, with the vouchers, is the answer to that demand, and, in effect, imports a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it." p. 106.

The object of requiring such an examination is to afford seasonable notice to the bank of any unauthorized payment, in order that it may have an opportunity to retrieve against losses. This principle has been extended to the payments of checks intrusted to an agent, after his misconduct had been revealed by a return of vouchers and statement of the account. No statements or reports, showing the prior forgeries, were received by the grand lodge. The reports regularly sent in by Mulford lodge contained no clues to the forgeries. As between the grand lodge and its depositary we know of no rule of diligence requiring an examination of the ledger of a subordinate lodge in order to ascertain whether some officer of the latter is transacting his business honestly, in the absence of any notice or suggestion of dishonesty. Negligence cannot be imputed for failure to discover fraud which an examination might have disclosed, unless, as between the parties affected, ordinary diligence required such an examination. While it is

true that prior payments made upon indorsements were shown by the monthly statements of the bank, and checks returned to the grand lodge, still there is no proof or presumption that it knew the signatures of the payees, and, in the absence of any information to the contrary, it could rely upon the genuineness of the indorsements. It was said in Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 97, 29 L. ed. 811, 819, 6 Sup. Ct. Rep. 657: "As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk, or someone else, had forged the payee's name in the indorsement." p. 117.

Although the defendant paid the check on the faith of prior indorsements, it may, without resorting to the liability of such indorsers, have the protection of any defense the Atchison bank might have made, and is subject to the same responsibility. Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617. Circuity of action is thus avoided.

The Atchison bank took the check without inquiry as to the indorsement of the payee; having faith in Mishler, it accepted his indorsement as a sufficient guaranty that the indorsement of the payee was genuine. This presents the crucial question whether the direction to Mishler to deliver the instrument to Cyrus Thompson gave him authority to identify Thompson's signature at the bank. So far as the agent acted within the directions—that is, within the scope of his agency—the lodge is bound although he acted fraudulently. Story, Agency, 9th ed. § 452; Mechem, Agency, § 740; 31 Cyc. 1582. But if beyond that authority he acted fraudulently or committed a crime, the grand lodge is not bound, nor is notice of such frauds imputed to it. Shipman v. Bank of State, 126 N. Y. 318, 331, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; United States v. National Bank, 123 C. C. A. 501, 205 Fed. 433, 438. The views of this court upon the general subject of the crimes or torts of an agent are stated in Sachrowitz v. Atchison, T. & S. F. R. Co. 37 Kan. 212, 15 Pac. 242, 8 Am. Neg. Cas. 269; Laird v. Farwell, 60 Kan. 513, 57 Pac. 98; Clark v. Folscroft, 67 Kan. 446, 73 Pac. 86; and Crelly v. Missouri & K. Teleph. Co. 84 Kan. 19, 24, 33 L.R.A.(N.S.) 328, 113 Pac. 386, 3 N. C. C. A. 854.

It was said in Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881: "The theory that a party who makes and issues commercial paper, properly and carefully drawn, to express the liability which he intends to assume, is chargeable with negligence on account of the criminal act of another in altering it after its issue, would render him a warrantor against such acts, and is repugnant to justice and reason." p. 55.

It is argued that because the contract provided that money should be withdrawn only on orders issued in accordance with the rules, and that a rule required that orders on the beneficiary fund should be sent to the recorder of the local lodge, the bank should be acquitted of this charge; the order in this instance having been sent to the financier instead of the recorder. The bank had an interest in holding possession of the beneficiary fund, and stipulated that it could only be withdrawn as provided by the rules by which it was set apart for death losses. The contract guarded against withdrawal otherwise. It would be a strained construction of the contract to hold that the bank could refuse payment of an order on that fund merely because it was mailed to a different person than the one named in the rule. The rule in this respect could be modified without affecting the legal rights of the depositary.

The indorsement was not within the scope of Mishler's duty. It was made afterward and was an independent act. The defendant's argument upon this branch of the case is that, having been directed to deliver the check to Thompson, the payee, it became Mishler's duty to identify him. True there must be identification in order to make the delivery, but the duty ended there. Had the delivery been made, the service required would have been completely performed. No further duty was suggested by the instructions or necessary for the payment of the claim undertaken by the grand lodge, except to procure the affidavit and receipt. Had the check been delivered to Thompson—who, it must be remembered, was an actual, and not a fictitious, payee—and by some mischance it had come again into the hands of Mishler and he had then forged the indorsement, it would not be contended that the grand lodge would be bound. It is not perceived how his failure to deliver the check changes the legal effect of the agent's misconduct. In either case the forgery was beyond the scope of his employment.

A situation similar to the facts of this case appeared in Second Nat. Bank v. Guarantee Trust & S. D. Co. 206 Pa. 616, 56 Atl. 72. A bank paid a check to one who presented it under a forged indorsement. It had been drawn by a beneficiary association payable to the order of the brother of a

member supposed to be dead. The indorsement was forged. The bank paying the check was the depositary of the order. In a suit by the association to recover the amount charged against its account, an affidavit of defense alleging that the check had been drawn without due precaution, inasmuch as the beneficiary was living, was held insufficient. The court said: "We fail to see any relevancy whatever in the suggestion that the beneficial order was negligent in issuing a draft to pay a death benefit for a member who was yet alive. That is not the point in this case. Whether or not it failed to make due inquiry matters not in this proceeding. That would go only to the question of consideration as between the order and the beneficiary. Upon what it considered satisfactory proof, the order drew its draft upon the bank for a sum of money, payable to the order of John Davis. It had a right to require that its direction in this respect should be carried out. The draft was payable only upon the order of John Davis. And until John Davis did actually order or direct the payment of a draft to someone else, the title to the instrument remained in him, and never properly passed from him. When the defendant therefore took the draft without knowing whether or not the signature of John Davis, which appeared upon the back of the draft, was genuine, it took the instrument at its own peril." p. 620.

The defendant distinguishes that case by the fact that there was no evidence that the association had been negligent, because the agent to whom the check had been intrusted for delivery was the proper person, and there was no evidence that he had ever before been guilty of any wrongdoing. The grand lodge, as already stated, could modify its rule requiring checks to be delivered by the recorder of the local lodge, as it had often done. The duty of the depositary was to pay only upon the order of the payee, unless it can invoke the protection of estoppel or such negligence of the depositor as will be a sufficient defense. This negligence must relate to some duty which the grand lodge owed to the bank. As already stated, it was not required, in the absence of any notice or information, to explore the books of Mulford lodge which furnished the clue to Mishler's previous guilt, but might rely upon the presumption of his honesty. In the absence of notice or knowledge either to the grand lodge or the bank, the former forgeries were wholly unrelated to this transaction. Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648.

In Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325, the questions of negligence and estoppel in relation to the payment of forged checks was elaborately considered. A confidential clerk had forged a series of checks. After discovery of the fraud, a suit was brought by the depositor against the bank to recover the amount. The return of the pass book and forged checks was referred to, and the duty of the depositor to make the usual examination was stated. The court said that it was a question of fact whether the depositor had knowledge of the forgeries, or failed to obtain information from sources of information readily accessible, which by the exercise of reasonable diligence might have been obtained, and added: "If such facts be found to exist, then it must be also found, in order to work an estoppel, that the appellee acted, in honoring and paying the nine checks in question, in reference to the conduct of the appellants in failing to make known an objection to the account as stated, . . . and that such omission and neglect of the appellants did in fact mislead the appellee into the error of paying the nine forged checks now in dispute. This doctrine of estoppel *in pais* is applied in a great variety of circumstances, but its great object is to prevent injustice being done, where one party has been led into error by the fault or fraud of the other. It is a most valuable doctrine for the promotion of justice; but it can have no application except where the party invoking it can show that he has been induced to act, or refrain from acting, by the acts or conduct of the adverse party, under circumstances that would naturally and rationally influence ordinary men. . . . And in the recent case of Arnold v. Cheque Bank, L. R. 1 C. P. Div. 578, 45 L. J. C. P. N. S. 562, 34 L. T. N. S. 729, 24 Week. Rep. 759, where the principle was extensively discussed as to its application to the negligent conduct of the party suing, it was held, following the previous cases, that negligence, to create an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public." Hardy v. Chesapeake Bank, 51 Md. 562, 589, 591, 34 Am. Rep. 325.

The material transaction of the depositor in this case consisted in intrusting the check to Mishler for delivery. That of itself could not mislead the bank into a mistake. The mistake was caused by reliance upon Mishler's indorsement as a guaranty of the genuineness of the payee's indorsement, a matter not within Mishler's employment or duty, but apart therefrom.

It is suggested that the alleged negli-

gence of the grand lodge was a question of fact concluded by the finding of the jury. That would be true if the facts were disputed or there was room for different inferences,—a situation not presented here. Payment having been made upon a forged indorsement, the burden was upon the defendant to prove facts sufficient to avoid liability to the depositor. The facts proved are insufficient.

Among the cases cited in support of the defense is McHenry v. Old Citizens' Nat. Bank, 85 Ohio St. 203, 38 L.R.A.(N.S.) 1111, 97 N. E. 395. A stranger was introduced to a money lender as George Thresh, who asked for a loan on a farm. On examination of the record the title to the farm was found to be in George Thresh. Later the loan was agreed upon, a mortgage was made, and a check was delivered to Thresh, payable to his order, and upon his indorsement was paid by the bank. It was afterwards discovered that the farm belonged to another George Thresh, who knew nothing of the transaction. The suit was by the drawer of the check against the bank to recover the money, on the theory that it had been paid on a forged indorsement; but the action failed because the money was paid to the very person to whom the check had been delivered as payee by the drawer. The same result was reached in Land Title & T. Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L.R.A. 75, 79 Am. St. Rep. 717, 46 Atl. 420; Russell v. First Nat. Bank, 2 Ala. App. 342, 56 So. 868; S. Weisberger Co. v. Barberton Sav. Bank Co. 84 Ohio St. 21, 34 L.R.A.(N.S.) 1100, 95 N. E. 379; Maloney v. Clark & Co. 6 Kan. 82; Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 57 Am. Rep. 171, 11 Pac. 141. In each of these cases the drawer of a check was misled as to the identity of the payee; but the indorsement was made by, and the money paid to, the very person to whom the check had been drawn and delivered by the drawer. In this case no such delivery had been made, and the payee was not an impostor, and his identity is not questioned. In the cases referred to the drawer made the first mistake, from which the loss resulted. Here no mistake was made; the check was intended for Cyrus Thompson. The fact that the grand lodge had been fraudulently induced to write it does not affect the legal rights of the bank. Second Nat. Bank v. Guarantee Trust & S. D. Co. 206 Pa. 616, 56 Atl. 72. The case of London L. Ins. Co. v. Molsons Bank, 5 Ont. L. Rep. 407, is quite similar in many of its facts to this, but differs in at least one important respect. The insurance company had notice of former extensive forgeries of the same nature by its agent when it sent to him the checks in question. Here, as we have seen, notice of the former forgeries is lacking.

Valuable notes relating to various phases of the general subject discussed in this opinion are contained in 7 L.R.A.(N.S.) 744; 17 L.R.A.(N.S.) 514; and 41 L.R.A. (N.S.) 529.

The instrument upon which the indorsement was forged has been referred to as a check. The defendant calls attention to the fact that its language differs from that of an ordinary check by a designation added to the name of the payee. The order is to "pay to the order of Cyrus Thompson (brother) of Brother Charles H. Thompson, deceased, late member of Mulford Lodge, No. 137, located at Atchison, Kansas." It is also made payable out of the beneficiary fund. The language quoted is referred to as evidence of a special arrangement showing a relation with the bank different from that of debtor and creditor ordinarily existing between banker and depositor. We conclude, however, that the instrument has the legal effect of an ordinary bank check. The descriptive words suggested means of identification of the payee. For that purpose they were beneficial to the bank. See also First Nat. Bank v. Lightner, 74 Kan. 736, 8 L.R.A.(N.S.) 231, 118 Am. St. Rep. 353, 88 Pac. 59, 11 Ann. Cas. 596.

With great industry and ability, counsel for both parties have presented arguments and quoted extensively from the decisions of many courts pertinent to this controversy, but enough citations have already been made in this opinion to illustrate, and as we believe to support, the views expressed.

The judgment will be reversed, with directions to render judgment for the plaintiff for the amount of the check, with interest from the date of the demand for payment.

Petition for rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY v. CENTRAL MASSACHUSETTS ELECTRIC COMPANY.

(219 Mass. 85, 106 N. E. 566.)

Highway — right to carry electric wires over railroad at street crossing.

Municipal authority to maintain electric wires along a public highway does not in-

clude the right to carry them along the line of the street over an intersecting railroad upon the relocation of the street so as to pass under the railroad tracks under statutory authority to abolish the grade crossing.

(October 23, 1914.)

REPORT by the Superior Court for Worcester County for the determination of the Supreme Judicial Court of an action submitted upon an agreed statement of facts, to recover damages for the wrongful erection and maintenance by defendant of wires for the transmission of electricity over the tracks of a railroad of which plaintiff was the lessee. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. George H. Fernald, Jr., for plaintiff:

When the location of Maple street within the limits of the railroad location was discontinued by the decree of the superior court of May 6, 1891, confirming the award of the special commission, all rights to maintain any wires at this point ceased.

New England Teleph. & Teleg. Co. v. Boston Terminal Co. 182 Mass. 397, 65 N. E. 835; Boston Electric Light Co. v. Boston Terminal Co. 184 Mass. 566, 69 N. E. 346.

If the easements of the public way pass under the railroad, then the defendant, by maintaining its wires over the railroad without the authority of the plaintiff, the

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Note. — Right to carry wires across railroad.

On right of railroad to cut wires crossing tracks, see Alt. v. State, 35 L.R.A. (N.S.) 1212, and note.

On right to use railroad right of way for telegraph or telephone purposes as against owner of fee, see note to Anderson v. Interstate Mfg. Co. 36 L.R.A.(N.S.) 519.

On power to authorize construction of telegraph or telephone lines along railroad right of way without compensation to railroad company, see Canadian P. R. Co. v. Moosehead Teleph. Co. 29 L.R.A.(N.S.) 703, and note.

Telephone wires suspended 35 feet high above the tracks of a railroad, and 5 or 6 feet above telegraph wires strung on poles and running parallel with the railroad and used by the company in the operation of trains, do not constitute an obstruction to the operation of the road, so as to entitle the company to cut and remove them, where the poles used in crossing are not on the right of way, although the telephone company has failed to obtain the consent of the railroad company to the erection of its lines, or to take condemnation proceedings. McGowan v. State, 146 Ala. 679, 40 So. 142.

In St. Louis, I. M. & S. R. Co. v. Batesville & W. Teleph. Co. 80 Ark. 499, 97 S. W. 660, the court held that a railroad which had bought up, as part of its proposed right of way, land occupied by a telephone company under a verbal agreement with the owners, the right of way being crossed several times by the telephone wires, had no right to remove the poles and wires from the right of way, where the telephone line was not constructed so as to be dangerous to the operation of the railroad, as the telephone company had power by statute to condemn its way over the railroad right of way.

And it seems that a street railway company may not be denied the right to cross a railroad track because of the use of trolley wires, where it is otherwise entitled to cross and the trolley wires do not interfere with the operation of the trains. Philadelphia, W. & B. R. Co. v. Wilmington City R. Co. 8 Del. Ch. 134, 38 Atl. 1067; West Jersey R. Co. v. Camden, G. & W. R. Co. 52 N. J. Eq. 31, 29 Atl. 423.

The crossing of a steam railroad by an electric railroad may be reasonable and feasible although the trolley wires overhead will be a source of danger in the operation of trains, and electric cars may stop on the crossing from failure of the current, and the passage of the regular trains on the railroad will delay the street cars. Louisville, & N. R. Co. v. Bowling Green R. Co. 110 Ky. 788, 63 S. W. 4.

Where a street railway company places its trolley wires 25 feet above the tracks, there is no necessity for the approval of the commissioner of railroads and telegraphs, under a statute providing that all telegraph, telephone, electric light, or other wires of any kind, constructed over the line of any steam railroad within the state, must clear the top of the rails at least 25 feet, except in cases of trolley wire crossings, when such height as may be agreed upon and approved by the commissioner of railroads and telegraphs shall govern. Cincinnati & H. Electric Street R. Co. v. Cincinnati, H. & I. R. Co. 12 Ohio C. D. 113.

But according to NEW YORK C. & H. R. R. Co. v. CENTRAL MASSACHUSETTS ELECTRIC Co., where grade crossings are abolished, an electric company may not subsequently to such abolishment suspend its wires over the tracks of a railroad.

In Alt v. State, 88 Neb. 259, 35 L.R.A. (N.S.) 1212, 129 N. W. 432, the court, without passing upon the question whether there was an invasion of the rights of the railroad company in stringing telephone wires across its right of way at a highway crossing, without permission of, or compensation to, the railroad company, which owned the fee subject to an easement for highway purposes at the *locus in quo*, held that, even if there was such an invasion, the railroad company was not justified in cutting the wires as a nuisance, it appearing that they did not in any way endanger the company's employees, or interfere with the moving of trains or with the right of way.

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owner of the fee, is liable in an action of tort for trespass.

Butler v. Frontier Teleph. Co. 186 N. Y. 486, 11 L.R.A.(NS..) 920, 116 Am. St. Rep. 563, 79 N. E. 716, 9 Ann. Cas. 858.

Messrs. **F. Delano Putnam** and **A. Morris Crosby**, for defendant:

The fact that the newly located highway may be constructed some distance away from the old highway, on land owned by the plaintiff, gives the plaintiff no greater right than it would have had if the highway had not been relocated.

Boston & A. R. Co. v. Worcester, 180 Mass. 71, 55 L.R.A. 623, 61 N. E. 806.

If the plaintiff's tracks had crossed Maple street at grade, and the defendant's wires had crossed the tracks within the location of Maple street, the plaintiff would have had no cause of action.

New York, N. H. & H. R. Co. v. Cohasset Water Co. 216 Mass. 291, 103 N. E. 829.

If a right of way is created, and nothing more appears, the owner of the servient tenement may build over the way or do anything else so long as he does not interfere with or obstruct the right of passage over the soil.

Atkins v. Bordman, 2 Met. 457, 37 Am. Dec. 100; Gerrish v. Shattuck, 132 Mass. 235; Burnham v. Nevins, 144 Mass. 88, 59 Am. Rep. 61, 10 N. E. 494; Crocker v. Cotting, 181 Mass. 146, 63 N. E. 402; Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533, 29 N. E. 974; Savannah & O. Canal Co. v. Suburban & W. E. R. Co. 93 Ga. 240, 18 S. E. 824.

Rugg, Ch. J., delivered the opinion of the court:

Before 1891 a public way known as Maple street crossed at grade in the town of Warren the tracks of the Boston & Albany Railroad, now operated by the plaintiff. In that year the crossing was abolished by proceedings under Stat. 1890, chap. 428, now Stat. 1906, chap. 463, pt. 1, §§ 29–45, by relocating the street so that at its new location it passed under the tracks of the railroad, which crossed the street by an overhead bridge. The defendant is incorporated to sell electricity for lighting purposes to the public, certain of its wires being carried on poles. In 1894 the defendant was authorized by the proper public board "to erect its poles and maintain its wires" along Maple street among other highways in Warren. Acting under the authority assumed to be conferred thereby, and without the consent of the plaintiff or its predecessor, the defendant erected poles outside the railroad location, and carried over the tracks of the plaintiff where they cross Maple street, at a height of 33.7 feet above the rails, four electric wires, two bearing a heavy voltage.

The easement of public travel acquired by the location of a highway includes the transmission of electricity for lighting and power by means of poles and overhead wires or of underground conduits. Com. v. Morrison, 197 Mass. 199, 203, 14 L.R.A.(N.S.) 194, 125 Am. St. Rep. 338, 83 N. E. 415. But like any other kind of public travel, it must be exercised within the limits of the highway as located. The ground covered concurrently both by the location of the railroad and that of the highway before the abolition of the crossing at grade was subject to the uses of both kinds of easement, each to be exercised reasonably and with reference to like use by the owner of the other easement. Under those circumstances electric wires might have been carried over the tracks in a proper way without liability to the railroad company. New York, N. H. & H. R. Co. v. Cohasset Water Co. 216 Mass. 291, 103 N. E. 829.

The situation was changed by the abolition of the crossing at grade. The express design of the statute under which that was done was to separate utterly the two kinds of easements, and to put an end to the dangers arising from the exercise of each easement upon common ground. By such separation of grades a different domain was established for each easement, divided by the lower side of the bridge structure. The theretofore conflicting easements were regulated as to future use. The easement of general public travel, as contemporaneously practised, after the abolition was confined to the space beneath the bridge by which the railroad passed over the highway, while the easement of public travel by railroad was above that plane. Boston & A. R. Co. v. Worcester, 180 Mass. 71, 55 L.R.A. 623, 61 N. E. 806. The risk of injury from broken or sagging power or light wires passing over a railroad track is a capital illustration of those intended to be abrogated by the abolition of crossings at grade. The terms of the license granted to the defendant by the officers of the town of Warren, above quoted, did not go to the extent of authorizing the stringing of wires above the railroad track. If it had undertaken to do so in express words, it would have been beyond the jurisdiction of such officers.

It is not necessary to decide that under no circumstances would the public have a right to make use of the space above the railroad tracks. That question is not now presented. It follows that the conduct of the defendant in suspending its wires over the tracks of the plaintiff was not within any authority conferred upon it, and was an invasion of the plaintiff's rights.

In accordance with the terms of the report, let the entry be:

Judgment for the plaintiff for $1.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANNIE CARINI, by Next Friend, Appt.,
v.
THOMAS D. BEAVEN, Bishop of Springfield Diocese.

(219 Mass. 117, 106 N. E. 589.)

Religious societies — liability of bishop for act of priest.

A bishop who places in charge of a parish a priest whom he knows to be of bad character, whose appointment will likely result in attempts to debauch female parishioners, is not liable in damages as a corporation sole for a rape committed by the priest upon a member of the parish.

(October 24, 1914.)

APPEAL by plaintiff from an order of the Superior Court for Worcester County, sustaining a demurrer to a declaration filed to recover damages for a rape committed by a priest, alleged to have been negligently appointed by defendant. Affirmed.

The facts are stated in the opinion.

Mr. **Michael T. Flaherty** for appellant.

Messrs. **Herbert Parker, Henry H. Fuller,** and **John C. Lynch** for appellee.

Sheldon, J., delivered the opinion of the court:

The plaintiff in each of the four counts of her declaration seeks to hold the defendant as a corporation sole on the ground that he appointed as his agent to take charge of a parish of the Roman Catholic Church in Milford, to care for the property of the defendant in that parish, and to perform the pastoral and religious duties of a priest therein, one Petrarca, a man who, it is averred, was "of low moral character, . . . of vicious and degenerate tendencies and gross sexual proclivities." She avers that the defendant made this appointment with full knowledge of the bad character and evil tendencies of Petrarca, and knew, or, in the exercise of reasonable care, ought to have known, that the appointment of such a man to such a position was dangerous and likely to result in attempts of said Petrarca "to debauch and carnally know the female members of said parish, and that by reason of such confidential relations between such agent and priest and such members of the parish such attempts would be successful." She avers that while she was a member of the parish, "not quite eighteen years of age, innocent and confiding," and while she was engaged alone "in the act of a religious service in the church of the Sacred Heart parish, said church being the property of the defendant," Petrarca, being the agent of the defendant and "occupying the position of the defendant's moral and religious instructor to the people of said parish, guarding the morals of the young of said parish, and sustaining said confidential relations with the members thereof," dragged her from the alter to the vestry of said church, assaulted and overcame and debauched her, in consequence whereof she afterwards gave birth to a child. And she avers that all her injuries and sufferings resulted from and were caused by the defendant's negligent appointment of said Petrarca as his agent and priest in said parish.

We have summarized what are contended to be the material averments of the first count; but with one exception, hereafter to be spoken of, we find nothing upon which to base any important distinction between this and the other counts. The case comes before us upon demurrer to this declaration.

The gravamen of the plaintiff's charge is that the defendant negligently put or retained in the position of a parish priest one whom he knew, or, in the exercise of proper care, ought to have known, to be a man of bad character and of gross sexual proclivities, who he knew or ought to have known would be likely to attempt successfully to debauch the female members of the parish, and that this man committed upon the plaintiff what must, upon the language of her declaration, be taken to have been a rape. In other words, her claim is that the defendant appointed an unfit man; that this appointment was apt to give and did give

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Note. — No other reported case has been found wherein it has been sought to hold an ecclesiastic civilly liable for the tort of a subordinate.

In Magnuson v. O'Dea, 75 Wash. 574, 48 L.R.A.(N.S.) 327, 135 Pac. 640, it was sought to hold a bishop having spiritual control over the affairs of a school civilly liable for the conduct of those in charge thereof, because of his refusal to coerce a confession as to the whereabouts of a child which was kidnapped. In denying any liability the court said: "The law devolved no such duty upon him. He has committed no legal wrong, and the sins of others cannot be visited upon him. He occupies the same position as would the minister in charge of any other church, or the head officer of a fraternal society. Such officials are not responsible for the torts of their brethren, unless participated in or ratified and approved by them."

to the appointee opportunities to seduce women; and that the appointee, by means of these opportunities, committed a rape upon the plaintiff.

It would be difficult for the plaintiff in any event to maintain such an action. Upon elementary principles she could not do so without proving that the negligence of the defendant in appointing or retaining an unfit man was the direct and proximate cause of the injury which resulted to her. But, according to her allegations, the injury to her was done by Petrarca entirely outside the scope of his alleged agency or of his duties; it was a crime committed of his own free will, the result of his own volition, for which no one but himself was responsible. The criminal act of the alleged agent was itself the efficient cause of the plaintiff's injury. But the general rule of law is, as stated in Stone v. Boston & A. R. Co. 171 Mass. 536, 540, 41 L.R.A. 794, 51 N. E. 1, 2, 4 Am. Neg Rep. 490, "that where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him." So it was said in Glynn v. Central R. Co. 175 Mass. 510, 511, 78 Am. St. Rep. 507, 56 N. E. 698, 7 Am. Neg. Rep. 442, that "ordinarily even a wrongdoer would not be bound to anticipate a wilful wrong by a third person." The principle was carried further in Daniels v. New York, N. H. & H. R. Co. 183 Mass. 393, 62 L.R.A. 751, 67 N. E. 424, in which it was sought to hold the defendant liable for the death of a man who had been injured by its negligence, and who soon afterwards committed suicide while his mind was disordered in consequence of his injuries. It was held that the defendant was not liable for the death, because the proximate cause of that was not the defendant's negligence and the resultant injury to the deceased, but his own act of suicide. The same principle was applied in the recent case of Horan v. Watertown, 217 Mass. 185, 104 N. E. 464, in which it was held that the defendant town, although by its negligence it had afforded opportunity for the commission of certain crimes by third persons, could not be taken to have anticipated that such crimes would be committed, and so was not responsible for the injurious consequences which resulted therefrom to the plaintiff.

But, however that may be, we cannot find that any ground of liability is stated in this declaration. It is true, as was stated in Horan v. Watertown, ubi supra, that where a defendant's original negligence is followed by the independent act of third persons (not amounting to a crime such as is charged in the case at bar), and such new act directly results in injury to a plaintiff, "the defendant's earlier negligence may be found to be the direct and proximate cause of those injurious consequences, if, according to human experience, and in the natural and ordinary course of events, the defendant ought to have seen that the intervening act was likely to happen." Even if we should extend this doctrine to cover cases where the intervening act of another was an atrocious crime, yet it does not appear by the averments of this declaration that the defendant had any reason to foresee, or was at all chargeable with negligence for failing to foresee, that Petrarca would commit a rape, especially with the circumstances of sacrilege which here are charged. It is not "according to human experience and the natural and ordinary course of events" that a parish priest should commit so flagitious and atrocious a crime and expose himself undoubtedly to the discipline of his church as well as to the bitter penalty of the civil law (Rev. Laws, chap. 207, § 22), even though he might be a man of low moral character, of vicious and degenerate tendencies, and of gross sexual proclivities.

Upon the plaintiff's averments the defendant had no reason to apprehend that Petrarca would do more than to seek to seduce the women of his parish into acts of adultery or fornication; and flagitious as such acts would be, they could afford no ground of action to a woman who, under whatever stress of temptation, had shared in their commission. Dennis v. Clark, 2 Cush. 347, 350, 48 Am. Dec. 671. The facts averred in the case at bar are more favorable to the defendant than those which were considered in Henderson v. Dade Coal Co. 100 Ga. 568, 40 L.R.A. 95, 28 S. E. 251, 3 Am. Neg. Rep. 133.

The fourth count contains the additional averment that the defendant knew that Petrarca was often under the influence of liquor, and that while under that influence his lusts were ungovernable. But that is immaterial; for it is not averred or intimated that when he committed this crime he was at all under the influence of liquor.

It is not necessary to consider in detail the other assigned causes of demurrer. For the reason that no one of the counts of the declaration states any cause of action against the defendant, the order of the Superior Court sustaining the demurrer and the judgment for the defendant must both be affirmed.

So ordered.

NEW MEXICO SUPREME COURT.

JOHN W. PRICE, Appt.,
v.
PECOS VALLEY & NORTHEASTERN RAILWAY COMPANY.

(15 N. M. 348, 110 Pac. 565.)

Railroad — invitee — place.

1. The implied invitation to anyone having business with a railroad company to go upon the premises where it transacts such business with the public does not extend to portions of the premises which are obviously not adapted to, or used, or necessary for the transaction of the business for which such person is on the premises; and if he goes to such places, he puts himself outside of the protection of his invitation, and the railroad is not responsible for injuries he may receive unless it inflicts them purposely or wantonly.

Same — contributory negligence.

2. On the evidence in the case, the negligence of the appellant contributed to the injury he received, and, in the absence of evidence of any more than ordinary negligence on the part of the appellee, from which the appellant would not have suffered if he had exercised ordinary care, he is precluded from the recovery of damages against the appellee.

Headnotes by ABBOTT, J.

(July 26, 1910.)

Note. — Places within implied invitation extended to passengers or persons on business at railroad station.

It will be observed that the class of persons designated by the title, and to which this note is confined, includes only those who may be regarded as invitees, as distinguished from mere trespassers or bare licensees. The note is not concerned with the duty of such invitees or the duty of the railroad toward them, except so far as those questions turn upon the propriety of the invitee going to or remaining at the particular part of the station premises where he was at the time he sustained his injury. Questions which merely relate to the conduct of the invitee, or of persons for whom the railroad company is responsible, as, for example, the question of negligence in running a train past the station while passengers or other invitees are crossing the tracks, or the question of contributory negligence in attempting to cross the track in front of such a train, are not included, unless there was a question whether, apart from his perilous position at the instant of the accident, the invitee was justified in going to or remaining at the particular part of the station premises where the accident occurred.

As to whether one who goes upon property on business with the owner is deprived of the right to protection against defect by the fact that he temporarily turns aside to pursue a purpose of his own, see note to Pauckner v. Wakem, 14 L.R.A.(N.S.) 1119.

As to duty of railroad company to one who goes on station grounds for purpose of mailing letters on mail train, see note to Atchison, T. & S. F. R. Co. v. Jandera, 24 L.R.A.(N.S.) 535; also individual case, Bell v. Houston & S. R. Co. 43 L.R.A.(N.S.) 740.

As to liability for injury to trespasser or bare licensee at station by train, see note to Neice v. Chicago & A. R. Co. 41 L.R.A.(N.S.) 162.

Generally, where a person has entered on the premises of another under invitation, express or implied, he is bound by that invitation, and becomes a bare licensee if he goes to some other part of the premises for purposes of his own, using the premises for other purposes than those for which they were intended, or remains on the premises beyond a reasonable time ofter permission has expired. 29 Cyc. 452. See also PRICE v. PECOS VALLEY & N. E. R. Co.

As stated in PRICE v. PECOS VALLEY & N. E. R. Co., if it should be held, as the court thought it could not, that the invitation of the railroad company went so far as to warrant the defendant seating himself on the edge of the platform with his legs projecting beyond it toward the tracks, the evidence showed that he was guilty of contributory negligence in needlessly assuming such a dangerous position.

In Louthian v. Ft. Worth & D. C. R. Co. 50 Tex. Civ. App. 613, 111 S. W. 665, plaintiff went to a freight depot to procure a car in which to ship certain material, and finding the freight clerk busily engaged in a car on a side track, endeavored to transact business with him there; while standing on a gang plank affording entrance to the car, an engine, in making a coupling, suddenly moved the car, displacing the gang plank and throwing plaintiff to the ground. A recovery was denied, the court stating that an office was provided for the transaction of business pertaining to freight, and that no invitation was extended to plaintiff to follow the agent into a place of danger; that, in the absence of knowledge of plaintiff's presence, defendant owed him no duty to exercise care for his safety at the place of his injury, although defendant's servants were negligent in making the coupling, and plaintiff exercised ordinary care to ascertain whether a switch train was approaching.

Where a milkman, while removing cans from a platform, was struck by a passing locomotive which overlapped the platform about 6 inches, he was held guilty of contributory negligence barring a recovery, having failed to exercise ordinary care for his own safety in placing himself in such a position with his back to the running train. Chicago & W. I. R. Co. v. Reichert, 69 Ill. App. 93. The court in the above case stated that plaintiff was not invited to the

APPEAL by plaintiff from a judgment of the District Court for Eddy County in defendant's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

Statement by Abbott, J.:

The defendant company, here the appellee, was operating a railroad in this territory at the time of the injury complained of in this cause, and at the station at Hagerman on said road. The plaintiff, here the appellant, called to make inquiry for cars for the shipment of horses. He was told by the station agent that no cars such as he required were there, but that in a few minutes they would know whether there were such cars on the local freight train, which was about coming in. The station at Hagerman was used for freight and passenger business, and was a wooden building, having a platform about 4 feet above the ground, extending completely around it. There was at the southeast corner of the platform a flight of steps leading south from it to the ground, and from the top of the steps there was a railing near the edge of the east side of the platform, running north about 11 feet, and north of the point where the railing ended the platform was used for the purpose of unloading freight from the cars which were run close to it on the tracks, and there a railing would have been an obstruction to the work of unloading the cars upon the platform. It did not appear that there was

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place at which he was injured. All of his and the other cans were placed where no one need run any risk in taking them therefrom. Defendant was therefore not required to keep a watchman to warn plaintiff of the approach of trains.

Where a railroad company provides offices for the transaction of its business, accessible from the public street, the presence in the freight yard of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty. Diebold v. Pennsylvania R. Co. 50 N. J. L. 478, 14 Atl. 576. In the above case the plaintiff went to a freight station to transact the necessary business at the office of the shipping clerk. The offices of the shipping clerk and station master were on the street, not within the yard. When the plaintiff was next seen he was walking in the freight yard in company with an employee of the defendant, and a moment later, while standing on or near the track of the railroad within the yard, he was struck and killed by a freight car that was being "shunted" into the freight house.

In Toledo, W. & W. R. Co. v. Grush, 67 Ill. 262, 16 Am. Rep. 618, plaintiff lawfully entered upon the platform of a railroad company by the direction of his employer, to see that certain freight belonging to the latter, which had arrived at the station, was properly taken care of, and while upon the platform for that purpose, and looking for the agent, he accidentally stepped through a hole in the platform, causing a severe internal injury. The court, in holding the railroad company liable, stated that the obligation of care on the part of a railroad company extends to all the accessories of its business, among which are stations or depots. These must be constructed and arranged with care, properly lighted when dark, and otherwise made safe and convenient for persons lawfully entering therein for the transaction of business. But in these as well as in other matters the company is only bound to use ordinary care except in favor of passengers. The L.R.A.1915B.

record contains evidence tending to show that the defect in the floor of the platform where appellee was injured had existed for nearly two years, and was known to the agent of appellant having charge during that time. It was occasioned by the decay of a plank, and exhibited a hole for the length of time stated.

Where plaintiff, upon the invitation of the railroad company, entered a baggage room to point out her baggage, and was injured by a defective door falling upon her as she attempted to open it, the company was held liable. Illinois C. R. Co. v. Griffin, 25 C. C. A. 413, 53 U. S. App. 22, 80 Fed. 278.

The railroad company was held liable in Illinois C. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656, 13 Am. Neg. Rep. 15, affirming 100 Ill. App. 594, for injury to a person by falling over a skid on the platform, where, at the time she was injured, she was upon the platform of the defendant upon its implied invitation in a matter in which it was interested; namely, delivering meals to mail clerks upon a train.

Passengers awaiting train or remaining after arrival.

As indicated by the statement at the beginning of the note, only a comparatively narrow aspect of the general subject of duty and liability of the carrier to passengers at stations is covered by the present note. Other phases of that general subject have been covered in other notes.

Thus, as to degree of care toward passenger at station, see note to St. Louis, I. M. & S. R. Co. v. Woods, 33 L.R.A.(N.S.) 855.

As to duty of carrier to prevent passengers at stations from going into dangerous places, see note to Hillman v. Boston Elev. R. Co. 33 L.R.A.(N.S.) 198.

As to liability for injury to one going to station after it has been closed for the night, see note to Sherman v. Maine C. R. Co. 43 L.R.A.(N.S.) 1134.

As to right of one going to station to deposit baggage, see note to Metcalf v. Yazoo

any barrier to separate the portion of the platform used for passengers from the part used for unloading freight, or anything to indicate such a separation, except the termination of the railing, and the relative locations of the freight room and the waiting room. The side tracks nearest the platform were at such a distance that freight cars passing on them were near the edge of the platform for convenience in unloading freight, the distance between the edge of the platform and the nearest rail being 4 feet. East of the side track was the main track, its west rail being about 11 feet from the east rail of the side track. The door leading into the ticket office in the station was on the south side. The tracks were on the east of the platform. Passengers could not board trains from the platform, but in going from the ticket office had to pass down the flight of steps named and go to the cars. In the room in the station where tickets were obtained there was a table at which the station agent did a part of his work, and there were a few seats there for passengers, or others having business with the defendant company. After the plaintiff had been told by the station agent what has been stated, he went out on the platform to a point north of the railing, sat down on the edge of the platform with his legs hanging down outside of it toward the tracks to watch for the cars he hoped might come in for him. While he was in that position the freight train, or a portion of it, which had been cut off from the rest, was backed in on the side

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& M. Valley R. Co. 28 L.R.A.(N.S.) 311.

As to duty of carrier to person at station for business consultation with individual passenger, see note to Cogswell v. Atchison, T. & S. F. R. Co. 20 L.R.A.(N.S.) 837.

Still other notes may be found by consulting the Index to L.R.A. Notes, under the title, "Carriers."

The rule is stated in Louisville & N. R. Co. v. Glascow, 179 Ala. 251, 60 So. 103, that a person standing at or near a station, awaiting his train, is not guilty of contributory negligence by standing near the tracks, unless he gets so close thereto as to be struck by an ordinary train. In other words, if he stands far enough off to escape a train of ordinary width, but happens to be struck by something that projects therefrom, or is thrown or falls therefrom, he cannot be deemed guilty of contributory negligence. In this case the evidence tended to show that the plaintiff was struck with some hard instrument contemporaneous with the passing of defendant's train; that something on the train collided with the sack on the mail crane; and that either the mail sack or the projectile which struck the sack fell against plaintiff's leg. A judgment for plaintiff was affirmed.

The railroad company was held liable in Lehigh Valley R. Co. v. Dupont, 4 C. C. A. 478, 128 Fed. 840, where a passenger was killed by a train which overhung the platform 13 or 14 inches. The court stated that the evidence authorized the jury to find that the decedent was killed almost immediately after he had reached the platform; that in the intervening moment his attention was distracted and his deliberative faculties practically paralyzed by the onrush of a flying train and shrieking locomotive in place of an expected train, which would be moving slowly, preparatory to stopping at the platform; and that during a second or two of this disconcerting interval he unconsciously exposed himself near the perilous edge of the platform and beyond the undefined safety line. The court also stated that an instruction that decedent "had a right to assume generally that the train would not sweep him off, but it was his duty to use the platform with ordinary care and prudence," was strictly correct if decedent had been unaware previously that the passing train overlapped the platform.

The passenger waiting at a railroad depot for his train to arrive need not remain in the waiting room. The fact that he goes out upon the platform before it is time to board his train does not render him guilty of such negligence as to prevent his recovery for injury by being struck by a truck through the carelessness of a baggageman. Chicago & A. R. Co. v. Woolridge, 32 Ill. App. 237, 9 Am. Neg. Cas. 265.

The railroad company was held liable in Dobiecki v. Sharp, 88 N. Y. 203, 9 Am. Neg. Cas. 588, where a person standing upon a platform, intending to take a train, being an invitee, was struck by a passing train, the cars of which projected over the platform about 3 inches. The court stated that persons invited upon a platform to take a train are bound to be careful and cautious in not exposing themselves to needless danger, and they would not be free from negligence if, while a train was passing, they unnecessarily placed themselves in a position to be struck and injured by it. They must employ reasonable care and circumspection in their conduct while there, and if they fail to do this, they have no redress if injuries occur. "The claim of the appellant's counsel that the deceased was chargeable with knowledge of the draft of an express train while passing, and was precluded from a recovery by not placing himself beyond the line of danger, is not well founded. While he had no right to expose himself to danger by making close calculations as to the speed of the train by taking any unusual risks, it by no means follows, because he was upon the platform at this time, that he was there without right, and was chargeable with contributory negligence."

It is stated in Holcombe v. Southern R. Co. 66 S. C. 6, 44 S. E. 68, that if a prospective passenger forsakes the station house and goes to a place where he or she has no legal right to be, then the railroad is bound only to do no wilful injury to such person. In this case, however, a railway company was

track next to the platform. Several cars had passed the plaintiff, and for a moment before and at the time of the accident he was looking at some of the cars which had passed, and in the opposite direction from the coming cars, one of which was a refrigerator car whose door was partly open and swinging out and in from the motion of the car. It cleared the platform as it passed, but when it reached the plaintiff there was not space for it to pass his legs, and one of them was caught and crushed between it and the platform. There was no evidence that any employee of the defendant knew that the door of the refrigerator car was not fastened, or knew the position of the plaintiff, except that some of them were where they could and naturally might have seen the swinging door and the plaintiff seated on the edge of the platform; but all such employees testified that they did not in fact see or know of the swinging door or the position of the plaintiff. The trial court held that the plaintiff was, at most, merely a licensee at the place where he was on the defendant's premises; that the defendant owed him no duty other than not to injure him knowingly or wantonly; that there was no evidence of such injury; and directed a verdict for the defendant.

Messrs. **Bujac & Brice** and **John W. Armstrong** for appellant.

Mr. **Henry L. Waldo**, with Messrs. **R. E. Twitchell** and **W. C. Reid**, for appellee.

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held liable for injury to a person standing on the platform, awaiting a train, about 16 feet from the baggage car, by being struck by a trunk which was being unloaded. "If the baggage had been handled with the care due under the circumstances [said the court], it is not probable that plaintiff could have been injured by collision with a trunk when she was standing some 16 feet from the baggage car. It was properly left to the jury to say whether the injury was the result of defendant's negligence. Under this view it was immaterial whether plaintiff was a passenger in contemplation of law, or whether she was there as a licensee by permission of the defendant company."

The question of plaintiff's due care was for the jury in Sonier v. Boston & A. R. Co. 141 Mass. 10, 6 N. E. 84, where, while standing on the platform, awaiting a train, he was struck by the broken projecting step of a passing engine. The court stated that plaintiff had a right to rely to some extent upon the giving of proper and usual signals of danger or other suitable warning, in case of the approach of a train; and the mere fact that he did not look to see if a train was approaching is not, under the circumstances, conclusive of a want of due care on his part. Certainly he was where he had a right to be, unless at that particular moment he was guilty of a want of due care in failing to look out for the train; and inasmuch as the defendant negligently omitted to give him such due and proper warning as he had a right to expect, the question of his due care, under these circumstances, was properly submitted to the jury.

While it is not the purpose of this note to exhaustively treat the question of the duty of a railroad company to maintain a safe platform, it may be said that the company is bound to so construct its platform that it shall be reasonably safe for use by passengers, and to locate it in such proximity to the railroad tracks that it will afford a safe and convenient means of egress to and from its cars for its passengers, including those who may be aged and infirm. While trains are passing such platforms, or are likely to pass, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as are usually attached to ordinary trains. Under such circumstances the edge of the platform is usually a place of danger; and if a passenger, while occupying such a place, is struck in this way, the injury cannot ordinarily be attributed to negligent construction by the company.

Thus, in Dotson v. Erie R. Co. 68 N. J. L. 679, 54 Atl. 827, 13 Am. Neg. Rep. 655, plaintiff was walking along the platform, which was on a level with the top of the rails, towards the station, in order to purchase a ticket. She suddenly diverged in her course toward the rail, so that she was struck from behind by the bumper of a slowly moving train just pulling into the station, on which she was to take passage, and was injured. The platform was constructed of crushed stone which extended to the line of planking 18 inches wide along the nearest rail. The trial judge treated the outer line of the stone surface as the edge of the platform. The evidence showed that the bumper projected slightly over the edge of the platform, and it was left to the jury to say, in case they should find that plaintiff was walking within the line of the platform when she was struck, whether it was negligence in the company to have constructed its platform in such close proximity to the rail. It was held, on review, that no negligence was shown, and that the charge in this respect was erroneous.

Admitting that a person who enters the waiting room of a railroad company with the intention of taking a train is there at the invitation of the company, and that the company is bound to see that its premises are in such condition in all respects that such a person, in the exercise of ordinary care, can leave them without injury, and that this extends to and embraces proper and suitable platforms, steps, and walks, as well as suitable light, such a person passes beyond the scope of that invitation where, after being informed that there would be no other train that night, he lingers about the station, awaiting a horse car, and, after the

Abbott, J., delivered the opinion of the court:

Plaintiff originally went on the premises of the defendant for the purpose of transacting with it business of the kind which it undertook to do with the public, and was, therefore, there by its implied invitation, and, according to the evidence, was remaining by its direct invitation, or suggestion of the station agent, when he received the injury for which he seeks to hold the defendant liable. The defendant claimed, and the trial court held, that he went outside of the protection of his invitation in placing himself as he did, when he received the injury.

Obviously, there must be some limit to what would be included in an invitation which is not expressed, but only implied from the fact that the business of a common carrier of passengers and freight is transacted on the premises. At most of the railway stations in this country there is nothing to prevent the public from going upon the tracks of the railroad from the offices, waiting rooms, and platforms. It is assumed to be, and is, we think, matter of common knowledge, that it is highly dangerous to go upon or close to tracks where engines and cars too heavy to be stopped at a moment's notice are passing with more or less regularity and frequency. This general knowledge of the danger is relied on to a great extent at the smaller and less frequented railway stations to prevent people who are there on business from going upon

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lights are partly extinguished, is injured in attempting to leave the waiting room by an insufficiently lighted step leading to the platform. Heinlein v. Boston & P. R. Co. 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698. The court in the above case, denying recovery, stated that there was no allurement or inducement held out for him to remain, and if he did so, it was at his own risk. In order that it may be held that thereafter the defendant owed any duty to him, it must be shown not merely that it or its servants acquiesced in his remaining, and permitted it when his only possible business had been concluded, but that it was in accordance with their invitation, or with the intention and design with which the waiting room was prepared to be used. Of this there was no evidence.

In Holmes v. South Pacific Coast R. Co. 97 Cal. 161, 31 Pac. 834, a passenger, while waiting to board a train, walked up and down near the station on the roadway between the sidewalk and the railroad. It was held that in walking where he did, in dangerous proximity to the track, without looking or listening for the approach of the train for which he was waiting, and finally stepping partly upon the track, in front of the moving engine, he was guilty of contributory negligence precluding a recovery. "A railroad track upon which trains are constantly run [said the court] is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*. . . . Up to the very moment that he was struck by the engine it was within his power to escape the injury which he received by simply moving to a

place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his own negligence at the time in not looking or listening for the approach of the train."

So, where a passenger standing on the station platform, facing a north-bound accommodation train coming into the station, was struck by a south-bound express train, it was held in Edgerton v. Baltimore & O. R. Co. 6 App. D. C. 516, that in thus placing himself in a position of obvious danger, he was guilty of contributory negligence barring a recovery.

In Chicago, B. & Q. R. Co. v. Mahara, 47 Ill. App. 208, a passenger, while waiting for his train, instead of waiting in the waiting room provided for passengers, went out and stood on the edge of the platform, which was 19½ inches from the outside of the nearest rail, where, being oblivious to his surroundings, and with his back towards an oncoming train, he was struck by the bunting beam of the engine, which extended over the edge of the platform 4¾ inches. The court said that a railroad track along which a train may pass is necessarily a place of danger. Platforms along such places are designed to afford a means of passage along and approach to the train Every person knows that it is not safe or prudent to stand on the edge of a platform while a train is passing, if the train does not overlap the platform at all, and only comes even with its edge. To be safe for such purposes a platform would have to be some distance away, so as to be unserviceable as a platform. Such a platform as a person of reasonable prudence would stand on the edge of while a train was passing him would be of no use in alighting from or getting on cars. To build a platform so narrow or in such manner between tracks as to compel a passenger to stand dangerously near a train has been held to be negligence for which a company is liable in case of injury; but where the platform was 8 feet wide, so as to afford plenty of room to stand in safety, the court was of the opinion that it was clearly not

the tracks except as it may be necessary in taking trains, or doing such other business as they may have at the stations. At such times as they are necessarily upon the tracks for their business, the railroad company, which has impliedly invited them there for the purpose, is held to the degree of responsibility for their safety which the circumstances impose. But, in this case, it was in nowise necessary or even more convenient for the transaction of the plaintiff's business with the defendant company, that he should go near the tracks. He could have seen empty cars as well—one would suppose better—from a safe place on the platform than with a part of his person projecting into the space marked by the edge of the platform and the rails as that reserved and presumably deemed necessary for the passage of the trains, even if the implied invitation of the defendant, or the express invitation of its representative, the station agent, gave the plaintiff the right to go wherever he pleased on the platform. It cannot be that he was thereby authorized to go beyond it, when there was no occasion for him to go for any purpose connected with his business there. Oatts v. Cincinnati, N. O. & T. P. R. Co. 15 Ky. L. Rep. 87, 22 S. W. 330; Gulf, C. & S. F. R. Co. v. Bolton, 2 Ind. Terr. 463, 51 S. W. 1086, 6 Am. Neg. Rep. 493; Diebold v. Pennsylvania R. Co. 50 N. J. L. 478, 14 Atl. 576; 29 Cyc. 452, and cases cited. The only duty of the defendant toward the plaintiff, under the circumstances, was not to injure him wantonly or unnecessarily after his presence where he was was known to its employees. Thomp. Neg. §§ 1705, 1723; St. Louis & S.

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negligence to build it so that the nearest edge could not be occupied in safety as a standing place while a train was passing.

In Gulf, C. & S. F. R. Co. v. Bolton, 2 Ind. Terr. 463, 51 S. W. 1085, 6 Am. Neg. Rep. 493, a person, who apparently intended to take a train back to a station which he had passed by mistake, left the waiting room provided for passengers, and went out on the platform to a point near the end thereof, sat down upon the edge, with his feet upon the ground, and within a foot or a foot and a half of the rail of the main track, and went to sleep, where he was struck by a passing freight train. The court laid down the rule that one who is about to take passage upon a railway train has no right to leave the waiting room provided for passengers, and go out upon or near the main track of the railway and go to sleep; and if he does so, he is guilty of the grossest negligence; and the only duty which the railway company owes him is not to wantonly and unnecessarily inflict injury upon him after its employees have discovered him.

Where a person waiting for a train at a station which had no depot attempted to sit on the edge of the platform, but, miscalculating the height of the platform, which was 4 feet, stepped off and was injured, the court held in Missouri, K. & T. R. Co. v. Turley, 29 C. C. A. 196, 56 U. S. App. 1, 85 Fed. 369, that she was guilty of contributory negligence precluding a recovery. "The platform, manifest to any person," states the court, "was built for the sole purpose of ingress to and egress from the cars. Its edge was not designed for a place for passengers to go in the nighttime and sit upon. The plaintiff was not invited by anything naturally or incidentally connected with the use of the platform to so undertake to sit down on its edge. The accident was in no degree probably incident to the taking of passage on defendant's train. Such use of the edge of the platform on a very dark night was so disconnected and remote from the purpose of its construc-

tion as to preclude any possible admissible relation between the imputed neglect of the defendant to barricade the sides of or to light the platform, and an accident resulting as this did."

In Zumault v. Kansas City Suburban Belt R. Co. 175 Mo. 288, 74 S. W. 1015, plaintiff, man of mature years, in possession of all his faculties, with good eyes and hearing, familiar with the movements of trains, and while momentarily expecting the arrival of one at the station, upon which he intended to take passage, took a position on the platform so near the railroad tracks that a train could not pass without striking him, turned his face to the east when he was expecting a train from the west, and either fell asleep, or from some other cause became entirely oblivious to his surroundings, when by looking he could have seen the approaching train, or by listening he could have heard it. It was held that, in assuming such a position whereby he was struck by a passing engine, he was guilty of contributory negligence precluding a recovery for injuries sustained. It was in effect admitted that plaintiff was guilty of negligence in sitting upon the platform in the position he was when struck, but plaintiff claimed that, notwithstanding his negligence, defendant's servants and employees in charge of the train could have avoided injuring him by the use of ordinary care and diligence, such as sounding the danger signals, or stopping the train after they saw him, or could have seen him in a perilous position; and having failed to exercise such care and diligence, that he was entitled to recover for the injuries sustained by him by reason thereof. The court stated that it was impossible that the engineer could have prevented the injury after actually discovering the perilous position plaintiff was in, as he used every available means to that end, but they proved unavailing. There was nothing in the conduct of the engineer in charge of the train indicative of a wilful, reckless, or wanton disregard of human life. But, on the other hand,

F. R. Co. v. Bennett, 16 C. C. A. 300, 32 U. S. App. 621, 69 Fed. 525.

There was no evidence that the culminating act of negligence on the part of the appellant that he was looking from instead of toward the approaching cars when he was injured was known to any employee of the appellee, and only slight evidence, compared with that to the contrary, that any employee noticed him as he was seated. If, however, it should be held, as we think it cannot, that the invitation of the appellee went so far as to warrant the appellant in seating himself on the edge of the platform with his legs projecting beyond it toward the tracks, we think the evidence shows, beyond question, that he was guilty of contributory negligence at the time of the injury. He saw cars approaching on the tracks nearest him, and while there was room for them to pass him, with little to spare, if he remained as he was, and the cars kept to the rails and nothing projected from them, it was little short of recklessness to incur the risk needlessly that he might be accidentally thrown forward from behind by some passing truck or other object, or that the cars might leave the rails, or that some article might be projecting from a car, as so frequently happens, from the jolting of its load. He had no right thus to adventure his person beyond the edge of the platform into the space thus plainly marked off and reserved for the passage of cars. And, as if to emphasize his challenge to disaster, he allowed his gaze to be directed to the direction in which the cars were going instead of keeping it fixed on them as they approached. Even that precaution would, probably, have availed to save him from the

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plaintiff, while in full possession of all his faculties, placed himself within the danger line of cars passing along on the railroad track, and sat there, evidently oblivious to all surroundings, without even keeping a lookout for approaching trains, until he was struck by the engine in question, and was badly injured. Such conduct, observed the court, could but be characterized as the grossest negligence, which precludes a recovery by plaintiff for damages the result of such conduct.

A nonsuit was properly refused in Matthews v. Pennsylvania R. Co. 148 Pa. 491, 24 Atl. 67, where a person standing on the platform awaiting a train was struck by an incoming engine, the bumper of which overlapped the platform 20 inches. The court stated that there was nothing in the construction of the platform to make it dangerous. The accident was the result of deceased's own negligence in standing so near the track as to be struck by the passing engine.

Meeting or accompanying friends.

Here again the scope of the note excludes all questions as to duty and liability to the persons indicated by the heading, except so far as the question may be whether they were at a proper place at the time of the injury.

Generally as to duty of carrier to persons who accompany passengers to, or wait for them at, station, see note to Galveston H. & S. F. R. Co. v. Matzdorff, 20 L.R.A.(N.S.) 833.

Where an old lady accompanied friends to the station, and, after they had entered the train, stood upon the platform about 10 feet from the edge, awaiting the train to pull out, so that she could bid her friends a last farewell, when servants of the railroad company negligently propelled a trunk onto her, the railroad company was held liable for the injury sustained. Atchison, T. & S. F. R. Co. v. Johns, 36 Kan. 769, 59 Am. Rep. 607, 14 Pac. 237. In the above case there was a waiting room in the station house or depot to which plaintiff might have retired if she had so chosen. The court said, however, that plaintiff certainly could not be considered as a trespasser upon the company's premises; and if not, then the defendant and its servants owed her the duty of exercising reasonable and ordinary care and diligence to avoid injury to her. We do not think they exercised any such care or diligence, but really they were guilty of gross negligence. The plaintiff was not standing in a straight line between the place where the trunks lay on the platform and the place on the platform from which they were to be taken into the baggage car; and the men moving the trunks had to move the same out of a straight line, and up a slightly inclined plane, in order to strike the plaintiff. There was plenty of room on the platform and in a straight line, within which the trunks might have been moved from where they lay to the baggage car without molesting the plaintiff.

Although servants in charge of a locomotive were guilty of negligence in not ringing and whistling on approaching the station, it was held in Langan v. St. Louis, I. M. & S. R. Co. 5 Mo. App. 311, that a person who had gone to the station to see his friend off and to help him carry his trunk could not recover for injuries, the result of an accident, the immediate cause of which was his own negligence in standing on the platform at a moment when he knew that a train was about to arrive, in such proximity to the tracks and in such a position that he was liable to be and was in fact struck by the buffer of a locomotive. "Waiving all questions of pleading in this case," says the court, "there is no evidence that the engineer or fireman saw plaintiff until the very instant that he was struck, or that they were guilty of negligence in not seeing him, or in not stopping the train."

J. D. C.

deplorable injury which occurred to him. That precaution, so clearly necessary to one in his position, he failed to take, and we find no warrant in law for requiring the defendant to bear any of the consequences of his negligence. Thomp. Neg. §§ 1606, 1638; 29 Cyc. 507 et seq.; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; Pennsylvania R. Co. v. Bell, 122 Pa. 58, 15 Atl. 561.

Although the trial court did not expressly base its direction to the jury to return a verdict for the defendant on the contributory negligence of the plaintiff, we think it might properly have done so on that additional ground. Mitchell v. New York, L. E. & W. R. Co. 146 U. S. 513, 36 L. ed. 1064, 13 Sup. Ct. Rep. 259; Tucker v. Baltimore & O. R. Co. 8 C. C. A. 416, 8 U. S. App. 491, 59 Fed. 968; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 702, 24 L. ed. 542; Bancroft v. Boston & W. R. Corp. 97 Mass. 278, 3 Am. Neg. Cas. 765.

The judgment of the District Court is affirmed.

Parker, McFie, and Mechem, JJ., concur.

Dismissed by the Supreme Court of the United States, May 1, 1914. (234 U. S. 767, 58 L. ed. 1583, 34 Sup. Ct. Rep. 677.)

UNITED STATES SUPREME COURT.

FREMONT WEEKS, Plff. in Err.,
v.
UNITED STATES.

(232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341.)

Searches and seizures — use of evidence wrongfully obtained.

1. The immunity from unreasonable searches and seizures afforded by U. S. Const., 4th Amend., has been denied the accused in a criminal prosecution in a Federal district court where that court has refused the accused's seasonable application for the return of his letters and private documents seized in his house in his absence, by a United States marshal holding no warrant for his arrest and none for the search of his premises, and has permitted their use in evidence at the trial.

Same — protection against misconduct of police officers.

2. Protection against individual misconduct of municipal police officers not acting under any claim of Federal authority is not afforded by the guaranty of U. S. Const., 4th Amend., of immunity from unreasonable searches and seizures, but the limitations of such amendment reach only the Federal government and its agents.

(February 24, 1914.)

ERROR to the District Court of the United States for the Western District of Missouri to review a judgment convicting defendant of unlawfully using the mails in aid of a lottery or gift enterprise. Reversed.

The facts are stated in the opinion.

Mr. **Martin J. O'Donnell**, for plaintiff in error:

The decision of the district court denying defendant's petition to return his property and private papers after it had taken jurisdiction of the subject-matter set forth in the petition, and found that such private papers had come into the possession of the government as a result of its own unlawful acts, in violation of its own Constitution, is reversible error.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; United States v. Mounday, 208 Fed. 186; United States v. McHie, 196 Fed. 586, 194 Fed. 894; United States v. Wilson, 163

Note.—Admissibility against defendant of documents or articles taken from him.

This note is supplementary to the notes to State v. Edwards, 59 L.R.A. 465; State v. Fuller, 8 L.R.A.(N.S.) 762; and People v. Campbell, 34 L.R.A.(N.S.) 58.

As to incriminating evidence furnished by defendant acting under compulsion, see note to State v. Turner, 32 L.R.A.(N.S.) 772.

As to whether merely demanding that accused produce an incriminating document is a violation of his privilege, see note to Gillespie v. State, 35 L.R.A.(N.S.) 1171.

Upon the question whether records of sales of liquor, which a druggist is required by law to keep, may be used as evidence against him in a criminal prosecution, see note to State v. Pence, 25 L.R.A.(N.S.) 818.

As to the right of an officer in executing criminal process, to take possession of evidentiary articles, see note to Getchell v. Page, 18 L.R.A.(N.S.) 253.

Effect of illegality of taking.

Supplementing note in 34 L.R.A.(N.S.) 59.

The recent cases are in accord with the rule announced in the earlier notes on this question, to the effect that mere illegality in the taking of documents or articles from one charged with a crime does not render such documents or articles inadmissible in evidence against him, unless they were

Fed. 338; United States v. Mills, 185 Fed. 318; Wise v. Mills, 220 U. S. 549, 55 L. ed. 579, 31 Sup. Ct. Rep. 597; Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599.

The reception in evidence of the property and papers seized by officers of the government, after the court had inquired into and found that they had been so seized, was reversible error.

3 Bl. Com. p. 256; 4 Bl. Com. pp. 180, 223; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Broom, Legal Maxims, 7th ed. 227; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; 1 Greenl. Ev. § 245a; Marshall v. Riley, 7 Ga. 367; 3 Bl. Com. p. 256, note 1; Rusher v. State, 94 Ga. 366, 47 Am. St. Rep. 175, 21 S. E. 594; Shields v. State, 104 Ala. 35, 53 Am. St. Rep. 17, 16 So. 85, 9 Am. Crim. Rep. 149; State v. Flynn, 36 N. H. 64; Thornton v. State, 117 Wis. 338, 98 Am. St. Rep. 924, 93 N W. 1107; Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103; United States v. Wong Quong Wong, 94 Fed. 832; 4 Wigmore, Ev. §§ 2251, 2270; 2 Wharton, Crim. Ev. 10th ed. § 516f, p. 1076.

The common-law rules of evidence embodied in the Constitution have, by being so embodied, been clothed with the dignity

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taken from him under such circumstances that their admission would violate his constitutional right not to be required to furnish evidence against himself. Thus, on a prosecution for keeping cocaine with intent to sell it, a bottle of cocaine found on the defendant's person is admissible in evidence against him, notwithstanding it was obtained by an unlawful search of his person, and by force or threat of shooting. State v. Sutter, 71 W. Va. 371, 43 L.R.A. (N.S.) 399, 76 S. E. 811.

And a leaf torn from a book, on which one under arrest charged with a crime wrote an offer of money to the special agent who had arrested him, if the latter would "keep quiet" about the matter, and the book itself from which the leaf was torn, are admissible in evidence against the accused, although they were forcibly taken from him by the special agent. State v. Reese, — Utah, —, 140 Pac. 126. The court said: "While we do not wish to be understood as unconditionally approving the use of force in taking property from one who is accused of an offense, yet we cannot interfere with convictions which are otherwise regular, proper, and legal for matters of this character."

As stated in Rex v. Honan, 26 Ont. L. Rep. 484: "The question is not, By what means was the evidence procured? but is whether the things proved were evidence." And, accordingly, articles consisting of slips and racing forms and other papers apparently used for the purpose of recording bets, found on the person and upon the premises of one accused of keeping a common betting house, and seized by police constables, are admissible in evidence against him, although the officers entered the premises and seized the articles illegally.

And neither the constitutional provision against unlawful searches and seizures, nor that against compelling an accused to give evidence against himself, is violated by the admission in evidence against an accused, of a letter written by him to his wife, and obtained by an illegal search of his premises (State v. Wallace, 162 N. C. 622, 78 S. E. 1); or of articles taken and carried away from his premises by the sheriff and county attorney, without his knowledge or consent (State v. Rogne, 115 Minn. 204, 132 N. W. 5).

So, "the evidence obtained by an illegal search of the house of the accused is admissible against him. This has been repeatedly held by this court and the supreme court." Young v. State, 12 Ga. App. 86, 76 S. E. 753.

And letters procured from an accused by officers who went to his house for the purpose of getting from him other papers are not inadmissible in evidence against him on the ground that they were procured by an unlawful search and seizure, where the accused did not seriously resist the search that was made. Lum Yan v. United States, 115 C. C. A. 122, 193 Fed. 970. The court said: "It will be premised that the objection to receiving the letters in evidence as being private papers taken without the accused's assent was raised for the first time in the trial of the cause for the offense charged. The question was not in any way made or interposed in any attempt to resist an unlawful seizure of the documents. Indeed, it does not appear that plaintiff in error [the accused] seriously resisted the search that was made. Under such circumstances, it has been held by the Supreme Court of the United States (Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372) that such papers are competent as proof tending to show the guilt of the accused, although they may have come into the possession of the officers irregularly, or by compulsory process."

And on a prosecution for illegally selling intoxicating liquors, the Federal liquor license issued to the defendant is admissible in evidence against him, although it was obtained by the state by stealth. Nixon v. State, 92 Neb. 115, 138 N. W. 136.

Likewise, on a prosecution for a violation of the prohibition laws, evidence of the finding of twenty-eight half-pint bottles of whisky in the defendant's valise is admissible, even though the search made by the parties arresting him, which disclosed these bottles, may have been illegal.

of a fundamental law; and the application of the same under the Constitution is not limited by the rules of the common law.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Black, Const. & Interpretation of Laws, p. 22; Bram v. United States, 168 U. S. 532, 542, 42 L. ed. 568, 573, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; Brown v. Walker, 161 U. S. 596, 597, 40 L. ed. 820, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Emery's Case, 107 Mass. 172, 9 Am. Rep. 22; Entick v. Carrington, 19 How. St. Tr. 1029; People ex rel. Hackley v. Kelly, 24 N. Y. 74; Sohm, Institutes of Roman Law, 2d ed. p. 30; Thayer, Ev. 263, 276.

Messrs. **John W. Davis** and **W. T. Denison**, Assistant Attorney General, for the defendant in error:

The question is no longer open.

Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 302, 52 L. ed. 208, 218, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595; Holt v. United States, 218 U. S. 245, 252, 54 L. ed. 1021, 1030, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138; United States v. Wilson, 163 Fed. 338; Hardesty v. United States, 91 C. C. A. 1, 164 Fed. 420.

Martin v. State, 1 Ala. App. 215, 56 So. 3.

And on a prosecution for having possession of intoxicating liquors with the intent to sell them, it does not constitute a legal objection to the admissibility of the evidence of officers that, on the day of the alleged offense, they went to the defendant's premises to execute a search warrant, and there found certain intoxicating liquors, etc., that the search warrant was illegally issued, or the officers in serving it exceeded their authority. "The accepted rule is that the admissibility of evidence is not affected by the illegality of the means through which the witnesses were enabled to obtain the evidence." Silva v. State, 6 Okla. Crim. Rep. 97, 116 Pac. 199.

The case of WEEKS v. UNITED STATES, it will be noted, is not necessarily opposed to any of the above decisions, as the United States Supreme Court expressly states that this is not the case of testimony offered at a trial, where the court is asked to stop and consider the illegal means by which proofs otherwise competent were obtained; but, in this case, the defendant had made a seasonable application, before trial, for the return to him of letters and private documents seized in his house in violation of his constitutional rights, and it was held that the court below should have restored these papers to the accused; that its refusal of his application for their return involved a denial of his constitutional rights, and that, in holding them and permitting their use upon the trial, it committed prejudicial error.

In United States v. McHie, 194 Fed. 894, the court granted an application by a corporation which was not itself one of the defendants, for a return of its property which had been seized in an unlawful raid on an alleged bucket shop conducted by it, and was held for use as evidence against the defendants, who were the individual agents and servants of the company. But in United States v. McHie, 196 Fed. 586, it appears that, at the time the order was entered directing the surrender of the property to the company, the district attorney filed a petition for its retention or impounding in the custody of the clerk for use upon the coming trial, whereupon the court entered an order impounding the property for use upon the trial, with leave to the defendants to apply to vacate such order. And in this case, the court denied a motion by the company to set aside the order thus impounding its property, holding that it had power to impound property unlawfully or irregularly taken by government officers, even though the property belonged to a stranger to the prosecution, where such impounding was necessary to the administration of justice.

But in a prosecution for keeping intoxicating liquors on hand at his place of business, evidence as to the finding of such liquors in the defendant's safe is inadmissible, where he was illegally arrested without a warrant merely on suspicion, and taken to the police barracks, and there, in the presence of the solicitor of the city court and of several policemen, was ordered to give up his keys to the safe, and, upon his refusal to do so, the officers caught hold of him, and forcibly and against his will and protest, overcoming his resistance by violence, took the keys from his pocket, and, leaving him in custody at the barracks, went to his place of business, secured a locksmith to turn the combination of the safe, and, when this was done, unlocked the safe with the keys thus secured from the person of the accused for that purpose, and found and seized the intoxicating liquors; the accused, by such conduct on the part of the officers, having been compelled to give evidence tending to criminate himself in violation of the constitutional provision. Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103.

And in Scott v. State, 14 Ga. App. 806, 82 S. E. 376, a prosecution for burglary, the court said: "Evidence of guilt which the defendant, either directly or indirectly, is compelled to disclose by an unlawful search and seizure of his person under illegal arrest, is not admissible in a criminal prosecution of the person thus illegally arrested."

And to like effect is Wright v. State, 9 Ga. App. 266, 70 S. E. 1126, which was a prosecution for carrying a concealed weapon.

Mr. Justice Day delivered the opinion of the court:

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the district court of the United States for the western district of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code [35 Stat. at L. 1129, chap. 321, U. S. Comp. Stat. Supp. 1911, p. 1652]. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched

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In Underwood v. State, supra, however, the court said: "True, the officers might have gone to the safe and, without a warrant, broken it open; and in that event the testimony probably might have been admissible; but they did not pursue that course. They forced the accused to give up his keys. In other words, they forced him to give into their possession the means of discovering the incriminating fact. It is wholly immaterial that they might have discovered the incriminating fact otherwise. We are simply discussing the method employed by the officers to compel the accused to furnish the means whereby the incriminating evidence was discovered."

Prosecution for carrying concealed weapons.

Supplementing note in 34 L.R.A.(N.S.) 61.

In Wright v. State, supra, the court also said: "Where evidence is incidentally disclosed by an unlawful search or seizure, it is not thereby necessarily rendered inadmissible; but where the sole object of the search and seizure was to obtain that very evidence, and the defendant was thus involuntarily compelled (in obedience to the will and act of another) to reveal the evidence of a crime, which he would not have disclosed but for the fact that his volition was nullified or supplanted by that of another who enforced disclosure, the evidence so obtained should not be received against the accused on his trial." And further: "The criterion by which to determine as to the admissibility of testimony obtained by reason of an illegal search of the defendant's person is, Who furnished the evidence? If the evidence of guilt which it is sought to introduce would not have been disclosed except by the defendant's being forced to disclose the incriminatory fact, then the fact or facts disclosed against the will of the accused are inadmissible against him."

But evidence of the finding by an officer of a concealed pistol on the person of the defendant is admissible in a prosecution for carrying a concealed weapon, where the defendant, prior to the discovery of the pistol on his person, had been lawfully arrested by the officer under a warrant for another offense. Pitts v. State, 14 Ga. App. 283, 80 S. E. 510. The court said that while "the obtaining of self-incriminating evidence by illegal seizure and search of the defendant's person must be regarded as compelling him to furnish testimony against himself, and evidence thus obtained is without probative value against him," yet "when evidence of one's guilt of carrying a deadly weapon is obtained by a search of his person while he is in the legal custody of an officer, under arrest for a different offense, and the search is necessary in order to disarm the prisoner, for the safety of the officer, the evidence is not illegal."

Shoes taken to compare with tracks.

Supplementing note in 34 L.R.A.(N.S.) 63.

For cases involving the question whether compelling accused to place his foot in a track for purposes of comparison violates the constitutional provision against self-incrimination, see note to State v. Turner, 32 L.R.A.(N.S.) 772.

The admission in evidence against one charged with murder, of one of his shoes, and testimony as to the similarity of the track made by it to tracks found going to and from the place where the body of the victim was found, does not violate the constitutional right of the defendant not to be compelled to be a witness against himself, although the chief of police ordered the defendant, while in jail, to take off his shoe and give it to him (the officer), and the defendant did so, and the shoe was then compared with the tracks found, and was put on the foot of another person who made a track beside one of those found, for comparison. State v. McIntosh, 94 S. C. 439, 78 S. E. 327.

Nor is the constitutional provision that an accused shall not be compelled to give evidence against himself violated by the admission against him of testimony as to the result of a comparison of his shoes with footprints found at the scene of the crime, where the accused, upon being taken to

the defendant's room and carried away certain letters and envelops found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant.

The defendant filed in the cause before the time for trial the following petition:

Petition to Return Private Papers, Books, and Other Property.

Now comes defendant and states that he is a citizen and resident of Kansas City, Missouri, and that he resides, owns, and occupies a home at 1834 Penn street in said city;

That on the 21st day of December, 1911, while plaintiff was absent at his daily vocation, certain officers of the government whose names are to plaintiff unknown, unlawfully and without warrant or authority so to do, broke open the door to plaintiff's said home and seized all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home, and this in violation of §§ 11 and 23 of the Constitution of Missouri, and of the 4th and 5th Amendments to the Constitution of the United States;

That the district attorney, marshal, and clerk of the United States court for the western district of Missouri took the above-described property so seized into their possession, and have failed and refused to return to defendant portion of same, to wit:

One (1) leather grip, value about $7; one (1) tin box valued at $3; one (1) Pettis county, Missouri, bond, value $500; three (3) mining stock certificates which defendant is unable to more particularly describe, valued at $12,000; and certain stock certificates in addition thereto, issued by the San Domingo Mining, Loan, & Investment Company; about $75 in currency; one (1) newspaper published about 1790, an heirloom; and certain other property which plaintiff is now unable to describe.

That said property is being unlawfully and improperly held by said district attorney, marshal, and clerk, in violation of defendant's rights under the Constitution of the United States and the state of Missouri.

That said district attorney purposes to use said books, letters, papers, certificates of stock, etc., at the trial of the above-entitled cause, and that by reason thereof and of the facts above set forth defendant's rights under the amendments aforesaid to the Constitution of Missouri and the Unit-

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that place, and asked by an officer to take off his shoes, did so willingly and voluntarily, and surrendered them to the officer. State v. Sirmay, 40 Utah, 525, 122 Pac. 748.

And in State v. Thompson, 161 N. C. 238, 76 S. E. 249, it is held generally that the admission of evidence as to the conclusions of witnesses who have compared tracks found at the place where a crime has been committed, with the shoes worn by a person suspected of having committed the crime, or one under arrest therefor, is not considered as making such person furnish evidence against himself, and does not violate his constitutional right "not to be compelled to give evidence against himself."

Miscellaneous.

Supplementing note in 34 L.R.A.(N.S.) 64.

"It does not affect the admissibility of letters and documents to show that they were taken from the person of the defendant at the time of his arrest." State v. Wilkins, — Or. —, 142 Pac. 589.

So, a letter found on the person of one charged with a crime at the time of his arrest, which he admits having written (Nioum v. Com. 128 Ky. 685, 108 S. W. 945), or an envelop found in the possession of one charged with forgery, on which he had written the names which he is alleged to have forged on another paper (Whorton v. State, — Tex. Crim. Rep. —, 152 S. W. L.R.A.1915B. 1082),—is admissible in evidence against the accused.

And on a prosecution for theft, money and a cloth bag or sack taken from the person of the defendant when he was arrested are admissible in evidence against him, together with testimony of the officer making the arrest as to the taking of the property off the defendant, and testimony of the prosecuting witness as to the identity of the sack as the one in which he kept his money when it was stolen, and as to the denomination of the bills lost by him, which tallied with the money taken off the defendant. Coleman v. State, — Tex. Crim. Rep. —, 150 S. W. 1177.

The admission in evidence against a prisoner charged with murder, of a letter written by him to his mother, which was intercepted in the hands of the jail keeper, is not a violation of either the constitutional provision against unreasonable search, or that against compelling one in a criminal case to be a witness against himself, as "these provisions do not relate to such an instance." State v. Booker, 68 W. Va. 8, 69 S. E. 295.

And compelling a druggist on trial for unlawfully selling spirituous liquors, to produce, in order that they may be used as evidence against him, the physicians' orders and prescriptions on which he has made sales of such liquors, and which he has preserved as required by statute, does not violate the constitutional provision against compelling an accused to be a witness

ed States have been and will be violated unless the court order the return prayed for;

Wherefore, defendant prays that said district attorney, marshal, and clerk be notified, and that the court direct and order said district attorney, marshal, and clerk, to return said property to said defendant.

Upon consideration of the petition the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order the district attorney returned part of the property taken, and retained the remainder, concluding a list of the latter with the statement that, "all of which last above-described property is to be used in evidence in the trial of the above-entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court. Among the papers retained and put in evidence were a number of lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the marshal upon his search of defendant's room.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters writ-

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against himself, as such documents are not his private papers within the meaning of the provision, but are quasi public documents. State v. Davis, 68 W. Va. 142, 32 L.R.A.(N.S.) 501, 69 S. E. 639, Ann. Cas. 1912A, 996. Generally, as to whether records of sales of liquor which a druggist is by law required to keep may be used as evidence against him in a criminal prosecution, see note to State v. Pence, 25 L.R.A. (N.S.) 818.

Upon a trial for unlawfully selling liquors, the defendant's valise and its contents, consisting of about 3 gallons of whisky in quart and pint bottles, are admissible in evidence against him, where there was no examination or search into the contents of the valise before the defendant's arrest, but he voluntarily disclosed its contents. Weatherington v. State, 13 Ga. App. 408, 79 S. E. 240.

And the admission in evidence against an accused person, of papers voluntarily produced and delivered by him to the prosecuting attorney just prior to the finding of an indictment against him, for the attorney's examination and use in the investigation of a matter which the accused knew was about to be presented to the grand jury then in session, and in which he was not then named as a defendant, and in connection with which he claimed to be innocent of all wrongdoing, but upon which he admitted that these papers would throw some light,—does not violate either the constitutional provision against compelling an

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accused to produce evidence against himself, or that prohibiting unreasonable searches or seizures, even though the prosecuting attorney promised to return the papers and has refused to do so, and the court has ordered that they be kept in its custody, open to inspection by both parties, so long as required as evidence. United States v. Hart, 216 Fed. 374. The court said: "It seems to me in view of the history of our Constitution, that its inhibition against unreasonable searches and seizures is not aimed at the use of papers and documents voluntarily turned over by a subsequently indicted person to the prosecuting officer for use in the investigation before a grand jury, of which investigation he has knowledge and in which he is seeking to exculpate himself, and retained for use by such officer on the trial; their relevancy and importance having become apparent on full examination. In the absence of threats, force, and coercion, and of promises of immunity, it seems to me that when a person voluntarily turns over papers to the prosecuting officer for examination for the purpose of determining whether or not a crime has been committed, and if so the guilty party, the expectation of such person being that he will be wholly exonerated, he may not, if such papers with other evidence disclose his guilt, prevent the use of such papers, on the claim that there has been an unwarranted search and seizure, or a deprivation of property without due process of law, or that he is being compelled to

ten to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and 5th Amendments to the Constitution of the United States. We shall deal with the 4th Amendment, which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for the court in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. See 2 Watson, Const. 1414 et seq. Resistance to these practices had established the principle which was enacted into the fundamental law in the 4th Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution said: "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen." "Accordingly," says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he com-

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produce evidence against himself. The breach of an agreement to return, assuming such breach, does not amount to an unreasonable search and seizure, or to a deprivation of property, when the court sanctions the detention of the papers for use on the trial only, or to compelling the defendant to produce evidence against himself."

In this case it appears that, as in WEEKS v. UNITED STATES, a due motion for the return of the papers to the accused had been denied, and the court distinguished WEEKS v. UNITED STATES, on the ground that it "dealt with a case where there was plainly both an unreasonable and an unlawful search of the defendant's premises and seizure of his papers there found," while here, in the Hart Case, there was merely a voluntary delivery of the papers for the purpose of making an investigation before the grand jury in session, whether or not a crime had been committed, and, if so, fixing the responsibility, which investigation resulted in the indictment with others of the one so delivering the papers, so that the court here had properly denied the motion of the accused prior to the commencement of the trial, for an order directing the prosecuting attorney to return the papers to him. United States v. Hart, supra.

And money and papers voluntarily surrendered to the prosecuting attorney by one suspected of the crime of attempted bribery, with full knowledge that they were to be used as evidence against him on the trial of a charge which was to be filed against him for that crime, are admissible in evidence against him, and should not be ordered returned to him upon his petition prior to the trial. State ex rel. Murphy v. Brown, — Wash. —, 145 Pac. 69.

On a prosecution for unlawfully having possession of certain game, evidence of the finding of such game by an officer, in the defendant's game bag, after his arrest, is admissible against the defendant, where, although he was illegally arrested without a warrant, he thereafter voluntarily surrendered possession of the game bag before the search thereof was made. Cooper v. State, 14 Ga. App. 464, 81 S. E. 364.

And where the officer arresting one accused of a burglary told the accused that the state had quite positive proof of his guilt, and that if he would give up a gun alleged to have been stolen from the building broken into and entered, it would save the necessity of locking him up while a search warrant could be procured for its discovery, and the accused, without any apparent protest by him, and without offer of immunity or clemency by others, proceeded with the officer to his room and delivered up the gun,—evidence of these facts is not inadmissible against the accused as evidence of a confession obtained by duress or by promise or hope of immunity or reward. State v. Skaggs, 153 Iowa, 381, 133 N. W. 779.

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mit a trespass. This principle is jealously insisted upon." In Ex parte Jackson, 96 U. S. 727, 733, 24 L. ed. 877, 879, this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that, consistently with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures, such matter could only be opened and examined upon warrants issued on oath or affirmation, particularly describing the thing to be seized, "as is required when papers are subjected to search in one's own household."

In the Boyd Case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 How. St. Tr. 1029, Mr. Justice Bradley said (630):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In Bram v. United States, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's Case, dealing with the 4th and 5th Amendments, said (544):

"It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop, Crim. Proc. § 211; Wharton, Crim. Pl. & Pr. 8th ed. § 60; Dillon v. O'Brien, 16 Cox, C. C. 245, Ir. L. R. 20 C. L. 300, 7 Am. Crim. Rep. 66. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained,—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within his control.

The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well or other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty

to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372, this court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd Case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court, the first of which is Adams v. New York, supra. In that case the plaintiff in error had been convicted in the supreme court of the state of New York for having in his possession certain gambling paraphernalia used in the game known as policy, in violation of the Penal Code of New York. At the trial certain papers, which had been seized by police officers executing a search warrant for the discovery and seizure of policy slips, and which had been found in addition to the policy slips, were offered in evidence over his objection. The conviction was affirmed by the court of appeals of New York (176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636), and the case was brought here for alleged violation of the 4th and 5th Amendments to the Constitution of the United States. Pretermitting the question whether these Amendments applied to the action of the states, this court proceeded to examine the alleged violations of the 4th and 5th Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, was competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant, and not in the wrongful invasion of the home of a citizen, and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, Ev. § 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.

The same point had been ruled in People v. Adams, 176 N. Y. 351, 63 L.R.A. 406, 98 Am. St. Rep. 675, 68 N. E. 636, from which decision the case was brought to this court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held they were, they were admissible in evidence at the trial, the court saying (p. 358): "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which are material and properly offered in evidence." This doctrine thus laid down by the New York court of appeals and approved by this court, that a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony, has the

sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to State v. Turner, 136 Am. St. Rep. 129, 135 et seq. After citing numerous cases the editor says: "The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence. People v. Adams, supra. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof."

It is therefore evident that the Adams Case affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The government also relies upon Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, in which the previous cases of Boyd v. United States, and Adams v. New York, supra; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125, and Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, are reviewed, and wherein it was held that a subpœna duces tecum requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies, located in different parts of the United States, was an unreasonable search and seizure within the 4th Amendment, and it was there stated that (p. 76) "an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd Case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpœna duces tecum, against which the person, be he individual or corporation, is entitled to protection." If such a seizure under the authority of a warrant supposed to be legal, constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the 4th Amendment.

Another case relied upon is American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 Ann. Cas. 595, in which it was held that the seizure by the United States marshal in a copyright case of certain pictures under a writ of replevin did not constitute an unreasonable search and seizure. The other case from this court relied upon is Holt v. United States, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 20, 20 Ann. Cas. 1138, in which it was held that testimony tending to show that a certain blouse which was in evidence as incriminating him, had been put upon the prisoner, and fitted him, did not violate his constitutional right. We are at a loss to see the application of these cases to the one in hand.

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in Wise v. Henkel, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc. § 210; Rex v. Barnett, 3 Car. & P. 600; Rex v. Kinsey, 7 Car. & P. 447; United States v. Mills, 185 Fed. 318; United States v. McHie, 194 Fed. 894, 898.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the

finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. Boyd Case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and see Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion.

KENTUCKY COURT OF APPEALS.

FARMERS' MUTUAL EQUITY INSURANCE SOCIETY, Appt.,
v.
HERBERT SMITH.

(158 Ky. 459, 165 S. W. 675.)

Insurance — temporary vacancy of property — effect.

Vacancy of premises from Saturday to the following Monday pending change of tenants does not avoid a five-year policy of insurance thereon which provides that insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit.

(April 21, 1914.)

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in plaintiff's favor in an action to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. **Montgomery Merritt**, for appellant:

Vacancy of premises from Saturday to the following Monday avoids the policy.

Ostrander, Fire Ins. § 143; Bennett v. Agricultural Ins. Co. 50 Conn. 420; Farmers' Ins. Co. v. Wells, 42 Ohio St. 519; Burner v. German-American Ins. Co. 103 Ky. 370, 45 S. W. 109; Robinson v. Ætna Ins. Co. 18 Ky. L. Rep. 865, 38 S. W. 693.

Messrs. **Vance & Heilbronner**, for appellee:

The provision in the policy voiding insurance because of vacancy must be construed to mean a reasonable vacancy, and a vacancy from Saturday to Monday is not such a va-

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Note. — Insurance: vacancy during change of tenants as violation of vacancy clause in fire policies covering rented premises.

This note does not cover the question as to when the insured is bound to give notice of a vacancy, or as to the validity or effect of such notice. Nor does it go into the question of increase of risk by vacancy, or the question whether the vacancy of a part of a building will avoid a policy as to the whole. So, the question as to a temporary vacancy ceasing before loss is beyond the scope of the note. See on that subject, notes in 10 L.R.A.(N.S.) 740, and 28 L.R.A. (N.S.) 593.

As to effect of sleeping on premises to prevent their becoming vacant or unoccupied within insurance policy, see note to Seubert v. Fidelity-Phenix Ins. Co. 40 L.R.A. (N.S.) 58.

As to vacancy permit as waiver of previous vacancy, see note to Caledonian Ins. Co. v. Smith, 47 L.R.A.(N.S.) 619.

Introduction.

A distinction has been recognized between rented premises and premises occupied by the owner in determining whether or not they have become vacant or unoccupied.

The court in Hotchkiss v. Phœnix Ins. Co. 76 Wis. 269, 20 Am. St. Rep. 69, 44 N. W. 1106, relative to this question said: "Under certain circumstances, premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insure it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house be considered vacant, and the policy forfeited or suspended (according to its terms), immediately upon the tenant's leaving it." And to the same effect is Lockwood v. Middlesex Mut. Assur. Co. 47 Conn. 553.

The great majority of the courts have adopted a liberal construction of provisions in policies on rented property against the premises becoming vacant or unoccupied. A few courts, however, have construed such provisions strictly according to their letter, and have held the policies avoided even during a reasonable change of tenants.

Liberal construction.

The rule was adopted in the following cases, where policies issued on rented premises were in suit, that, notwithstanding the fact that they contained provisions that they should become void in case the premises became vacant or unoccupied, still they

cancy as can be construed to work a forfeiture.

Dwelling-house Ins. Co. v. Walsh, 10 Ky. L. Rep. 282; 19 Cyc. 732.

Clay, C., filed the following opinion:

Plaintiff, Herbert Smith, was the owner of a frame dwelling house which was insured by defendant, Farmers' Mutual Equity Insurance Society, for the sum of $300. The policy, which was to continue for a period of five years, contained the following provision: "Insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit, which will be granted only on the written application filed with the secretary, for a period of thirty days, with privilege of one renewal. The amount of the insurance shall be reduced one half during said vacancy." The house was occupied by a tenant who moved out on Saturday evening, April 19, 1913. Another tenant was to take possession on the following Monday, April 21st, but was prevented from doing so by the destruction of the property by fire, which occurred the same morning. Having refused to pay the insurance, plaintiff brought this action against the defendant to recover on the policy. The company defended on the ground of nonoccupancy, in violation of the contract. This defense was held insufficient, and judgment was rendered in favor of plaintiff. Defendant appeals.

In construing exceptions, warranties, and conditions in policies of insurance, it is generally held that the language, being that

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contemplated a temporary vacancy in case of a change of tenants, and were not therefore avoided where the vacancy did not continue for an unreasonable time: Kelley v. Home Ins. Co. Fed. Cas. No. 7,658; Traders' Ins. Co. v. Race, — Ill. —, 29 N. E. 846; Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep. 334, 59 N. W. 16; Dwelling-house Ins. Co. v. Walsh, 10 Ky. L. Rep. 282; Tracey v. Queen City F. Ins. Co. 132 La. 610, 61 So. 687; Union Ins. Co. v. McCullough, 2 Neb. (Unof.) 198, 96 N. W. 79; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; Liverpool & L. & G. Ins. Co. v. Buckstaff, 38 Neb. 148, 41 Am. St. Rep. 724, 56 N. W. 695; State v. Tuttgerding, 8 Ohio Dec. Reprint, 74; Doud v. Citizens' Ins. Co. 141 Pa. 47, 23 Am. St. Rep. 263, 21 Atl. 505; Roe v. Dwelling House Ins. Co. 149 Pa. 94, 34 Am. St. Rep. 595, 23 Atl. 718. See also cases under heading, "Specific holdings."

Strict construction of provisions against vacancy.

As before intimated, some courts have been inclined to give a strict construction to clauses in policies on rented premises providing that they should become void upon the buildings becoming vacant or unoccupied.

Thus, in Ridge v. Scottish Commercial Ins. Co. 9 Lea, 507, where a policy for three years on a rented house provided that it should become void if the premises should become vacant or unoccupied without the insurer's consent, the risk was held to be avoided upon its appearing that four or five days before the property was burned, the tenant had moved out leaving it temporarily vacant, and the insured's agent closed the building and procured another tenant, who was to have moved in on the day after the fire occurred. The court said: "Now the question is, whether, notwithstanding this stipulation, the company will nevertheless be liable for a loss occurring during a vacancy, provided the vacancy be of short duration, or, in the language of the bill, a necessary and not unreasonable vacancy, occurring by a tenant unexpectedly moving out and the difficulty of procuring another to take his place at once. If the risk be greater during a vacancy, then the length of the vacancy is immaterial as to the degree of the risk; it is only material as to the continuance of the risk. A house vacant for five days is during the period as completely vacant as it would be if so continued for six months. The increased risk is the same in either case, the difference being only in the period of its continuance. Furthermore, how are the courts to determine what would be reasonable vacancy? What period of time shall they fix? If the policy covers a loss occurring during a vacancy continuing five days, why not ten or twenty? The same misfortune of the owner might prevent him from getting a tenant for even a longer period. The owner, however, having failed to stipulate for such contingencies, and procure a policy without limit in this respect, and having failed to procure the assent of the company, it simply results that during the period of vacancy he is without insurance, and carries the risk himself."

And in East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122, it was held that a policy on a warehouse providing that if it should become vacant or unoccupied without the insurer's consent, the policy shall be null and void, was avoided where one tenant moved out on Saturday and another moved in on Wednesday, and the property was burned sometime later.

On a subsequent appeal of this case, however, in 12 Tex. Civ. App. 533, 34 S. W. 393, in which new evidence was before the court tending to show a changing of the several tenants of the building at different times, but a continuous use by some one of the tenants, it was held that the policy was not avoided on account of vacancy or unoccupancy. The court here expressly differed from the supreme court as to the construction of the provision in question, and said: "In reason and in the nature of things the assumption under this state of facts necessarily arises that the parties to the

of the insurer, selected by him and intended for his benefit, must be clear and unambiguous, and if of doubtful meaning, the doubt will be resolved in favor of the insured. The purpose of such conditions in a policy is to restrict the insurer's obligation, and, if the meaning is not clear, it is his fault in not making use of more definite terms in which to express it. Chandler v. St. Paul, F. & M. Ins. Co. 21 Minn. 85, 18 Am. Rep. 385; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805; Olson v. St. Paul, F. & M. Ins. Co. 35 Minn. 432, 59 Am. Rep. 333, 29 N. W. 125. In determining the effect of a provision of a policy avoiding the insurance if the premises become vacant or unoccupied, it is generally held that the intention of the parties will control, and that such intention will be ascertained from the whole instrument, the subject-matter of the contract, and the situation of the property insured. Stout v. City F. Ins. Co. 12 Iowa, 371, 79 Am. Dec. 539; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88.

Perhaps the most important consideration in passing on a question of forfeiture for vacancy or nonoccupancy is the use which, under the policy, may be made of the premises insured. Where it is occupied by the owner as a residence, it cannot be said to be within the contemplation of the parties to the contract that the premises shall never become vacant or unoccupied, even for a very brief period of time. The company knows that the owner will sometimes

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contract contemplated that one tenant may move out and another move into the building; and to accomplish this purpose it was not essential, in order to preserve the life of the policy, that the incoming tenant should be required to do the unusual and unheard-of thing of taking actual possession and moving into the building before the outgoing tenant had moved out and vacated it; but upon the contrary, it is fair to assume, from the nature of the contract, that a reasonable time may be allowed the incoming tenant in which to take possession. This construction naturally arises from the terms of the policy when considered with the character of property insured. To so hold that the contract in this case requires a forfeiture to be declared upon a vacancy so arising would be to place upon the policy an unreasonable and strained construction, and would give to the language used a technical effect and application that would, in our opinion, defeat the meaning and intent of parties that may be gathered from a reasonable construction of the terms of the contract. But this, in our opinion, is the effect of the decision of the supreme court. The reasoning in that case, by an inverse process, would logically lead to the holding that a vacancy or unoccupancy for the fraction of an hour or an hour's time would avoid the policy; or, in other words, that one who insures his property under a stipulation of this character must become a prisoner confined to his premises, otherwise a temporary absence such as a closing up and absenting himself from his place of business on the Lord's Day, or a visit to his neighbors, or a removal for a time however slight of his furniture and goods out of the building for the purpose of repairing it and cleaning it, would be at the peril of a forfeiture of his policy. Such a result, we think, was never contemplated by the parties to this contract. But, upon the contrary, knowing that the policy authorized a change of tenants, and that in the nature of things a change might occur, it would be unreasonable to construe the contract in a way that would practically cut off this right, and to arbitrarily declare that this purpose as contemplated should not be given effect."

In Ætna Ins. Co. v. Meyers, 63 Ind. 238, it was held that no recovery could be had under a policy covering a tenement house, and providing that it should cease to operate so long as the property was unoccupied, where the tenants moved out about four days before the fire, although the insured had secured another tenant who was to take possession after certain repairs were made; it being held that it might naturally be expected that a change of tenants would be had, and that the insurer had inserted this provision to relieve it of liability during the intervening vacancy.

And it has been held that a policy providing that "if during the insurance the above-mentioned premises shall become vacant or unoccupied, then and from thenceforth, so long as the same shall continue vacant or unoccupied, this policy shall cease and be of no force or effect," is avoided where the tenants moved out the day before a fire, since the contract was held to be absolute and unconditional, and the fact that the property was a tenement house occupied by a tenant when insured, and that this fact was known to the insurer's agent, was held to have no weight against the express provision. Wheeler v. Phœnix Ins. Co. 53 Mo. App. 446.

And in Bennett v. Agricultural Ins. Co. 50 Conn. 420, where a policy covering a house occupied by a tenant provided that if "the dwelling house hereby insured shall cease to be occupied as such, then this policy shall cease and be of no more force or effect," it was held that the provision was explicit and not obscure, and that the policy was avoided where the tenant moved from the house with all of his furniture about 6 o'clock in the evening, and it was destroyed about 2 o'clock the next morning.

And in Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 So. 768, where a policy provided that if the building, which was insured as a dwelling, became vacant or unoccupied without the written permission of the insurer, the policy should be void and all insurance should cease, it was held to be

be away on a visit, or be temporarily absent for some necessary purpose. So, too, where the property is occupied by a tenant, it must necessarily be within the contemplation of the parties to the contract that occasionally it will be vacant for a short and reasonable interval of time between the outgoing of one tenant and the incoming of another. While there is a lack of uniformity in the decisions on the question, and many of the courts hold that a forfeiture is incurred even in case of the temporary absence of the owner, or a short period of time between the exchange of tenants, yet many of the courts hold that, under the circumstances above set forth, a forfeiture will not be adjudged. Thus, in the case of Franklin F. Ins. Co. v. Kepler, 95 Pa. 492, the absence of the insured from his dwelling from Wednesday until Monday to attend a funeral was held not to be a breach of the provision of the policy against vacancy and unoccupancy. In the case of Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 30 N. W. 808, the tenant moved out on Tuesday. On Wednesday the owner took possession and commenced cleaning the house, intending to occupy it with his family on Saturday. On Friday night the house burned down. It was held that the house was not vacant. In Shackelton v. Sun Fire Office, 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343, the house was occupied by a tenant. The tenant moved out, and the landlord at once moved his own goods in and began to clean up, with the intention of

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avoided upon its appearing that the tenant moved out fourteen days before the fire occurred, and that no vacancy permit had been secured.

In Continental Ins. Co. v. Kyle, 124 Ind. 132, 9 L.R.A. 81, 19 Am. St. Rep. 77, 24 N. E. 727 it was held that a building was vacant and unoccupied where a tenant had moved out, although for the purpose of letting new tenants in, and they intended to move in the day after the fire occurred, and had already made some repairs on the house, but nothing had been left in it except two or three planes.

And in Richards v. Continental Ins. Co. 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350, the house was held vacant where the tenant moved out with the insured's knowledge two days before the fire, although the tenant left some goods in the house which he did not need at the time for the purpose of housekeeping, there being no other tenant moving in to take his place.

And in Niagara F. Ins. Co. v. Drda, 19 Ill. App. 70, where a policy provided that if the building should become vacant or unoccupied for the purpose indicated, as a dwelling house, the policy should become void unless the underwriters indorsed their consent upon the contract, it was held erroneous to make the insurer's liability depend upon the diligence of the insured to keep the building occupied.

See also McClure v. Watertown F. Ins. Co. and Farmers' Ins. Co. v. Wells, under subdivision, "Effect of landlord's ignorance of vacancy, or lack of control over tenant."

Effect of landlord's ignorance of vacancy, or lack of control over tenant.

It has been held that policies on rented premises were avoided because of a breach of the provision against the premises becoming vacant or unoccupied, although the insured had no knowledge that his tenant had moved out. Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; Farmers' Ins. Co. v. Wells, 42 Ohio St. 519; McClure v. Watertown F. Ins. Co. 90 Pa. 277, 35 Am. L.R.A.1915B. Rep. 656; East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122.

In Farmers' Ins. Co. v. Wells, supra, it was held that a condition that the policy should be void if the building should become vacant or unoccupied was absolute, and that where a tenant moved out during the term of his lease without any intention of returning, and during the night following the house burned, no recovery could be had, although the insured had no knowledge of the removal.

And in McClure v. Watertown F. Ins. Co. supra, it was held that no recovery could be had under a policy providing that it should be void if the insured house became vacant by the removal of the tenant, or ceased to be occupied in the usual and ordinary manner that dwelling houses are occupied, where the insured's tenant moved from the premises without his knowledge or consent, although as soon as he discovered the fact he endeavored to procure a new one, but a loss occurred before he succeeded.

And it has been held that a provision that the insurer should not be liable for any loss while a dwelling house was left without an occupant or person actually residing therein, except in case of temporary absence, while none of the household goods were removed, was violated where the tenant had moved from the premises six or eight days before the fire, although the insured lived at some distance, and although the tenant's term was not up, and the insured did not suppose he would quit the premises before that time, notwithstanding he was in arrears for rent and his goods had been distrained. Abrahams v. Agricultural Mut. Assur. Asso. 40 U. C. Q. B. 175.

And in Sleeper v. New Hampshire F. Ins. Co. 56 N. H. 401, the insured had no knowledge that a tenant who had paid rent in advance for nearly a year had moved, but it was nevertheless held that a vacancy occurred within the meaning of the policy.

In Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977, 9 Ann. Cas. 91, it was held that the usual condition against

occupying the house himself. Next day he went away for three days' absence. While cleaning the house he ate and slept at a neighboring house, and after a few days went off on a business trip. While gone the house was burned. It was held that the policy had not become void on the ground of vacancy. In the case of Laselle v. Hoboken F. Ins. Co. 43 N. J. L. 468, the policy provided that it should become void "if the dwelling house should become vacant and unoccupied and so remained." It was held that the mere absence of the tenant, who was then occupying the building as a dwelling house, on the night of the fire, did not leave the building vacant or unoccupied within the sense of the contract. In Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011, it was held that a continuous use of the dwelling house was not necessary to constitute occupancy within the meaning of the fire insurance policy, but that the family might be absent for health, pleasure, business, or convenience for reasonable periods. In Doud v. Citizens' Ins. Co. 141

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vacancy in insurance policies on property occupied by the owner, which was inserted in a policy on a building occupied by a tenant, would not operate to avoid the policy immediately upon the removal of the tenant, where the owner had no notice of the removal or reasonable opportunity to obtain it.

See also German Ins. Co. v. Davis, under "Specific holdings," and Vanderhoef v. Agricultural Co., under "Question of law or fact."

In some cases, following the stipulation against vacancy or unoccupancy, there is found a provision reading "by any means within the knowledge or control of the insured," or words to that effect.

Thus, in American Cent. Ins. Co. v. Clarey, 28 Ill. App. 195, where a policy insuring a "dwelling house occupied by a tenant" provided that it should become void "if the premises shall be used or occupied so as to increase the risk, or be or become vacant or unoccupied, . . . or the risk be increased by the erection or occupation of neighboring buildings, or by any means within the knowledge or control of the assured," it was held that the last clause referred back and modified the preceding, and that the policy was not avoided where the tenant moved out in the morning and the house burned on the evening of the same day, it appearing that the insured had no knowledge of the tenant's vacating.

But in Dennison v. Phœnix Ins. Co. 52 Iowa, 457, 3 N. W. 500, there was held to be a violation of provisions that the policy should be void if the premises should "become vacant or unoccupied and so remain without notice to and consent of this company, . . . or the risk be increased by the erection of neighboring buildings, or by any means whatever within the control of the assured," where the tenant moved out seventeen days before the fire, and it remained tenantless until destroyed, although the vacancy occurred by some means not within the control of the insured, and without his knowledge, it being held that the last clause of the provision did not refer to the provision as to vacancy. The court said: "It is not a question as to how long this state of things may exist without the knowledge of the assured. He is bound by the terms of his policy to see to it that his house does not become vacant, or give notice, etc. Neither is it a proper inquiry as to whether the risk is increased by reason of the building being unoccupied. The parties have settled that question by their contract. The question as to whether the building was unoccupied for a reasonable or unreasonable length of time is wholly immaterial. The time is only material in determining whether the building is, in fact, vacant or unoccupied within the meaning of the contract. The only material consideration is, Was this building vacant or unoccupied, and did it so remain until destroyed by fire? Of course, the terms of the contract must receive a reasonable construction. The parties did not intend that one tenant should not move out and another move in. Nor did they intend that the house should be deemed vacant if the occupant should close it and go off on a visit, and not occupy it for a reasonable time. But the evidence in this case tends to show that the building was actually unoccupied for seventeen days, not by reason of anything other than that one tenant left, and the house stood there awaiting another occupant. It was, to all intents, a vacant and unoccupied house when it was destroyed. It is immaterial how the house came to be vacated or unoccupied." And to the same effect is Moore v. Phœnix F. Ins. Co. 64 N. H. 146, 10 Am. St. Rep. 384, 6 Atl. 27.

In North American F. Ins. Co. v. Zaenger, 63 Ill. 464, a provision that the policy should be void if the premises should become vacant, or the risk increased by erection of buildings, "or by any means whatever within the control of the assured, without the consent of" the insurer, was held to be in the nature of a warranty that the premises should not become vacant if within the insured's power to prevent it, and where it appeared that the tenant had left some three weeks before the fire, it was held incumbent on the insured to show that the vacation of the house was beyond his control.

In Atlantic Ins. Co. v. Manning, 3 Colo. 224, where a policy provided that if the "premises shall become vacant or unoccupied, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured," it should be void, in an action in which it appeared that the tenant on the insured premises moved before the fire, and that shortly afterward, and before the expiration of his term, and

Pa. 47, 23 Am. St. Rep. 263, 21 Atl. 505, it was held, under a policy of insurance on leased premises, containing a clause avoiding the policy if the premises should become vacant without the written consent of the insurer, that a reasonable time should be allowed to carry out a change of tenants without imposing upon the insured the penalty of either an intended or permitted vacation of the premises. The same rule was followed by our superior court in the case of Dwelling-house Ins. Co. v. Walsh, 10 Ky. L. Rep. 282.

Other authorities might be added, but those cited are sufficient to establish the rule that is clearly applicable under the facts of this case. Here the tenant vacated the house on Saturday evening. Another tenant was to move in on the following Monday. Early Monday morning the house was burned. The interval of time incident to the change of tenants was not only not unreasonable, but such as the parties to the contract must have contemplated would necessarily take place.

Judgment affirmed.

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while some of his property remained in the house, it burned, it was held proper to instruct the jury on the question of vacancy that if it was not within the means or control of the insured, he could recover.

Vacancy as question of law or fact.

What is meant by the terms "vacant or unoccupied" is a question of law for the court. Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093; Gash v. Home Ins. Co. 153 Ill. App. 31; Phœnix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692.

And where the undisputed facts as naturally interpreted show vacancy and unoccupancy, and consequent increase of risk, it becomes the duty of the court to declare a verdict for the insurer. Moore v. Phœnix F. Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27.

But ordinarily the question whether a building is vacant or unoccupied at the time a loss occurs is one of fact for the jury. Schuermann v. Dwelling House Ins. Co.; Gash v. Home Ins. Co.; Phœnix Ins. Co. v. Tucker; and German-American Ins. Co. v. Buckstaff, supra; State v. Tuttgerding, 8 Ohio Dec. Reprint, 74.

And the question whether a house was unoccupied was held to be for the jury in Vanderhoef v. Agricultural Ins. Co. 46 Hun, 328, where the evidence, among other things, showed that a tenant of a part of the premises had left about a week before the fire, but the insured did not learn of the fact until the day before the fire occurred.

And in Wait v. Agricultural Ins. Co. 13 Hun, 371, in which a policy provided that it should become void if the house should cease to be occupied in the usual and ordinary manner in which dwelling houses are occupied as such, the question whether there had been a breach of the provision was held for the jury, where the tenant commenced to move out and removed most of his furniture and all his family from the house, and a fire occurred the next night.

And in Woodruff v. Imperial F. Ins. Co. 83 N. Y. 133, the question whether the premises were vacant or unoccupied was held to be for the jury where they were rented and occupied until two days before the fire, and the former tenant testified that he left part of his goods in the house with the insured's permission, and that his tenancy ceased when his goods were burned, and another witness testified that he was in the house the day before the fire and saw goods in some of the rooms and that other rooms were locked.

So, in Cummins v. Agricultural Ins. Co. 67 N. Y. 260, 23 Am. Rep. 111, the question whether the insured house had become vacant by removal of the occupant was held for the jury where it appeared that the occupant went away temporarily to stay at the insured's house during his absence, but that he left his furniture in the house, and his wife visited it from time to time, and they intended to return there to reside, the court holding that the provision had reference to a permanent removal.

In Moore v. Phœnix F. Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27, it was held that there was not sufficient evidence to take to the jury the question whether the insured building was "vacant and unoccupied" for a period of more than ten days, where the testimony showed that the tenant moved away and no one lived on the premises, which were in a secluded place, for nearly three months between the date of the policy and the fire, and that a verdict for the defendant should have been directed.

In Bonenfant v. American F. Ins. Co. 76 Mich. 653, 43 N. W. 682, while the evidence tended to show that a tenant had quit and removed from the premises with the intention of remaining permanently away, the plaintiff introduced some testimony under which it was held proper to submit the question whether the premises had become vacant to the jury.

Specific holdings.

In the following cases, involving policies on rented property, there was held to be no violation of provisions that the policies should become void if the buildings became vacant or unoccupied,—

—where the tenant had commenced moving and part of his goods had been taken away and part remained on the insured premises, Insurance Co. of N. A. v. Coombs, 19 Ind. App. 331, 49 N. E. 471; Norman v. Missouri Town Mut. F. L. T. C. & W. Ins. Co. 74 Mo. App. 456; Liverpool & L. & G. Ins. Co. v. Buckstaff, 38 Neb. 146, 41

Am. St. Rep. 724, 56 N. W. 695; Omaha F. Ins. Co. v. Sinnott, 54 Neb. 522, 74 N. W. 955; Insurance Co. of N. A. v. Hannum, 1 Monaghan (Pa.) 369;

—where the tenants, without the insured's knowledge, moved out part of their stock on the evening preceding the fire, but left some of their things and retained the key, German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698;

—where, a day or two prior to the fire, a tenant had moved out, but another tenant had moved in some of his property, Union Ins. Co. v. McCullough, 2 Neb. (Unof.) 198, 96 N. W. 79;

—where, so far as appeared, one tenant moved in when the other moved out, Woodruff v. Imperial F. Ins. Co. supra;

—where a tenant's term expired April 1st, and he commenced moving March 24th, and finished on the 27th, and the property burned on the 28th, and it appeared that it had been let to a new tenant whose term was to commence April 1st, Roe v. Dwelling House Ins. Co. 149 Pa. 94, 34 Am. St. Rep. 595, 23 Atl. 718;

—where the most that could be deduced from the evidence was a vacancy during change of tenants of six or seven days, Tracy v. Queen City F. Ins. Co. 132 La. 610, 61 So. 687, Ann. Cas. 1914D, 1145;

—where the tenant who occupied the premises had made arrangements to move into another place, and, a day or two before the fire, went away to meet his wife, leaving his two daughters in the house with instructions to wait until his return, and having employed a man to move the furniture, a small part of which was removed before the premises were burned, Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. Rep. 196, 32 S. W. 383;

—where a tenant moved out on Wednesday and gave the insured the key on Thursday, and on Thursday, Friday, and Saturday the latter and one to whom he had rented the house were cleaning and repairing the house preparatory to moving in on Monday, and a fire occurred on Saturday, Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep. 334, 59 N. W. 16;

—where the tenant of a building leased as a boarding house removed most of furniture to another building, but her husband and his man continued to occupy the building nights, looking after stock which remained on the premises, Seubert v. Fidelity-Phenix Ins. Co. 29 S. D. 261, 40 L.R.A. (N.S.) 58, 136 N. W. 103;

—where the insured took possession of a tenant house as soon as a tenant moved out, and was repairing the house for some other tenant, and it was burned five weeks after the former tenant left, Dwelling-house Ins. Co. v. Walsh, 10 Ky. L. Rep. 282;

—where a tenant moved out a little over a month before a fire, and during the intervening time the owner took steps to procure another tenant, and he and his family, who lived in the immediate vicinity, were frequently in the house during the daytime, and a man was hired to sleep there at night, L.R.A.1915B. Traders' Ins. Co. v. Race, — Ill. —, 29 N. E. 846;

—where insured living apartments had been rented prior to the month of May, when the tenants moved out, and a lounge was immediately put in the building and the insured's husband slept there five or six nights a week, and sometimes a whole week, and slept there July 3d, on which day the building was rented, but did not sleep there on the 4th, when it burned, but slept nearby in a house situated on the same lot, Thieme v. Niagara F. Ins. Co. 100 App. Div. 278, 91 N. Y. Supp. 499, affirmed in 185 N. Y. 576, 78 N. E. 1113;

—where a tenant had moved out about thirty-three days before with the insured's knowledge, during which time he was endeavoring to obtain another tenant, it being held in this case that the words "so remain" following "vacant or unoccupied" meant something more than a mere temporary vacancy, such as would occur where one tenant moved out, if it was not continued for an unreasonable time, Kelley v. Home Ins. Co. Fed. Cas. No. 7,658.

And see also Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 30 N. W. 808, and Shackelton v. Sun Fire Office, 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343, which are fully set out by the court in FARMERS, MUT. EQ. INS. SOC. v. SMITH, and American Cent. Ins. Co. v. Clarey and Ohio Farmers' Ins. Co. v. Vogel, under heading "Effect of landlord's ignorance of vacancy, or lack of control over tenant," and East Texas F. Ins. Co. v. Kempner, under heading "Strict construction of provision against vacancy."

And a house out of which a tenant has moved, but in which some trifling articles of his still remain, while other goods of his are in a smokehouse a few steps away, and into which an incoming tenant has moved a portion of his effects, set up a stove, built a fire, and would have brought his family except for rain, may be found as a question of fact not to be vacant and unoccupied within the meaning of an insurance policy. Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078.

And in German-American Ins. Co. v. Buckstaff, 38 Neb. 135, 56 N. W. 692, where a policy insuring a hotel provided that it should be void if the premises should become unoccupied, it was held that if a tenant moved from the building and had entirely ceased to occupy it at the time of the fire, the policy would become void, but that if the vacancy was temporary only and occasioned by the tenant's moving out, and that if the tenant had not moved all his goods and furniture at the time of the fire, such removal would not render the premises vacant and unoccupied.

In the following cases in addition to those cited in previous subdivisions, however, the facts were held to be such as to render the rented premises vacant or unoccupied within the meaning of provisions of the policies;

—where a tenant moved the day before

the fire, and had no intention of returning, and there was no evidence that anyone intended to occupy them in the future, Snyder v. Firemen's Fund Ins. Co. 78 Iowa, 146, 42 N. W. 630;

—where a tenant moved out of a building used as a store and factory, leaving an old counter intended for sale, and some bottles and jugs which had been stored by a third person, and there was no certainty as to when, if at all, the building would be reoccupied, Limburg v. German F. Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626;

—where the tenant had moved two months before, and had notified the insured, who requested him to lease the house to someone else, but subsequently countermanded the order, although a few articles of furniture remained in the house, American Ins. Co. v. Padfield, 78 Ill. 167;

—where one tenant had moved out of a farmhouse, and another tenant to whom the premises had been leased had not moved in when the property was burned, and it was not clear that he intended to occupy the house, although he controlled and used the farm, Stoltenberg v. Continental Ins. Co. 106 Iowa, 505, 68 Am. St. Rep. 323, 76 N. W. 835;

—where a tenant had moved out a week before the fire, and before he moved the insured, who had previously lived on the property, stored part of his goods in the kitchen, removed his wearing apparel, ate and slept elsewhere, and had no idea of returning to the house to live, Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285;

—where the tenant, who had paid his rent until the following May, left the premises in July, going to another place in search of employment, intending to return the next spring, and if work was dull to return earlier, and his family also left, taking their wearing apparel and some of the furniture, but leaving a part, which remained in the house until it was burned in October, Sleeper v. New Hampshire F. Ins. Co. 56 N. H. 401;

—where the insured procured one tenant to move out in order that another might take possession, and the first tenant moved twelve or fifteen days before the fire, and no one occupied the house during this time, and no cause was shown why the other tenant did not move in, East Texas F. Ins. Co. v. Smith, 3 Tex. App. Civ. Cas. (Willson) 344;

—where the tenant had moved out and nothing was left in the house which indicated an intention to occupy it as a dwelling, although it had been rented and a tenant was expected to take possession within a few weeks, and the owner, who lived nearby, spent a part of each day cleaning the premises, and her father left some tools in the house at night, Feshe v. Council Bluffs Ins. Co. 74 Iowa, 676, 39 N. W. 87;

—where the tenant moved out about four weeks before the fire, Craig v. Springfield F. & M. Ins. Co. 34 Mo. App. 481; Mooney v. Glenns Falls Ins. Co. 4 Pa. Dist. R. 639; L.R.A.1915B.

—where the tenant moved out about a month before the fire, and a son of the owner slept in the house during the day and worked nights, having no furniture therein except a cot, a chair, and an alarm clock, and the family of the owner lived next door and obtained rain water from a cistern in the insured house, and the owner went through it everyday, the fire occurring late at night, Eureka F. & M. Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57;

—where the tenement house insured was occupied by several tenants shortly before the fire, whose leases covered the whole of the month in which the fire occurred, and part of them left of their own accord and part upon notice from the insured of his intention to repair the building, and the day before the fire a carpenter found the house empty with doors unfastened and windows broken, Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093.

And it has been held that an insured house was vacant and unoccupied for more than ten days where a tenant went off in search of work, and his wife went away taking her wearing apparel and leaving only a few articles of small value, and, although the insured expected the tenant to return, he took no steps to have it occupied or watched for fifteen or twenty days, when a fire occurred. Robinson v. Ætna Ins. Co. 18 Ky. L. Rep. 865, 38 S. W. 693.

And a like provision was held to have been violated in Home Ins. Co. v. Scales, 71 Miss. 975, 42 Am. St. Rep. 512, 15 So. 134, where an insured building was occupied by a firm of merchants when the policy was issued, but at the expiration of their lease, and about six weeks before the fire, they moved everything except a few boxes and barrels, although they retained the key for the purpose of occasionally entering to sell the boxes and barrels remaining on the premises. J. T. W.

CALIFORNIA SUPREME COURT.

(Department No. 2.)

LUTHER B. WOOD, Respt.,
v.
J. E. KREPPS et al., Appts.

(— Cal. —, 143 Pac. 691.)

Contract — validity — failure to comply with statute.

1. Failure of a money lender to give the borrower a memorandum of the transaction,

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Note. — Failure of money lender to procure license as affecting validity of his contract.

The earlier cases on this question will be found at page 616 of the note to Levison v. Boas, 12 L.R.A.(N.S.) 575, on the general subject of validity of contracts in business which it is a misdemeanor to transact,

when the securities are executed as required by statute, does not prevent enforcement of the securities if the statute merely subjects him to fine for such failure.

Pawnbroker — failure to comply with municipal regulation — validity of other contracts.

2. That a pawnbroker has not complied with the municipal regulations for the conduct of such business does not affect the validity of a contract made by him as a personal-property broker in lending money on chattel mortgage.

License — failure to secure — effect on contract.

3. Failure of a money lender to secure a license required by municipal ordinance for revenue purposes under penalty for the transaction of such business does not prevent the enforcement by him of his loan contracts.

(October 1, 1914.)

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to foreclose a chattel mortgage given as security for the payment of a promissory note executed by defendants in plaintiff's favor. Affirmed.

The facts are stated in the opinion.

Messrs. **Grant Jackson** and **Theodore Martin**, for appellants:

The failure to give defendants the memorandum or notice of the transaction as required by the act of April 16, 1909, rendered the note and mortgage void.

Levinson v. Boas, 150 Cal. 185, 12 L.R.A. (N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661; Fergusson v. Norman, 5 Bing N. C. 76, 6 Scott, 794, 1 Arnold, 418, 8 L. J. C. P. N. S. 3, 3 Jur. 10; Cope v. Rowlands, 2 Mees. & W. 149, 2 Gale, 231, 6 L. J. Exch. N. S. 663; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 473, 64 N. W. 29; St. Joseph v. Levin, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101; Buckley v. Humason, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 639, 52 N. W. 385; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884.

Plaintiff's failure to procure and hold, and keep posted in his place of business, the license required by the ordinance of the city of Los Angeles in force at the time of the execution of the note and mortgage, rendered the obligation void.

Levinson v. Boas, 150 Cal. 185, 12 L.R.A. (N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661; Berka v. Woodward, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; Brooks v. Cooper, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 978; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880; Buckley v. Humason, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 637, 52 N. W. 385; Cope v. Rowlands, 2 Mees. & W. 149, 2 Gale, 231, 6 L. J. Exch. N. S. 63; Youngblood v. Birmingham Trust & Sav. Co. 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245, 12 So. 579; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; Griffith v. Wells, 3 Denio, 226; Ex parte Lichtenstein, 67 Cal. 359, 56 Am. Rep. 713, 7 Pac. 728; Jackson v. Shawl, 29 Cal. 267; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; St. Joseph v. Levin, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101.

The failure of plaintiff to keep the license posted in his office, and to keep the register of loans, and to give defendant a copy, rendered the loan void.

Levinson v. Boas, 150 Cal. 185, 12 L.R.A. (N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; St. Joseph v. Levin, 128 Mo. 588, 49 Am. St. Rep. 577, 31 S. W. 101.

Mr. **John F. Poole** for respondent.

Lorigan, J., delivered the opinion of the court:

This action was brought to foreclose a chattel mortgage given as security for the

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which includes cases arising under statutes regulating licensing trades and occupations. See also note to Johnson v. Berry, 1 L.R.A. (N.S.) 1159. Other notes which may be of service because of analogy of the questions covered may be found by consulting the Index to L.R.A. Notes, under the title "Contracts," subdiv. "Essential validity and effect."

In Levinson v. Boas, 150 Cal. 185, 12 L.R.A.(N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661 (cited and set forth in WOOD v. KREPPS), it was held that the contracts of a pawnbroker who attempts to carry on his business without a license and without complying with the requirements of statutes and ordinances as to recording the contracts, noncompliance with which is made a misdemeanor, are void, and he can claim no lien upon the pledges.

So, also, one who "shaves" notes as a business without first paying the privilege tax and obtaining a license cannot maintain an action on a note purchased by him. Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424.

And in Gant v. Hobbs [1912] 1 Ch. 717, 81 L. J. Ch. N. S. 393, 106 L. T. N. S. 443, 28 Times L. R. 298; Lodge v. National Union Invest. Co. [1907] 1 Ch. 300, 76 L. J. Ch. N. S. 187, 96 L. T. N. S. 301, 23 Times L. R. 187; Re Campbell [1911] 2 K. B. 992, 81 L. J. K. B. N. S. 154, 105 L. T. N. S. 529, 19 Manson, 1, contracts of an unregistered money lender were held to be void for illegality, and not enforceable. J. H. B.

payment of a promissory note for $1,000 principal, with interest at 4 per cent per month, executed by defendants in favor of the plaintiff. The note and mortgage were executed March 7, 1910, and the mortgage was recorded the day following its execution.

The answer of the defendants set up that at the time of the execution of the note and mortgage the plaintiff was engaged in the city of Los Angeles in carrying on the business of pawnbroking and the business of loaning money for himself and others on personal security and on personal property other than carrying on the business of banking, and, as special defenses against the right of plaintiff to recover, alleged: First, that plaintiff did not at the time of the execution of the note and mortgage,—March 7, 1910,—nor until October, 1911, give to the defendants the memoranda or notice provided for by § 5 of an act of the legislature defining personal property brokers and regulating their charges and business (Stat. 1909, p. 969); and, second, that plaintiff had not, at the time of the execution of said note and mortgage, procured a license, as required by an ordinance of the city of Los Angeles to authorize him to carry on the business of pawnbroking, or the business of loaning money for himself and others upon personal security and upon personal property in which he was engaged. Plaintiff moved to strike out from the answer these special defenses referred to, on the ground that they were immaterial and redundant. The court granted the motion and entered a decree of foreclosure in favor of the plaintiff. Defendants appeal from this decree, insisting that the court erred in striking out the defenses set up in their answer. This is the only point made.

The theory of the defendants in alleging that plaintiff had failed to give them the memorandum or notice of the contents of the note and mortgage and other matters provided for by § 5 of the said act of 1909, at the time the note and mortgage were executed, is that such failure precluded any recovery by plaintiff. But this theory is erroneous. While the section relied on provides that when a loan such as here is made, a memorandum or notice of the contents of the note and mortgage and other matters shall be given the mortgagors, it is not made by the statute essential to the validity of the transaction that this shall be done. It is a statutory duty, imposed upon the personal-property broker, to be performed by him when the loan is made, but after the instrument taken as security is executed. It is a matter which does not at all enter into the contract between the parties, but is collateral to it. The statute itself provides that as a penalty for failure to give the memorandum or notice the broker shall be subjected to a fine not exceeding the specified amount. This is the only penalty which the statute imposes. No further penalty is declared, and the contract itself is not in any manner affected by the failure to comply with this provision of the section.

Now as to the ordinance pleaded in the answer. This ordinance, alleged to have been in force on and prior to the making of the note and mortgage, was a general license ordinance of the city of Los Angeles, which declared that it shall be unlawful for any person to commence or carry on any trade, profession, or occupation set forth in the ordinance without having first procured a license to do so; declared that the amount of such license imposed on any occupation mentioned in the ordinance shall be deemed a debt to the city, to be collected by civil action; provided that "every person, firm, or corporation engaged in doing or carrying on the business of pawnbroking or the business of loaning money for himself or any other person upon personal security, upon evidences of indebtedness, assignments of salary, salary warrants or demands, or any personal property other than those carrying on the business of banking," shall pay a license of $50 per annum; and further provided that a violation of any of the provisions of the ordinance shall constitute a misdemeanor punishable by fine or imprisonment, or both.

The theory of the appellants upon this branch of the defense pleaded is that, the note and mortgage having been executed at a time when respondent was engaged in the business of a personal-property broker as distinguished from that of a pawnbroker without having procured the license required by the ordinance to do so, the note and mortgage given to him were executed in violation of the law, and are void.

It is to be observed in considering this claim of appellants that while they allege in their special defenses that respondent was engaged in the business of pawnbroking and also in the business of loaning money upon personal property as a personal-property broker (and the section of the ordinance just quoted fixing a license tax mentions them both), still they are there treated as separate and distinct businesses, and the transaction here involved pertains solely to the business of loaning money on personal property,—the personal-property brokerage business. In their answer, though not heretofore referred to, appellants set up, in connection with their pleading based on the ordinance, various regulations prescribed by it for the conduct of the business of pawnbroking and the failure of the re-

spondent to conform to them, as well as a failure to have procured a license for carrying on the business of a personal-property broker, and cite cases—notably that of Levinson v. Boas, 150 Cal. 185, 12 L.R.A. (N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661—where it is held that the business of pawnbroking is subject to police regulations for the benefit of the public; that it may be suppressed or licensed as a municipality sees fit; that when licensed it may be required to be conducted under rules, regulations, and restrictions; and that if conducted without a license or without conforming to the regulations imposed, contracts of pledge made in the transaction of such business are rendered void. But here we are not concerned with the business of pawnbroking or the validity of contracts made in disregard of regulations imposed by ordinance for the valid conduct of such business, because the contract involved here has no relation to that business. It is one alleged to have been entered into with plaintiff while conducting the business of a personal-property broker—loaning money on chattel mortgage—without a license, a legitimate business which neither called for nor was subjected to any regulation under the ordinance.

But considered even with respect to such latter business, appellants insist that as the note and mortgage were executed to plaintiff while he was engaged in such business and as part of it in violation of the ordinance which forbade, under penalty, that particular business from being carried on without a license, the note and mortgage are therefore void. The position of counsel for appellants is that where a penalty is fixed in an ordinance for doing business without a license, it amounts to a prohibition against doing such business, and a contract executed in violation of such prohibition cannot be enforced. There are some authorities which sustain this position to the extreme extent which appellants claim, but it is not of general application. Whether the imposition of a penalty under a statute or ordinance is intended to be prohibitory or not is to be determined from a consideration of its nature and terms, and in determining this, certain rules have been established which are generally recognized. The general doctrine now well-settled by the authorities is that when the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public or in the interest of public morals, health, or police, the imposition of the penalty amounts to a prohibition against doing the business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void. This was the rule applied in Levinson v. Boas to the pawnbroking contract there involved, and that case fairly illustrates its application. On the other hand, it is equally well-settled, though it must be admitted that there are some few authorities to the contrary, that when the object of the statute or ordinance in imposing a license to conduct a harmless and legitimate business is solely for the purpose of yielding a public revenue, and not for the purpose of protection, contracts made in the course of such business are valid, notwithstanding a penalty is imposed for a failure to obtain a license to conduct it. This was the purpose—municipal revenue solely— which the municipality had in view by requiring a license for carrying on the business of loaning money on personal property or the personal-property brokerage business in which plaintiff was engaged, and out of which the note and mortgage here involved arose. There is no law in this state making the business of loaning money on personal property illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. The business itself, however, is not affected. It is neither *malum in se* nor *malum prohibitum*. The ordinance does not pretend to prescribe or prohibit the business. Anyone may carry it on, the only condition attached to doing so being that the person engaging in it must obtain a license. The only penalty imposed is that if he does not do so, he will not only be subject to a civil action at the instance of the city, but likewise to a penalty in a criminal proceeding for doing business without having obtained it. The carrying on of the business itself is not prohibited; it is only the carrying on of it without a license. The prohibition runs against the person engaged in it without a license, not against the business itself. The ordinance does not declare that a contract, made by anyone in the conduct of the various businesses for which licenses are provided to be procured under the ordinances, shall, if a license is not obtained, be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract. The primary purpose of the ordinance is to secure revenue by the imposition of license taxes on the several occupations mentioned in it, and not to suppress or to prohibit their being carried on, and while a penalty is, as usual, imposed for failure to obtain the license, this, in the absence of any declaration of a further

penalty, is the only one to which the party conducting the business without a license was intended to be subjected. The question of license is essentially one between the city and the person engaging in business within the limits of the municipality. It is not a matter in which third parties are interested. Whatever penalties are imposed upon business delinquencies are in aid of enforcing the rights of the city, and are not intended to operate further so as to defeat contracts between those engaged in business without a license and third parties, or to afford the latter an opportunity of repudiating their indebtedness or acquiring property without paying for it.

The rule just declared is supported by the weight of authority. Vermont Loan & T. Co. v. Hoffman, 5 Idaho, 376, 37 L.R.A. 509, 95 Am. St. Rep. 186, 49 Pac. 314; Walker v. Baldwin, 103 Md. 352, 63 Atl. 362; Ruckman v. Bergholz, 37 N. J. L. 437; Tooker v. Duckworth, 107 Mo. App. 231, 80 S. W. 963; Sunflower Lumber Co. v. Turner Supply Co. 158 Ala. 191, 132 Am. St. Rep. 20, 48 So. 510; Mandlebaum v. Gregovich, 17 Nev. 87, 45 Am. Rep. 433, 28 Pac. 121; Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346; Lindsey v. Rutherford 17 B. Mon. 245; Fairly v. Wappoo Mills, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108; Harris v. Runnels, 12 How. 79, 13 L. ed. 901; Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720; Aiken v. Blaisdell, 41 Vt. 655; Elliott, Contr. § 267; Sutherland, Stat. Constr. § 336.

We quote from only one of these authorities, which, however, discusses at some length the doctrine applicable in cases such as this. In Vermont Loan & T. Co. v. Hoffman, cited, the action was brought to recover on certain promissory notes and to foreclose a mortgage representing a loan made by plaintiff to defendants. A statute of Idaho required a license to be procured before engaging in the business of loaning money, and declared it a misdemeanor to transact such business without having procured it. The defendants set up as a defense to the action that the loan to them was made by plaintiff while engaged in the business of loaning money without having procured such license, and that hence the transaction was in violation of the law of the state and void. In affirming the action of the trial court in sustaining a demurrer to this defense, the supreme court of that state said: "From a careful study of all the authorities we think that the better class of authorities and the better reasoning leads to the conclusion that, where the prohibition is implied from a penalty imposed, as in the case at bar, the prohibition being for the protection of the public revenue, and no declaration in the statute making the prohibited act void, the doing of such act is not illegal. There is nothing in our statutes which makes it unlawful to loan money at interest. There is nothing in our statutes which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se*, nor is it *malum prohibitum*. Anyone may conduct the business, but, under our statutes, if he does so, he must obtain the license, and if he carries on such business without paying the license tax and obtaining the license, he is guilty of a misdemeanor. The offense consists not in doing the business, for that is not prohibited, but in failing to pay the license tax. The statute was passed, not to protect the public, not to protect the borrower, nor to prevent the loaning of money at interest, but for the purpose of raising the revenue to be derived from the license taxes to be collected from those persons who should engage in the business of loaning money at interest. . . . Take the case at bar. The respondent loaned $2,800 to the appellants. The respondent was doing the business of loaning money at interest, in violation of law, without the license. This was a fraud upon the public revenue, but was no injury to the appellants. For such failure the legislature has said to respondent: 'You are guilty of a misdemeanor. The assessor and collector may direct suit against you, and recover the license tax imposed by statute, together with $20 damages.' But the legislature has not further said that 'you shall not recover back any money which you may loan at interest before paying such license tax.' It is the duty of the court to construe all of our statutes which relate to the subject in question *in pari materia*, and ascertain what the intention of the legislature was as to the validity of the contract in question. A careful consideration of the said statutes, of the subject-matter and object to be obtained, convinces us that it was not the intention of the legislature that a violation of § 6983, supra, should be attended with any penalty other than those prescribed by the statutes. If the act of loaning money at interest was injurious to morals or good society, or prohibited by law, we could not come to this conclusion. The legislature may, within the limits of the Constitution, prescribe traffic regulations, and may impose upon a business a tax, and require persons intending to engage in such business to obtain, before doing so, a license; and we think the legislature might go one step further and say that whoever should engage in any business upon which a license tax is imposed without first paying such license tax should not only be

fined and imprisoned, one or both, but that such person should not recover upon any contract made by him while engaged in such business without a license. But the legislature has not done so, nor has it shown any intention to attend such forfeiture upon a person violating the statute. Having specified the penalty for a violation of the statute, and further provided for the collection of the license tax with damages, we are authorized to and do conclude that the legislature did not intend that any further punishment should be inflicted. This conclusion is strengthened by the well-known principle that forfeitures are not favored in law; nor does this court favor the idea of giving one's goods to another without compensation. We think that the respondent clearly has the right to recover back the money which it loaned to the appellants."

The other authorities cited declare the same doctrine.

The judgment appealed from is affirmed.

We concur: **Henshaw, J.; Melvin, J.**

LOUISIANA SUPREME COURT.

LOUISIANA & NORTHWEST RAILROAD COMPANY
v.
ATHENS LUMBER COMPANY, Appt.

(134 La. 788, 64 So. 714.)

Joint debtors — indemnity — settlement of claim.

1. Where two defendants are condemned *in solido*, one of them cannot obtain a judgment against the other, based on a contract wherein it is agreed that the one free from fault shall be held harmless by the other, until the one claiming the judgment against the other shows that it has paid the judgment in the other suit, or that it has suffered some actual damage by the judgment rendered against it.

Same — adjudication of responsibility.

2. As the plaintiff in this suit has not shown that it has suffered any loss by being condemned by the judgment in the former suit, this court will not now undertake to determine whose fault caused the accident that was the basis of the other suit.

Attorney and client — annual retainer —services to stranger — recovery.

3. A corporation employing an attorney by the year is not entitled to recover from another corporation for his services in defending a suit brought against both corporations for a judgment *in solido*, without showing that there was some agreement to pay for his services.

(March 2, 1914.)

CROSS APPEALS from a judgment of the Judicial District Court for the Parish of Claiborne in plaintiff's favor for a less relief than demanded in an action for the cancelation of a judgment against it and for the recovery of costs and attorneys' fees in defending the suit brought against it and defendant *in solido;* plaintiff seeking to amend the judgment so as to afford him full relief, and defendant seeking a reversal as to the relief awarded. Affirmed.

The facts are stated in the opinion.

Messrs. **Roberts, Goff, & Barnette,** for appellant:

If the negligence of the defendant in failing to make the best of a bad situation stands in the way of assessing the full lia-

Headnotes by BREAUX, Ch. J.

Note. — Right of client to recover from third person for services rendered by attorney which benefit both.

This note does not include the case of allowance to counsel out of a fund in court, as that is a question belonging rather to the equitable powers of the court in distributing a fund in its charge, than to actual contract.

The subject of this note necessarily excludes the consideration of cases brought by an attorney for his services.

The cases where a client has recovered from a third party for the services of his counsel rendered to such third party or for his benefit seem to be few.

It has been held that while one of two tort feasors who has paid a judgment against both cannot have contribution therefor, it is otherwise as to the reasonable amount of fees he has paid an attorney employed by him who acted for both in defending the suit, with the knowledge at the time of the other defendant. Percy v. Clary, 32 Md. 245. (Cited in a case holding that there might be contribution between wrongdoers for the costs as distinguished from the damages in a suit against them. Fakes v. Price, 18 Okla. 415, 89 Pac. 1123.)

In Hayes v. Morrison, 38 N. H. 90, it was held that while there would be contribution between tenants in common for the "costs" of a suit against them, in proportion to their respective interests in the property, there could be no contribution for witness fees or expenses of counsel paid by one party, except upon an agreement with the co-owner from whom contribution is sought. The court said: "In the absence of any agreement to that effect, either of the parties incurring expense in defending the suit would incur it on his own account. The fact that others had a common interest with him in the defense would not of itself authorize him to incur expense upon their joint account. If the action had been for a tort, in which case no contribution could

bility against the plaintiff, then it and the defendant are joint tort feasors, and therefore the plaintiff in no event can recover a judgment against the defendant.

9 Cyc. 804; Sincer v. Bell, 47 La. Ann. 1548, 18 So. 755.

Mr. **John A. Richardson** for appellee.

Breaux, Ch. J., delivered the opinion of the court:

This is an action by plaintiff against the Athens Lumber Company, defendant, to have it declared that the judgment in the suit of Bailey v. Louisiana & N. W. R. Co. 129 La. 1029, 57 So. 325, has been paid, decreeing the cancelation of the judgment and its erasure from the books of judicial mortgage. The alternative plea is: If not thus ordered canceled, then for a judgment of interest and costs in favor of plaintiff against the defendant lumber company. Plaintiff, in addition, asked for a judgment in the sum of $557, court costs, and attorneys' fee incurred by it in defending the suit. Ibid.

The Athens Lumber Company admits that it operated its trains on plaintiff's tracks, and that plaintiff Bailey obtained judg-

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be had among the judgment debtors, their agreement to conduct the defense upon their joint account would have rendered the necessary and proper expenses of the defense their joint debt, for the payment of which contribution might have been had, as in other cases upon contract. But whether the action were for a tort of *ex contractu*, the only ground upon which contribution could be required for the expenses incurred in the defense is that the parties among whom contribution is sought, agreed to make it on their joint account."

It may be noted that it was held in the briefly reported case of Rarrick v. Clay, 6 Ky. L. Rep. 360, that where one of several defendants sued jointly, employed counsel for all, and the others, being informed of such employment, accepted the services of the counsel thus retained, they were as much liable as if they had made or authorized the employment in the first place; but it does not appear whether the suit was by the counsel for services, or by the employer for reimbursement of amount paid the counsel.

Some of the cases have arisen upon express contracts to share the expenses of counsel.

Where some of those who have mutually agreed upon the joint prosecution of a suit, and for the employment of counsel, have paid the counsel, they may have contribution against the other contracting parties. Huston v. Fisk, 10 La. Ann. 769.

Where several fire insurance companies agreed together to defend against claims against them severally for a loss on certain property, and to employ counsel, etc., and to pay expenses, etc., *pro rata*, and an attorney employed by them recovered his fees from one of such companies, such company may have contribution from the other solvent companies to the same extent as if no insolvent companies were parties to the agreement. Security Ins. Co. v. St. Paul F. & M. Ins. Co. 50 Conn. 233.

Where an agreement between certain creditors to provide for the expenses of defending a suit attacking the debtor's title to property on which they claimed liens provided that such suit should be litigated at their joint and equal expense, and that each should pay and bear one half of all costs and counsel fees that had been incurred and paid by one of them since the defense was assumed by him, and also all counsel fees and expenses thereafter to accrue until the full determination of the litigation, —it was held that the agreement covered also counsel fees in defending other suits brought in attempts by other creditors to obtain the rents from such property. Ponvert v. Belmont, 10 Jones & S. 531.

Where three persons bought a tract of land in common, and made partition, it was held that after their deaths no action for contribution to the expenses of defending the title could be brought under their contract, which provided that "in the event of any suit or suits being prosecuted by or against the parties aforesaid, or either of them, involving the title of the original grant . . . the expenses shall be equally borne by the parties hereto . . . for the performance of which we bind ourselves, our heirs, executors, and administrators." Sturgeon v. Schaumburg, 40 Mo. 482, 93 Am. Dec. 311.

In Harris v. Mercur, 202 Pa. 318, 51 Atl. 971, it was held that under an agreement to bear a certain part of the expenses of a lawsuit, he who pays more than his share is entitled to interest on the excess. (It does not affirmatively appear that counsel fees were among the expenses so paid.)

It may be noted that in Hill v. Palmer, 8 N. Y. S. R. 805, where an agreement, by which A purchased B's interest in certain land, provided that A should protect and preserve B harmless from any and all damages arising from and under a certain sale of the land by reason of a certain contract, and that if any claim should be made against B he should at once notify a specified attorney as his attorney "at the proper costs and charges of" A, it was considered on the evidence that A must bear the expense of defending a suit for the commissions of the agent who made the sale referred to, as the expense of such a suit was intended to be covered by the agreement.

It may be noted that it was held in Graham v. Taggart, 44 Mich. 383, 6 N. W. 852, that an attorney for a mortgagee cannot recover of the mortgagor money for extending the time of the mortgage without an employment by the mortgagor, as the money, if payable at all, belongs to the mortgagee.

B. B. B.

L.R.A.1915B.

ment for the damages claimed; but the Athens Lumber Company denies that it is responsible in damages for the injuries, seeks to have them assessed exclusively against the plaintiff, alleges that the accident was due to the gross negligence of plaintiff and its employees, that they did not give the proper warnings and instructions to Bailey, furnished him with no schedule of time, left him in complete darkness and ignorance as to the movements of trains. Plaintiff should be condemned to pay the judgment.

Thus we have it in this contest: Plaintiff stoutly urges that defendant should be made to pay the damages, and defendant is equally as insistent that the plaintiff should pay. Defendant adds that the judgment has not yet been paid.

The defendant filed a peremptory exception of no cause of action. It was followed by the answer covering the points before stated.

The contract between the defendant and plaintiff in part reads: That it, defendant (the Athens Lumber Company) will be responsible for all personal injuries to its own employees, to the employees of the plaintiff, as well as to other persons, caused by its locomotives or trains. There is a stipulation in the contract under which it is provided: "When a locomotive or train of the party of the second part is out with the authority of the train master or of the plaintiff, then the question of responsibility will be left to determination as to which party was at fault."

There are conflicting clauses in the contract. In the first part, expressions of indemnity are positive and direct; in the second, they are not. It was left by the last clause to be determined who was at fault.

The "locomotive or train of the party of the second part was out with the authority of the train master or of the plaintiff" at the time of the accident. From that point of view the last clause must prevail, and it was therefore left to the weight of the testimony as to who was at fault.

The district court rendered judgment in favor of plaintiff against the Athens Lumber Company for $57 and all costs of this suit, and rejected the other demands of plaintiff as in nonsuit, and rejected plaintiff's reconventional demand.

Defendant appeals, and plaintiff on the appeal asked for an amendment of the judgment.

In the above-cited decision, this court affirmed the judgment of the district court, condemning defendants *in solido* to pay $3,500 to the plaintiff. It also reserved the right of the defendant railroad company as against the defendant lumber company.

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The court stated in the decision cited supra that Bailey had not been properly informed; that he had not been instructed; that he had been left to his own resources as a section foreman; that he met the train which caused the accident, and did for the best under the facts and circumstances when he met with the accident of which he complained.

Plaintiff as section foreman had charge of the hand car which was coming from an opposite direction. He did all he could to avoid the collision, but failed, a failure for which he could not be held responsible, because it was not due to his negligence, but to the fault of the defendants. The court said in the cited decision: "We find nothing in the contract which relieves either from the responsibility to plaintiff for the injury received."

The testimony in the case before us for decision is not sufficient to enable us to determine at this time who was at fault and liable for the judgment as between the two defendants. The suit originally was brought by a third person. The judgment has been paid; by whom it does not satisfactorily appear. The issues, to an extent at least, have been merged into the judgment.

It is contended by plaintiff that this judgment has been paid. The contention is not sufficiently sustained. Plaintiff has not been subrogated to any of the rights of parties. If the judgment has been paid by the Athens Lumber Company, it will simplify the issues very much. If it has been assigned and is now held by a third person, as contended by the lumber company, it is not possible legally to order that the judgment is satisfied and that the judicial mortgage must be canceled. That can only be done contradictorily with all parties concerned. It cannot be done exclusively as between the defendants. Plaintiff has acquired no rights, as before stated. When [illegible] will have acquired rights (if ever it does), it will be time to grant a judgment accordingly, decreeing that the judgment should be paid by the Athens Lumber Company if it was at fault. In the present condition of the issues, we do not find it possible to interpose the authority of the court. Defendants have been condemned *in solido*, and must remain condemned until it becomes evident that other remedy can be invoked.

With reference to the contract strictly of indemnity:

As to the claim of plaintiff that in this suit we should decide who was at fault when plaintiff Bailey was injured, we must decline so to do. The matter is before us on the evidence. It was rendered before in the cited case; nothing is added thereto.

Besides, we think that in the present condition all questions relating to that judgment must be disposed of before taking up the question of who is liable.

Relative to the fee of attorney: We have been unable to discover that plaintiff is entitled to a fee for its regularly retained attorney paid by the year. Plaintiff has no right to fees, there having been no contract made in regard to the fees, and the attorney appeared as its attorney. While he did assist in the defense in the cited case, his services therefor cannot be charged to the defendant, the Athens Lumber Company.

Regarding the $57 for costs incurred by plaintiff in the first suit, it should, in our opinion, remain as it was decided by the judge of the lower court. That is, it must be paid to the plaintiff for the sake of consistency, if for nothing else. The idea is that plaintiff has suffered no loss; that it has been amply protected to date, and will not have anything to pay, not even costs, for those are ordered paid. "The best rule would seem to be that, where the contract is strictly one of indemnity, the indemnitee cannot recover until he has suffered actual loss or damage. Where the contract is to protect against liability, the indemnitee may recover as soon as his liability has become established."

The indemnity here cannot be established as between the defendants and plaintiff.

For reasons assigned, the judgment appealed from is affirmed.

Provosty, J., being absent on account of illness, took no part.

LOUISIANA SUPREME COURT.

UNION ICE & COAL COMPANY, Appt.,
v.
TOWN OF RUSTON.

(135 La. 898, 66 So. 262.)

Tax — operation of ice plant — validity.

The manufacture of ice by a town and its distribution among the inhabitants is not within the permissive operation of a constitutional provision allowing the taxing power to be exercised only for purposes strictly public in their nature.

(May 25, 1914.)

APPEAL by complainant from a judgment of the District Court for the Parish of Lincoln refusing to annul and enjoin the execution of an ordinance adopted by defendant providing for the purchase, installation, and operation of an ice-manufacturing plant. Reversed.

The facts are stated in the opinion.

Messrs. **Barksdale & Barksdale**, for appellant:

The legislature has no power, regardless of Federal or state constitutional limitations, to authorize a municipality to engage in the ice business.

1 Bl. Com. 127; Murchie v. Cornell, 155 Mass. 60, 14 L.R.A. 492, 31 Am. St. Rep. 526, 29 N. E. 207; 1 Thomp. Corp. p. 48; State v. American Sugar Ref. Co. 108 La. 606, 32 So. 965; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 231; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The test of a town's authority to erect an ice plant and engage in the ice business or any other enterprise is its authority to tax the people for the establishment and maintenance of such business or enterprise. An ice plant cannot be built by a municipality except with public funds raised directly or indirectly by taxation.

Citizens' Sav. & L. Asso. v. Topeka, supra; Cooley, Taxn. pp. 84, 192; State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774; 15 Cyc. 583; Opinion of Justices, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405; Louisiana State Bank v. Orleans Nav. Co. 3 La. Ann. 294; Cecil v. Board of Liquidation, 30 La. Ann. 34; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383.

The act and ordinance directly violate prohibitory articles of the Louisiana Constitution.

Holland v. State, 15 Fla. 455; University R. Co. v. Holden, 63 N. C. 410; Commercial Bank v. New Orleans, 17 La. Ann. 196; 29 Cyc. 1532; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 661, 22 L. ed. 461.

Messrs. **S. D. Pearce** and **F. W. Price**, for appellee:

The ownership and operation of an ice plant by a municipality, under a legislative grant of power and authority to that effect, for the purpose of manufacturing and selling ice to the inhabitants of the municipality, is not unconstitutional; nor is the legislative act granting the power to the municipality unconstitutional.

Holton v. Camilla, 134 Ga. 560, 31 L.R.A. (N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199.

Note. — Generally as to right of municipal corporation to engage in enterprise generally regarded as of a private character, see notes to Holton v. Camilla, 31 L.R.A. (N.S.) 116, and Laughlin v. Portland, 51 L.R.A.(N.S.) 1143.

Provosty, J., delivered the opinion of the court:

The town council of the town of Ruston having adopted an ordinance providing for the purchase and installation of an ice manufacturing plant, to be operated in connection with its water and electric light plant for the production of ice to be sold to the inhabitants of the town, the plaintiff company, and ice-manufacturing company, which had theretofore been furnishing ice to the town, brought this suit, in its quality of a taxpayer, to annul the ordinance and enjoin its execution.

The ordinance is said by plaintiff to contravene articles 46, 58, 227, 263, 270, and 287 of the state Constitution; but, while these grounds are not waived in the argument, they are evidently not insisted on with any great confidence in their merit. The main ground, to which the bulk of the brief of plaintiff is devoted, and to which we shall confine ourselves, is that the cost of said ice-manufacturing plant is proposed to be paid in part out of revenues derived from taxation; and that the power of taxation can be exercised only for public purposes; and that the manufacturing of ice by a town, for sale to the inhabitants of the town, is not a public purpose.

Act No. 3, p. 128, of 1912, amending act No. 136 of 1898, provides as follows: "The mayor and board of aldermen of every city and town owning, maintaining, and operating either municipal waterworks or electric light system or both shall have the additional power to install, own, maintain, and operate in connection with such system, an ice-making plant for the purpose of supplying its inhabitants with ice, and to prescribe the rates at which ice shall be supplied to its inhabitants."

There is no question, therefore, but that the town had authority to adopt said ordinance, if the conferring of such authority was within the power of the legislature.

As we understand the argument of the learned counsel for the defendant, it is that the legislature "may do everything which the state Constitution does not prohibit." This is not true. In addition to the limitations contained in the Federal and state Constitutions, there are those limitations which inhere in the nature of our form of government; such as that the power of taxation can be validly exercised only for a public purpose. But, for finding this particular limitation, it is not necessary, in this state, to go outside of the Constitution, for its article 224 provides as follows:

"Art. 224. The taxing power may be exercised by the general assembly for state purposes and by parishes and municipal corporations and public boards, under authority granted to them by the general assembly, for parish, municipal, and local purposes, strictly public in their nature."

The several Constitutions of this state prior to that of 1879 contained no restriction upon the taxation power except those of equality and uniformity. The Constitution of 1879 contained many restrictions. The Constitution of 1898 retained them, and added to them this one, that the power should be exercised by municipalities only for purposes "strictly public in their nature."

Our question is, therefore, whether the establishment and operation of an ice plant for making ice to be sold to the townspeople is a "purpose strictly public in its nature."

It may be well to premise that, in a case such as this, where a municipality is about to contract for an expenditure that will have to be met, in whole or in part, by taxation, the taxpayer who, like the plaintiff in this case, intends to resist the tax, does not have to wait until the tax has been actually imposed, or until his property is being seized to satisfy it, but that he may attack the ordinance itself which authorizes the expenditure to be incurred; indeed, that that is the proper course for him to pursue. As said by the Supreme Court of the United States in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 660, 22 L. ed. 455–460: "The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose."

So well settled is this that the learned counsel for defendant have not made any point in that connection. See 20 Am. & Eng. Enc. Law, p. 1084.

As indicating the public nature of such an enterprise, the learned counsel for defendant adduce the fact (not supported, by the way, by any evidence in the case) that the United States government has established ice plants of this kind for supplying its own needs, not for sale; and that the city of New York is meditating a like undertaking. But, we imagine, no one would contest the right of the town of Ruston to do this same thing if the town were of proper size for such a thing. But Ruston is not a city, nor even a very large town.

The engineer in charge of the town electric light plant testified that an ice plant could be operated very economically in connection with the electric light plant, because it would be run during the day, when the load is off of the electric light plant, and therefore with the same engine, and, to some extent, by the same employees, and with no great addition of fuel. But the question in such cases is not whether the thing can be done economically or not, but whether the

doing of it falls within the legitimate functions of municipal government. The fact that shoes and ready-made clothing could be manufactured more cheaply by the municipality in connection with its public utilities would not justify the town in going into the shoes and clothes business.

We do not wish to be understood, however, as placing shoes and clothes on a parity with ice in connection with the possibility of their production being, or becoming, a municipal function. While both are to-day on a parity as articles of commerce, there is this difference between them: That the bulkiness of ice renders its being produced locally of greater necessity than is the case with shoes or clothes. Water and light may be—indeed, are—articles of commerce in towns unprovided with the modern facilities for furnishing both to the inhabitants more conveniently and economically; but the furnishing of them to the inhabitants of a town is now a well-recognized municipal function. Whether, if it were shown that ice can be produced so cheaply in connection with a town electric light plant as to be classible almost as a by-product, and, as such, be furnished to the inhabitants of the town with incomparably greater convenience and cheapness than by the ordinary mode, a case would not be presented to which the same reasons would in a measure be applicable which justify the furnishing of water and light as municipal functions, we will not undertake to say. Such proof has not been made. Defendant's engineer has merely shown that the production under those conditions would be cheaper; and he admits that he is no expert in the matter, and that much of such information as he possesses on the subject has been derived from interested sources,—from sellers of ice-making machinery.

On the question of what is a public purpose many illuminating passages are to be found in the decisions, from among which we select a few:

In People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400, Judge Cooley, speaking for the supreme court of Michigan, said: "But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because, on the whole, it is deemed best by the public authorities that they should be. On the other hand, certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the state from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a 'public purpose;' but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing; yet, if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a private purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture; but, while the right to pay out the public funds for the one would be unquestionable, the other, by common consent, is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a matter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation. Yet, even in a case where the public authorities did not regard the street as of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift the street would at once become a public object and purpose, upon which the public funds might be expended with no more restraints upon the action of the authorities in that particular than if it were the most prominent and essential thoroughfare of the city.

"By common consent, also, a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural

operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants, and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality."

In Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 664, 22 L. ed. 455–461, the Supreme Court of the United States, speaking through Justice Miller, said: "It is undoubtedly the duty of the legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And, in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

The rigors of the New England winter making it highly desirable that the municipalities should be allowed to become dispensaries of fuel, coal, and wood, to their inhabitants at a reduced rate, the legislature of Massachusetts, in 1892, concluded to give this authority to the towns of that state, if it could do so constitutionally; but having its doubts on the subject, submitted the question to the judges of the supreme court. The answer of the judges, reported in 155 Mass. 601, 15 L.R.A. 810, 30 N. E. 1143, is a full discussion of the question of what is a public purpose, and is as follows: "Whether the legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this commonwealth, but of the states generally, and of the United States. The following are some of the decisions or opinions on the subject: Kingman v. Brockton, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998; Opinion of Justices, 150 Mass. 592, 8 L.R.A. 487, 24 N. E. 1084; Mead v. Acton, 139 Mass. 341, 1 N. E. 413; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; Mather v. Ottawa, 114 Ill. 659, 3 N. E. 216; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Ottawa v. Carey, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361: Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; Atty. Gen. v. Eau Claire, 37 Wis. 400; State v. Eau Claire, 40 Wis. 533; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Opinion of Justices, 58 Me. 590.

"It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a 'public service,' within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service, within the meaning of the Constitution. The preamble of the Constitution declares that 'the end of the institution, maintenance, and administration of government is to secure the existence of the body politic; to protect it, and furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights and the blessings of life.' It is declared in part 1, art. 1: 'All men are born free and equal and have certain natural, essential, and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.' Constitutional questions con-

cerning the power of taxation necessarily are largely historical questions. The Constitution must be interpreted as any other instrument with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or who adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing, to the discussions upon the nature of the government to be established, to the meaning of the language used as then understood, and to the grounds on which the adoption or rejection of the Constitution was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as, at the time when the Constitution was adopted, was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The objects of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private enterprise of individuals. In the opinion in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 664, 22 L. ed. 455, 461, the Supreme Court of the United States say: 'It is undoubtedly the duty of the legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily, and by long course of legislation, levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal.'

"The early usages of towns undoubtedly did not exhaust the authority which the legislature can confer upon municipalities to levy taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called trade or commercial business. Instances can be found of some very curious legislation by towns in the colonial and provincial times, some of which would certainly now be thought to be beyond the powers of towns under the Constitution. Whatever the theory was, towns in fact under the colony charter, and for some time under the province charter, often acted as if their powers were limited only by the opinion of the inhabitants as to what was best to be done. This was the result of their peculiar situation and condition, and the powers of towns or of the general court were not much considered. The exercise of these extraordinary powers, however, gradually died out. The purposes for which, by the province laws, towns were authorized to raise money, were for the maintenance of highways, the support of the ministry, schools, and the poor, and for the defraying of other necessary charges arising within the town. The words 'necessary charges' are still retained in the statutes, but they have been strictly construed by the courts. We do not find either in the colony or the province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legislation on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town, in an emergency, was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers. Neither was it usual for town to supply their inhabitants with grain or other commodities. We know of no instance of this being done, except by the town of Boston. In the fall of 1713 there was a scarcity of grain, and the general court prohibited the exportation of it. 1 Pro. Laws, State ed. p. 724. The town of Boston, in March, 1713–14, voted to lay in a stock of grain to the amount of 5,000 bushels of corn, and to store it in some convenient place, and it was left to the selectmen to dispose of it as they saw fit. 8 Record Commissioners Report, pp. 101, 104. After that, as shown by the records,

the town regularly bought and stored grain and sold it to the inhabitants, as late as 1775, and perhaps later, and it established two granaries, one of which, in the common, remained in use probably as long as the town bought and sold grain. Whether, after the Revolution, the town continued to buy grain we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report of a committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was 5,836 bushels, and that the stock on hand was 376 bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself, deemed reasonable prices. On May 25, 1795, the town voted to sell the granary. This action of the town of Boston was an exception to the usages of towns, and it appears from the reports of committees that before the Revolution it had come to be considered as of doubtful expediency, and during the Revolution, or not long after, it was discontinued. The nearest analogy under the Constitution to the subject we are considering is the authority given by the recent statute (Stat. 1891, chap. 370), whereby cities and towns are empowered to maintain works for the manufacture and distribution of gas or electricity for furnishing light to the municipalities and their inhabitants.

"In the opinion given to the House of Representatives on May 27, 1890, which is printed in 150 Mass. 592, 8 L.R.A. 487, 24 N. E. 1084, the justices advised that the manufacture and distribution of gas or electricity for furnishing light to the inhabitants of cities and towns might properly be regarded as constituting a public service. It was there said: 'It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not.' Gas or electricity for furnishing light has in recent times become a most convenient means of lighting both public and private buildings, streets, and grounds. It is impracticable that each individual should manufacture gas or electricity for himself; but this can best be done by some company or the municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses, within that territory, cannot be permitted to manufacture and distribute gas or electricity for the public use or the use of other persons, as it is distributed by means of pipes or wires; and the number who properly can be permitted to lay pipes or wires in a given territory must be limited to one, or, at most, to a few, persons or corporations. The pipes or wires must be laid in or over the public ways, or in or over land taken for the purpose, which may require the exercise of the right of eminent domain. These were some of the reasons why the subject seemed to the justices a proper one for municipal regulation and control, and to constitute a service which a municipality could be authorized to perform for itself and its inhabitants. But when the Constitution was adopted the buying and selling of wood and coal for fuel was a well-known form of private business, which was generally carried on as other kinds of business were carried on, and is now carried on in much the same manner as it was then. It was and is a kind of business which, in its relations to the community, did not and does not differ essentially from the business of buying and selling any other of the necessaries of life. Although all kinds of business may be regulated by the legislature, yet to buy and sell coal and wood for fuel requires no authority from the legislature, and requires the exercise of no powers derived from the legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies, for the safety of the state or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the cooperative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants. We therefore answer the questions in the negative."

The apparent urgency of the situation again pressing the legislature to take some action in the matter, it resubmitted the question to the judges in 1903. The answer reported was as follows: "It is established

that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house, taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government, there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use. Until within a few years, it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for, if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessaries of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities. Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this state, beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise, with supplies emanating from a single source, as is required for the econmical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means. We therefore have no hesitation in answering the first three questions in the negative." Re Municipal Fuel Plants, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592.

The syllabus of the case reads as follows: "Municipalities have authority to provide fuel for paupers; but they cannot be given power by the legislature to buy and sell fuel in competition with private enterprise, although it is scarce and high in price, and the cost to consumers may be thereby reduced, unless there is such a scarcity as to create a general and widespread distress in the community, which cannot be met by private enterprise."

Very instructive in connection with our question, although not bearing directly upon it, are the two decisions of the supreme court of South Carolina in the celebrated Liquor Dispensary Cases.

In the case of McCullough v. Brown, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458, the supreme court of South Carolina said: "Finally the constitutionality of the dispensary act is assailed upon the ground that the legislature have undertaken thereby to embark the state in a trading enterprise, which they have no constitutional authority to do; not because there is any express prohibition to that effect in the Constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their Constitution; and therefore all the powers conferred by that instrument upon the various departments of the government must necessarily be regarded as limited by that declared purpose. Hence, when, by the 1st section of the 2d article of the Constitution, the legislative power was conferred upon the general assembly, the language there cannot be construed as conferring upon the general assembly the unlimited power of legislating upon any subject, or for any purpose, according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and

only purpose for which the Constitution was adopted; to wit, the formation of a civil government. In this connection it is noticeable that the word 'all' is not used in the section above referred to, but the language used is, 'the legislative power,' meaning such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their Constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose. It is manifest from the numerous express restrictions upon the legislative will found in the Constitution that the people were not willing to intrust even their own representatives with unlimited legislative power, but, as if not satisfied with these numerous express restrictions, and perhaps fearing that some important right might have been overlooked, a general clause, not usually found in state Constitutions, was inserted, apparently designed to cover any such omissions; for in § 41 of article 1 it is expressly declared that 'the enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.' Now, upon well-settled principles of constitutional construction, we are not at liberty to disregard this clause, but must give it some meaning and effect. It seems to us that the true construction of this clause is that, while there are many rights . . . reserved to the people, not expressly, but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. These views have not only the support of the highest authority in this country, as may be seen by reference to the cases of Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455, and Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442, but have been distinctly adopted by the supreme court of the state in Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6, as well as by the courts of Massachusetts and Maine, as may be seen by reference to Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185, and Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; and, what is more, they were applied to the vital power of taxation,—a power absolutely essential to the very existence of every government. These cases substantially hold that, although there may be no express restrictions contained in a state Constitution forbidding the imposition of taxes for any other purpose than a public purpose, yet such a restriction must necessarily be implied from the very nature of civil government; and hence the legislative department, under the general power of taxation conferred upon it, cannot impose any tax except for some public purpose. Upon the same principle it seems to us clear that any act of the legislature which is designed to or has the effect of embarking the state in any trade which involves the purchase and sale of any article of commerce for profit is outside and altogether beyond the legislative power conferred upon the general assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not, and cannot properly be, regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government."

In the case of State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 345, 20 S. E. 221, the same court reversed this decision on the ground that no rule of property was involved; that no one could acquire vested rights in the sale of intoxicating liquors; that intoxicating liquors could not be placed on the same footing with other commodities; and that the state, having the authority to prohibit the sale of intoxicating liquors, had authority to dispense them itself as a means of regulation. But in this decision the court reaffirmed and emphasized the rule that the state was without authority to engage in trade or commerce. On this general principle the court said: "We think differences of opinion as to the constitutionality of this act arise from the attempt on the part of some to apply to it the law applicable to the ordinary commodities of life. . . . It is because liquor is not regarded as one of the ordinary commodities that the act of 1892 prohibiting its sale was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that, if the government can take the exclusive control of the liquor traffic, it can do so as to any other avocations in life."

The court said further: "It is contended that the foregoing section prevents the legislature from embarking the state in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the ab-

sence of § 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation."

In Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331, the Minnesota supreme court denied the authority of the state legislature to authorize a municipality to maintain an elevator or warehouse for the public storage of grain.

In Keen v. Waycross, 101 Ga. 588, 29 S. E. 42, the supreme court of Georgia held that a town had no authority to engage in the business of selling plumbers' materials even in connection with the management of its waterworks plant.

And in Opinion of Justices, 58 Me. 590, the supreme court of Maine held that the legislature could not empower a town to establish manufactories on its own account and run them by the ordinary town officers or otherwise.

It will be noted that Judge Cooley, in People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400, and Judge Miller, in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455, would determine the question of whether a particular purpose is public or not mainly according to what has been the settled usage; Judge Miller very properly adding, however, that usage is not the sole criterion.

In the latter connection, the following extract from the decision of the appellate division of the supreme court of New York, in the case of Sun Printing & Pub. Asso. v. New York, 8 App. Div. 230, 40 N. Y. Supp. 607, is apposite. "In considering this question it must be premised that cities are not limited to providing for the strict necessities of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure, or education. They are not limited to policing the city, to paving the streets, to providing it with light, water, sewers, docks, and markets. They may also be required by the sovereign power to furnish their citizens with schools, hospitals, dispensaries, parks, libraries, and museums, with zoological, botanical, and other gardens. They may thus even gratify our ears with music of a summer afternoon, or minister to our comfort by providing us with public baths. Expenditures in all these directions under legislative authority have never been questioned. Where, then, shall we draw the line? It would be very simple to draw it at those purposes for which precedent in the past can be found, and to exclude all others. This test should be easy of application, but would be essentially vicious and erroneous. Growth and extension are as necessary in the domain of municipal action as in the domain of law. New conditions constantly arise which confront the legislature with new problems. As the structure of society grows more complex, needs spring up which never existed before. These needs may be so general in their nature as to affect the whole country or the whole state, or they may be local and confined to a single county or municipality. In any case, it is the duty of that legislative body which has the power and jurisdiction to apply the remedy. To hold that the legislature of this state, acting as the *parens patriæ*, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods and agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon the fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever the question has been considered, it has been universally treated in the broadest spirit."

What is meant here by treating the question in the broadest spirit is that the decision of the legislature upon any particular point within its legitimate sphere of action is not to be overridden by the courts unless upon the clearest grounds of its being in violation either of the Constitution itself, or of those fundamental principles which, apart from all written constitutional sanction, underlie our system of government. Touching this conclusiveness of the legislative decision, Judge Cooley, in his work on Taxation, 2d ed. p. 103, says: "It is implied in all definitions of taxation that taxes can be levied for public purposes only. Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement. It is also agreed that the determination what is and what is not a public purpose belongs in the first instance to the legislative department. It belongs there because the taxing power is a branch of the legislative, and the legislature cannot lie under the necessity of requiring the opinion or the consent of another department of the government before it will be at liberty to exercise one of its acknowledged powers. The independence of the legislature is an axiom in government; and to be independent it must act in its own good time, on its own judgment, influenced by its own reasons, restrained only as the people may have seen fit to restrain the grant of legislative power in making it. The

legislature must, consequently, determine for itself, in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible."

He adds: "But it is also generally admitted that the legislative determination . . . is not absolutely conclusive."

He then mentions the necessity of the purpose of a tax being public, and that the taxpayer may resist a tax whose purpose is not public, and adds: "It is not inconsistent with this doctrine that in every instance the highest consideration should be paid to the determination of the legislature that a tax should be laid. It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give it due investigation or reflection. The presumption, on the other hand, must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed. This is the general rule in constitutional law when the validity of legislation is involved, and it is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid."

The legislature, by passing the said statute, has determined that the establishing and carrying on of an ice plant by a town for supplying the citizens with ice is a purpose "strictly public in its nature;" and our question is whether that conclusion is clearly incorrect.

The only court that has had occasion to consider the question of whether the engaging in the ice business is a function of a public nature is the supreme court of Georgia. In Holton v. Camilla, 134 Ga. 560, 31 L.R.A.(N.S.) 116, 68 S. E. 472, 20 Ann. Cas. 199, that court said: "If, in the hot season of the year, the inhabitant of the city must, for sanitary reasons, relinquish the cool draft from the well because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practical, to cool the water which it delivers through pipes as a substitute, and which ofttimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a frozen condition to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has a right to furnish its inhabitants with water in a liquid form, we fail to see . . . why it cannot furnish it to them in a frozen condition. . . . It is a well-known fact that one of the main uses to which ice is put is the cooling of water for drinking purposes; and when it is used for this purpose, if impure, it is as apt to be deleterious to the consumer as any other impure water. Why, then, in the exercise of its police power, may not a city guard against impurities in the ice, as well as the water used by its inhabitants? Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might, perhaps, equally as well be said to be manufacturing when, by the use of a filtering process, it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason."

The same line of reasoning here adopted by the supreme court of Georgia having been presented incidentally by counsel in the case of State ex rel. Mueller v. Thompson, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774, in the supreme court of Wisconsin, Judge Timlin, in a concurring opinion, made the following answer to it: "It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint. Under a statute authorizing a city to buy coal, it probably could not buy diamonds, although it is said they are chemically identical. Neither is atmospheric gas passed through a varying aperture and articulated by varying contacts always equivalent to argument. The difference between the collection and

distribution of water by means of pipes laid in the streets and the manufacture, sale, and distribution of ice, is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management."

Putting aside the frozen-water argument of the Georgia court as having been well answered by the amusing witticism of the Wisconsin court, we note that, as pointed out by the Wisconsin court, all analogy between the municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for the one business pipes have to be laid in the public streets, and, necessarily, for doing this, the streets have to be torn up and disturbed, whereas the other is a purely competitive business enterprise. There would be analogy between the two if the city were to abandon the sovereign mode of water distribution by means of underground conduits through the public streets, and to go peddling the liquid, as is done in towns unprovided with waterworks and unblessed by a sufficient rainfall for gathering a supply in cisterns, and as has to be done with ice. There would then be complete analogy; but everybody would then see that the town was no longer discharging a sovereign function, but carrying on a private enterprise.

The invocation of the police power by the Georgia court amounts practically to an acknowledgment of the weakness of its side of the argument. For nothing is better established than that, when a legislative measure is dependent for its execution upon the exercise of the taxing power, its validity must be determined by the validity of the tax that will have to be imposed for carrying it out.

"As the funds of a municipal corporation are raised by taxation, the power of the legislature to authorize such a corporation to incur indebtedness, or to expend its funds for the purpose of aiding individuals or individual enterprises, depends upon the fundamental question whether the corporation could be authorized to levy a tax for the purpose of liquidating the indebtedness to be incurred, or could have levied a tax for the purpose of the expenditure proposed." 20 Am. & Eng. Enc. Law, 2d ed. p. 1084.

See also Citizens' Sav. & L. Asso. v. Topeka, supra.

A city may, of course, "guard against impurities in the ice as well as in the water [and, we may add, in the milk and fish and meat and bread] used by its inhabitants;" but the fact that it can do this casts no light upon the question of whether it may go into the ice or the milk or the fish or the meat or the bread business. The terms, "police power" and "eminent domain," have a meaning coextensive with sovereign power or sovereignty; but, as said by the supreme court of Minnesota in a case where the police power was invoked for saving from nullity a plan to provide for the erection of a state grain elevator and storage warehouse (Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331, supra): "As understood in American constitutional law, the term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, *Sic utere tuo ut alienum non lædas.*"

In other words, it is a power to regulate the business of others, and not a power to go into business. Of course, if the business cannot be regulated otherwise than by the government going into it, or perhaps, even if, in the opinion of the legislature, that mode of regulation is the most practical and best, such mode can be adopted; but nothing of that kind could be pretended in the case of the grain or the ice business. The police power, as a separate and distinct power from that of taxation, or in its meaning of one of the dismemberments of the sovereign power, is easily sufficient for regulating the ice business, without aid from the taxing power; and it can play no part in this case. If, as stated in the argument, the ice business in this country is a monopoly that needs regulation, the power of taxation is not the proper power to use for that purpose. Such a thing might be done if the Constitution contained no restrictions on that power; but in this state the Constitution has practically put that power in a straight jacket; and it goes without saying that the legislature is powerless to liberate it therefrom.

One of these restrictions is that in municipal affairs that power can be exercised only where the purpose is "strictly public in its nature." The word "strictly" here inserted by the framers of the Constitution has to be reckoned with. In other words, in this state it does not suffice that a purpose be merely public in order that the power of taxation may be exercised for it, but it must be strictly so, and be so "in its nature."

Among the definitions given to the words "strict" and "strictly" in Webster's New International Dictionary are the following:

"Strict: Exact, accurate; precise; undeviating; rigorously nice; hence, rigid in interpretation; free from latitude; as, to keep strict watch, or strict silence; strict construction of a law; governed or govern-

ing by exact rules; rigorous; as very strict in observing the Sabbath: strict discipline."

"Strictly: In a strict manner; closely; precisely; rigorously; stringently; without latitude; positively."

The Century Dictionary gives the derivation of the word as from the Latin "strictus, past participle of stringere, draw tight, bind, contract," and, among other definitions, gives the following:

"7. Exacting; rigorous; severe; rigid. . . .

"8. Restricted; taken strictly, narrowly, or exclusively."

"Strictly: Rigorously; severely; without remission or indulgence; with close adherence to rule."

In the interpretation of a statute or Constitution, words are understood in their ordinary, popular meaning, and every word is to be given effect, if possible; none is to be supposed to have been inserted by accident or inadvertence, or without the deliberate intention that it should be understood in its ordinary meaning and given effect accordingly. Hence, in the interpretation of this article 224, the word "strict," qualifying the word "public," is to be understood in its ordinary, popular meaning as given hereinabove from the dictionaries, and is to be given effect accordingly. This is so elementary as not needing support by citation of authority. Let it be noted, also, that this article 224 does not contain this same qualification, limitation, or restriction when describing the state purposes for which the taxing power may be exercised, but has added it only when describing the municipal purposes. Its language is that "the taxing power may be exercised by the general assembly for state purposes [no qualification or restriction] and by . . . municipal corporations . . . for municipal . . . purposes strictly public in their nature."

This contrast between the delegation of the power for state purposes and for municipal purposes places in a strong light the deliberate intention of the framers of this article 224 that the municipalities should be required to adhere rigidly to purposes strictly, or, in other words, clearly, or admittedly, public in their nature.

And it goes without saying that this provision of the Constitution is as binding on the legislature as it is on the municipalities, that the legislature can no more abate or arrest any part of its authority and controlling influence than the municipality can; and also that its rigid enforcement is as binding on the courts as the due observance of it is binding on the legislature and the municipalities. Hence, unless a purpose is strictly public in its nature, the legislature is as powerless to authorize the use of the taxing power for it as the municipality would be to use said power for the same purpose without legislative authority; and, if the attempt is made to do so, the courts are bound to enforce the constitutional provision.

It may not be amiss to call attention to the fact that, in the intention of this article 224, the legislature cannot, by its fiat, make that a public purpose which is not already so. The requirement is that the purpose be in its nature public; that is to say, that it be of that character independently of the legislative fiat. This restriction of article 224 would be no restriction at all if the legislature could make public in its nature every purpose for which it desired to delegate the taxing power to a municipality.

By a purpose being strictly public in its nature this article 224 does not mean merely that the purpose must be unaffected by or uncoupled with a private interest; or, in other words, merely that no private individual or private corporation be associated in the business with the municipality. It means that the business must in itself be public; or, in other words, that it must be a municipal business, such business as pertains to the administration of the municipality as a municipality. This results from the force of the expression, "in its nature:" not because the legislature chooses that the municipality may or shall conduct the business, but because the business is in its nature public. If the idea had been merely to prohibit or preclude the use of the taxing power in the interest of private individuals or corporations, either in partnership with the municipality or separately, this provision would have been left out as useless, since ample provision had already been made by article 58, in the most specific and searching terms, against any use of the taxing power in connection with private interests.

No one familiar with the discussions that had taken place, both in and out of the courts, prior to the adoption of this restriction in article 224 touching this question of how far the taxing power may be used by municipalities for engaging in business usually left to private enterprise, such as public gristmills, storage warehouses, distribution of fuel, etc., can fail to see at a glance that this restriction was adopted for the very purpose of setting that question in this state; of giving constitutional sanction in this state to the principle which, independently of constitutional expression, underlies our form of government, and, as such, had been enforced in other states,—that the taxing power can be used only for public purposes.

The framers of this article 224 were familiar with these discussions, and knew that, while there was no disagreement on the point that the taxing power can be legitimately used only for a public purpose, there was great difficulty in ascertaining what was and what was not a public purpose; and to one familiar with the said discussion it is obvious that the peculiar phraseology of this article 224 was adopted with a view to removing that difficulty in this state as far as possible. It was not possible to enumerate what purposes should be held to be public and what not. General language had to be used; and the provision was worded as we find it; that the purpose must be public in its nature, and that it must be so, not merely by taking a liberal or latitudinous view of the matter, or, as some decisions had held, by viewing it in "a liberal spirit," but "strictly" so, *i. e.:*

"Restrictedly; severely; narrowly or exclusively, rigorously; without latitude; positively; with close adherence to rule."

Now, is this business in which the defendant municipality proposes to engage by this ordinance of this strictly public character in its nature?

We think clearly not. The business of manufacturing and selling ice has heretofore been left to private enterprise; as much so as the business of making and selling bread or of any of the articles of household consumption.

The only feature of it that is suggested as likely to impart to it a public character is the growing necessity of ice as an article of household consumption in modern life; but ice is no more necessary than bread and meat. In fact, this argument of necessity has been so thoroughly pulverized, annihilated, by Judge Cooley in the Salem Case, supra, that the discussion of it here would be mere waste of time. And the argument of cheapness of production comes in the same category and must share the same fate; unless, indeed, as intimated hereinabove by us, under very special circumstances such as are not revealed by the record in this case.

Nothing, then, indicates the public nature of this business, and still less its strictly public nature, and the case resolves itself into the proposition that, in disregard of the said restriction of article 224, the legislature has undertaken to authorize the municipalities of this state to use the taxing power for a purpose not strictly public in its nature. In such a case the courts are left to choose between the Constitution and the legislature, and necessarily must obey the Constitution.

In the brief of the defendant, the statement is made that "so far as research has been able to disclose, there is only one municipal ice plant in active operation in the United States, and this is in Weatherford, Okl."

The "research" here spoken of is not that of the defendant or of its counsel, but of J. Walls Wentworth, appointed by the president of the borough of Manhattan to gather statistical information on the subject of municipal and government ice plants, "and to extend his research in foreign countries as well as in the United States." This research shows that there are two towns in England—Bolton and Wolverhampton—and several in Italy that manufacture ice for sale, and none other in the world, except the Oklahoma town. Judging from this, anyone would unhesitatingly say that the making of ice for sale was not supposed by the world in general to be a municipal function; but that, on the contrary, the consensus of opinion throughout the civilized world was that it was not.

We do not lose sight of the fact that, as well observed by the court of appeals of New York, supra, changed conditions may bring about new purposes for which the taxing power may be legitimately exercised; but ice was being manufactured in cities for sale long before the adoption of the Constitution of 1898, and the need for municipal distribution of ice was at that time just as great and as well known to everybody as now; and hence no changes brought about by new conditions can be invoked in connection with that business.

Not a city or town of the state, except the defendant, has sought to take advantage of this law, so far as we know. And we should not wonder at this lack of interest, if the operation of this law is to be the same in all the towns and cities as is shown in this case it would be in the defendant town. The soda water stands are shown to consume a large quantity of ice and to pay but an insignificant amount of taxes. The Rock Island Railroad pays over $3,000 of taxes, approximately one fourth of the total tax of the town, and consumes but an insignificant amount of ice. The operation of this ice plant scheme would be to make the Rock Island Railroad and other large taxpayers who at the same time are small consumers of ice pay in part for the ice to be furnished by the town to the small taxpayers who are at the same time large consumers of ice. What would be the operation of this law in the city of New Orleans, with its street railways and banks and agencies of all kinds paying heavy taxes and needing no ice save a lump for the water cooler, is easily imagined. The pock-

ets of these large taxpayers would be gone into by the city to enable her to drive out of business and destroy the existing ice companies. The operation of this law is thus referred to as calculated to throw a sidelight upon the question of whether this ice making and selling enterprise by a town or city is or is not a "purpose strictly public in its nature."

For the support of its paupers and indigent sick the municipality may go as deeply as the necessity of the case may require into the pockets of its large taxpayers; but it cannot do so for the purpose of selling ice or bread or meat or drugs, etc., etc., more cheaply to its inhabitants in general than the regular merchants are doing. This would be paternalism pure and simple, a thing foreign to our form of government.

The judgment appealed from is therefore set aside, and it is now ordered, adjudged, and decreed that the ordinance of the town of Ruston No. 120, adopted on October 28, 1912, be, and the same is, hereby decreed to be unconstitutional, null, and void, and is hereby annulled, that an injunction issue enjoining the mayor and board of aldermen of said town from attempting to carry said ordinance into effect, and that defendant pay the costs of this suit.

O'Niell, J., takes no part.

Petition for rehearing denied October 20, 1914.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ALICE M. SMITH
v.
TRAVELERS INSURANCE COMPANY.

(219 Mass. 147, 106 N. E. 607.)

Insurance — accident — meningitis — snuffing douche.

A policy insuring against injuries effected through external, violent, and accidental means alone does not cover death from meningitis resulting from a violent snuffing of a nasal douche, which caused infection to pass into the middle ear and thence through the mastoid process into the brain, where the snuffing was no harder than was intended.

(October 24, 1914.)

REPORT by the Superior Court for Suffolk County for the determination of the Supreme Judicial Court, after verdict for defendant, of an action brought to recover on a policy of accident insurance. Judgment for defendant.

The facts are stated in the opinion.

Messrs. **Endicott P. Saltonstall** and **Charles W. Blood**, for plaintiff:

The injury resulting in the death of the insured was caused by "external" means.

Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A.(N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; McGlinchey v. Fidelity & C. Co. 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; Jenkins v. Hawkeye Commercial Men's Asso. 147 Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199; Maryland Casualty Co. v. Hudgins, — Tex. Civ. App. —, 72 S. W. 1047; Hamlyn v. Crown Acci. Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

The injury resulting in the death of the insured was caused by "violent" means.

Hatch v. United States Casualty Co. 197 Mass. 101, 14 L.R.A.(N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; Paul v. Travelers' Ins. Co.

Note. — The question as to when death or injury may be deemed to have been caused by accidental means, though the voluntary act of the insured was the primary cause thereof, is discussed in the note to Fidelity & C. Co. v. Carroll, 5 L.R.A.(N.S.) 657. And see Shanberg v. Fidelity & C. Co. 19 L.R.A.(N.S.) 1206.

As to whether death or injury from substance taken internally be deemed to have been caused by external means, see note to Jenkins v. Hawkeye Commercial Men's Asso. 30 L.R.A.(N.S.) 1181.

Several cases involving questions similar to that before the court in SMITH v. TRAVELERS' INS. CO. are treated in the note accompanying Lehman v. Great Western Acci. Asso. 42 L.R.A.(N.S.) 562, dealing with the question of injury or disability from strain as within provision as to external, violent, and accidental means of accident policies.

As to liability under accident policy for condition caused by external infection without cut or abrasion, see note to Sullivan v. Modern Brotherhood, 42 L.R.A.(N.S.) 140.

The different elements involved in provisions in accident policies insuring against bodily injuries effected through "external,

112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

The injury resulting in the death of the insured was caused by "accidental" means.

Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; H. B. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; McGlinchey v. Fidelity & C. Co. 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; Rodey v. Travelers' Ins. Co. 3 N. M. 543, 9 Pac. 348; Maryland Casualty Co. v. Hudgins, — Tex. Civ. App. —, 72 S. W. 1047; Jenkins v. Hawkeye Commercial Men's Asso. 147 Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199; Hamlyn v. Crown Acci. Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663.

The death of the insured was "effected directly and independently of all other causes" "through external, violent, and accidental means."

Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; New Amsterdam Casualty Co. v. Shields, 85 C. C. A. 122, 155 Fed. 54; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945; Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42, 43 L. T. N. S. 459, 29 Week. Rep. 116; Lawrence v. Accidental Ins. Co. L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781; Delaney v. Modern Acci. Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; Martin v. Equitable Acci. Asso. 61 Hun, 467, 16 N. Y. Supp. 279; Martin v. Manufacturers' Acci. Indemnity Co. 151 N. Y. 94, 45 N. E. 377.

Messrs. **Walter I. Badger** and **William Harold Hitchcock**, for defendant:

In order for the plaintiff to recover, she must show that the death of her brother resulted from "bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means."

Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; National Masonic Acci. Asso. v. Shryock, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774.

The deceased did not receive or suffer "bodily injuries" within the meaning of the policy.

Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; H. B. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329.

If, in snuffing the douche, Smith did nothing but what he intended to do, there can be no recovery under this policy, even though an unexpected result followed. In such a case there would be nothing accidental or unexpected in the means. He would merely have suffered an unintended result of an entirely voluntary act. It is the means, not the result, which is the basis of liability under this policy.

Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752; Hastings v. Travelers' Ins. Co. 190 Fed. 258; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787; Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; United States Mut. Acci. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191.

The insured's death was not "effected directly and independently of all other causes" by snuffing the douche.

Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

The case is simply one of the extension of an existing disease by an alleged accidental means. For this there can be no recovery.

Freeman v. Mercantile Mut. Acci. Asso. supra; Stanton v. Travelers' Ins. Co. 83 Conn. 708, 34 L.R.A.(N.S.) 445, 78 Atl. 317; White v. Standard Life & Acci. Ins. Co. 95 Minn. 77, 103 N. W. 735, 884, 5 Ann. Cas. 83; Penn v. Standard Life & Acci. Ins.

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violent, and accidental means" are so interlinked that it frequently becomes difficult to treat any one of them independently.

This is illustrated to some extent by the decision in SMITH v. TRAVELERS' INS. Co., where it is held that the external act of the insured, *i. e.*, the violent inhalation of the douche, was exactly what he designed it to be, though it produced some internal consequences which he had not foreseen, and L.R.A.1915B.

that there was no bodily injury effected through a means which was both external and accidental,—it being held that it was not sufficient that the death or the illness that caused the death might have been an accidental result of the external cause, but that that cause itself must have been not only external and violent, but also accidental.

J. T. W.

Co. 158 N. C. 29, 42 L.R.A.(N.S.) 593, 73 N. E. 99; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

Sheldon, J., delivered the opinion of the court:

The deceased, whose life was insured by the defendant against some risks, died from spinal meningitis. This disease, according to the plaintiff's evidence, was caused by the presence of streptococcus germs in the brain. The germs had penetrated into the brain from the middle ear through a hole in the mastoid bone. They had been carried into the ear from the outer nose, through the Eustachian tube, by a nasal douche which the deceased was using for catarrh, as he had been in the habit of doing, and which on this occasion he had "snuffed" or drawn into his nostril less gently or harder or more violently than he usually did. Streptococcus germs are among the most virulent and dangerous germs known; but they are found somewhat frequently in the outer nose, and might remain there indefinitely without harm. The nasal douche used by the deceased was harmless in itself; but the harm was done by the fact that he drew it too violently into his nostril, by reason whereof it reached the Eustachian tube and was carried into the middle ear, and thence penetrated into the brain. That there should be a hole or perforation in the mastoid bone through which pus or germs could pass from the ear into the brain is a vary rare occurrence, in only one out of about 1,000 skulls.

The policy insured the deceased against "bodily injuries effected directly and independently of all other causes, through external, violent, and accidental means," and against death resulting "from such injuries alone," within a stated time not now material.

There is here no difficulty in saying that there could be found to have been an unbroken string of causation between the too violent inhalation of the nasal douche and the ensuing death. The too violent inhalation carried the streptococcus germs with the douche into the Eustachian tube, and everything else followed naturally. The presence of these germs in a place where, however virulent in themselves, they were harmless, and the existence of the perforation in the mastoid bone, could be found to have been conditions rather than operating causes of the illness and death. If therefore it can be said that this too violent inhalation effected a bodily injury through "external, violent, and accidental means," that it was itself such a means of injury, the first and chief obstacle to the plaintiff's recovery would be removed. This is the doctrine of many of the decisions relied on by her. Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; McGlinchey v. Fidelity & C. Co. 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; Ludwig v. Preferred Acci. Ins. Co. 113 Minn. 510, 130 N. W. 5; United States Mut Acci. Asso. v. Barry, 131 U. S. 100, 121, 33 L. ed. 60, 66, 9 Sup. Ct. Rep. 755; Preferred Acci. Ins. Co. v. Muir, 61 C. C. A. 456, 126 Fed. 926; Manufacturers' Acci. Indemnity Co. v. Dorgan, 22 L.R.A. 620, 7 C. C. A. 581, 16 U. S. App. 290, 58 Fed. 945, 954; Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42, 43 L. T. N. S. 459, 29 Week. Rep. 116; Lawrence v. Accidental Ins. Co. L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781; Hamlyn v. Crown Acci. Ins. Co. [1893] 1 Q. B. 750, 62 L. J. Q. B. N. S. 409, 4 Reports, 407, 68 L. T. N. S. 701, 41 Week. Rep. 531, 57 J. P. 663; Turvey v. Brintons [1904] 1 K. B. 328, 73 L. J. K. B. N. S. 158, 68 J. P. 193, 52 Week. Rep. 195, 89 L. T. N. S. 690, 20 Times L. R. 129.

But there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that cause itself must have been, not only external and violent, but also accidental. Hatch v. United States Casualty Co. 197 Mass. 101, 104, 14 L.R.A.(N.S.) 503, 125 Am. St. Rep. 332, 83 N. E. 398, 14 Ann. Cas. 290; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Hastings v. Travelers' Ins. Co. (C. C.) 190 Fed. 258; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 Times L. R. 173, 1 Ann. Cas. 787.

In Healey v. Mutual Acci. Asso. 133 Ill.

550, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, the deceased did not know that what he drank was a poison; he took and drank it accidentally. In Jenkins v. Hawkeye Commercial Men's Asso. 147 Iowa, 113, 30 L.R.A.(N.S.) 1181, 124 N. W. 199, the swallowing of the fishbone that caused the death of the insured was a mere accident. In Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252, the oysters which caused the death were eaten by the deceased in ignorance of their unsound condition. In Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, the deceased had no intention of inhaling the gas which caused his death. None of these decisions is inconsistent with the view which we take of the case at bar.

In Delaney v. Modern Acci. Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91, the defendant was held because it was the external physical injury, and not the death as distinguished from the injury, which was accidental. In Rodey v. Travelers' Ins. Co. 3 N. M. 543, 9 Pac. 348; Preferred Acci. Ins. Co. v. Patterson, 213 Fed. 595; and American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191, there was evidence that the original injury was accidental. That was the finding made in Bohaker v. Travelers' Ins. Co. 215 Mass. 32, 46 L.R.A.(N.S.) 543, 102 N. E. 342, and this court decided that the evidence justified the finding.

We do not consider the cases in which it was contended, under various clauses in policies of insurance against accidents, that a death was due to a prior disease or infirmity, and not directly or exclusively to the happening of an accident. Those cases are not applicable here.

We cannot find that there was any "external, violent, and accidental means" producing the injury which caused the death other than this inhalation by the deceased of the nasal douche, which he took, not accidentally in any sense of that word, but purposely, with full knowledge of its character, and in the very way in which he intended to take it.

The burden was upon the plaintiff to show that the death resulted from bodily injuries "effected directly and independently of all other causes, through external, violent, and accidental means." Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360. That she has failed to do. It follows that judgment must be entered on the verdict for the defendant.

So ordered.

L.R.A.1915B.

OKLAHOMA SUPREME COURT.

CORA HOPPER et al., Plffs. in Err.,
v.
OKLAHOMA COUNTY.

(— Okla. —, 143 Pac. 4.)

Tax — appeal from equalization.

1. Chapter 87, Sess. Laws 1910, and chapter 152, Sess. Laws 1910–11, creating board of equalization with power to equalize assessments and to adjust individual assessments, such board is a quasi judicial body, and an appeal will lie from the decision of such board to the district court.

Same — constitutionality of act.

2. Chapter 152, Sess. Laws 1910–11, is not unconstitutional under article 4, § 1, of the Constitution and article 7, § 1, of the Constitution.

Same — remedy.

3. Chapter 87, Sess. Laws 1910, and chapter 152, Sess. Laws 1910–11, construed together, provide an adequate certain remedy by appeal.

(September 1, 1914.)

Headnotes by LOOFBOURROW, J.

Note. — Power of legislature to permit appeal to court for purpose of reviewing the amount of a tax assessment.

Many of the cases upon this question are treated in the note to Silven v. Osage County, 13 L.R.A.(N.S.) 716, the present annotation being supplementary thereto. Viewing the cases therein discussed in connection with the remaining cases upon the subject, the decided weight of authority seems to be to the effect that the legislature has power to provide for appeals to the court from tax assessments, and that a statute so providing is not an unlawful delegation to the judiciary of legislative power. Some jurisdictions, however, adhere to the rule that the granting of a right of appeal to the courts for the purpose of reviewing the amount of an assessment violates the constitutional provision for separate and distinct governmental departments.

The present, like the earlier, note, excludes cases of illegal or fraudulent assessments.

The majority rule, that the legislature may authorize an appeal to the courts for the purpose of reviewing the amount of a tax assessment, was expressly laid down in HOPPER v. OKLAHOMA COUNTY, wherein the contention was that the granting of such a permit violates the constitutional provision for separate and distinct departments of government. And in the Oklahoma case of London v. Day, 38 Okla. 428, 133 Pac. 181, as is shown in HOPPER v. OKLAHOMA COUNTY, the constitutionality of the Oklahoma act allowing appeals to the courts from tax assessments was assailed and the contention

ERROR to the District Court for Oklahoma County to review an order setting aside a judgment reducing the assessment on plaintiffs' property upon appeal by them from the action of the county equalization board. Reversed.

The facts are stated in the opinion.

Messrs. **Wright & Blinn**, for plaintiffs in error:

An appeal to the courts will lie from the act of the equalization boards in the assessment of property.

Re Western U. Teleg. Co. 29 Okla. 483, 118 Pac. 376; Williams v. Garfield Exch. Bank, 38 Okla. 539, 134 Pac. 863; Garvin County v. Lindsay Bridge Co. 32 Okla. 784, 124 Pac. 324; Re McNeal, 35 Okla. 17, 128 Pac. 285.

Messrs. **D. K. Pope** and **H. Y. Thompson**, for defendant in error:

Taxation and assessment belong to the legislative department of government.

Cooley, Taxn. 2d ed. chap. 2, p. 41; Heine v. Levee Comrs. 19 Wall. 660, 22 L. ed. 226; Auditor v. Atchison, T. & S. F. R. Co. 6 Kan. 500, 7 Am. Rep. 575; Silven v. Osage County, 76 Kan. 687, 13 L.R.A. (N.S.) 716, 92 Pac. 604, 14 Ann. Cas. 163; Kansas P. R. Co. v. Riley County, 20 Kan. 144.

A proceeding before an assessor or board of equalization is, in no sense a case, and therefore by the terms of our Constitution could not be removed to the jurisdiction of our Federal courts or appeal to Supreme Court.

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held to be without merit, but the character of the alleged constitutional objection or objections does not appear in the report of the case. And see the following additional Oklahoma cases in which the constitutionality of the Oklahoma statute authorizing appeals from tax assessments seems to have been tacitly recognized: Re Western U. Teleg. Co. 29 Okla. 483, 118 Pac. 376; Re Osage & O. Gas Co. 35 Okla. 154, 128 Pac. 692; Williams v. Garfield Exch. Bank, 38 Okla. 539, 134 Pac. 863; Mellon Co. v. McCafferty, 38 Okla. 534, 135 Pac. 278.

So, in Iowa it has been held (Re Sioux City Stock Yards Co. 149 Iowa, 5, 127 N. W. 1102) that a statutory provision (Iowa Code, § 1373) allowing appeals to the courts for the purpose, among others, of ascertaining the correctness of an assessment as affected by the value of the property taxed, was not violative of the constitutional provision that the powers of government shall be divided into legislative, executive, and judicial departments, and that no person charged with the exercise of powers properly belonging to one of such departments shall exercise any function appertaining to either of the others except as expressly directed or permitted. This was upon the ground that the ascertainment of the value of the property for the purpose of taxation was a judicial act, and therefore that an appeal involving the correctness of such judicial determination presented a judicial question. The court also said that this right of the court to review the "correctness of an assessment involving the valuation of property . . . has too long been acquiesced in to justify a serious review of the question." And see the following recent Iowa cases wherein the court had a statutory provision allowing an appeal from the tax assessment under consideration, but in which no question as to its constitutionality was raised: Re Seaman, 135 Iowa, 543, 113 N. W. 354; Peterson v. Board of Review, 138 Iowa, 717, 116 N. W. 818; Murrow v. Heath, 146 Iowa, 347, 125 N. W. 259; Morril v. Bentley, 150 Iowa, 677, 130 N. W. 734; Dowling v. Webster County, 154 Iowa, 603, 134 N. W. 870; Re Farmers' Loan & T. Co. 155 Iowa, 536, 136 N. W. 543.

And in State ex rel. Union P. R. Co. v. State Bd. of Equalization, 81 Neb. 139, 115 N. W. 789, the court referred to the statutory right to appeal from tax assessments, and, without expressly raising the question of the right of the legislature to authorize such an appeal, said that the taxing board in fixing an assessment acts in a quasi judicial capacity. This decision would form a sufficient foundation for holding constitutional a statute providing for appeal from tax assessments. And in the subsequent Nebraska case of Re Bankers' L. Ins. Co. 88 Neb. 43, 128 N. W. 661, the court had under consideration Nebraska Comp. Stat. 1907, chap. 77, art. 1, § 124, which expressly provides for appeals from any action of the county board of equalization, and there seems to have been no question but that the statute was valid.

So, in Boston & M. R. Co. v. State, 76 N. H. 515, 85 Atl. 616, citing Boston & M. R. Co. v. State, 76 N. H. 86, 79 Atl. 701, the court in construing New Hampshire Pub. Stat. chap. 64, § 10, which authorizes an aggrieved railroad to appeal to the supreme court from a tax assessment, emphasized the fact that a tax appeal was a judicial proceeding and that the same rules apply as in other judicial proceedings.

And it seems that in Washington the legislature may constitutionally authorize an appeal to the court from an assessment. This has not been expressly held, but is reasonably deducible from the cases of Seattle v. Seattle & M. R. Co. 50 Wash. 132, 96 Pac. 958, holding that a statute authorizing the superior court to review the assessment roll when returned by commissioners appointed by it is not unconstitutional as a delegation of legislative power to the judiciary; and the case of Renard v. Spokane, 48 Wash. 345, 93 Pac. 917, which refers, without raising any question of constitutionality, to the Washington statute allowing an appeal from tax or special assessments.

And as supporting the West Virginia

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Upsher County v. Rich, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651; State ex rel. West v. Cobb, 24 Okla. 662, 24 L.R.A. (N.S.) 639, 104 Pac. 361; Homesteaders v. McCombs, 24 Okla. 201, 38 L.R.A.(N.S.) 1000, 103 Pac. 691, 20 Ann. Cas. 181; State ex rel. Haskell v. Huston, 21 Okla. 782, 97 Pac. 982; State ex rel. Atty. Gen. v. Huston, 27 Okla. 606, 34 L.R.A.(N.S.) 380, 113 Pac. 190.

An appellate body takes only such jurisdiction as possessed by the tribunal from which an appeal is presented.

Milam v. Smith-Mauer Bros. 38 Okla. 328, 133 Pac. 33; Bostick v. Noble County, 19 Okla. 92, 91 Pac. 1125; 37 Cyc. 1087; Cooley, Taxn. 537.

Loofbourrow, J., delivered the opinion of the court:

Plaintiffs in error complained to the county equalization board of Oklahoma county that the valuation placed upon certain lots in Oklahoma county was more than the fair cash value of said lots on January 1, 1912; from the action of the county equalization board plaintiffs in error appealed to the district court; the district court heard the evidence, found that the valuation of the property was excessive, and entered judgment reducing the assessment on the property set forth in the appeal on July 16, 1913; on August 25, 1913, defendant in error filed a motion to set aside said judgment for the following reasons: "First, that under the Constitution of the state of

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cases set out in the earlier note (13 L.R.A. (N.S.) 716), see West Virginia Nat. Bank v. Spencer, 71 W. Va. 678, 77 S. E. 269, wherein it was again said, in effect, that the question of ascertainment of value of property for purposes of taxation was a judicial one.

And it has been held that the state may constitutionally grant the right to appeal to the court from a tax assessment to either the state or the taxpayer, and deny such right to the other. Thus, in State v. Bley, 162 Ala. 239, 50 So. 263, it was held that a statute (General Acts 1903, p. 295; acts September 30, 1903, § 1) which authorized the tax commissioners to appeal from an order of the court of county commissioners was not unconstitutional in that it did not give the taxpayer an equal opportunity to appeal. And in State v. Ide Cotton Mills, 175 Ala. 539, 57 So. 481, applying the rule laid down in State v. Bley, supra, it was held that the legislature could authorize an appeal to the courts by taxpayers from an assessment, without granting a similar right to the state. As is pointed out in this case, this was done by Acts 1911, pages 159–191, which repealed Code 1907, § 2252, which authorized both the tax commissioners and the taxpayers to appeal from an order of a county commissioners' court, and which grew out of and was a modification of the statutes set out in State v. Bley, supra. The above set out decision in State v. Ide Cotton Mills was seemingly approved in State Tax Commission v. Bailey, 179 Ala. 620, 60 So. 913. And in Com. v. Big Sandy Co. 155 Ky. 412, 159 S. W. 956, it was held that the fact that Kentucky Statutes, § 4128, granted the right of appeal from an assessment to a taxpayer, and withheld it from the county and state, "in no way affects the validity of the act."

So, in the Alabama case of State v. Hall, 172 Ala. 316, 54 So. 560, the court, without questioning the right to allow an appeal from a tax assessment, held that the statute which granted that right in Alabama was not unconstitutional as depriving the property owner of the equal protection of the

law in that the statute authorized the court on appeal to fix the assessment "at the fair market or real value" of the property, whereas it was the custom of the assessors to fix the assessment at 60 per cent of the fair market value.

And for jurisdictions in which the question as to the constitutionality of statutes allowing appeal to the court from tax assessments has not been expressly passed upon, but in which the courts in recent cases have had such statutes under consideration but did not raise any question as to the constitutionality of the statute, see the following cases: State v. Allen, 151 Ala. 556, 44 So. 564 (applying Alabama General Acts 1903, pages 225, 297); State v. Slouss-Sheffield Steel & I. Co. 162 Ala. 234, 50 So. 366 (construing and applying Alabama Code 1907, §§ 2148, 2265); State v. Yavapai County, 14 Ariz. 222, 127 Pac. 727 (referring to Arizona Civil Code 1901, ¶ 3875, which was said to authorize an appeal by a taxpayer where he is dissatisfied with a reduction allowed by the board of equalization); Arizona Copper Co. v. State, 15 Ariz. 9, 137 Pac. 417 (applying the statutory provision set out with the next preceding case); Clay County v. Brown Lumber Co. 90 Ark. 413, 119 S. W. 251 (citing Kirby's Ark. Dig. § 6999, which allows an appeal from the determination of the county court as to the correctness of the valuation placed on property by the board of equalization); Singer Mfg. Co. v. Denver, 46 Colo. 50, 103 Pac. 294 (Colorado statute authorizing the court on appeal to review and give relief where the assessment was manifestly excessive, etc.); New York C. & St. L. R. Co. v. Hammond, 170 Ind. 493, 83 N. E. 244 (applying in Indiana statute allowing appeals in case of special assessments for public improvements where the benefits assessed were too high or the damages too low, etc.); Gardiner v. Bluffton, 173 Ind. 454, 89 N. E. 853, 90 N. E. 898, Ann. Cas. 1912A, 713 (referring to Indiana Acts 1905, p. 219, § 111; Burns's Anno. Stat. 1908, § 8716, which provided for appeals directly to the court where assessments for local improvements were deemed excessive);

Oklahoma the legislature cannot authorize an appeal from the county assessor or the county board of equalization; second, that if under the Constitution such an appeal can be allowed, then the present law is void for uncertainty."

The motion was sustained, and the judgment in favor of plaintiffs in error set aside. From this order plaintiffs in error appeal, and it is agreed by the parties to this appeal that there are but two questions involved in this case, which were those involved in the motion as above indicated.

It is contended that, since article 4, § 1, of the Constitution of Oklahoma provides: "The powers of the government of the state of Oklahoma shall be divided into three separate departments: The legislative, executive, and judicial; and except as provided in this Constitution, the legislative, executive, and judicial departments of government shall be separate and distinct, and nei-

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Gish v. Shaver, 140 Ky. 647, 131 S. W. 515; Chesapeake & P. Teleph. Co. v. Alleghany County, 116 Md. 220, 81 Atl. 520 (construing Maryland act 1910, chap. 430); Taylor v. Haverhill, 192 Mass. 287, 78 N. E. 475 (holding that Massachusetts Rev. Laws, chap. 49, § 4, granted a right of appeal for abatement of an assessment); Cheney v. Assessors, 205 Mass. 501, 91 N. E. 1005 (applying Massachusetts Rev. Laws, chap. 12, § 78, and Massachusetts statute 1909, chap. 490, pt. I. § 77); Sears v. Assessors, 205 Mass. 558, 91 N. E. 913 (applying Massachusetts Rev. Laws, chap. 12, §§ 77, 78); Essex County v. Lawrence, 214 Mass. 79, 100 N. E. 1016 (construing and applying Massachusetts Rev. Laws, chap. 12, §§ 77, 78); Sears v. Nahant, 215 Mass. 234, 102 N. E. 491, Ann. Cas. 1914C, 1296 (citing Massachusetts Rev. Laws, chap. 12, § 78); State v. Minnesota & O. Power Co. 121 Minn. 421, 141 N. W. 839 (applying Minnesota General Laws 1909, chap. 294, §§ 2, 3; Rev. Laws Supp. 1909, § 1038–54); Parker v. Raleigh Sav. Bank, 152 N. C. 253, 67 S. E. 492 (citing and stating the rights given by North Carolina Rev. § 1074); Clark v. Burschell, 220 Pa. 435, 69 Atl. 900 (referring to Pennsylvania Acts 1889, P. L. 37, which authorized an appeal from an assessment which is deemed excessive); H. C. Frick Coke Co. v. Mt. Pleasant Twp. 222 Pa. 451, 71 Atl. 930 (same as next preceding case); Delaware, L. & W. R. Co.'s Tax Assessment, 224 Pa. 240, 73 Atl. 429 (same statute); Lehigh & W. B. Coal Co. v. Luzerne County, 225 Pa. 267, 74 Atl. 67 (same statute); Lehigh & W. B. Coal Co.'s Assessment, 225 Pa. 272, 74 Atl. 65 (same statute); Mineral R. & Min. Co. v. Northumberland County, 229 Pa. 436, 78 Atl. 991 (same statute); Philadelphia & R. Coal & I. Co. v. Northumberland County, 229 Pa. 468, 79 Atl. 109 (same statute); Central Pennsylvania Lumber Co.'s Appeal, 232 Pa. 191, 81 Atl. 204 (referring to the acts of April 19, 1889, P. L. 37, and June 26, 1901, P. L. 601). But in connection with Clay County v. Brown Lumber Co. supra, see Perry County v. Matthews, 46 Ark. 383, as set out in the earlier note.

The minority rule which is rejected in HOPPER V. OKLAHOMA COUNTY finds support in the Connecticut case of Bradley v. New Haven, 73 Conn. 646, 48 Atl. 960, wherein the court had under consideration the constitutionality of a statute which was confined in its effects to one locality and was of a temporary character. This statute provided for an examination, valuation, and record of all the taxable real estate in New Haven by the assessors, and conferred appellate jurisdiction upon the superior court, and was enacted for the purpose merely of furnishing reliable information for use in determining the assessments, but was not to be binding upon the assessors. It was claimed that the attempted conferring of appellate jurisdiction on the superior court was unconstitutional as conferring administrative power upon the judiciary, and the court (Baldwin, J., dissenting) so held, saying: "The valuation appealed from in such case is not an assessment valuation, nor a valuation that fixes the amount of a tax, nor a valuation that in any way affects the legal rights of anybody in the way of unjust or illegal taxation or otherwise. The court, in acting upon such an appeal, is taking part in an administrative act pure and simple, which, when completed, legally affects nobody, legally binds nobody, settles no rights, redresses no wrongs, and can only serve the convenience of administrative officers in performing their duties. In such an appeal the plaintiff is not, and cannot be, legally injured by the valuations of which he complains; and consequently the redress which he asks, and which the court is empowered to grant, is not legal redress at all. The valuation which the court is asked to make in such cases is not made in the exercise of any judicial power or function, nor is it made as incident to the exercise of any such power or function; it is made as part of an administrative act or process, for a purpose purely administrative; and it is an act which, under this legislation, is required of the superior court as a court, and not as a special statutory tribunal. We think such action as is required of the court under this special legislation falls clearly without the limits of the judicial department. If the court can be empowered to aid others in performing the work called for by this special legislation, it is difficult to see why it cannot be empowered to do the entire work without the aid of others; and, if this be so, then it is still more difficult to see why it cannot be empowered to do any administrative act whatsoever. Upon the view here taken of the nature and purpose of the special legislation in question, we are constrained to hold that in so far as it attempts to confer jurisdiction upon the superior court, it is, to that extent, unconstitutional." G. J. C.

L.R.A.1915B.

ther shall exercise the powers properly belonging to either of the other;" and that since taxation comes within the powers of the legislative department,—no part of that function of government may be exercised by the judicial department. In support of this proposition, counsel cite, among other cases, Silven v. Osage County, 76 Kan. 687, 13 L.R.A.(N.S.) 716, 92 Pac. 604, 14 Ann. Cas. 163, wherein the supreme court of Kansas held that an act of the legislature providing for appeals from the action of the assessor to the board of equalization and from the board of equalization to the district court was unconstitutional for the reason that the assessment of property, for purposes of taxation, is not a judicial function. However, the strict rule applied in the Kansas case is not followed by a great many courts, and the contrary doctrine has been repeatedly recognized by this court. See London v. Day, 38 Okla. 428, 133 Pac. 181, a case involving the identical proposition, in which opinion the following Oklahoma cases are cited: Williams v. Garfield Exch. Bank, 38 Okla. 539, 134 Pac. 863; Rumph v. Joines, 38 Okla. 30, 131 Pac. 1095; Re McNeal, 35 Okla. 17, 128 Pac. 285; Re Western U. Teleg. Co. 29 Okla. 483, 118 Pac. 376; Kingfisher County v. Guarantee State Bank, 27 Okla. 736, 117 Pac. 216; Asher State Bank v. Pottawatomie County, 31 Okla. 145, 120 Pac. 634,—in which the validity of such statute is recognized. And the court said: "In addition, however, plaintiff assails the constitutionality of the act of the legislature under which the foregoing opinions have been rendered. Chapter 87, Sess. Laws 1910. We have examined the contentions made in this regard, but deem them to be without merit."

Section 1, article 7, Const. Okla. provides: "The judicial power of this state shall be vested in the senate, sitting as a court of impeachment, a supreme court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the supreme court, as may be established by law."

While by § 1 of article 3 of the Kansas Constitution the judicial power of the state is vested solely in the courts, no authority being given the legislature to clothe commissions or boards with judicial power.

For authorities holding that a court may review or correct assessments, see Ward v. Beale, 91 Ky. 60, 14 S. W. 967; State ex rel. Spencer v. Ensign, 55 Minn. 278, 56 N. W. 1006; State ex rel. Merrick v. District Ct. 33 Minn. 235, 22 N. W. 625, 632; State, Van Riper, Prosecutor, v. North Plainfield Twp. 43 N. J. L. 349; Wheeling Bridge & Terminal R. Co. v. Paull, 39 W. Va. 142, 19 S. E. 551; Charleston & S. Bridge Co. v. Kanawha County Ct. 41 W. Va. 658, 24 S. E. 1002; State v. South Penn. Oil Co. 42 W. Va. 80, 24 S. E. 688; Edes v. Boardman, 58 N. H. 580. And in the following cases the constitutionality of an act authorizing appeals to courts where the owner feels aggrieved at the valuation placed upon his property by the assessor has not been questioned, *viz.:* Farmers' Loan & T. Co. v. Newton, 97 Iowa, 502, 66 N. W. 784; Royal Mfg. Co. v. Rahway, 75 N. J. L. 416, 67 Atl. 940; Iron Companies v. Pace, 89 Tenn. 707, 15 S. W. 1077; Louisiana Brewing Co. v. Board of Assessors, 41 La. Ann. 565, 6 So. 823.

In the case of Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234, Mr. Justice Field, in the opinion, states: "In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them,—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with, when designed and manifest departures from the rule are avoided. To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judical in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment."

The board of county commissioners are constituted *ex officio* the county board of equalization, of which board the county as-

sessor is the secretary. In § 11, chap. 152, Sess. Laws 1910–11, is found the powers and duties of such board; they not only equalize taxes over the county, but they have the power to raise, lower, and adjust individual assessments, and to fix the valuation of the property at its fair cash value, etc. Now, in order to find the fair cash value to be placed upon property for the purposes of taxation, this board may hear evidence both for and against the individual complaining; from this evidence they ascertain the facts and apply thereto the law, decide the controversy, and, in effect, render judgment; their action is final unless appealed from, and cannot be collaterally attacked; in so doing they have exercised judicial power, thereby performing a judicial act. In the performance of their duties they exercise both administrative and judicial functions. The county equalization board is a quasi judicial body, and by reason of the judicial character of a part of the duties to be performed by the county board of equalization, they are, no doubt, such a board as is contemplated by § 1, article 7, of the Constitution.

In Cooley on Taxation, 3d ed. pages 1464–1466, in discussing the right of an action against an assessor for the wrong which may result in injury to the taxpayer by reason of the error or mistake in judgment of the assessor in assessing the property, it is said: "It has long been considered of the very highest importance that when questions, either of law or fact, are referred to the judgment of an officer selected for the purpose of passing upon them, he should be guarded by such rules of protection that in acting he should be under no concern regarding personal consequences, so that the free exercise of an unbiased judgment may be expected from him. To insure to him the necessary feeling of security it is necessary that he be altogether exempt from responsibility to such interested parties as may be dissatisfied with his conclusions, and who might be inclined, if the law permitted it, to call him to personal account for his mistakes or faults of judgment, and endeavor to recover from him a compensation for any loss that they may have suffered as a result of his action. The policy and justice of this exemption are so plain and reasonable that the rule meets with universal assent and is applied in all cases where functions of a judicial nature are exercised. . . . And this principle of protection is not limited in its application to the judges of courts, but extends to all officers who have duties to perform which in their nature are judicial, and which are to be performed according to the dictates of their judgment. . . . If the duties of assessors are in their nature judicial, then this principle applies, and they are entitled to rely upon it for their protection. The proper remedy for erroneous decisions on their part will then be seen to be, not a suit at law to hold them to personal responsibility, but some direct proceeding to correct the error and prevent the injurious consequences likely to flow from it. . . . That the duty of these officers calls into action the judicial function is unquestionable. . . . If, therefore, it shall be found that one of these officers has made an excessive assessment, he cannot be held personally responsible for the error, whether it results from an erroneous view of the facts or of the law." L.R.A.1915B.

For authorities holding that the members of a board of equalization or review, with power to change an individual assesament, act judicially, and therefore are not liable in a suit at law for illegal and corrupt conduct, see People v. Goldtree, 44 Cal. 323; State ex rel. Mason v. Ormsby County, 7 Nev. 392; Steele v. Dunham, 26 Wis. 393. See also Boody v. Watson, 64 N. H. 162, 9 Atl. 794.

As to the second contention there is no merit. Chapter 87, p. 173, Sess. Laws 1910, provided for appeals from county boards of equalization to the county court. In January, 1911, this court held, in the case of Kingfisher County v. Guarantee State Bank, 27 Okla. 736, 117 Pac. 216, that an appeal would not lie in such a case from the county court to the supreme court for the reason that § 17, art. 7, of the Constitution, enumerates the character of cases in which appeals will lie from the county court to the supreme court; the action of the county court on an appeal from the board of equalization not being one of them. The legislature, being then in session, enacted chapter 152, Sess. Laws 1910–11, and § 15 of said act provides for appeals from all county boards of equalization to the district or superior courts of the county in which the assessment is made, etc. This act deals with the same subject-matter as chapter 87, Sess. Laws 1910, supra, but instead of appeal being taken from the county board of equalization to the county court, it provides that such appeal may be taken to the district or superior court. The act of 1910–11 does not specifically repeal the act of 1910, and therefore the two acts must be construed together in so far as they are not inconsistent, and the manner and method of taking the appeal is as provided by the act of 1910.

Since it is conceded that the judgment set aside by the trial court was correct if the law was constitutional and the statute valid, the cause is reversed and rendered.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

A. J. GRANT
v.
JOHN H. SWANK et al.
and
CECIL P. REED, Appt.

(— W. Va. —, 81 S. E. 967.)

Deed — for support — lien.

1. A recital that grantees "agree to care for and support" grantors "with money and other necessaries for their support their natural life," though such agreement was the sole consideration for the grant, will not alone create a lien or charge on the land conveyed. To operate as such, an intent to impose such burden must definitely appear, or be directly inferable from the grant when properly construed.

Judgment — against nonresident — validity.

2. A personal decree against nonresident defendants, not served otherwise than by publication, and not appearing to the proceeding, is erroneous.

Same — prayer for relief.

3. Upon a bill stating facts warranting general, but not special, relief, though praying both, the court may, upon proof deemed sufficient, grant only the general relief, provided it be not inconsistent with that specifically prayed.

(April 14, 1914.)

APPEAL by defendant Reed from a judgment of the Circuit Court for Pleasants County in plaintiff's favor in a suit to enforce a provision in a deed. Reversed.

The facts are stated in the opinion.

Mr. **J. Howard Holt**, for appellant:

A provision for "necessaries" and support is not a condition.

The same words may be employed to create a covenant as a condition; if there is doubt of the intention, courts will construe them to be a covenant, and not a condition; for conditions which destroy estates are not favored in law, and are strictly construed.

Headnotes by LYNCH, J.

6 Am. & Eng. Enc. Law, 502; Brown v. Caldwell, 23 W. Va. 187, 48 Am. Rep. 376.

If the provision for necessaries and support is a consideration for the grant, it is not a lien upon the land; for no lien is expressly retained on the face of the deed.

McCartney v. Bolyard, 22 W. Va. 641.

It is not technically a covenant, because not signed and sealed by the grantees; assumpsit lies, but not action of covenant.

West Virginia, C. & P. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696; 2 Devlin, Deeds, 1047.

Mr. **G. D. Smith** for appellee.

Lynch, J., delivered the opinion of the court:

By deed dated February 8, 1908, Alvilda Grant, who was the owner of the fee, and her husband, conveyed to John H. Swank and his wife, H. J. O. Swank, a tract of 102 acres of land in Pleasants county. The deed recites a consideration of "$1,800, cash in hand, the receipt whereof is here acknowledged, and other considerations hereinafter mentioned." The only recitals indicative of "other considerations" are that the grantees "doth herein agree to care for and support the said Alvilda Grant and A. J. Grant with money and other necessaries for their support their natural life." The deed contains no provision indicative of an intent to charge or burden the land, or to reserve a lien thereon to secure the faithful discharge of the obligations assumed by the grantees.

H. J. O. Swank, by deed of June 2, 1909, purporting to pass the fee in the entire acreage, but in which John H. Swank did not join, granted the land to J. Warren Reed.

His wife having died, A. J. Grant instituted this suit to charge the lands with the expenses paid by him incident to her illness and death, and those incurred in the maintenance and support of himself since her death, and to enforce the same by a sale under the decree of the court. He

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Note. — While, as held in GRANT v. SWANK, and by the weight of authority, a provision in a deed for the support of the grantor does not constitute an equitable lien upon the property conveyed in favor of the grantor, which will be enforced against the property, nevertheless this doctrine will not preclude courts of equity from charging the grantor's support upon the premises conveyed whenever, from the language of the parties or the attending circumstances, they can infer an intention to create such a charge. See notes in 13 L.R.A.(N.S.) 725; 28 L.R.A.(N.S.) 607; and 43 L.R.A. (N.S.) 929. The general question as to the relief of the grantor in a conveyance of this character, the consideration of which is the agreement to support him, where the grantee fails to perform, is considered in a note in 43 L.R.A.(N.S.) 916. In view of the limited relief given in GRANT v. SWANK, this question of relief and the extent of relief is an important one. The case, however, can hardly be considered as authority for granting so limited relief in the ordinary case, since the decision on that point was apparently largely affected by the pleadings.

As to validity of personal judgment against nonresident upon constructive service of process, see note in 50 L.R.A. 577.

A. G. S.

bases his right to the relief sought upon the theory that the deed creates a lien on the land conveyed, or a right to charge it with the amounts thus expended, although it does not expressly retain a lien or right to charge it for any purpose. The bill states all these facts in detail, but alleges that the cash consideration was not paid or intended to be paid, but that the sole consideration for the grant was the maintenance and support of the grantors during their joint lives and the life of the survivor. He charges that Reed, at the date of the grant by H. J. O. Swank, had notice of plaintiff's lien and right to charge the land with the expenses of the maintenance and support for which the deed provided, and in consideration of which the land was conveyed to J. H. and H. J. O. Swank.

The Swanks and J. Warren Reed are named as defendants, but were not personally served with process. They were proceeded against by publication. Reed tendered an answer, which the court permitted him to file, and to which plaintiff replied generally. H. J. O. Swank did not appear for any purpose. While one of the decrees entered in the cause recites the tender and filing of an answer by J. H. Swank and general replication thereto, no such answer appears in the record. If filed, we cannot ascertain what it contains. Although in other respects Reed denies the averments of plaintiff's bill, he does not controvert the statement contained therein as to the real consideration for the grant to the Swanks. Nor does he offer any proof to show that Mrs. Swank was, at the date of her deed, in fact divorced from her husband, warranting the failure to join him as grantor therein, nor does he directly aver that she had obtained a divorce. The only averment of the fact of divorce is that at the date of her deed she was a single woman, "having been divorced from her former husband, John Swank." The mere recital in the deed that the grantor was "usually called Oregon Swank, formerly wife of John H. Swank," and in the certificate of acknowledgment that she was "a single woman of lawful age," does not negative the continuance of a relation existing only a year before.

Having found "that there was reserved a life estate (in the Grant deed) for the support of the grantors therein," and "that the life estate so reserved in said deed is a charge and lien on said 102 acres of land, and liable for the life support and maintenance of the said Alvilda Grant and A. J. Grant during their natural lives," and "being unable at this time to ascertain the true amount plaintiff is entitled to recover on account of the expenses and money expended for Alvilda Grant in her lifetime, including her funeral expenses and all other expenses incident to her death, and also the amount A. J. Grant is entitled to be paid for his life support and maintenance," the court directed a reference to a commissioner to ascertain and report the amounts thus incurred and paid, and the amount requisite for the support of plaintiff subsequent to the death of his wife to the date of the decree.

The death of J. Warren Reed being noted of record, the court directed the cause to proceed against Cecil P. Reed, his only son and heir at law, and, confirming the findings of the master, decreed "that the plaintiff do recover of and against the defendants herein the sum of $72.70, with interest from September 2, 1912, and the sum of $615, being the item for support and maintenance found due in favor of the plaintiff for the period of 123 weeks at the rate of $5 per week, from September 23, 1908, until February 8, 1911, with interest" from the date last named; that said sums "be and they are declared to be a charge upon the real estate of the defendants;" and directed a sale of the land to satisfy the sums so charged thereon.

Thereafter, but before sale, Cecil P. Reed appeared and tendered his petition, averring the death of J. Warren Reed intestate, that petitioner was his only child and heir at law, that during the previous proceedings in the cause and at the time of filing the petition he was a nonresident of this state, and that he had not therefore been served with process or appeared as a party in the cause. He copies and adopts the answer of his father theretofore filed, and prays to be admitted as such party. The petition, however, contains no prayer for a rehearing or review of the previous proceedings in the cause. But, having found no error, the court approved and confirmed the preceding decrees. Hence this appeal by the petitioner.

While courts of other jurisdictions have, in an apparent effort to protect aged grantors from the result of their imprudence, held provisions similar to that in the Grant deed effectually creative of a lien, charge, or equitable mortgage, this court has held otherwise, except in cases distinguishable from that now under review. If the language used in the Grant deed may be said to create any lien on the land conveyed, or any right to charge it with the support of the grantors, the lien or charge can only be implied. There is no express provision or reservation to that effect. Its language is rather suggestive of an agreement or undertaking by the grantees for maintenance and support. In Brawley v. Catron, 8

Leigh, 522; McCandlish v. Keen, 13 Gratt. 615 (both binding authorities in this state until disapproved); Crim v. Holsberry, 42 W. Va. 668, 26 S. E. 314; Taylor v. Lanier, 7 N. C. (3 Murph.) 98, 9 Am. Dec. 599; Cornell v. Maltby, 165 N. Y. 557, 59 N. E. 291; Id. 35 App. Div. 630, 56 N. Y. Supp. 1105; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868; McKillip v. McKillip, 8 Barb. 552; Meigs v. Dimock, 6 Conn. 458; Peters v. Tunell, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; Arlin v. Brown, 44 N. H. 102; Salyers v. Smith, 67 Ark. 526, 55 S. W. 936,—similar provisions are held insufficient to create such lien or charge on the land conveyed.

Though Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874; McClure v. Cook, 39 W. Va. 579, 20 S. E. 612; and Pownal v. Taylor, 10 Leigh, 172, 34 Am. Dec. 725, held agreements sufficient for that purpose, it was because in each case there was either an express charge created by the deed, or language importing an intention to reserve a lien on the land or a right to charge it with the expense incident to the wants and necessities of the grantors. Such reservation clearly appears in the Bates Case. In the McClure Case the deed provided for retention by the grantors of the possession and occupancy of the land "where they now reside so long as they live," and that the grantee "is not to sell or dispose of any part or interest in the property, without the consent and approval of" the grantors, thus manifesting an intention on their part to secure themselves against the improvidence of the grantee and his lack of fidelity to the obligations thereby imposed. The deed in the Pownal Case contained the covenant by the grantee for the support of the grantors, and declared the land bound therefor "into whose hands soever it may come." Even there the court held the provision a mere charge upon the land enforceable in equity

While this court has granted relief by way of cancelation because of the failure of the grantee to comply with his agreement to maintain and support, as for a failure of consideration, it has not construed, and feels constrained now to refuse to construe, this or other similar language, without more, as indicative of an intention on the part of the grantors to create either a lien or a charge upon the land conveyed. If either is thus created, the deed or other contract should clearly indicate a purpose to burden it either by a lien or by a charge for that purpose.

But the bill contains allegations which, when sustained by proof, as in effect they are, fully warrant a decree responsive to the prayer for general relief, though not in response to the prayer for specific relief prayed and granted. The court therefore had jurisdiction to grant relief under the general prayer. 5 Enc. Dig. 132. As said in Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223: "Where the allegations of a bill are sufficient to support a decree, and there is a prayer for general relief, and such decree is pronounced, it will stand, although not specifically prayed for in the bill." So here, had the court upon the hearing granted relief in accordance with the general prayer by decreeing cancelation of the deed to the Swanks to the exoneration of A. J. Grant's curtesy interest in the 102 acres, it would have had the support of competent authority. Furbee v. Furbee, 49 W. Va. 191, 202, 38 S. E. 511; Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E. 553; Goff v. Price, 42 W. Va. 384, 26 S. E. 287; Cumberledge v. Cumberledge, 72 W. Va. 773, 79 S. E. 1010; Wilfong v. Johnson, 41 W. Va. 283, 23 S. E. 730; White v. Bailey, 65 W. Va. 573, 23 L.R.A.(N.S.) 232, 64 S. E. 1019. The first three cases sustain the right to grant the prayer for general relief; the others, the right to cancel deeds for failure to comply with agreements for maintenance and support.

Does the deed to Reed interpose an insurmountable barrier to the grant of the prayer for general relief by way of cancelation? To this inquiry the response is, not any greater barrier to the general than to the special relief actually granted. But, as that answer is not fully responsible, we must search the record for another, and, if one appears, determine its preventive effect, if any.

The Grant deed vested in the Swanks' title to the 102 acres an undivided moiety in each grantee. By her deed Mrs. Swank, her husband not joining with her, undertook to pass title to the whole tract as if she were a single woman and sole owner. While the validity of her deed is not in issue by any pleading, it is obvious that, even if she were divorced, of which there appears neither direct averment nor sufficient proof, she could, and by her deed did, pass only an undivided moiety. J. H. Swank owns the other moiety. But for the grant to the Swanks, plaintiff would, upon the death of his wife, have become tenant by the curtesy of the whole tract. So, conceding, for present purposes alone, the due execution of the deed to Reed and its efficacy as a grant of Mrs. Swank's moiety, a cancelation of the deed as to the other moiety would restore to plaintiff his curtesy right in the latter. But the record, as presented, limits the relief available, even under the prayer for general relief, to the partial cancelation suggested. The record does not warrant

other or more complete relief. However, if so advised, plaintiff may, on remand, amend his bill in order to raise on issue as to the validity of the H. J. O. Swank deed to Reed.

The decree is erroneous also in another respect. There is a personal decree against all the defendants. Mrs. Swank, though named as a party, did not appear for any purpose. She was not a resident of the state. The bill so avers. The decree of July 12, 1912, by recitals, shows that the only process invoked to convene defendants was by order of publication. Upon such process alone, without an appearance in person or by counsel, it was error to pronounce a personal decree.

Without expressing an opinion as to the validity of the deed by H. J. O. Swank to J. Warren Reed, its due execution not being in issue, or as to other questions discussed in argument, none of which are important in view of what has been said, our conclusion is to reverse the decrees of September 19, 1911, July 12, 1912, and January 29 and March 20, 1913, and to remand the cause, with leave to plaintiff to amend the bill if so advised.

Petition for rehearing denied May 21, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

J. E. JOHNSON et al.
v.
F. O. NORRIS et al., Trustees.

(111 C. C. A. 291, 190 Fed. 459.)

Bankruptcy — surplus — payment of interest.

When there is a surplus of a voluntary bankrupt's estate, after the payment of all proved claims and interest thereon to the date of the filing of the petition, such surplus should be applied first to the payment of the interest accruing on the claims subsequently to the filing of the petition, and the remainder only returned to the bankrupt.

(October 2, 1911.)

Headnote by SHELBY, Circuit Judge.

PETITION for revision of a decree of the District Court of the United States for the Southern District of Texas denying petitioners the right to be paid, out of a surplus in the hands of respondents, interest accruing on all approved claims subsequently to the filing of a petition in bankruptcy. Petition allowed.

Argued before Pardee, McCormick, and Shelby, Circuit Judges.

Statement by **Shelby**, Circuit Judge:

On November 6, 1907, in the court below, the firm of Vineyard, Walker, & Company, and the individuals composing the firm, to wit, B. L. Vineyard, A. M. Waugh, Peter Hahn, Leo Hahn, and R. E. Walker, were, on their voluntary petition, adjudged bankrupts. F. O. Norris, J. J. Whatley, and L. R. McFarlane were appointed trustees. During the course of administration, dividends were paid to the partnership creditors and to the creditors of the individual partners amounting to 100 cents on the dollar, including interest to the date of the filing of the petition; but no interest which accrued subsequently to November 6, 1907, was paid.

On March 26, 1910, the trustees filed a report showing the following assets on hand:

B. L. Vineyard	$60,061 45
R. E. Walker	7,119 54
Peter Hahn	16,357 78
Leo Hahn	4,894 04
Total	$88,432 81

The trustees prayed that their report be approved as a final report, and that they be discharged and ordered to return the surplus assets to the bankrupts. J. E. Johnson and other holders of approved claims against the partnership estate, and S. S. Robinson, the holder of an approved claim against the individual estate of R. E. Walker, opposed the application, and prayed that the trustees be required to further administer the estate and to pay such interest as had accrued on all approved claims from and after November 6, 1907, the date of the filing of the petition. The referee denied the creditors' petition for interest, granted the trustees' application, and ordered the surplus assets turned over to the bankrupts.

Note. — Right to interest on allowed claims in bankruptcy.

This question was treated in the note to Re John Osborn's Sons & Co. 29 L.R.A. (N.S.) 887, where a treatment of the earlier American cases will be found. As shown in that note, the rule is that where there is a surplus of assets, interest will be paid L.R.A.1915B.

on all allowed claims from the date of the adjudication (under the act of 1867) or the filing of the petition (under the act of 1898) to the date of payment. This was the rule laid down in JOHNSON v. NORRIS, which decision seems to be supported by both authority and reason.

But where the assets are insufficient to satisfy the principal of the claims asserted,

The creditors mentioned, whose claims aggregated over $70,000, filed their petition for review. On May 30, 1910, the matter came up for hearing before the district judge, who rendered a decree affirming the order of the referee, and refusing the creditors' prayer for interest, and ordering the trustees to return to the bankrupts the surplus, $88,432.81. In their petition for review, the creditors assign this decree as error.

Messrs. **Carothers & Brown**, with Mr. **Walter F. Brown**, for petitioners.

Messrs. **Richard G. Maury** and **Lane, Wolters, & Story**, with Messrs. **T. M. Kennerly** and **C. A. Warnken**, for respondents:

Under the bankrupt act of 1898, only such claims as are a "fixed liability absolutely owing" at the time of the filing of the petition can be proved or paid.

Re Garlington, 115 Fed. 999; Merchants' Bank v. Thomas, 57 C. C. A. 374, 121 Fed. 36; Re Gebhard, 140 Fed. 571; Re Roche, 42 C. C. A. 115, 101 Fed. 957; Re Keeton, 126 Fed. 426; Re T. H. Thompson Mill. Co. 16 Am. Bankr. Rep. 456; Bray v. Cobb, 100 Fed. 270; Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 244, 31 Sup. Ct. Rep. 256; Sloan v. Lewis, 22 Wall. 150, 22 L. ed. 832; Re Haake, 2 Sawy. 231, Fed. Cas. No. 5,883; Re Ward, 12 Fed. 325; Re Orne, 1 Ben. 361, Fed. Cas. No. 10,581; Thomas v. Western Car Co. 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824; Grand Trunk R. Co. v. Central Vermont R. Co. 91 Fed. 569; Bowman v. Wilson, 2 McCrary, 394, 12 Fed. 864; Solomons v. American Bldg. & L. Asso. 116 Fed. 676; Shawnee County v. Hurley, 94 C. C. A. 362, 169 Fed. 92; Tredeger Co. v. Seaboard Air Line R. Co. 105 C. C. A. 501, 183 Fed. 289.

The bankrupts having been discharged as of the date of the filing of their petition in bankruptcy (November 6, 1907), and they and their trustees having pleaded the same, such discharge is a complete bar against a recovery by appellants of interest accruing after the filing of such petition.

United States v. North Carolina, 136 U. S. 216, 34 L. ed. 338, 10 Sup. Ct. Rep. 920; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857.

Mr. **J. F. Walters** also for respondents.

Shelby, Circuit Judge, delivered the opinion of the court:

This controversy involves the disposition of $88,432.81, a surplus left in the hands of the trustees of the bankrupts after paying the principal of all claims proved and allowed, and the interest thereon up to the date of the filing of the petition in bankruptcy. The contention of the creditors is that interest on their claims accruing subsequently to the filing of the petition should be computed and paid out of the surplus, and that the bankrupts are entitled to have returned to them only the surplus left after paying such interest. The contention of the respondents is that the creditors are entitled to collect only the principal of their claims and interest to the date of the filing of the voluntary petition, and that therefore the entire surplus should be returned to the bankrupts. The referee sustained the contention of the respondents, and the district court affirmed the referee's decision and directed by decree that the trustees pay the entire surplus to the bankrupts.

The creditors seek to review and reverse that decree.

The record presents this question for decision: Where there is a surplus of a voluntary bankrupt's estate after the payment of all proved claims with interest thereon to the date of the filing of the petition, should all of such surplus be returned to the bankrupt, or should it be first applied to the payment of the interest which has accrued on the claims subsequently to the filing of the petition, and the remainder only be returned to the bankrupt?

Section 63 of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 562, Comp. Stat. 1913, § 9647) designates the debts

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there is, as pointed out in the earlier note, a somewhat different question presented. However, there has seemingly been but one decision since the compilation of that note which treats the question of the right to interest where the assets are insufficient to pay the principal of the indebtedness. And that case, Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 244, 31 Sup. Ct. Rep. 256, reversing Re Kessler, 103 C. C. A. 582, 180 Fed. 979, which affirmed 171 Fed. 751 (both of which lower court decisions are set out in the former note), holds that the secured creditors of a bankrupt selling their security after the filing of the petition in bankruptcy, and finding the proceeds insufficient to pay the whole amount of the claims, are not entitled to apply such proceeds, first, to interest accrued since the filing of the petition, then, to the principal debt, and then prove for the balance, although by the bankruptcy act, § 67d, liens remain unaffected by that statute, and the value of securities is by § 57h to be determined by converting them into money, "according to the terms of the agreement;" but that interest and dividends accruing upon pledged securities after the filing of the petition in bankruptcy against the obligor may be first applied by the obligees to the after-accruing interest upon the debt.

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which may be proved and allowed against the bankrupt's estate, and the first class of debts named is described as follows: "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

And § 65e provides that "a claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act."

Relying on these provisions, the respondents contend that only such claims as are a fixed liability at the date of the filing of the petition can be proved, and that no interest can be proved or paid except that which has accrued when the petition is filed.

Ordinarily, no question as to subsequently accruing interest can arise, for it is a very rare occurrence that a surplus is left after paying the principal and interest to the date of the filing of the petition. When the fund is insufficient to pay the whole amount of the debts, it is immaterial between creditors holding claims bearing interest at a uniform rate as to what time interest should be computed. The bankrupt would have no interest in the question, and it is unimportant to such creditors whether the dividend is at a higher or lower rate per cent, as the amount received by them would be the same. That the interest on all interest-bearing claims should be computed to the same time is necessary to secure an equitable distribution, and both state insolvency statutes and bankruptcy acts usually fix a time, or the courts, in practice, adopt a time. The purpose is to secure uniformity and an equitable distribution. The provision is made in both state insolvency statutes and in bankruptcy laws as a rule for the settlement of an insolvent or bankrupt estate. It was not intended to be applied to a solvent estate. It was not in the contemplation of Congress that a solvent estate would be settled in the bankruptcy courts. In involuntary cases, the adjudication is only had when an act of bankruptcy has been committed and when the estate of the alleged bankrupt is insolvent; that is, "whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts." Bankruptcy act, § 1. The voluntary bankrupt is required to allege in his petition "that he owes debts which he is unable to pay in full." General order 38, form 1 (32 C. C. A. xxxix., 89 Fed. xv.). With the exception of property exempt under state laws from liability for debts, the bankruptcy act provides for the distribution of the bankrupt's entire estate among his creditors. The only reference in the act to returning any of the estate to the bankrupt relates to unclaimed dividends. Dividends that remain unclaimed for six months after the final dividend has been declared are to be paid by the trustee into court; and dividends unclaimed for one year are, under the direction of the court, to be distributed to the creditors whose claims have been allowed, but not paid in full, and, after such claims "have been paid in full, the balance shall be paid to the bankrupt." Bankruptcy act, § 66.

This section relates to unclaimed dividends only. It shows that the legislature intended (exempt property and costs, and debts having priority, being excepted) that the entire estate should be divided *pro rata* among the creditors by the declaration of dividends. When a dividend is unclaimed, it provides for its disposition,—it is to go to the satisfaction of other claims till they are paid in full. It is only after the claims are paid in full that "the balance shall be paid to the bankrupt." The balance meant is not a surplus, but the remainder of unclaimed dividends,—the remainder of sums allotted to creditors who have failed to claim them; the remainder after satisfying in full the claims of other creditors who have not failed to claim their dividends. This section gives no authority to pay a surplus to the bankrupt which has never been embraced in a declaration of dividends, and it shows that the act neither contemplates the existence nor provides for the disposition of any surplus which shall not be embraced in the declaration of dividends.

But, unquestionably, a surplus after paying in full all debts, including all interest due on the debts accruing before and subsequently to the filing of the petition, would equitably belong to the bankrupt, and no statute would be needed to authorize the court to direct its payment to the bankrupt.

The act provides that any person, except certain corporations, shall be entitled to the benefits of the act as a voluntary bankrupt. Section 4a. The adjudication on a voluntary petition is *ex parte*, and the creditors are not heard to contest it. Re Carleton (D. C.) 115 Fed. 246; Re Jehu (D. C.) 94 Fed. 638. Can it be that the act means that a voluntary petitioner may, although solvent in fact, stop the interest on his debts, while collecting by the trustee the interest on his assets; and that he may accomplish this in an *ex parte* proceeding which his creditors are not heard to resist? In such case, if the contention of the respondents is to prevail, the proceeding may be greatly to the profit of the bankrupts

after paying the referee and trustees the fees allowed by law. The extraordinary result would be that a delay in payment arising from a proceeding begun by the debtors, and which the creditors were powerless to resist, would prevent the creditors from collecting interest out of an estate able to pay it, when the general rule is that interest is always given for delay in payment. The bankrupt's estate often, as in this case, may consist, in the main, of interest-bearing assets. The act provides that the trustee shall account for and pay over to the estate all interest received by him upon the property of the estate. Section 47 (1). Where the settlement is delayed, this interest may amount to a large sum. A construction of the act that would give it to the bankrupt, and leave unpaid interest on debts due from the bankrupt, would seem strangely inequitable.

It is true, as a general rule, that where property of an insolvent passes into the hands of the court, subsequently accruing interest is not allowed against the fund. Thomas v. Western Car Co. 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824. This principle is applied as between creditors claiming the fund. It is properly applicable doubtless, in some cases, in favor of a debtor who has been enjoined or prevented from paying a debt by litigation begun by a creditor. But in this case there is no dispute between creditors. The contest is between the creditors, and the debtors, and the litigation was begun by the debtors, and no proceeding was had at the instance of others to delay payment.

If it be conceded that there is no express provision of the statute allowing interest that accrues after the filing of the petition to be paid out of a surplus, the statute is certainly silent, also, as to paying such surplus to the bankrupt and leaving such interest unpaid. Under the general rule of law, the debtor is required to pay interest up to the time he pays his debt. If the bankruptcy act does not control, the general law does.

As said by Jenkins, Circuit Judge, in Re Kane, 62 C. C. A. 616, 127 Fed. 552, 553: "A court of bankruptcy is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter."

Whether the bankrupts, or the trustees acting for them, move the court to direct the fund to be paid to them, they should be required to do equity by paying the interest due by law up to date. Even in cases where there is a statute making usury forfeit all interest, a complainant seeking relief in equity from usury is required to pay legal interest.

The bankruptcy act of March 2, 1867, chap. 176, 14 Stat. at L. 517, provided that all debts due and payable at the time of the adjudication of bankruptcy may be proved against the estate, providing for a rebate of interest as to debts existing, but not payable until a future day. Under that statute, to secure equitable uniformity in the distribution, interest was computed to the same time on each claim. When a question arose between the bankrupt and a creditor as to the payment of subsequently accruing interest out of a surplus, the question stood on principle just as it stands under the present bankruptcy act. The act in neither case makes express provision for such contingency. In Re Hagan, 6 Ben. 407, 10 Nat. Bankr. Reg. 383, Fed. Cas. No. 5,898, Blatchford, District Judge, approved a decision of the register holding that the creditors, out of a surplus left in the estate after paying the claims with interest up to the date of the filing of the petition, were entitled to collect the subsequently accruing interest. Bond, Circuit Judge, in Re Bank of N. C. 12 Nat. Bankr. Reg. 130, Fed. Cas. No. 895, likewise held that the creditors were entitled to receive the subsequently accruing interest out of a surplus fund. Re Town, 8 Nat. Bankr. Reg. 40, Fed. Cas. No. 14,112, decided by Longyear, District Judge, is to the same effect.

The same question has arisen under the insolvency laws of several of the states.

In Clemons v. Clemons, 69 Vt. 545, 548, 38 Atl. 314, 315, a case involving the construction of an insolvency statute, the court said: "It is true the statute provides that, upon debts subject to the payment of interest, interest shall be computed to the date of filing the petition. It is a matter of convenience that a time should be fixed for that purpose, and the time chosen is as convenient as any; but the statute does not mean that interest shall in no event be computed to a latter date, for obviously it should be when, for instance, the assets are more than enough to pay the face of the debts as allowed."

The insolvency statutes of other states have been construed in the same way. Brown v. Lamb, 6 Met. 203, 210, 211; Williams v. American Bank, 4 Met. 317; Prichett v. Newbold, 1 N. J. Eq. 571. Chancellor Walworth, construing the New York statute, in Re Murray, 6 Paige, 204, 205, said: "In settling the tableau of distribution, therefore, the interest upon those debts which bear interest, or upon which it is recoverable as damages, upon settled legal principles, should be computed to that time [the date of assignment]: and, if any debts are not then due, and which are not upon interest, a proper discount should be made. As to subsequent interest, if the debts are not paid at that time, and the fund which is after-

wards realized by the assignee is more than sufficient to pay the amount thus found due at the time of the assignment, the interest on all the debts subsequent to the assignment should be paid ratably out of the surplus."

In Sexton v. Dreyfus, 219 U. S. 339, 344, 55 L. ed. 244, 245, 31 Sup. Ct. Rep. 256, 257, Mr. Justice Holmes said: "We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state."

In 1743, long before the passage of our first bankruptcy act, Lord Chancellor Hardwicke, in Bromley v. Goodere, 1 Atk. 75, considered and decided, under the English statutes, the exact question involved here. It was a contest between the creditors and the heirs of the bankrupt over a surplus. The debts had been paid in full, principal and interest; the interest being computed, as the English statute required, up to the date of the commission. The creditors claimed the subsequently accruing interest out of the surplus, and the bankrupt's heirs claimed the entire surplus, pleading the bankrupt's discharge. The lord chancellor held that the creditors were entitled to have the subsequently accruing interest paid out of the surplus. This rule was approved in later English cases. Ex parte Mills, 2 Ves. Jr. 295; Ex parte Clarke, 4 Ves. Jr. 677.

Blackstone states the usual English rule to be that all interest on debts shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive. 2 Bl. Com. 488.

The facts are not very clearly and fully stated in Re John Osborn's Sons & Co. 29 L.R.A.(N.S.) 887, 100 C. C. A. 392, 177 Fed. 184; but the statement is sufficient to show that certain claims based on accounts had been proved against the bankrupt's estate and paid in full by dividends, and that the controversy was as to whether a surplus should be paid to the bankrupts or be used in paying interest on the claims, including interest which accrued subsequently to the allowance of the claims. The court, deciding that the proof and allowance of the claims were, in effect, judgments, held that they were entitled to be treated as judgments, and, as such, interest accruing both before and after their allowances should be paid on the claims. And National Bank v. Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176, is cited as sustaining this view by analogy. The Osborn Case is the only one to which our attention has been called, involving the distribution of a surplus, that has arisen under the present bankruptcy act.

It is said that the subsequently accruing interest should not be paid because it has never been proved as a debt. We do not think this objection is sound. The proof of an interest-bearing claim is proof of the interest collectable on such claim. Interest is an incident of, or a part of, the debt, and no separate proof of it is required.

The fact that the surplus to be distributed arises from the individual estates of the partners does not affect the question; for it is expressly provided by § 5f of the act that "should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts."

It is argued that the respondents, having been discharged in bankruptcy, are protected by the discharge from the payment of the interest claimed. The discharge ordinarily operates to relieve the bankrupt of further liability; but it does not relieve the fund in the hands of the trustees, nor affect in any way the claim that creditors may have to the fund. It is a trust fund held by the trustees for administration under the direction of the court, wholly unaffected by the discharge of the bankrupts. Bromley v. Goodere, 1 Atk. 75, 80.

The statute contains no express provision that answers the question involved in this case. There is in court a fund amounting to $88,432.81. The court must give directions as to its disposition. Whether we are governed by the apparent intention of Congress as shown by the general purpose of the bankruptcy law, or by the general principles of equity, the result would be the same. The bankrupts should pay their debts in full, principal and interest to the time of payment, whenever the assets of their estates are sufficient. The balance then remaining should be returned to the bankrupts.

The petition for revision is allowed, and the decree of the District Court is reversed, with directions to distribute the fund in conformity with the foregoing opinion of this court.

Petition for rehearing denied.

Petition for a writ of certiorari denied by the Supreme Court of the United States, February 2, 1914. 232 U. S. 723, 58 L. ed. 815, 34 Sup. Ct. Rep. 479.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

AUGUST DIEDERICH, Appt.,
v.
W. SCHNEIDER WHOLESALE WINE & LIQUOR COMPANY.

(115 C. C. A. 37, 195 Fed. 35.)

Trademark — placing on sign.

1. The placing upon a sign intended to designate the proprietor of the business conducted at the place where the sign is placed, of a symbol which another had adopted as a trademark to designate the product of his manufacture, is not an infringement of such trademark.

Courts — Federal — jurisdiction — unfair trade.

2. A Federal court has no jurisdiction of a suit brought between citizens of the same state to restrain unfair trade.

(Sanborn, Circuit Judge, dissents.)

(March 22, 1912.)

APPEAL by defendant from an order of the Circuit Court of the United States for the Eastern District of Missouri enjoining the alleged infringement of a trademark by its use on a signboard. Reversed.

The facts are stated in the opinion.

Argued before Sanborn and Adams, Circuit Judges, and Wm. H. Munger, District Judge.

Mr. **Charles F. Krone**, with Mr. **James A. Carr**, for appellant.

Mr. **Alphonso Howe**, with Mr. **James L. Hopkins**, for appellee:

The act is constitutional.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 548, 34 L. ed. 997, 1004, 11 Sup. Ct. Rep. 396; Cohen v. Virginia, 6 Wheat. 264, 393, 5 L. ed. 257, 288; Trade-Mark Cases, 100 U. S. 82, 95, 25 L. ed. 550, 552; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 969, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Reilley v. United States, 46 C. C. A. 33, 106 Fed. 896.

Note. — Use of another's trademark, or insignia not technically a trademark, for advertising purposes as infringement or unfair competiton.

It is not intended to cover in this note the question as to the protection of a trademark from infringement generally. This note is confined to the question whether or not the use of another's mark or name, not a technical trademark, constitutes an infringement or unfair competition, where the use complained of is by advertising disconnected from its use on any article of merchandise.

Where mark or name not attached to original article by user.

The question as to protection against unfair competition has been covered generally in the following notes: 8 L.R.A. (N.S.) 1153 (right to protection against use of a particular number); 19 L.R.A. (N.S.) 269 (protection against use of similar design, shell, or pattern not protected by patent); 26 L.R.A. (N.S.) 73 (protection of use of geographical name); 16 L.R.A. (N.S.) 550 (protection of name capable of becoming trademark on expiration of copyright or patent); 1 L.R.A. (N.S.) 660 (limitation of right to use one's own name as tradename).

Few cases have been found involving the question decided in DIEDERICH v. W. SCHNEIDER WHOLESALE WINE & LIQUOR CO. whether the user of a mark for advertising purposes in the manner in which it was used and applied in that case can claim protection against its use by another for advertising purposes on the ground that the mark constituted a technical trademark and the use complained of constituted an infringement thereof. It is conceded that the mark was entitled to protection on the ground of unfair competition, but on jurisdictional grounds relief of this character is denied. The dissenting opinion is based upon the ground that the complainant had a technical trademark in the numerals used, and hence the use complained of constituted an infringement. It is obvious that if the numerals did not constitute a technical trademark, the use of them by another would not constitute an infringement even though it did amount to unfair competition. The dissenting opinion in DIEDERICH v. W. SCHNEIDER WHOLESALE WINE & LIQUOR CO. holds that under the pleadings in that case the numerals in question constitued a technical trademark; but where this question has been presented, uninfluenced by any admissions in the pleadings, it has been held that the mere use of a name or mark in advertisements, circulars, etc., where not attached to any commodity, did not give the user a technical trademark in the name or mark used, and hence he was not entitled to have the same protected against use by a competitor, on the ground that the name or mark constituted a trademark and the use was an infringement thereof.

Thus in Eggers v. Hink, 63 Cal. 445, 49 Am. Rep. 96, it is held that a sign by a retail saloon dealer to describe the beverage sold by him cannot be protected as a trademark against a similar use by other saloon dealers.

And in Consumers' Co. v. Hydrox Chemical Co. 40 App. D. C. 284, holding that merely spending money in advertising to popularize a certain mark did not give to the advertiser a right to the exclusive use of the mark, it is said that a trademark is not acquired by the invention or discovery of a word or symbol or by advertisement, but it only becomes a trademark by attach-

Appellant's sign is within § 16 of the trademark act.

Walker v. Alley, 13 Grant, Ch. (U. C.) 366.

W. H. Munger, District Judge, delivered the opinion of the court:

This suit was brought by appellee, as complainant, to enjoin the infringement of a trademark. From the granting of a temporary order of injunction, Diederich, the defendant, has appealed to this court.

It appears that the Schneider Wholesale Wine & Liquor Company has a registered trademark, consisting of the arbitrary numbers "905," applied to whiskies; that the defendant, who was formerly a stockholder and officer in the Schneider Company, having disposed of his interest therein, engaged in the saloon business by himself, and placed upon the front of his saloon, or saloons, the following signs:

"A. Diederich,
The Originator of
905."
"Kay-Dee-Liquor Co.
A. Diederich
The Originator
of 905
Mgr."
"A. Diederich,
905
The Originator of."

The bill contained an allegation as follows: "That the defendant is engaged in

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ing it or affixing it to a certain article of merchandise.

And see Guth Chocolate Co. v. Guth, 215 Fed. 750, holding that a trademark must be in some way attached or affixed to the goods to be designated by it, or to the packages in which they are sold, and the exclusive right to it may be secured in no other way.

In Germer Stove Co. v. Art Stove Co. 80 C. C. A. 9, 150 Fed. 141, it is held that one retailer of stoves in his advertising may use the term "twentieth century," as applied to the construction of the fire pot, although another company also sells a stove containing a fire pot which he designates as a twentieth century fire pot, the term, however, not being affixed upon or attached to their stoves or fire pots, and hence not constituting a trademark.

And it has been held that the mere use of a term for advertising purposes gives the user no rights therein which were violated by the use by another for advertising purposes. Thus, in Westminster Laundry Co. v. Hesse Envelope Co. 174 Mo. App. 238, 156 S. W. 767, a company in order to advertise its business used a certain striking combination of words in a blind advertisement inserted in different newspapers, intending, after having sufficiently excited public curiosity, to complete the advertisement by a reference to its business. In this regard, however, it was anticipated by another company which made use of the combination of the words in advertising its business. This conduct on the part of the latter company was held not to render them liable to the former company.

But where the use complained of is by a competitor, and such use tends or may tend to mislead the public as to the person or company referred to in the advertisements, such use by a subsequent user will amount to unfair competition. Thus, where an auctioneer of real estate in his advertisements in newspapers for many years used a certain emblem in combination with other devices, a competing auctioneer was restrained from making a similar use of an imitative emblem, although used in combination with other and different devices none of which was imitative of the plaintiff's, where, however, the use of the emblem alone was calculated to and had deceived people, who believed the defendant's advertisements to be the complainant's. Johnson v. Hitchcock, 3 N. Y. Supp. 680.

In Hopkins Amusement Co. v. Frohman, 202 Ill. 541, 67 N. E. 391, where the term "Sherlock Holmes" was used to designate a play dramatized from a book of which the dramatizers were the authors, this term being used to designate the principal figure of the book, the use of the same term to designate and advertise another play was enjoined.

In Busch v. Gross, 71 N. J. Eq. 508, 64 Atl. 754, the use of a name on a sign indicating the name of a hotel is restrained where a similar name has for a long period of time been used by another hotel man to designate his hotel, the two hotels being in the same vicinity.

Where not attached to article by subsequent user.

A distinction between the use of a trademark to designate competing goods and its use in advertisements of competing goods is pointed out in New York Mackintosh Co. v. Flam, 198 Fed. 571. In this case the defendant was held not guilty of infringing the plaintiff's trademark, a picture, by using an exact copy of it on their cards, letter heads, etc. The court said that this picture was such a complete reproduction of the plaintiff's trademark that it would clearly have infringed it if it had been attached to the defendant's goods or to the boxes in which they were shipped. After pointing out that a trademark is something attached to the goods or the recepticals containing them which the buyer sees and by which the goods become known to the buyer, the court continued, "It seems strange that the defendants should have copied this trademark on their business papers, and should have abstained from attaching it to their goods; but such a use of it on their business papers, while

interstate commerce, and has sold and shipped merchandise, sold by him by reason of said deceptive use of your orator's trademark, to customers residing in the state of Illinois and elsewhere."

This allegation does not allege that the merchandise which he sold to customers residing in the state of Illinois had placed thereon, or upon the wrapper, or in any way connected with such merchandise, the trademark "905," and there is nothing in the proofs to that effect.

In what are designated as the Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550, it was held that Congress only possessed power to grant a trademark for use in commerce among the states, foreign nations and Indian tribes.

The act of 1905 (33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485), 1st section, is in part as follows: "That the owner of a trademark used in commerce with foreign nations, or among the several states, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration of such trademark by complying with the following requirements: First, by filing in the Patent Office an application therefor in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicil, location, and citizenship, the

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affording strong proof of unfair competion in trade, is, in my opinion, no proof of infringement of the trademark."

Where the infringment complained of is the use in an advertisement, of another's trademark, if the use is temporary merely, and is discontinued as soon as the user ascertains that another has a trademark right thereto, a temporary injunction will not issue unless it also appears that there is danger of the use being continued. Waterproofing Co. v. Neal Farnham, 188 Fed. 679.

In New York Mackintosh Co. v. Flam, supra, in refusing to protect the term "Bestyette" as a trademark from infringement by the use of a similar term in advertisements by a competitor, the court said that "no dealer can be prevented from asserting by an advertisement printed on the goods, or in any other manner, that his goods are the best, or the best yet, or the very best."

Relief in this class of cases, however, has been granted on the ground that the use complained of constituted unfair competition.

Thus, in Hartzler v. Goshen Churn & Ladder Co. — Ind. App. —, 104 N. E. 34, a corporation is held guilty of unfair competition in adopting and using as its corporate name a name that a competing company used to designate its goods, where defendant company used this name in its circulars and advertisements in a manner calculated to deceive the public as to the origin and ownership of the goods.

In Collier v. Jones, 66 Misc. 97, 120 N. Y. Supp. 991, a rival publishing company was restrained from advertising the publication and sale of a set of books designated as "Dr. Eliot's Five Foot Shelf," where that name had already been adopted and was being used by another publishing company to designate a set of books published and sold by it which had been selected by Dr. Eliot.

And see Dr. Peter H. Fahrney & Sons Co. v. Ruminer, 82 C. C. A. 621, 153 Fed. 735, holding that the advertisements by a competing company of a patent medicine under substantially the same name as that adopted and used by another company to designate its patent medicines constituted unfair competition. In this case the name was used both in advertising and on bottles of the defendant, and the court makes no distinction between the use of the name on bottles and in advertising.

Where no exclusive right to use name: family name.

In this connection reference may profitably be made to the late case of Thaddeus Davids Co. v. Davids Mfg. Co. 233 U. S. 461, 58 L. ed. 1046, 34 Sup. Ct. Rep. 648, which construes and applies § 5, 33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485, permitting the recording as trademarks of names which have been in actual and exclusive use as trademarks for ten years, but which at common law could not be appropriated as technical trademarks. It is here pointed out that the effect of this statute is not to preclude a person having the same family name as that recorded as a trademark under this statute, from using the same in connection with a competing business, but it only prevents him from so using his name as to confuse and deceive the public as to the origin or ownership of the goods, and while the question of the use of the same name and advertising is not raised, it seems reasonably clear from the reasoning of the court that the registration of the trademark would not preclude its use by another in circulars and other advertising not tending to mislead as to the origin and ownership of the article advertised. Upon this point it is said: "Where the mark consists of a surname, a person having the same name and using it in his own business, although dealing in similar goods, would not be an infringer, provided that the name was not used in a manner tending to mislead, and it was clearly made to appear that the goods were his own, and not those of the registrant."

The general question as to the right of competitors having the same family name each to use it to designate their goods is discussed in the notes in 1 L. R. A. (N.S.) 660, and 28 L.R.A. (N.S.) 934. It is intend-

class of merchandise and the particular description of goods comprised in such class to which the trademark is appropriated; a description of the trademark itself, and a statement of the mode in which the same is applied and affixed to goods," etc.

It will be observed that this section contemplates that the trademark is to be affixed to the goods which are used in the commerce specified, as it requires the applicant, in his application for a trademark, to give not only a description of the trademark itself, but "a statement of the mode in which the same is applied and affixed to goods."

Section 16 of the enactment provides: "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trademark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several states, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof," etc.

Complainant bases its right to an injunction upon the fact that the signs above men-

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ed herein to take up the one phase of the question as to the right of the subsequent user to use the family name to advertise his goods, and the limitations upon such use. In general it may be said that while there is no exclusive right to the use of a family name, and the original user is not entitled to protection against any confusion arising from the mere use of the name by another of the same name, nevertheless, the original user is entitled to be protected from any confusion that may arise from the use of the name in a manner calculated to confuse and deceive the public as to the origin of the goods or business with reference to which it is used. Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609.

As applied to the specific question under consideration, it has been held that an injunction against using any name, mark, or advertisement indicating that the party complained of is the successor of the original user of the name, or that its goods are the product of such user or its successors, will be granted a company which succeeds by purchase the original user of the name which was the family name of such user; but the stockholders of the original company bearing such family name, who have the right to engage in this business, will not be enjoined from using their name in connection with their business except as indicated. Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288.

A member of a partnership selling his interest in a partnership business operated under his name has been held entitled to reengage in a competing business and to use his name on signs and posters in designating said business. Wright Restaurant Co. v. Wright, 74 Wash. 230, 133 Pac. 464.

And in World's Dispensary Medical Asso. v. Pierce, 203 N. Y. 419, 96 N. E. 738, a company engaged in manufacturing different proprietary medicines under the name of Dr. Pierce's Family Remedies, or similar names, was held entitled to restrain another person by the name of Pierce, but not a doctor, from using the name "Dr. Pierce" in designating different and distinct proprietary medicines which he sold.

It is the duty of a subsequent user of a family name to warn the public that his goods are not those of the original user of the name, but this rule does not go to the extent of making it impracticable for him to use his name in trade. In performing his duty to warn the public, however, he should lay aside his character as an advertiser, and unequivocally point out that the goods advertised are not those of the original user of the name. And this is true although in performing this duty he will be compelled to advertise the original user's business. Stix, B. & F. Dry Goods Co. v. American Piano Co. 127 C. C. A. 639, 211 Fed. 271.

In Gordon Hollow Blast Grate Co. v. Gordon, 142 Mich. 488, 105 N. W. 1118, it is held that after a patentee has sold his patent and the business of manufacturing the patented article conducted under his name, he may continue the manufacture of any subsequent patents of a competing article, and he may advertise that he manufactures such competing article under later patents, but he must also point out in an equally prominent statement that the later company he is connected with is distinct from and has no connection with the original company.

And where the patentee of an article procured the organization of a corporation in which he was a large stockholder for the manufacture and sale of the article, and his name was adopted as the name of the corporation, and the articles were also marked, sold, and advertised under his name, it has been held that he cannot, after having sold his interest in the corporation, manufacture and sell under his name a competing article under patents issued to him. He was, however, permitted to advertise the article under his patent, providing that he indicated in type equally as prominent that he was distinct from and had no connection with the original company. Penberthy Injector Co. v. Lee, 120 Mich. 174, 78 N. W. 1074.

tioned, placed upon the buildings in which he conducted his saloons, were an infringement of its trademark. The inquiry then naturally presents itself whether complainant has a trademark in a sign placed upon a building, simply indicating that goods of a certain character were sold at that place.

In 28 Am. & Eng. Enc. Law, 2d ed. p. 352, it is said: "It is essential to the validity of a trademark as such that there shall be some actual, physical connection between the goods and the mark, so that the mark goes with the goods into the market. Words, marks, or symbols, used in advertisements, circulars, and other similar ways, but not actually affixed to the goods, are not valid, technical trademarks. It is sufficient if the mark is affixed either upon the goods themselves, or upon the box or wrapper containing them, or in some other way physically attached to the goods. Words not actually affixed to the goods frequently constitute tradenames, and are protected as such against unfair competition."

In Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. 142 Ill. 494, 30 N. E. 339, it was said: "A trademark owes its existence to the fact that it is actually affixed to a vendable commodity."

In Oakes v. St. Louis Candy Co. 146 Mo. 391, 48 S. W. 467, it is said: "A trademark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark be-

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And in Dr. A. Reed Cushion Shoe Co. v. Frew, 89 C. C. A. 577, 162 Fed. 887, it is held that where a patented article was sold under the name of the patentee, and the latter thereafter sells his interest in the manufacturing company and in the production and sale of the article, but does not include the exclusive right to use his name, he may advertise a competing article by representing that such article is manufactured under patents later than those embodied in the original. But he must also point out that the article is not the original article.

In Hotel Claridge Co. v. George Rector, 164 App. Div. 185, 149 N. Y. Supp. 748, it is held that where a person by the name of Rector associated with others in the organization of the corporation, incorporated under his name, this corporation was entitled to use its corporate name or the name "Rectors" in advertising its business, although there was a competing company which had previously acquired the right to use that name in connection with its business; but the later company was held not entitled to so use the name in its advertising as to represent that it was identical with the company formerly operated under that name, or that it was a successor of that company.

Where one of the original stockholders in a manufacturing company bearing his family name sold out, but he did not bind himself not to re-engage in the same business, he was held entitled to use his name in connection with a competing business in such a manner as not to indicate that the articles produced were the articles produced by the original company; and such use was permitted notwithstanding the fact that it was conceded that because of his skill and his honesty in the matter of production of articles when he was associated with the original company, his name in connection with such articles had acquired considerable value which would redound to the benefit of the company he was subsequently associated with and which was using his name. William Rogers Mfg. Co. v. Simpson, H. M. & Co. 54 Conn. 527, 9 Atl. 295.

And see Fish Bros. Wagon Co. v. LaBelle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595, holding the use of the trademark "Fish Brothers & Co." by brothers of that name engaged in manufacturing wagons to designate wagons of their manufacture, and subsequently used by the corporation which succeeded them, and in which they were officers and stockholders, does not preclude such persons, after severing their connection with the corporation, from re-engaging in the manufacture of wagons and selling them under their own name. They are, however, denied the right to represent and advertise their present business as the same as that which they formerly carried on, although permitted to refer to their former connection with that business in order to show their experience, etc.

The circumstances may be such that a person will be restrained from using his family name by affixing it to the articles he manufactures and sells, either in the packages or on the labels, although permitted under restrictions, to use his name in advertising such articles. In this connection it is worthy of note that a court will feel freer, than in the ordinary case of the use by different persons of the same family name, to restrain the use by a person of his family name, where he has sold a business in which he used his name and attached it to the articles produced and sold, and advertised it to such an extent that his name became so associated with the article that any subsequent use by him of his name attached to similar articles would amount to a fraud on the purchaser of the original business.

Thus, in Guth Chocolate Co. v. Guth, 215 Fed. 750, it is held that where a person uses his own name in connection with the manufacture of candy to designate the product to the extent that it has acquired a secondary meaning and he subsequently sold the business and assigned the trademark, he is not thereby required to refrain from the use of his name in a competing business subsequently established by him, although he cannot use the name on the candies he manufactures or in or on the packages containing the same, but he may

ing inherent in the expression itself. An article can only be said to be distinguished by a trademark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon, the article as it is offered for sale."

In Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396, it was held that a trademark, to be valid, must be such as to indicate origin, manufacture, or ownership; that, if used to denote simply class, grade, style, or quality of the articles, it could not be upheld as technically a trademark. Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 468.

And in Ryder v. Holt, 128 U. S. 525, 32 L. ed. 529, 9 Sup. Ct. Rep. 145, it was held that, in a case where the bill did not allege that the trademark was used on goods intended to be transported to a foreign country, the Federal court had no jurisdiction.

We think it clear, from the foregoing authorities, that a trademark is only valid when attached to the article or wrapper, or in some manner physically connected with the article itself. Such being the case, it is very clear that complainant could have no trademark in a sign, placed upon a building, containing the figures "905," and if complainant had no trademark in such a sign upon a building, because the validity of the trademark owes its existence to the fact that it is in some manner at-

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use the name in his advertisements, providing he therein gives notice that the candy he advertises is the product of a later company, and not that of the original company, and this notice must be as conspicuous as his own name.

Upon this point a case of interest is Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879, a tradename case. In this case the defendant had built up a large retail business in his own name and thereafter sold it to a corporation, which continued the business in that name. The defendant thereafter undertook to re-engage in a competing business a short distance away from the place of business he had sold, and he was restrained from using his own name in connection with his subsequent business.

Generic term.

Where the name of the person applied to a patented article has become generic as indicating the article itself, and at the same time, in a secondary and relative sense, indicates to the public the source of manufacture, the manufacturer, on the cessation of the monopoly at the expiration of his patent, has not the right to prevent the making by another of a like machine in the form in which it was made during the life of the patent, or to prevent another from calling such machines by him made, by the generic name attributed to them during the monopoly, or from placing his name on them and using it in advertisements and circulars. "But the original user is entitled to require that the name as thus used shall be accompanied with such explanation as to show that the thing manufactured is not the product of the patentee or his successors. Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 170, 41 L. ed. 119, 16 Sup. Ct. Rep. 1002, and see to the same effect Singer Mfg. Co. v. Hipple, 109 Fed. 152; Singer Mfg. Co. v. Loog, L. R. 8 App. Cas. 15, 52 L. J. Ch. N. S. 481, 48 L. T. Ch. N. S. 3, 31 Week. Rep. 325; Singer Mfg. Co. v. Wilson, L. R. 3 App. Cas. 376, 47 L. J. Ch. N. S. 481, 38 L. T. N. S. 303, 26 Week. Rep. 664.

To the same effect are Singer Mfg. Co. v. Larsen, 8 Biss. 151, Fed. Cas. No. 12,902; Filley v. Child, 16 Blatchf. 376, Fed. Cas. No. 4,787; Yale & T. Mfg. Co. v. Ford, 122 C. C. A. 12, 203 Fed. 707.

Where the words, "always closed," as applied to revolving doors to which the patent has expired, are merely descriptive, the fact that they have been used by the original manufacturer as a trademark or tradename, and have been impressed upon their doors and used in their advertisements, will not prevent a subsequent manufacturer from using the same words in his advertisements of revolving doors. Van Kannel Revolving Door Co. v. American Revolving Door Co. 215 Fed. 582.

Where the patentee of an article upon which the patent has expired is still the largest producer of the article, and the name applied thereto, although indicating the article, also indicates the patentee as the manufacturer, it is incumbent upon a subsequent manufacturer of the article who makes use of this name as a generic name to describe it, so to use it as to preclude the possibility of a mistake by that portion of the public likely to be interested as to the source or origin of its manufacture; and a subsequent manufacturer will not be permitted in his advertisements so to use the name as to deceive or confuse the public as to the source of manufacture, but he must clearly and unmistakably specify, in connection with the use of the name, that the article is not the product of the original manufacturer. Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co. 92 C. C. A. 60, 166 Fed. 26.

The advertising in circulars of an edition of a book by a certain author will not be enjoined at the instance of the publisher of a former edition of the same book by the same author, where there is no evidence of fraud or other ground for interference except the fear of confusion. Halstead v. John C. Winston Co. 111 Fed. 35; and see Halstead v. Houston, 111 Fed. 376.

Although the name "Webster" as applied to a dictionary is a generic term and may be used by anyone to designate a reprint of that dictionary after the expiration of the copyright, nevertheless where the

tached to the article of commerce itself, we are unable to perceive how it can be said that such a sign placed by defendant upon the building in which he transacted his business was an infringement of complainant's trademark.

It is a self-evident proposition that what is not and cannot be a trademark is not and cannot be infringed as a trademark.

It is true that the foregoing authorities were decided during the existence of the act of March 3, 1881 (act March 3, 1881, chap. 138, 21 Stat. at L. 502), but the 1st section of that act is in substantially the same language as the act of 1905. It requires an applicant to file in the Patent Office "a statement of the mode in which the same is applied and affixed to goods."

Section 16 of the act of 1905, above quoted, is somewhat broader than § 7 of the act of March 3, 1881, relating to the same matter, in that the act of 1905 renders a person liable who affixes such registered trademark, without the consent of the owner, to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise, etc.

Stress is placed, in the argument of counsel, upon the meaning of the word "signs." The word "sign" must be understood to have been used for the purpose of protecting simply what the owner has by virtue of his trademark. The word "sign" has various meanings. I find in a copy of the Standard Dictionary before me that the

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name also indicates by long association that the dictionary is published by the original publisher, another publisher will be enjoined from so using the name in connection with advertisements and circulars as to convey the impression that he is a successor to the original publisher. Ogilvie v. G. & C. Merriam Co. 149 Fed. 858. And see affirming opinion in 16 L.R.A.(N.S.) 549, 88 C. C. A. 596, 159 Fed. 638, 14 Ann. Cas. 796.

In Merriam v. Holloway Pub. Co. 43 Fed. 450, it is said that there may be a right of action growing out of the appropriation and use on letter heads, circulars, etc., by one publisher of an edition of Webster's dictionary, of the device of an open book which another publisher of a different edition of the same dictionary also used on its letter heads, advertisements, and circulars, if this use tends to deceive the public by leading them to suppose that the dictionary sold by the subsequent user is printed and put on the market by the prior user.

Right to advertise former connection with firm.

It is to be noted that the use complained of in DIEDERICH v. W. SCHNEIDER WHOLESALE WINE & LIQUOR Co. was the advertisement that the defendant was the originator of "905" liquors. Upon the question as to whether or not such a use of this term constitutes unfair competition, it may be of value to refer to the cases passing upon the right of a person who has been connected with the business, after having severed his connection with such business, to advertise his former connection with the business. In such case the rule may be confidently asserted that where, in such advertisements, it is made clear that the business to which the advertisement relates is not the business with which the advertiser was formerly connected, but that it is a new and different business established and operated by the advertiser, such reference to the former business is proper; and the fact that the advertiser was so connected with the former business that the knowledge to the public of his withdrawal therefrom and his connection with a competing business will be detrimental to the original business and beneficial to the subsequent business affords no basis for relief. See William Rogers Mfg. Co. v. Simpson, H. M. & Co. 54 Conn. 527, 9 Atl. 295, and Fish Bros. Wagon Co. v. La Belle Wagon Works (Fish Bros. Wagon Co. v. Fish) 82 Wis. 546, 16 L.R.A. 453, 33 Am. St. Rep. 72, 52 N. W. 595.

The right of a person who has been connected as part owner or employee in a company known and designated by a certain name, where he does not contract to the contrary, to engage in a competing business after severing his connection with such firm or company, is clear, and it is equally clear that he may advertise himself as lately with or formerly of such company (Marcus Ward & Co. v. Ward, 61 Hun, 625, 40 N. Y. S. R. 792, 15 N. Y. Supp. 913; Van Wyck v. Horowitz, 39 Hun, 237; Peterson v. Humphrey, 4 Abb. Pr. 394; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Holbrook v. Nesbitt, 163 Mass. 120, 39 N. E. 794); and it is immaterial so far as it concerns this rule that such person also uses the same name to designate his business as is used to designate the business he had formerly been connected with, where he has the right to use the name on the ground that it is his family name (Burgess v. Burgess, 17 Eng. L. & Eq. Rep. 257, 17 Jur. 292, 3 De G. M. & G. 896, 22 L. J. Ch. N. S. 675, 25 Eng. Rul. Cas. 183).

But a person cannot advertise himself as late assistant in a well-established business, where her position in that business was a subordinate one, and not that of an assistant. Colton v. Deane, 7 N. Y. S. R. 78.

Nor can a person advertise himself as "late manager" of his former employer's business, where he was simply a business manager of the business. Humphreys Homœopathic Medicine Co. v. Bell, 15 Daly, 6, 2 N. Y. Supp. 50.

And in a very similar case in Smith v. Cooper, 5 Abb. N. C. 274, the seller of an interest in a partnership firm doing a retail business who re-engaged in the same business in the same street a short distance from the old stand was restricted from using his

word, when used as a noun, has the following definitions: "(1) A pantomimic gesture; (2) an inscription or representation to indicate a place of business; (3) an arbitrary mark; symbol; (4) a token; emblem."

As complainant acquired a right to the trademark only as it was affixed in some manner to the article which it sold in commerce among the states, foreign countries, and Indian tribes, it is evident that the term "sign" was used to indicate a mark, symbol, token, or emblem, which was affixed in some manner to the article sold.

It is quite probable that complainant states, in its bill, a cause of action against defendant for unfair trade. That question, however, we cannot pass upon. The parties being citizens of the same state, the court below had no jurisdiction to determine that question. Hutchinson, P. & Co. v. Loewy, 217 U. S. 457, 54 L. ed. 838, 30 Sup. Ct. Rep. 613.

As the alleged act of defendant was no infringement upon complainant's trademark, the order granting an injunction was erroneous, and is consequently reversed.

Sanborn, Circuit Judge, dissenting:

The sale on which this injunction is founded was made in Missouri under a contract to deliver the whisky in Illinois; the whisky was so delivered pursuant to the contract; and the sale was induced by the defendant's use on a sign and print upon the front wall of his dramshop in which the sale was made, of the plaintiff's trademark "905," which had been recorded under act Feb. 20, 1905, 33 Stat. at L. chap. 592, §§ 1, 16, pp. 724, 728, Comp. Stat. 1913, §§ 9485, 9501. This sale and delivery constituted interstate commerce, the plaintiff's trademark which induced it was used in commerce among the states, and the case falls within the literal terms of the act of Congress. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Butler Bros Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 174, 156 Fed. 1, 8, and cases there cited. There can be no doubt that this use of the plaintiff's mark by the defendant constituted unfair and unlawful trade as the majority suggest, and it seems to me that it also presented a cause of action for an infringement of the plaintiff's trademark under the act of 1905.

The question here is not whether or not it was essential to the validity of the plaintiff's arbitrary distinctive trademark "905" that the plaintiff should have affixed this mark to and should have used it upon merchandise, but it is whether or not, after it had so affixed it, used it, secured it, and registered it, the defendant infringed that trademark by placing it upon the front wall of his dramshop for the purpose of inducing purchasers to buy his whisky, when in the law the trademark and its use were the property of the plaintiff. The complainant averred in its bill that it applied its trademark "905" continuously and without interruption "to the packages containing its merchandise, by branding, stenciling, or printing the same upon barrels and labels and corks used in packing liquors for sale," and that it also used it upon buildings to mark the places where such whiskies could be obtained. There is no answer in the record to this averment, and it must be taken as true. The provision of the first sections of the acts of 1881 (21 Stat. at L. chap. 138, p. 503) and 1905 (33 Stat. at L. 724, chap. 592, Comp. Stat. 1913, § 9485), cited by the majority, to the effect that the applicant for registration shall file a statement of his trademark and "the mode in which the same is applied and affixed to goods," may condition the registration and perhaps the existence of a trademark that may be registered, but it in no manner prescribes or limits the acts which constitute the infringement of such a trademark after it has been secured and established. Those acts are prescribed and determined by other sections of the acts of Congress, by § 7 of the act of 1881 and § 16 of the act of 1905. The record in this case, therefore, as the writer understands it, conclusively shows that the plaintiff had a trademark in the arbitrary symbol "905" which it had applied to merchandise used in interstate commerce and registered, and which it had also used on buildings in which it sold

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name as a tradename in advertising his business, and also the name of the partnership, where he used the term "of the late firm," where these words, although of good size, were but little more than a third as high as the letters signifying the name of the partnership.

In Peterson v. Humphrey, 4 Abb. Pr. 394, although a tradename case, it is held that while a member of a partnership which has dissolved cannot, as against another member engaging in the same business, use the partnership name to indicate his place of business, or advertise that he is carrying on the business formerly carried on by the firm, yet he may place a sign over his place of business with his own name thereon, and also the statement that he was formerly a member of the partnership, and he may advertise in any form that he was one of the members of this firm, and that he carries on the same kind of business as formerly.

A. G. S.

its merchandise. Let us now turn to the real question in the case, to which it seems to me the requirement of the first sections of the acts, to the effect that the applicant for registration shall state the mode in which his trademark is applied or affixed to goods, is immaterial. That question is, Does the use of a trademark by another than the owner, on the front wall of a dramshop, or elsewhere, without affixing it to the merchandise sold or to the packages which contain it, raise a cause of action in favor of the owner under the act of February 20, 1905?

There can be no doubt that Congress had the power to give such a cause of action. Nor can there be any doubt that such a use of a counterfeit of a recorded trademark to sell the counterfeiter's goods for those of the owner of the trademark as completely contravenes the purpose of the act as the use of the counterfeit on the packages which go with the goods to the purchaser. When the Congress enacted the legislation now in question, it was not without experience in the operation of a similar act. It had provided by act March 3, 1881, 21 Stat. at L. chap. 138, § 7, p. 503, for the registration of such trademarks, and that: "Any person who shall reproduce, counterfeit, copy, or colorably imitate any trademark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trademark at the suit of the owner thereof."

After the enactment of this statute the courts held in the cases cited by the majority that, in order to constitute an infringement, the trademark of the owner must be affixed to the goods or to the packages of the alleged infringer which went with them to the purchasers. Subsequent to all these decisions Congress passed the act of 1905, and, after providing therein for the registration of a trademark by the owner in substantially the same words as in the act of 1881, it enacted that: "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trademark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, *or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration*, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation, in commerce among the several states, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof."

It is indisputable that the words the writer has italicized in the last quotation were added in the act of 1905 to those used in the act of 1881 for the purpose, and that they must, under familiar rules of construction, have the effect, to make actionable other uses of counterfeit trademarks by infringers than their use affixed to goods similar to the goods of the owner. Under the old act, the use of these counterfeit trademarks by infringers was made actionable only when they affixed them to the goods. Under the act of 1905 their use affixed to the goods was made actionable by the same words used in the act of 1881, and in addition their use on "labels, signs, prints, packages, wrappers, or receptacles intended to be used upon, or in connection with the sale of, merchandise." Note that not only was the use of such counterfeit trademarks on labels, signs, prints, packages, wrappers, or receptacles made actionable when they were "intended to be used upon," but also when they were "intended to be used in connection with the sale of," merchandise similar to that of the owner of the trademark. A copy of the trademark of the plaintiff was by the defendant affixed to, nay, it was a sign and a print. It was intended by him to be used, and it was used by him, in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in the plaintiff's registration. I am of the opinion that such a use fell within the specific terms of the act, and that it as effectually defeated the purpose of the act as a use of it by affixing it to specific merchandise would have done.

I agree with the court below that the complainant was entitled to its injunction.

Petition for a writ of certiorari denied by the Supreme Court of the United States, March 10, 1914, 232 U. S. 726, 58 L. ed. 816, 34 Sup. Ct. Rep. 603.

ARKANSAS SUPREME COURT.

C. B. HUNT et al., Appts.,
v.
MARIANNA ELECTRIC COMPANY et al.

(— Ark. —, 170 S. W. 96.)

Electricity — change of current — cost of altering apparatus.

A corporation organized to furnish elec-

Note. — As to duty to adapt electrical appliances to the system which supplies the

tricity to the public is not bound to bear the expense of altering the apparatus of consumers, even though purchased from it, upon changing in good faith the character of current supplied so that the old apparatus can no longer be used.

(October 19, 1914.)

APPEAL by complainants from a decree of the Chancery Court for Lee County sustaining a demurrer to a complaint filed to enjoin defendants from changing their system of electricity. Affirmed.

Statement by **Smith, J.**:

Appellants, who were the plaintiffs below, alleged in their complaint that they were subscribers and users of electricity furnished by the Marianna Electric Company, the appellee, which company was the defendant below; that this electric company is a public service corporation engaged in the business of furnishing electricity for light and power to all the citizens of the city of Marianna, and that at the present time, and for a number of years heretofore, the said company has been operating a system or plant in which the generator of electricity used in operating the plant produced what is known as "133-cycle current of electricity," and that plaintiffs had installed motors and machines for conducting their business so constructed and adjusted as to be operated by this 133-cycle system used by the defendant company, and that their various motors and machines were installed with the view and for the purpose of meeting the requirements of said electric company, and using the electricity as furnished by it; that the said electric company is now undertaking and proceeding to change the kind and character of machinery operated by them into what is termed a "60-cycle system," so that the said system will not operate the motors used by the plaintiffs herein, and by the citizens generally in the city of Marianna, and that the said company is demanding of the subscribers to its current of electricity that they bear the expense of the readjustment and repairs to their various motors and fans so that they can be operated by the said electric company, which expense will aggregate in amount a sum in excess of a thousand dollars. Plaintiffs further alleged that they had demanded of the electric company that it readjust their motors, fans, and machines so that they would be adapted to the new plant proposed to be installed, to the end that the electric company might carry out its contract and agreement with them and the public to properly serve electricity; but that the said electric company refuses so to do, and is proceeding to change its system, the result of which will be to put out of use all the motors and other electrical appliances owned by the citizens, and will result in great and irreparable injury to them in the stopping of their various lines of business. And other grounds of equitable relief were alleged. Plaintiffs twice amended their complaint, and the effect of these amendments, so far as it is material to state, was to allege that the motors owned by them were, in many instances, purchased from the defendant itself, and that, in some cases, these purchases had been recently made with the knowledge on the part of the defendant as to the uses intended to be made of them, and that they had offered to allow the defendant to change, alter, or repair their various appliances so that they would be adapted to the change in the system, and that the former service of the defendant had been satisfactory, but that since the change in the system had been made they were without service. And they further alleged that the defendant company had the exclusive franchise from the city of Marianna for the operation of an electric light plant in said city, so that the plaintiffs had no opportunity to purchase electric power from any other concern or to organize one themselves. The court sustained a demurrer which was interposed to these various pleadings, and dismissed the complaint for want of equity. The court in its decree recited its finding to be that the matter of the kind or character of current furnished by the company, so long as it was within the bounds of its franchise, was a matter of detail or administration, and that the court was without power to interfere to prohibit the proposed change being made. Certain questions of pleading are raised which we find it unnecessary to discuss. Plaintiffs have duly prosecuted this appeal from the decree of the court dismissing their complaint, as amended, for the want of equity.

Messrs. **Roleson & McCulloch**, for appellants:

The facts of the exclusive franchise held by the defendant company, the adoption by it of its methods of transmission, and the purchase by these patrons of the character of motors that would receive such

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current, see State ex rel. W. J. Armstrong Co. v. Waseca, 46 L.R.A.(N.S.) 437, and note.

The somewhat analogous question, as to the right to compel consumer to pay for connection with water mains, is treated in the notes to Bothwell v. Consumers' Co. 24 L.R.A.(N.S.) 485, and State ex rel. Otero De Burg v. Water Supply Co. L.R.A.1915A, 246.

electricity, amounted to a contract between the electric company and the citizens.

Asher v. Hutchinson Water, Light & P. Co. 66 Kan. 496, 61 L.R.A. 57, 71 Pac. 813; Paterson Gaslight Co. v. Brady, 27 N. J. L. 245, 72 Am. Dec. 360; State ex rel. W. J. Armstrong Co. v. Waseca, 122 Minn. 348, 46 L.R.A.(N.S.) 437, 142 N. W. 319.

Messrs. **Daggett & Daggett**, for appellees:

It is the consumers' duty to place themselves in such condition that they may receive the commodity contracted for at the place of delivery, which, in lighting propositions, is the main wire on the street line, generally spoken of as "the door of the consumer."

Ex parte Goodrich, 160 Cal. 410, 117 Pac. 451, Ann. Cas. 1913A, 56; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; Bothwell v. Consumers' Co. 13 Idaho, 568, 24 L.R.A.(N.S.) 485, 92 Pac. 533; Fisher v. St. Joseph Water Co. 151 Mo. App. 530, 132 S. W. 288.

Smith, J., delivered the opinion of the court:

It does not appear from the pleadings in this case why the change in the system was made. For aught we know from the pleadings, it may have been ordered by the city council, but however that may be, it may be assumed from the state of the pleadings that the change was permitted by the council. We cannot know what the terms of the franchise were under which appellee company was operating, as that information is not disclosed in any of the pleadings; but we do know that such matters are within the control and under the regulation, to some extent, of the city council. In the matter of granting franchises involving the use of the city streets, the city has the right to impose proper conditions to secure a suitable and adequate service to the public. It may not only impose these conditions in the first instance, but it may impose conditions after the grant of the franchise, subject only to the condition that it may not impair the obligation of any contract made with the public service corporation. But, not even by contract, can the city convey away its right of regulation under the police power. Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300, 67 S. W. 761.

Notwithstanding the allegation of the pleadings that the service formerly rendered by the electric company was satisfactory and sufficient, it is not alleged that the change was needlessly and capriciously made, and even though there may have been no municipal requirement in regard to this change, the electric company would have the right to make such change in its system and method of operation as, in the exercise of an honest judgment on the part of its managing officials, was necessary to a proper service of the public, and there is no allegation that the change was not an advantageous one from the standpoint of the general public, although it is alleged that it was an unnecessary one from the standpoint of these plaintiffs.

Counsel have not cited us to any case discussing or deciding the questions here involved, and we have been unable to find any, and accordingly we have been compelled to decide this case upon a consideration of what appears to a majority of the court to be the general principles involved.

It is urged as a reason against the right of the electric company to make this change that there existed an implied contract between them and the company that a current should be furnished them which would permit the use of the fixtures which they owned, and which, in some instances, had been bought and recently bought from the company itself. If this is true, no change could ever be made, for it would hardly happen that all fixtures would cease to be serviceable at the same time, and if a change was ever to be made it must necessarily be true that, when it was made, there would be some fixtures which would still be serviceable and have a usable value with the supply of the old current. The pleadings concede the duty of the users of the electricity to furnish their own appliances, but this, they say, they have done, and they call upon the company to make such adjustments as are necessary to adapt their fixtures to the new system or to furnish them with new appliances; and we conceive the question in the case to be whether or not the company is under any duty to perform this service, or whether that expense should be borne by the plaintiffs. In our judgment, it not having been alleged that the change was needlessly or capriciously made, we think this expense should be borne by the plaintiffs. Otherwise, having become a part of the operating expense of the company, this would be an item to be considered in fixing the rates to be charged all consumers of electricity, and would be an expense to be borne at last by the public generally, rather than by those owners who were required to supply themselves with new appliances.

We are much impressed with the reasoning of the court of appeals of Missouri in the case of Fisher v. St. Joseph Water Co. 151 Mo. App. 530, 132 S. W. 288, where, in a discussion of a question involving, to

some extent, the principles here involved, it was said: "Whether a public utility, such as a system of waterworks, be owned and operated by the municipality or by a private corporation, the consumers in the long run must pay, not only the operating expenses of the business, but also the whole cost of construction and expense of maintenance and betterments, together with a reasonable profit on the investment, if the business be in the hands of a private corporation. It would seem to be more fair and just that each consumer should bear the construction expenses relating exclusively to his own service than that the gross sum of all such expenses should be ratably assessed against all the consumers through the medium of an increased charge for the service. In one form or another the consumers must foot all the bills, and we think it is reasonable, so far as it may be done, to make each pay for what he gets."

It is no doubt true that these plaintiffs, from their standpoint, will be required to incur an expense without fault on their part; but someone at last must bear this expense, and we think that burden must fall upon them. Opportunity for wide choice exists in the selection of appliances for the use of the electric current, and interminable confusion might ensue and great injustice be done if the company was required to take into account these various opinions and preferences resulting from the change in appliances. It was the duty of the plaintiffs in the first instance to furnish their own appliances, and the change of system not having been made needlessly or capriciously, we think it equitable that they should acquire, at their own expense, such fixtures as are adapted to their purposes to receive the current under the new system. Moreover, there are no allegations in the complaint from which it could be said that there was any privity of contract requiring the company to furnish the appellants with any particular kind of current.

There was an allegation in the complaint that the change in the system was made without notice to certain owners, who, in ignorance of the change, turned on the current of the new system, whereby their motors were burned out and otherwise damaged. We have not thought it proper or necessary to consider in this case the question of the liability of the electric company to such owners, and, if they have any cause of action growing out of a failure to give notice of the change, it is not concluded by this opinion.

The decree of the court sustaining the demurrer will therefore be affirmed.

McCulloch, Ch. J., disqualified and not participating.

L.R.A.1915B.

GEORGIA SUPREME COURT.

JOHN A. ROEBLING'S SONS COMPANY, Plff. in Err.,
v.
SOUTHERN POWER COMPANY.

(— Ga. —, 83 S. E. 138.)

Sale — wire — specifications — implied warranty.

1. Where a company engaged in transmitting electrical power ordered from another company engaged in the business of manufacturing wire for electrical transmission, certain copper wire for use in the business of the purchaser, and the written contract specified the diameter of the wire, and contained a clause stating that the vendor guaranteed "the wire not to vary in gauge over 1 per cent above or below diameters given, and to have a conductivity of not less than 97 per cent of that of pure copper," this did not exclude an implied warranty on the part of the manufacturer that the wire was so constructed as to be properly adapted for use in transmitting electricity, and that it was free from latent defects rendering it unsuited to that purpose.

(a) Under such a contract specifying the diameter of the wire and its conductivity, there was no implied warranty that it would accomplish all that was expected of it or intended by the purchaser; but there was an implied warranty that it was properly constructed copper wire of the size and kind specified, and reasonably suited for use as such.

Pleading — sufficiency.

2. The first ground of the special demurrer to the petition was without merit. The allegation of negligence in the eighteenth paragraph may have been unnecessary and surplusage, but, taken as a whole, the suit was for a breach of an implied warranty, and not for damages for a tort.

(a) The first clause in the eighteenth paragraph of the petition, standing alone, would be too general, as merely alleging that the wire was defectively constructed. If the defects were sufficiently alleged, this opening general statement would not render the paragraph demurrable; but the allegation as to the defect was stated in the alternative, and to this the special demurrer raised an objection which was well taken. Green v. Ingram, 16 Ga. 164; Gould, Pl. 217, and note; 6 Enc. Pl. & Pr. 268; 6

Headnotes by FISH, Ch. J.

Note. — The question whether an express warranty as to quality excludes an implied warranty as to quality is discussed in the note to Loxterkamp v. Lininger Implement Co. 33 L.R.A.(N.S.) 501. And see also in this connection the question discussed in the note to Springfield Shingle Co. v. Edgecomb Mill Co. 35 L.R.A.(N.S.) 286, as to the effect of a sale with particular description of kind or quality as excluding implied warranty of fitness.

Standard Enc. Proc. 694; 31 Cyc. 74. Under our practice this did not form a part of the general demurrer that no cause of action was set forth, but furnished ground for special demurrer.

(b) The allegation "that petitioner has sold it as such [that is, the wire as junk copper], realizing therefrom the sum of $98,839.05, which was its only value," was attacked by the special demurrer on the ground that it was not shown that the sum realized was the market value of the copper at the time and place of delivery as contemplated and fixed by the contract. This ground was well taken. It did not appear from the petition when the sale was made, or whether the price of copper, or the value of the wire, was the same at the time when thus sold as when delivered. If the value fluctuated, this would not have affected the measure of damages under the contract. Berry v. Shannon, 98 Ga. 459; Americus Grocery Co. v. Brackett, 119 Ga. 489. Of course, this would not exclude special damages in a proper case.

(c) What is said as to a former ground of demurrer controls the attack of the statement that the construction of the wire was negligence and a failure to furnish an article reasonably suited for the purpose for which it was sold.

Same — indefiniteness.

3. The nineteenth paragraph of the petition was vague, indefinite, and uncertain, and failed to state with sufficient definiteness the time, character, or amount of expenditures or the stoppages of business and the losses resulting therefrom. The ninth ground of the special demurrer, therefore, should have been sustained. This ground was sustained in part, but apparently was not sustained as to the general allegation of the loss of the price of the wire and the sum expended in erecting and taking down the same, with interest thereon. These allegations were also too general.

Same — duplicity.

4. The tenth ground of demurrer was without merit. The action as brought was not duplicitous, but was one based upon a breach of an implied warranty. It was not alleged that the wire was not 2/0 or 3/0 copper wire, nor that it varied in gauge over 1 per cent, nor that it did not have a conductivity of 97 per cent of pure copper. But the action was based on the theory that the wire was furnished for use for the transmission of electrical power, and to be suspended between towers; that it was not properly constructed for the use with reference to which it was purchased, and that it had latent defects.

Appeal — rulings on demurrer.

5. No ruling on the other grounds of demurrer requires a reversal.

(September 23, 1914.)

ERROR to the Superior Court for Fulton County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged defects in the quality of certain copper wire sold and delivered by defendant to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. **Noble, Estabrook, & McHarg** and **Henry A. Alexander**, for plaintiff in error:

When any contract, agreement, or undertaking has been reduced to writing and is evidenced by a document, the contents of such document cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.

Pitcairn v. Philip Hiss Co. 61 C. C. A. 657, 125 Fed. 110, 21 Am. & Eng. Enc. Law, 2d ed. 1079; Thayer, Ev. pp. 390, et seq.; 1 Greenl. Ev. 16th ed. § 350a; Davis Calyx Drill Co. v. Mallory, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 332; Reynolds v. General Electric Co. 73 C. C. A. 23, 141 Fed. 551; De Witt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; Pender v. Fobes, 18 N. C. (1 Dev. & B. L.) 250; Sparks v. Messick, 65 N. C. 440; Etheridge v. Palin, 72 N. C. 213; Wood v. Ashe, 1 Strobh. L. 407; Stucky v. Clyburn, Cheves, L. 186, 34 Am. Dec. 590; Smith v. McCall, 1 M'Cord, L. 220, 10 Am. Dec. 666; Porcher v. Caldwell, 2 McMull. L. 329; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380; Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711; 2 Mechem, Sales, § 1254; Fay & E. Co. v. Dudley, 129 Ga. 314, 58 S. E. 826; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; J. I. Case Threshing Mach. Co. v. Broach, 137 Ga. 602, 73 S. E. 1063; Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671.

The foregoing rule applies to every species of written contract, and contracts for manufacture and sale are no exception to it.

Gardner v. Winter, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143; Davis Calyx Drill Co. v. Mallory, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 332; Reynolds v. General Electric Co. 73 C. C. A. 23, 141 Fed. 551; DeWitt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; Dickson v. Jordan, 33 N. C. (11 Ired. L.) 166, 53 Am. Dec. 403; Wasatch Orchard Co. v. Morgan Canning Co. 32 Utah, 229, 12 L.R.A.(N.S.) 540, 89 Pac. 1009; Leavitt v. Fiberloid Co. 15 L.R.A. (N.S.) 862, note; Bucy v. Pitts Agri. Works, 89 Iowa, 464, 56 N. W. 541; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co. 101 Me. 114, 6 L.R.A. (N.S.) 180, 63 Atl. 555; Wood v. Ashe, 1 Strobh. L. 407; Stucky v. Clyburn, Cheves, L. 186, 34 Am. Dec. 590; M'Laughlin v. Horton, 1 Hill, L. 383; Smith v. McCall, 1 M'Cord, L. 220, 10 Am. Dec. 666; Lanier

v. Auld, 5 N. C. (1 Murph.) 138; Chase Hackley Piano Co. v. Kennedy, 152 N. C. 198, 67 S. E. 488; W. F. Main Co. v. Griffin-Bynum Co. 141 N. C. 43, 53 S. E. 727; Johnson v. Latimer, 71 Ga. 470; DeLoach Mill Mfg. Co. v. Tutweiler Coal, Coke & I. Co. 2 Ga. App. 493, 58 S. E. 790; Crankshaw v. Schweizer Mfg. Co. 1 Ga. App. 363, 58 S. E. 222; Moultrie v. J. S. Schofield's Sons Co. 6 Ga. App. 464, 65 S. E. 315; Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671; Malsby v. Young, 104 Ga. 205, 30 S. E. 854; Springer v. Indianapolis Brewing Co. 126 Ga. 321, 55 S. E. 53; Brooks Bros. Lumber Co. v. Case Threshing Mach. Co. 136 Ga. 754, 72 S. E. 40.

Where express warranties are contained in a written contract of sale, the Georgia statute relating to sales of personal property does not apply.

Johnson v. Latimer, 71 Ga. 470; Malsby v. Young, 104 Ga. 205, 30 S. E. 854; Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671; Springer v. Indianapolis Brewing Co. 126 Ga. 321, 55 S. E. 53; Brooks Bros. Lumber Co. v. Case Threshing Mach. Co. 136 Ga. 754, 72 S. E. 40; De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & I. Co. 2 Ga. App. 493, 58 S. E. 790; Fay & E. Co. v. Dudley, 129 Ga. 314, 58 S. E. 826; Crankshaw v. Schweizer Mfg. Co. 1 Ga. App. 363, 58 S. E. 222; Moultrie v. J. S. Schofield's Sons Co. 6 Ga. App. 464, 65 S. E. 315; Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711; J. I. Case Threshing Mach. Co. v. Broach, 137 Ga. 602, 73 S. E. 1063.

But if the rule were otherwise in cases where the contract was made and was to be performed in the state of Georgia as the *locus contractus*, in the case at bar it would be governed by the rules of the common law without reference to local statutes.

Pattillo v. Alexander, 96 Ga. 60, 29 L.R.A. 616, 22 S. E. 646, 105 Ga. 482, 30 S. E. 644; Akers v. Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424; Lay v. Nashville, C. & St. L. R. Co. 131 Ga. 345, 62 S. E. 189.

Messrs. **Norman I. Cocke** and **King, Spalding, & Underwood**, for defendant in error:

The law neither contemplates nor tolerates that the petition shall set out the evidence, or anticipate what might be matter for defensive answer.

Bittick v. Georgia, F. & A. R. Co. 136 Ga. 138, 70 S. E. 1106; Louisville & N. R. Co. v. Peeples, 136 Ga. 448, 71 S. E. 805.

In a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the condition precedent that the goods shall answer the description, an implied warranty that they shall be salable or merchantable.

2 Benjamin, Sales, Corbin's ed. § 983.

Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied term of warranty that it shall be reasonably fitted for the purpose for which it is to be applied.

2 Benjamin, Sales, Corbin's ed. § 988.

The warranty extends to latent defects unknown to, and even undiscoverable by, the vendor, which render the article sold unfitted for the purpose intended.

Benjamin, Sales, Corbin's ed. § 994.

Where the seller of an article to be delivered is the manufacturer, and knows the use to be made of it by the purchaser, there is implied warranty that it will be free from latent defects arising in the process of manufacture, and that it will be merchantable and reasonably fitted for the purpose for which it is bought.

Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422.

Where the defect in the article is not discoverable on inspection or by ordinary tests, such warranty continues after delivery and acceptance by the buyer.

Bierman v. City Mills Co. supra; Howard v. Hoey, 23 Wend. 350; Cleu v. McPherson, 1 Bosw. 480; Hamilton v. Ganyard, 34 Barb. 204; Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

The law of Georgia in its application to the sale and purchase of goods not on hand, but to be thereafter furnished, is the same as the common law. The only difference in the Georgia law is that the rule of implied warranty has been extended to all sales.

Gammell v. Gunby, 52 Ga. 504; Wilcox v. Hall, 53 Ga. 635; Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

There is no express warranty in the quotation made by defendant, accepted by plaintiff, which excludes the implied warranty above specified.

Austin v. Cox, 60 Ga. 520; Wilcox v. Owens, 64 Ga. 601; National Computing Scale Co. v. Eaves, 116 Ga. 511, 42 S. E. 783; Elgin Jewelry Co. v. Estes, supra; Hawley Down Draft Furnace Co. v. Van Winkle Gin & Mach. Works, 4 Ga. App. 85, 60 S. E. 1008; Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 550; McQuaid v. Ross, 22 L.R.A. 187, and note, 85 Wis. 492, 39 Am. St. Rep. 864, 55 N. W. 705; Murchie v. Cornell, 14 L.R.A. 492, and note,

155 Mass. 60, 31 Am. St. Rep. 526, 29 N. E. 207; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; General Fireproofing Co. v. L. Wallace & Son, 99 C. C. A. 204, 175 Fed. 650.

The implied warranty or merchantability and adaptation to the use for which goods are bought, when they are bought for a particular purpose known to the seller, is implied.

Thomas v. Simpson, 80 N. C. 4.

Where the sale is by description, without opportunity for prior inspection, the rule of *caveat emptor* does not apply, and there is an implied warranty of fitness.

Baer v. Mobile Cooperage & Box Mfg. Co. 159 Ala. 491, 49 So. 92.

On the sale of a machine an implied warranty of suitableness and adequacy for use intended exists notwithstanding an express warranty as to quality and technical capacity contained in the order.

George E. Pew Co. v. Karley, 154 Iowa, 559, 134 N. W. 529.

An express warranty does not exclude an implied warranty, unless the two are inconsistent.

Boulware v. Victor Automobile Mfg. Co. 152 Mo. App. 567, 134 S. W. 7.

Where goods of a known character, which can be manufactured so as to have no latent defects, are sold by description, a warranty is implied that they are merchantable.

Leavitt v. Fiberloid Co. 196 Mass. 440, 15 L.R.A.(N.S.) 855, 82 N. E. 682.

Where express warranty appears on a true construction of the contract, to have been superadded for the benefit of the buyer, it does not exclude the implied warranty of fitness.

Mody v. Gregson, L. R. 4 Exch. 53, 38 L. J. Exch. N. S. 12, 19 L. T. N. S. 458, 17 Week. Rep. 176; Bigge v. Parkinson, 7 Hurlst. & N. 955, 31 L. J. Exch. N. S. 301, 8 Jur. N. S. 1014, 7 L. T. N. S. 92, 10 Week. Rep. 349; Drummond v. Van Ingen, L. R. 12 App. Cas. 284, 56 L. J. Q. B. N. S. 563, 57 L. T. N. S. 1, 36 Week. Rep. 20.

Fish, Ch. J., delivered the opinion of the court:

We will first consider the general demurrer to the petition. The John A. Roebling's Sons Company, by a writing dated in New York city, May 28, 1906, and addressed to the Southern Power Company, Charlotte, North Carolina, stated: "We beg leave to quote you on approximately 730,000 pounds of solid and stranded hard drawn and semi-hard drawn copper wire, as follows:"

Then followed seven kinds, stating the size, the number of wires, the diameter, the proximate weight per mile, and the cost of delivery for North Carolina and for South Carolina of each item. Among these were 2/0 and 3/0 sizes. The paper further contained the following: "We guarantee the wire not to vary in gauge over 1 per cent above or below diameters given, and to have a conductivity of not less than 97 per cent of that of pure copper."

The remainder of the paper referred to the times of delivery and payment, and it was also stated that the acceptance of this proposition was to constitute a purchase of the material at the prices named, and to bind the company to deliver it as stated. Under this was written the word "Accepted," followed by the signature of the plaintiff. A large lot of wire known as 2/0 and 3/0 with hemp center and copper strands was delivered. The plaintiff did not allege that it lacked the conductivity guaranteed, but alleged that it was defectively constructed and unsound, and was unfit for the purpose for which it was furnished, and for which it was sold by the defendant to the plaintiff with knowledge of the purpose for which it was bought. It was alleged that either the material of which the wire was constructed was so defective as to pit and break, or that some substance which had been put upon the hemp produced a corrosive material which rendered the wire defective and the lines strung with it wholly useless and unable to be maintained as transmission lines, and of no value except as junk copper. It was also alleged that the wire was shipped in such completed shape that plaintiff had no knowledge or notice, or means of knowing, of any defect in its manufacture; that wire of the character and description, if sound and in good order, unless broken by external and violent means, would last for about fifty years; but that these wires commenced breaking shortly after the completion of the lines of transmission for which they were used, and continued to do so. The controlling question raised by the general demurrer was whether the descriptive words "2/0" and "3/0," and the guaranty that the gauge would not vary over 1 per cent above or below the diameter given, and that the wire would have a conductivity of not less than 97 per cent of that of pure copper, excluded all implied warranties as to quality or suitableness for the purpose for which it was intended. This question was argued, first, with reference to the provisions of the Code of this state and the decisions made under them; and, second, with reference to the common law and decisions of other courts, treating the contract as governed by the common law. We will consider the question under these divisions.

By Civil Code 1910, § 4135, referring to sales of personalty, it is declared: "If there

is no express covenant of warranty, the purchaser must exercise caution in detecting defects; the seller, however, in all cases (unless expressly or from the nature of the transaction excepted) warrants—1. That he has a valid title and right to sell. 2. That the article sold is merchantable, and reasonably suited to the use intended. 3. That he knows of no latent defects undisclosed."

This would seem on its face to be plain. In the absence of an express warranty, it places upon the purchaser the duty of using caution in detecting defects; but it declares that "in all cases (unless expressly or from the nature of the transaction excepted)" there is a warranty declared by law to be implied in the respects mentioned. So that such implied warranty arises unless there is an express exception of it, or unless from the nature of the transaction it is excepted. This section was contained in the first Civil Code of this state, which was adopted in 1861, but went into effect in January 1, 1863; and this has been the law of Georgia ever since. It cannot be repealed by decisions of courts. If a contract expressly declares that there shall be no other warranties than those expressed, no difficulty can arise. The only possibility of difference is as to whether the nature of the transaction under investigation is such as to exclude the implied warranties, or any of them, declared in the section of the Code. In some of the decisions, both in this and in other states, broad language has sometimes been used to the effect that an express warranty excludes an implied warranty; but such expressions are to be considered in connection with the question involved in the case in which they were used. It would seem to be wholly illogical and unreasonable to say, if in the sale of goods the title was expressly warranted, this excluded all implied warranty of merchantability or of the absence of latent defects; or, on the other hand, that if there was an express warranty that goods were of a certain character or quality, it excluded an implied warranty that the seller had a valid title to them. There is no conflict between the two, and one does not overlap or exclude the other. If a merchant ordered coffee warranted to be equal to a given sample, he certainly would not mean that he waived any question as to whether the seller owned the coffee. Where the express contract covers or supersedes the implied warranty of the law, it excludes the latter; but where the two are in any conflict, and the parties have not undertaken by the express warranty to cover the whole subject-matter of the sale and of the warranties which the law itself implies, they are not excluded, except so far as the express warranty deals with the subject-matter of the implied warranty.

There is undoubtedly much confusion on this subject. The theory that, where the parties have reduced their contract to writing, they will be presumed to have covered all matters touching the sale, is only partially true. If a merchant should order goods of a certain character, without specifying time for delivery, and the order should be accepted, this would be an express contract, and if in writing, an express written contract; and yet who doubts that the law would imply that the delivery should be made within a reasonable time? Nor is it likely that anyone would contend that, because the contract was reduced to writing, the law would imply nothing further. If a contractor should agree in writing to complete a house, specifying the size, number of rooms, etc., the law would unquestionably imply that the work should be done in a workmanlike manner, and if he agreed to furnish materials, that they should be proper and suitable for the purpose. Many instances might be cited in which parties enter into express contracts, and yet the law implies certain incidents or terms in regard to the carrying out of the contract. So that the maxim, *Expressum facit cessare tacitum*, has its limitations. Suppose that a purchaser should order from a manufacturer a table warranted to be of certain dimensions and with certain ornamentations; can it be contended that this would exclude an implied warranty that the table should be properly put together, and that such a contract would be fulfilled by supplying a table with the dimensions and ornamentations specified, although it might be constructed of such inferior material as to fall down as soon as the purchaser should place a dictionary upon it and turn to the word "warranty?" Or if the paint used was so improper in character as to soil or corrode everything put upon it, or if the legs were fastened on with carpet tacks? Or, if a piano should be warranted to be a genuine Knabe, would there be no implied warranty that the manufacturer should sell a piano with proper chords and keys? Or, if a carpenter should order from a manufacturer an auger, specifying or requiring a warranty that it should be of a certain length and diameter and with a certain character of handle, would there not be an implied contract or warranty that it should be an auger which would bore? Could it be made of lead or pot metal, on the theory that the specification of the size and handle excluded any other contract or warranty implied by law? We are not now discussing a possible difference between implied terms in a contract, and whether general

descriptive terms are more properly to be called warranties or agreements; but we are endeavoring to show that an arbitrary and unlimited statement that, because a contract has been made in writing, nothing else can be implied in regard to the subject-matter, can be carried to such an extreme as to result in a *reductio ad absurdum*.

We are not contending that terms can be added to a written contract by parol testimony, but that where the parties make a written contract the law may make certain implications in regard to the subject-matter, and that one of the things which it implies in a sale of personalty is a warranty of certain things, unless that warranty is excluded by reason of the terms of the contract itself, or by reason of the nature of the transaction. This is an implication which the law itself imposes, except under the circumstances mentioned; and it is an entirely different matter from endeavoring to superadd to a written contract parol agreements. In Austin v. Cox, 60 Ga. 520, where a note given for the price of a commercial fertilizer declared that "this fertilizer is sold under the inspection and analysis of Dr. A. Means, inspector at Savannah, and the department of agriculture at Atlanta," it was held that this did not preclude the maker, when sued upon the note, from setting up a warranty of quality, express or implied, and urging a total failure of consideration, in that the article sold was not a fertilizer, and had no fertilizing properties, and was wholly worthless. In the opinion Bleckley, J., said: "Suppose it were true that the article had been inspected and analyzed by the aggregate scientific skill of the universe, and that nevertheless it was not a fertilizer, had no fertilizing property, and was wholly worthless, would the inspection and analysis make the article 'merchantable, and reasonably suited to the use intended?' . . . We can see no reason for treating all questions as to its quality closed."

A careful consideration, however, of the decisions of this court, will show that there is no necessary conflict between them, when what is said in each is construed in reference to the facts under consideration. In Wilcox v. Owens, 64 Ga. 601, a guano note contained the clause: "Guano sold and guaranteed under analysis of Dr. A. Means, inspector, Savannah, which analysis has been submitted to me."

The question was whether this guaranty or warranty by implication excluded the defense that the fertilizer was not reasonably suited to the purpose for which it was sold. Jackson, J., after quoting the section of the Code above set out, said: "Therefore in this case the sellers warranted that this fertilizer was merchantable and reasonably suited to the use intended, unless this warranty be expressly excepted from this contract, or unless it is excepted therefrom from the nature of the transaction. It is not pretended that the warranty of the title is excluded by this guaranty; is the other implied warranty excluded? There are no words in this contract that expressly except this warranty which the law also puts in it; and the nature of the transaction does not except it, because the thing sold was known by both parties to be for fertilizing the soil, that was the use intended, and that use and its adaptation to it are of the very essence of the contract. . . . The guaranty that the article comes up to Dr. Means's analysis does not expressly exclude the warranty that it is merchantable and reasonably suited to the use intended, —to wit, the manuring the land and increasing the crop. The purchaser had a right to stipulate for both, and not to buy unless both were in the contract, and both might well consist without the overthrow of either. The one the law gave the purchaser; the other the express contract gave him."

This was a clear, unambiguous ruling that a warranty of a single thing in connection with a sale did not, under our Code, exclude the implied warranties imposed by the law, unless they were expressly excluded, or there was an inconsistency between the warranty made and the implied warranty, or the former was of such a character as to impliedly exclude the latter. This decision has never been modified or overruled, and, if there were any conflict between it and what was said in the later decisions, under our Code (Civil Code 1910, § 6207), the decision quoted would control until overruled or modified. But we do not mean to hold that there is any conflict.

In Johnson v. Latimer, 71 Ga. 470, Latimer sued Johnson on an open account for the first payment on a "Monarch separator." The evidence on behalf of the plaintiff was to the effect that the defendant ordered a machine with a cylinder of a given size, and there was no warranty as to weight; that the plaintiff warned him that it would be too large, but he insisted that he knew what he desired; that the plaintiff said, also, that he supposed the freight would be $1.65 per 100 pounds, and in fact it was $1.54 per 100; and that upon arrival of the machine the defendant refused to take it. The evidence on behalf of the defendant was to the effect that he desired a portable separator, for the purpose of hauling it about the country with his team; that he so informed the plaintiff, who guaranteed that the machine should be what he desired, and that

it should not weigh over 2,000 pounds; that he also agreed that the freight should not cost over $33 or $34, but upon its arrival at its point of destination the defendant was called upon for $82 freight; and that the actual weight was 2,800 pounds. One ground of the motion for a new trial was because the court refused a request to give in charge to the jury the following: "If the machine sold defendant by plaintiffs is not reasonably suited to the use intended, plaintiff cannot recover in this case, unless there was a special contract as to size," etc.

Another ground was because the court charged as follows: "The warranty which the law required Latimer to make was that the article sold was a separator,—that is to say, that it would separate the grain from the chaff; but he did not warrant that it was suitable for transportation over the roads in the country, or that it was such a machine as could be pulled by Johnson's teams."

Hall, J., delivering the opinion, said that the court thought that all that was intended by the charge was that the law did not require a warranty that the machine was suitable for transportation over the roads of the country. He stated that a simple refusal of the request, without any charge upon an inapplicable principle, would have been a better course. He then added: "It is only in the absence of an express warranty upon the subject that resort can be had to an implied warranty." And, after quoting the Code section on the subject, he added: "The maxim of the common law, *expressum facit cessare tacitum*, embodies the principle."

This was all that was said on the subject. It is evident that it was not held that there was no implied warranty that the separator would separate, but that, where there was an express agreement in regard to the kind of cylinder which should be placed upon the machine, there was no implied warranty that it was suitable for the country roads in the defendant's vicinity.

In Malsby v. Young, 104 Ga. 205, 30 S. E. 854, a steam engine and sawmill were sold. The machinery was expressly warranted to be of good material and durable, and with good care and proper usage to do as good work as any made in the United States of similar style, and like amount of use, and to be in good, fair condition. It was provided that, if it did not meet the above warranty after trial of ten days, written notice should be immediately given to the vendors, stating wherein it failed to satisfy the warranty, and a reasonable time should be given to them to send a competent person to remedy the difficulty; that the vendors reserved the right to replace any defective parts; and that, if then the machinery could not be made to fill the warranty, it was to be returned by the purchaser to the place where it was received, and another machine was to be substituted therefor that should fill the warranty, or the notes and money should be immediately returned and the contract canceled, neither party in such case to make or have any claim against the other. It was still further declared: "All warranties to be invalid in case the machinery is not settled for when delivered, or if this warranty is changed, whether by erasure, addition, or waiver, or if the purchaser shall in any respect have failed to comply therewith."

It will readily be seen that this warranty on its face covered the entire ground as to being reasonably suited to the use intended, and necessarily excluded an implied warranty on that subject. The trial judge charged that, whether there was an express warranty or not, the law would make the seller warrant the machinery to be reasonably suited to the use intended. This was held to be error. In discussing the question, Little, J., said: "Much would depend upon the nature and extent of the warranty, where it was express, whether any implied warranty would exist in connection with what was expressed; and as an express warranty was made a part of the written contract on which the suit was founded, and by the contract the defendants received the machinery subject to the conditions of the warranty printed therein, the rights of the parties as to the nature and character of the articles sold are to be measured by the representations and warranties therein contained; and as such express warranty covered the conditions as to title, make, capacity, etc., fully and in detail, the charge of the court complained of was error."

This distinctly recognized the rule as declared in Wilcox v. Owens, supra, and while in the further discussion the expression was used, "It is only in the absence of an express warranty that resort can be had to an implied warranty," this is to be taken in connection with what was previously said, showing that the express warranty was of a character to cover the entire matter of the suitableness of the machinery to the work to be done, and to leave no room for an implied warranty on that subject.

In National Computing Scale Co. v. Eaves, 116 Ga. 511, 42 S. E. 783, suit was brought for the price of a set of computing scales. The defendants pleaded failure of consideration, and that the scales were not reasonably suited for the use intended. The written contract in regard to the sale contained a guaranty that, if the scales should

"get out of order at any time within two years from date of shipment, with ordinary use (not dropped or broken), the vendors to quickly repair the same free of charge, the purchaser paying transportation charges to and from the factory." It was held that this guaranty did not exclude an implied warranty that the articles sold were reasonably suited to the use intended, but that the purchaser could not defeat an action brought to recover the purchase money, on the ground that the articles were not so suited, unless it appeared that when sold they were so defective as not to be reasonably suited to the use intended, or unless they became defective after the sale, and the seller had failed and refused to repair them within a reasonable time, or unless the defect thus arising was of such a character that it could not have been remedied even if the articles had been returned. In the opinion Justice Cobb said: "While there is no express warranty in the contract, other than the warranty that the plaintiff will repair any defects when not brought about in a given way, still there is nothing in the contract which excludes the implied warranty of the law; nor is the transaction one of such a nature as that such warranty would be excluded."

See also a discussion of the subject in Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

In Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711, suit was brought on a promissory note given for the purchase money of a horse. The note contained the following: "This note having been given to said S. S. Brewer as per contract for one black horse about seven years old, a little thick-winded. It is hereby agreed that the ownership and title to said horse shall remain in said S. S. Brewer until this note is fully paid, and it is distinctly understood that I take the risk of the horse dying."

The defendant pleaded that the plaintiff expressly warranted the horse to be "sound and all right in every respect," but that he proved to be unsound and entirely worthless. It was held that it was incompetent to show an express parol warranty by the representations and statements, for the purpose of adding to, taking from, or varying the written contract. It was plain, in the face of the statements in the note that the horse was thick-winded and that the purchaser took the risk of his dying, that the testimony was incompetent, on the ground that parol evidence was not admissible to change the agreement. This did not involve the question of an implied warranty imposed by law.

In Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671, suit was brought on a promissory note given for the purchase price of a piano. It contained the following, among other things: "If said instrument be defective, such defect shall be reported to the Cable Company or their agent within . . . days of the date of this obligation; and should I fail to make complaint within said time, it shall be held as conclusive evidence that no defect exists, or the same is waived if existing; and I hereby agree not to set up any such plea in defense of this obligation, if not reported within said time."

The defendants pleaded that, contemporaneously with the execution of the note, two written warranties had been given. One of them was signed by the vendor, through its salesman, and was as follows: "This certifies that Cable Piano, Style N, Mah. No. 38985, is fully warranted for five years from date of its manufacture, and if within that time, with proper care and usage, it proves defective in material or workmanship, we hereby agree to place it in good repair or exchange it for another of same style at our expense. Exposure to dampness and sudden changes of temperature will crack varnish, and cause other damage to the best piano; and against such exposure, ill-use, neglect, ordinary wear, accidents, and tuning, we will not be responsible."

The other agreement was made by the agent in his own name, with reference to taking back the piano in part payment for another. It was held that this latter paper was not binding on the principal. In the answer of the defendants it was further set up that the vendor's agent represented that the piano was fitted with a particular kind of action, and that this was untrue. It was alleged that, as soon as the defendants learned of the defects in the instrument, "of it not being what the plaintiff represented it to be, of it not being fitted and suitable for the use intended, they repudiated the contract of sale and demanded of the plaintiff another instrument in accordance with the contract, which demand was refused by the plaintiff." This was the only reference in the answer which might be construed as setting up an implied warranty. It was held that the agreement contained in the note and written warranty were sufficient to cover the entire contract on the subject of quality; and it was added that this excluded implied warranty on the same subject. It will be seen that this merely construed the written instrument as sufficient to cover the particular subject, and that accordingly it excluded implication on the subject so entirely covered. It did not hold that a mere express warranty of one thing, contained in a contract which did not purport to cover the

entire subject, and which was not inconsistent with the implied warranties of the law, would necessarily exclude them.

In Henderson Elevator Co. v. North Georgia Mill. Co. 126 Ga. 279, 55 S. E. 50, suit was brought for a breach of contract in regard to the purchase of certain corn. The defendant pleaded, among other things, breach of warranty, in that the plaintiff agreed to sell to it "20,000 bushels of No. 2 white corn, bulk," and that the corn shipped was not of that character or quality, that grinding some of it produced sour meal, and that defendant refused to accept further shipments. It was held that, in a contract for the sale of goods, words descriptive of the subject-matter of sale and the time of shipment are ordinarily to be regarded as a warranty. No question of implied warranty was involved, or whether such descriptive words would exclude the implied warranty of the law in other respects. Some courts have preferred to treat descriptive words of this character in a contract rather as being a term of the contract or part of the agreement than as a warranty strictly speaking, which is usually a collateral agreement. But, for the purposes of present discussion, we need not enter into that subject.

In Springer v. Indianapolis Brewing Co. 126 Ga. 321, 55 S. E. 53, it was said that from the evidence it appeared that both the buyer and the seller understood that the shipment of beer, for the purchase price of which the suit was brought, was to be of the same quality as that of a previous carload of beer, and that this amounted to an express warranty of the quality, and the standard was the grade and quality of the first shipment, and therefore it was held error to charge on the subject of implied warranty in regard to the quality of the beer. It will thus be seen that it was held that the exact standard was fixed by the quality of other beer previously shipped, and that the test was to be whether it measured up to that quality, rather than whether it was suitable for sale. The expression in the headnote and opinion, to the effect that an express warranty excluded an implied warranty, must be considered in connection with the facts before the court; and, so considered, it does not conflict with previous rulings.

In Fay & E. Co. v. Dudley, 129 Ga. 314, 58 S. E. 826, suit was brought for the purchase price of a machine known as "double-end tenoner." The contract of sale, which was signed by both parties, used the descriptive words: "No. 6 double upper and lower tenoning head bits, upper and lower cope heads and bits left off, but with cope spindles."

It also described the borer, "with bits to mortise and bore 5/16" mortise and hole, and to be suitable for small stationary slats, if necessary, as small as 7/8" x 3/32" mortise," and saw mandrel of a particular kind, and a sash sticker with a boring attachment of a particular sort. There were provisions: "That this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by and for the consignor, and void all its contracts of warranty, express or implied."

The defendants, among other things, sought to set up that the plaintiff sold the machine and warranted it to be the latest improved double-headed tenoner, suited for the purpose intended, such purpose being the manufacture of doors, sashes, blinds, and furniture, and that this was known to the plaintiff. It was held that the express contract excluded the implied warranty of suitability for the particular purpose intended by the buyer. It seems quite clear that the very terms of the contract sought to exclude such implied warranty. It was accordingly held that it was error to admit in evidence representations as to the work which the machine would do, made by the agent at the time the negotiations were pending and before the written contract was entered into. Really this was a question of adding to a contract by parol, rather than invoking the rule of law as to implied warranties. In the opinion it was stated: "In Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46, it was held that where a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular purpose, yet if the known, described, and definite thing be actually supplied, there is no warranty that it will answer the particular purpose intended by the buyer."

This statement is made one of the headnotes. It appears that this form of expression did not originate with the Supreme Court of the United States, but with an English judge, and that in the discussion by Chief Justice Fuller it was not taken as excluding the right on the part of the buyer to claim that the machine actually furnished was not properly constructed, or would not do the work of a machine of that character. This is a different thing from fulfilling the intention of the buyer, or doing the work intended by him. Under the contract before this court when Fay & E. Co. v. Dudley was decided, there can be

little doubt that there was no implied warranty that the machine would answer the particular purpose "intended by the buyer." Here again the point was that the contract covered the subject-matter of the particular warranty sought to be set up, and excluded an implied warranty on that subject. What has been just said applies also to the cases of Brooks Lumber Co. v. Case Threshing Mach. Co. 136 Ga. 754, 72 S. E. 40, and J. I. Case Threshing Mach. Co. v. Broach, 137 Ga. 602, 73 S. E. 1063.

Counsel for plaintiff in error rely with much earnestness upon certain expressions used by this court in deciding cases in which it was held that the express warranty was such as to cover the entire subject-matter, and to exclude implied warranties; and we have at some length reviewed most of the decisions of this court bearing on that subject, for the purpose of showing that, when certain general expressions are considered in connection with the facts of the case in which they are used, there is really no substantial conflict in the rulings of this court. Counsel also cited cases decided by the court of appeals of this state. A discussion of the subject will be found in Hawley Down Draft Furnace Co. v. Van Winkle Gin & Mach. Works, 4 Ga. App. 85, 60 S. E. 1008, where Powell, J., very clearly draws the distinction between particular purposes or uses intended by the buyer and the general use for which the article is intended in manufacturing it.

It was further contended that the present case must be decided by the common law, as the contract was neither made in Georgia nor to be executed here, and that this court has held that, in the absence of proof as to what the law of another state is, it will be presumed that the common law is there in force (possibly with the exception in those states in which the civil law is the foundation of their laws), and that this court would determine for itself what was the common law on the subject. Accordingly we will consider some of the many, and not wholly reconcilable, decisions in England and in this country on the subject in hand. It may be well at the outset, however, to remark that the section of our Code on the subject of implied warranties did not originate in a separate legislative act, but in a codification of what the codifiers deemed to be the general law on the subject, and was embodied in the Code, which was subsequently adopted by the legislature.

It has sometimes been broadly declared that in the purchase of particular articles the rule of *caveat emptor* applies at common law, but this was subject to exception. L.R.A.1915B. Originally cases of implied warranty were brought as actions on the case, alleging fraud, though there might be no actual fraud. Doubtless this theory rested on the idea that the person was supposed to know whether he had title to the personalty sold by him, or that he did not properly manufacture articles for another; and it was deemed that fraud might be implied or imputed from the circumstances. But in time this fictitious form of action gave way to an action of assumpsit, on the ground that a warranty might be implied from the nature of the circumstances of the case; and the tendency has since been of approximating the rule of the Roman law, which implies a warranty that the goods are merchantable and fit for the purposes for which they are known to be bought. 2 Story, Contr. 5th ed. § 1060. At a later period a sales act was passed in England.

In Jones v. Just, L. R. 3 Q. B. 197, 37 L. J. Q. B. N. S. 89, 23 Eng. Rul. Cas. 466 (decided in 1868), the subject of express and implied warranties was quite fully discussed by Mellor, J. He classified the cases under five heads as follows: (1) Where goods are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, "at least where the seller is neither the grower nor the manufacturer." (2) Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. (3) Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. (4) Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purposes to which it is to be applied. (5) Where the manufacturer undertakes to supply goods manufactured by him or in which he deals, but which the vendee has not had the opportunity to inspect, it is an implied term in the contract that he shall supply a merchantable article. The learned judge further said:

"We are aware of no case in which

the maxim *caveat emptor* has been applied, where there has been no opportunity of inspection, or where that opportunity had not been waived. . . . In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not it is unnecessary to put any other question to the jury. . . . It appears to us that in every contract to supply goods of a specified description, which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be salable or merchantable under that description."

In Gardiner v. Gray, 4 Campb. 144 (decided in 1815), the suit contained several counts. The first stated that the defendant undertook that (12) bags of waste silk purchased of him by the plaintiff should be equal to a sample produced at the time of the sale. Other counts stated the defendant's promise to be that the silk should be waste silk of a good and merchantable quality. The silk was imported from the continent, and, before it landed, samples of it, which the defendant had received in a letter, were shown to the plaintiff; but in the sale note no reference was made to the sample, nor a particular specification of the quality of the silk. It was held that this was not a sale by sample, and that there was no warranty that the silk should correspond to the sample. It was further held that the purchaser had a right to expect a salable article answering the description in the contract. Lord Ellenborough said: "Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply."

In Bigge v. Parkinson, 7 Hurlst. & N. 955, 31 L. J. Exch. N. S. 301, 8 Jur. N. S. 1014, 7 L. T. N. S. 92, 10 Week. Rep. 349 (decided in 1862), the plaintiffs having entered into an agreement with the East India Company for the conveyance of troops to Bombay, the defendants undertook to supply the plaintiffs with troop stores "guaranteed to pass survey of the honorable East India Company's officers." It was held in the exchequer chamber that this express warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purposes for which they were intended.

In Shepherd v. Pybus, 3 Mann. & G. 868, a boat and barge dealer sold a barge which had been built by him, and which was nearly finished and was afloat on his premises, where it was afterwards rigged and fitted up according to the agreement, and was removed to the plaintiff, but upon trial was found to be so defectively built as to let in considerable quantities of water. Suit was brought for breach of an implied warranty, and was sustained, notwithstanding there was a written contract describing the barge as that lying at the builder's wharf. A distinction was made between a warranty that the barge was reasonably fit for use, and the contention that it was not fit for the special purpose for which the builder knew that it was designed to be used. In the opinion, Tindal, Ch. J., said: "But in the case now before the court the subject of the purchase was a barge built by the seller himself; and the purchaser had had no opportunity of inspecting it in its progress, and the defects which were afterwards discovered were not apparent upon inspection, and could only be detected upon trial,"—and therefore he declared that the ruling in a case in which there had been a full opportunity for inspection did not apply.

In Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422, the defendant contracted in writing to manufacture and deliver to the plaintiffs, for shipment, oil of a certain brand, color, and fire test. The plaintiffs, pursuant to the rules of the produce exchange, which were made a part of the contract, appointed an inspector, who certified that the oil delivered was of the certain brand, color, and test contracted for. The rules also provided that an acceptance of the oil by the buyer's inspector should be an acknowledgment that the oil was in accordance with the contract. It was nevertheless held that the defendant was bound to deliver oil free from latent defects growing out of the process of manufacture, which would render it unmerchantable at the time and place of delivery, and which could be found by the exercise of reasonable care. O'Brien, J., said: "The general rule of the common law, expressed by the maxim *caveat emptor*, is not of universal application, though the exceptions are quite limited: and one of them is the case of a manufacturer who sells goods of his own manufacture, who, it is said, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. The seller in such a case is liable for any latent defect arising from the manner in which the article is manufactured, or from the use of defective materials, the character of which he is shown or is presumed to have knowledge. This rule, and the reason upon which it rests, or its qualifications and limitations, have seldom been stated in the same form by courts and writers upon the subject, but

that it exists as a principle in the law of contracts cannot be doubted. . . . It is strenuously urged, however, that it can have no application to a case like this, where the contract is in writing, with such ample description of the goods sold. But the obligation attached to an executory contract for the sale of goods by the manufacturer or maker cannot be changed by the mere fact that the contract has been reduced to writing. The writing, it is true, is deemed to express the whole agreement of the parties; but since this peculiar liability arises from the nature of the transaction and the relations of the parties, without express words or even actual intention, it will remain as part of the seller's obligation, unless in some way expressly excluded. All implied warranties, therefore, from their nature, may attach to a written as well as an unwritten contract of sale. The parties may, of course, so contract with each other as to eliminate this obligation from the transaction entirely. . . . The plaintiffs were entitled to something more than the mere semblance or shadow of the thing designated in the contract. They were entitled to the thing itself, with all the essential qualities that rendered it valuable as an article of commerce, and free from such latent defects as would render it unmerchantable. . . . . It frequently happens in large transactions that the article which is the subject of the contract is described by some vague generic word, which, taken strictly and literally, may be satisfied by a worthless or defective article. In such cases the words may mean more than their bare definition or literal meaning would imply, and impose upon the seller an obligation to furnish, not only the thing mentioned in the contract, but a merchantable article of that name."

If the contract involved in the case at bar be treated as a New York contract, there can be little doubt as to the law applicable to the subject.

In Bucy v. Pitts Agri. Works, 89 Iowa, 464, 56 N. W. 541, Given, J., said: "There are authorities holding that, where there is an express warranty, none will be implied, upon the theory that by the express warranty the parties have stated in words that by which they agreed to be bound. It is held, in this and many other states, that this rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract. 'A warranty will not be implied in conflict with the express terms of the contract.' Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548. The rule deducible from the authorities is that an implied and an express warranty may exist under the same contract, as when the expressed does not relate to the obligations created by the implied; but when the expressed warranty does provide as to the same obligation, it excludes the implied. In other words, the law will not imply anything as to matters about which the parties have expressly agreed."

See also Boothby v. Scales, 27 Wis. 626.

In Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537, a bridge company, having partially executed a contract for the construction of a bridge, entered into a written agreement whereby a subcontractor undertook, for a named sum within a specified time, to complete its erection. The subcontractor agreed to assume and pay for all work done and material furnished up to that time by the company. Assuming this work to have been sufficient for the purposes for which it was designed, the subcontractor proceeded with his undertaking; but the insufficiency of the work previously done by the company was disclosed during the progress of the erection of the bridge. No statement or representation was made by the company as to the quality of the work it had done. Its insufficiency, however, was not apparent upon inspection, and could not have been discovered by the subcontractor until actually tested during the erection of the bridge. It was held that the law implied a warranty that the work sold or transferred to the subcontractor was reasonably sufficient for the purposes for which the company knew it was designed. In the opinion Mr. Justice Harlan said: "According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. . . . But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed."

In De Witt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536, a quantity of varnish was sold under a written contract containing the following express warranty as to quality: "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company, of New York, and as per sample barrels delivered." "Turpentine copal varnish, at 65c. per gallon." "Turpentine Japan dryer, at 55c. per gallon."

There was no evidence that the goods were not of the same quality as those made for the De Witt Wire Cloth Company, nor that they did not conform to the sample. It was accordingly held that this language fixed a definite standard for the determination of the quality of the goods, and excluded an implied warranty or agreement that they should conform to a common commercial standard, and should be adapted to the known uses of the vendee.

In Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46, the refrigerating company sued Seitz for the purchase price of a refrigerating machine, under a written contract which specified that the vendor agreed to supply Seitz with a No. 2 size refrigerating machine as constructed by the refrigerating company, which was to be put up in the brewery of Seitz under the superintendence of a competent man furnished by the company. Among other things the defendant pleaded that the plaintiff represented that the machine was capacitated to cool certain rooms in the brewery which had been examined by the plaintiff, but that when set up and operated it was not so capacitated, and failed to perform the work for which, upon the representations of the plaintiff, the machine had been contracted for by the defendant; that the defendant contracted to purchase the machine upon the guaranty by the plaintiff that it would cool certain rooms, and upon the representation that the No. 2 machine was capable of cooling a space of 150,000 cubic feet of air continuously to a temperature sufficiently low for the purpose of brewing or manufacturing beer; but that the plaintiff knew that these representations were false and unfounded. Mr. Chief Justice Fuller, in delivering the opinion, said that there was no evidence to sustain the allegations of fraud, but that it was contended that under the amended answer the defendant was entitled to avail himself of the breach of the contract of warranty or guaranty collateral to the contract of purchase and sale, or of the implied warranty that the machine should be fit to accomplish a certain result, and that, assuming the sufficiency of the pleading of this question, there was no error on the part of the trial judge in directing a verdict in favor of the plaintiff. It was held that, as the contract specifically called for a No. 2 size refrigerating machine, the defendant was entitled to such a machine, and that there was no implied warranty that it would cool a given space; in other words, that it would "answer the particular purpose intended by the buyer."

A careful examination of that case will show, however, that while there was no implied warranty that the No. 2 refrigerating machine would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit, it was not held that a refrigerator improperly constructed or having latent defects so as to prevent its operating as a proper No. 2 machine could be furnished, without liability on the part of the vendor. When the purchaser obtained a No. 2 machine, he could not complain that it did not do the work of a larger machine; but he could have complained if it failed, on account of latent defects, to operate properly as a No. 2 machine should. Whether called a term of the contract or an implied warranty, the purchaser of a No. 2 machine was entitled to such a machine, not in name only, but in reality and substance; and if it was made and bought for the purpose of refrigerating as a No. 2 machine, he could set up that it failed to be reasonably suited for that purpose, though he might not set up that it failed to accomplish the purposes intended by him. In the opinion Mr. Chief Justice Fuller showed that he recognized this distinction. He stated: "It is not denied that the machine was constructed for refrigerating purposes, and that it worked and operated as a refrigerating machine should; but it is said that it did not so refrigerate as to reduce the temperature of the brewery to 40° Fahrenheit, or to a temperature which would enable defendant to dispense with the purchase of ice."

And again: "In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up, and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance."

See also General Fireproofing Co. v. L. Wallace & Son, 99 C. C. A. 204, 175 Fed. 650.

In the case at bar it was alleged that the vendor was a manufacturer of copper wires; that the vendee purchased wires for the purpose of using them for the transmission of electrical power, with the knowledge of the vendor; that the purchaser did not have the opportunity for examination in advance; and, in effect, that there were latent defects in the construction of the wire which rendered it unsuited for the purpose for which it was manufactured and furnished. The mere fact that the size and conductivity of the wire were specified in the contract did not cover the entire subject of its qualities and suitability for use in the transmission of electrical power, nor did it exclude the implied warranty on that subject. This is an entirely different thing from attempting to set up additional express warranties by parol, or that the wire of a particular size should do the work of a wire of a larger size, or conduct all the electricity which the purchaser might desire to put upon it. Such things would not be warranted under the rule just discussed, that where a known, described, and definite thing is supplied, there is no warranty that it shall answer the particular purpose intended by the buyer; but this rule would not authorize a manufacturer of wire to be furnished for conducting electricity, merely because the diameter and conductivity of such wire is specified, to send it in fragments of a few feet in length, which would be entirely unsuitable for use in conducting power for any distance. Nor would it authorize a manufacturer to furnish copper wire so improperly constructed and so full of concealed defects that it would not be reasonably suited for use as copper wire of that size. Whether called a term of the contract, or implied warranty, when a manufacturer undertakes to manufacture and sell copper wire for conducting electrical power, and the size and conductivity is given, he does not warrant that it will perform all the service which the purchaser may intend or expect it to do; but he does impliedly warrant that the wire which he furnishes is, in substance as well as in name, copper wire of the designated size, suitable for the transmission of electricity, and not full of latent defects.

From what has been said, it will be seen that the general demurrer was properly overruled.

The rulings in the other headnotes need no elaboration.

Judgment reversed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
Appt.,
v.
SOUTHERN EXPRESS COMPANY.

(— Ky. —, 169 S. W. 517.)

Witness — removal of papers — obstructing justice — self-incrimination — corporation.

A corporation which removes its books and papers from the jurisdiction of the court to avoid producing them before the grand jury in a threatened investigation is liable for obstructing justice, although no subpœna has yet been issued requiring their production and they may tend to incriminate it, since it is not entitled to the constitutional protection against self-incrimination.

(October 1, 1914.)

APPEAL by the Commonwealth from a judgment of the Circuit Court for Lincoln County sustaining a demurrer to an indictment charging defendant with the offense of obstructing justice. Reversed.

The facts are stated in the opinion.

Messrs. **James Garnett**, Attorney General, and **D. O. Myatt**, Assistant Attorney General, for appellant.

Mr. **Charles C. Fox**, for appellee:

The commonwealth of Kentucky had no right to seize the books, papers, and documents of the defendant for the purpose of indicting it, without some writ or warrant or order to that effect or for that purpose.

Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, ante, 834, 34 Sup. Ct. Rep. 344; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Ballmann v. Fagin, 200 U. S. 186, 50 L. ed. 433, 26 Sup. Ct. Rep. 212; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; McGinnis v. State, 24 Ind. 500; Blum v. State, 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26.

No person can be made to criminate himself.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370.

A party cannot be guilty of the obstruc-

Note. — The right of a corporation, corporate officer, or other person having custody of its books and papers, to refuse to produce them, on the ground that they may tend to incriminate, is considered in the note to Burnett v. State, 47 L.R.A.(N.S.) 1178.

tion of justice unless justice is actually being administered.

Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

Hannah, J., delivered the opinion of the court:

The appellee, Southern Express Company, was indicted in the Lincoln circuit court, charged with the offense of obstructing justice. The indictment alleges, in substance, that the grand jury of Lincoln county, which was impaneled at the May term, 1913, of the Lincoln circuit court, being about to engage in an investigation of violations of the prohibition against the unlawful sale, shipment, and delivery of intoxicating liquors in said county, the defendant, Southern Express Company, knowing that certain of its books and papers contained evidence of the violation of the law in the respects mentioned, committed by itself and others, and knowing that such books and papers would be called for and required by the grand jury in such investigation, caused the removal of such books and papers from the county of Lincoln and state of Kentucky, for the purpose of hindering, obstructing, and preventing such investigation by the grand jury, and thereby obstructed justice.

Defendant corporation demurred to the indictment, and the circuit court sustained the demurrer upon the stated ground that the books and papers of defendant corporation, if produced before the grand jury, might result in criminating defendant corporation itself, for which reason the court held that the removal thereof did not constitute the offense of obstructing justice. From the judgment thereupon entered, discharging the defendant, the commonwealth appeals.

It is admitted by the demurrer that the books and papers of the defendant corporation contain evidence of its violation of the law, and that it removed them from the jurisdiction of the court, knowing they would be called for and required by the grand jury. So the chief inquiry is whether defendant corporation could have been required to produce and permit an inspection of its books and papers by the grand jury, if such books and papers had been permitted to remain within the jurisdiction of the court; and the answer to this inquiry is controlling upon a consideration of the question whether the removal thereof from the jurisdiction of the court constituted an act in obstruction of justice, for the reason that, unless the production thereof could lawfully have been coerced by the grand jury, the removal of such books and papers from the jurisdiction of the court would not be such an act as would subject defendant corporation to a conviction of the charge set out in the indictment. Unless the production of its books and papers could lawfully have been coerced, their removal from the jurisdiction of the court is immaterial.

1. Where the books and papers of an individual citizen contain evidence incriminating him, he cannot be required to exhibit the contents thereof to the grand jury, any more than he could be required to incriminate himself by word of mouth; but in order that he may be entitled to assert the privilege against self-incrimination guaranteed to him by § 11 of the Constitution of the commonwealth of Kentucky and by the 5th Amendment to the Constitution of the United States, he must appear in person in the court out of which the subpœna issued, with the books and papers in his present possession, rendering himself amenable to the authority of the court, and tendering and offering himself and his books and papers for examination and inspection by the court, so that the court may determine for itself whether the contents of such books and papers are of a criminating nature. This being done, the Constitution throws around the individual citizen the sheltering guaranty against self-crimination. But the individual citizen may not resolve himself into a court, and himself determine and assert the criminating nature of the contents of books and papers required to be produced. United States v. Collins (D. C.) 146 Fed. 553; Ballmann v. Fagin, 200 U. S. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658. See also McGorray v. Sutter, 80 Ohio St. 400, 24 L. R. A. (N.S.) 165, 131 Am. St. Rep. 715, 89 N. E. 10.

2. But the constitutional privilege against self-crimination does not extend to corporations; and had defendant company permitted its books and papers to remain within the jurisdiction of the Lincoln circuit court, such books and papers could have been required to be produced before the grand jury. This could have been done by subpœna duces tecum ad testificandum directed to the agent of the corporation having possession of such records, or by a subpœna duces tecum without the ad testificandum clause, the subpœna being directed to the corporation itself and served upon the proper agent. It was so held in Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558, in which the court said: "Where the documents of a corporation are sought, the practice has been to subpœna the officer

who has them in his custody; but there would seem to be no reason why the subpœna duces tecum should not be directed to the corporation itself. Corporate existence implies amenability to legal process."

The court in that case further said: "What then is the status of the books and papers of a corporation which has not been created as a mere instrumentality of government, but has been formed pursuant to voluntary agreement, and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress."

See also United States v. American Tobacco Co. (C. C.) 146 Fed. 557; Re American Sugar Ref. Co. (C. C.) 178 Fed. 109.

3. And not only are corporations excluded from the assertion of the constitutional privilege against self-crimination, but such privilege may not be claimed for the corporation by its officers and agents. The privilege is purely a personal one. McAlister v. Henkel, 201 U. S. 90, 50 L. ed. 671, 26 Sup. Ct. Rep. 385.

It follows therefore that, as the constitutional privilege against self-crimination does not extend to corporations, had defendant corporation permitted its books and papers to remain within the jurisdiction of the Lincoln circuit court, that court could have compelled the company to produce them for the inspection of the grand jury, even though they contained evidence incriminating the corporation itself; and under this state of the law, the removal of such records, knowing they would be called for and required by the grand jury, and for the purpose of obstructing an investigation by the grand jury, constituted the offense of obstructing justice.

4. Nor is the fact that at the time of such removal of the books and papers there was no subpœna issued against the company requiring the production of its books and papers before the grand jury a valid objection to the sufficiency of the indictment.

As was said by this court in Com. v. Berry, 141 Ky. 477, 33 L.R.A.(N.S.) 976, 133 S. W. 212, Ann. Cas. 1912C, 516: "It will not do for a moment to admit that the respondent might anticipate the officers of justice, and secrete, bribe, or intimidate the state witnesses from attending the trial of public prosecutions, and not be liable for any act done until a subpœna had been legally served upon the witness. This view will leave untouched the most corrupting field for offenses of this character." Cited from State v. Keyes, 8 Vt. 57, 30 Am. Dec. 455.

See also State v. Horner, 1 Marv. (Del.) 511, 26 Atl. 73, 41 Atl. 139; State v. Holt, 84 Me. 509, 24 Atl. 951; State v. Desforges, 47 La. Ann. 1201, 17 So. 811; State v. Bringgold, 40 Wash. 20, 82 Pac. 132, 5 Ann. Cas. 716.

Judgment reversed.

SOUTH CAROLINA SUPREME COURT.

T. L. CAVE, Respt.,
v.
SEABOARD AIR LINE RAILWAY, Appt.

(94 S. C. 282, 77 S. E. 1017.)

Carriers — overcrowded trains — liability for injury to passengers.

1. A railroad company which, having reason to anticipate the condition, starts an overcrowded train from a terminal without notice to passengers that some will have

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Note. — Duty of carrier to provide passenger with seat.

I. Duty to furnish seat.
   a. Generally, 916.
   b. Right to particular seat, 918.
   c. Excuse for failure to furnish seat, 918.
   d. Failure to provide seat as negligence, 919.

II. Rights of passenger entitled to a seat, which is not provided.
   a. Right to refuse to surrender ticket or pay fare; ejection, 920.
   b. Right of action for breach of contract or for injuries due to failure to provide seat, 921.

to stand, is liable in damages to a passenger made ill by exposure in being compelled to ride on the platform, and insulted by the conductor when he asked for a seat.

Damages — punitive — insulting passenger.

2. Punitive damages may be awarded against a railroad company which, having needlessly permitted an overcrowded train to start from a terminal without notice to passengers that some would have to stand, insults a passenger who refused to give up his ticket unless provided with a seat, by telling him that a lady will be asked to give up her seat to him, with intent to humiliate him.

(Frazer, J., dissents.)

(April 7, 1913.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Hampton County in plaintiff's favor in an action brought to recover damages for defendant's wilful failure to furnish plaintiff with a seat upon its train, and for insults offered him when he complained of the treatment. Affirmed.

The facts are stated in the opinion.

Messrs. **Lyles & Lyles**, for appellant:

There is no evidence of any abusive or disrespectful language or conduct whatever on the part of the conductor, and a verdict should have been directed for defendant.

Daniels v. Florida C. & P. R. Co. 62 S. C. 1, 39 S. E. 762; Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 307, 126 S. W. 144.

This subject involves two somewhat distinct questions, one, the question whether the passenger is entitled to a seat, including the circumstances affecting his right, in that respect, and the other, the rights of the respective parties, assuming that a passenger is entitled to a seat, but one is not provided.

I. Duty to furnish seat.

a. Generally.

It may be said generally (without reference now to the consequences of the refusal or failure to provide the passenger with a seat) that a carrier owes a duty to furnish a passenger with a seat. St. Louis, I. M. & S. R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558, 8 Am. Neg. Cas. 31; Brazeau v. Canadian P. R. Co. 8 Can. Ry. Cas. 477; Louisville & N. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149, 8 Am. Neg. Cas. 213; Hardenbergh v. St. Paul, M. & M. R. Co. 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. 625; Davis v. Kansas City, St. J. & C. B. R. Co. 53 Mo. 317, 14 Am. Rep. 457; Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325; Weeks v. Auburn & S. E. R. Co. 60 Misc. 400, 113 N. Y. Supp. 626; Texas & P. R. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S. E. 1115; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. 5; Houston & T. C. R. Co. v. Bryant, 31 Tex. Civ. App. 483, 72 S. W. 885.

And as to the measure of the carrier's duty in furnishing seats, it has been held—

—that it is that high degree of care and prudence which would be used by a very cautious, prudent, and competent person under like circumstances, St. Louis Southwestern R. Co. v. Tittle, — Tex. Civ. App. —, 115 S. W. 640;

—that it is the duty of a carrier to provide its trains with coaches reasonably sufficient to seat and carry comfortably as many persons as, in the exercise of ordinary care, it would reasonably anticipate would demand to be carried thereon, Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 307, 126 S. W. 144;

—that more than ordinary diligence in furnishing seats must be exercised where the carrier is bound to anticipate an extra crowd because of low excursion rates, Texas & P. R. Co. v. Rea, — Tex. Civ. App. —, 74 S. W. 939;

—that a high degree of care must be exercised in furnishing a sufficient number of seats, in order to protect passengers from the danger of riding in a more exposed position, International & G. N. R. Co. v. Williams, 20 Tex. Civ. App. 587, 50 S. W. 732.

So, the carrier owes the duty to a passenger to place him on a train containing sufficient seats for all passengers on that train. Alabama State Southern R. Co. v. Gilbert, 6 Ala. App. 372, 60 So. 542.

So, if any uncertainty exists as to the ability of a carrier to furnish seats on a certain train, it should contract with reference thereto. Texas & P. R. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115.

And passengers who have tickets entitling them to go by a certain train are entitled to seats. Chicago, R. I. & P. R. Co. v. Lindahl, 102 Ark. 533, 145 S. W. 191, Ann. Cas. 1914A, 561.

So, where a carrier advertises an excursion and gives assurance that it will furnish first-class accommodations, first-class accommodations includes seats. Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891.

If passengers appropriate more than one seat each, leaving others without seats, it is not the duty or the right of the latter to wrangle or struggle with the former for seats; it is the duty of the proper officers of the trains to regulate that question. It is essential that good order shou.d prevail on every passenger train; and it is not likely always to prevail on crowded trains, if the dignitaries of the train leave the passengers to shift and scramble for themselves. Bass v. Chicago & N. W. R. Co. 36 Wis. 450, 17 Am. Rep. 495.

So, also, in Louisville, N. O. & T. R. Co. v. Patterson, 69 Miss. 421, 22 L.R.A. 259, 13 So. 697 it was held that a conductor

L.R.A.1915B.

When a rush of travel not reasonably to be expected by the company causes the congestion, the carrier is excused from liability for failure to furnish a seat.

Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 313, 126 S. W. 144; Hutchinson, Car. § 1575; Thomp. Neg. § 2546; 6 Cyc. 582.

Plaintiff was guilty of contributory negligence in not standing inside the car, where there was plenty of room for him to stand, and in riding on the platform, which he knew to be dangerous.

Camden & A. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120, 10 Am. Neg. Cas. 198.

Messrs. J. W. Vincent and C. B. Searson for respondent.

. Hydrick, J., delivered the opinion of the court:

Desiring to attend the automobile races at Savannah, Georgia, in November, 1910, plaintiff bought a round-trip excursion ticket from Estill, South Carolina, to Savannah and return over the defendant's road. On the return trip the crowd on the train was so great that plaintiff could not get a seat. When the conductor demanded his ticket, he refused, at first, to give it to him, unless he would furnish him a seat, but finally gave up his ticket under threat of expulsion from the train. Thereupon plaintiff brought this action for damages, alleging the purchase of the ticket; the failure of defendant to furnish him a seat; that he was compelled, on account of the crowd

should make provision for seating the passengers where some of the passengers are occupying two seats, and other seats are filled with valises.

And in Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 402, 32 Am. Rep. 325, action for assault in ejecting passenger from a drawing room car upon refusing to pay excess fare or leave the car until a seat was furnished, it was held that, although there were several seats filled with passengers' baggage, it was not the passenger's duty to ask a conductor for a seat before going into the drawing-room car, where, if the baggage had been removed, there would not have been enough seats to supply all the passengers who were standing.

If there is no sitting room for passengers excluded by a regulation from the ladies' car, and there is room to seat them there, they cannot be left standing without breach of the contract of carriage. Bass v. Chicago & N. W. R. Co. 36 Wis. 450, 17 Am. Rep. 495. "But," the court said, "in such case, in the admission of male passengers into the ladies' car, the object of the regulation must be regarded and observed, and it must necessarily rest in the discretion of the proper officials of the train to select those to be admitted. This discretion must be somewhere; and the good order of the train and the object of the regulation are not compatible with the choice of passengers to make their way, at will and without license or excuse, into a car from which the regulation primarily excludes them. In such cases, as in others, it would not comport with the comfort and convenience of the passengers, not always with their safety, for some of them to assert their rights with a strong hand. And the safety and comfort of the passengers generally are not to give way to the safety or convenience of one or of a few." But the court said further that the passenger was not "bound to wait the slow pleasure of the officials of the train to give him a seat, if the ladies' car was open to his peaceable entrance. If so open, we think that he might well enter it for a seat; for, as we have said, the regulation for convenience should give way to the right of contract. And if the officers of the train neither furnished him with a seat nor forbade or barred his entrance into the ladies' car, we are inclined to regard it as equivalent to their license to him to enter it. But if his entrance were barred or forbidden, we cannot hold that he could of right attempt by force to enter the car. If, however, being neither barred nor forbidden, he entered the car peaceably and was peaceably in it, where there was a seat for him, to which he was entitled and which he could not find elswhere, we hold that he was there rightfully. Being there rightfully under his contract of carriage, we cannot recognize any right of any officer of the train to remove him by force; certainly not without proffering him a seat elsewhere. And we deem it our duty to say that no circumstances could have justified the brakeman, if such were the fact, in violently throwing the respondent on the platform while the train was moving over the bridge. Some discretion and humanity are as essential to such persons as zeal, due or undue."

Street railroad companies owe a duty to furnish seats to passengers. Halverson v. Seattle Electric Co. 35 Wash. 600, 77 Pac. 1058. The court said that "the obligation of street car companies to furnish seats for their passengers rests upon the same principle as that of steam railways, *viz.*, the accommodation and safety of their passengers. No doubt, swiftly moving steam railway trains are more dangerous to standing passengers than electric or other motor cars running less swiftly, and for that reason greater care is necessary upon steam railway trains. But the principle is the same in both cases. Both must care for the safety of their passengers. It would not be negligence *per se* for a street car company to fail to furnish a seat to each of its passengers, but where seats are not furnished, and passengers are permitted or required to stand upon cars, greater care is required in the operation of its cars than where all are provided with seats. Nor it is negligence *per se* for a passenger

on the train, to ride on the platform; and that he was made sick by the exposure, and, also, that the conductor insulted him when he demanded a seat as the condition of surrendering his ticket. The defendant denied the allegations of the complaint, and pleaded contributory negligence on the part of plaintiff in riding on the platform. Plaintiff testified that he not only could not get a seat, but that he could not get standing room within the car, and was therefore compelled to ride on the platform, and that he was made sick from the exposure; that, having been on his feet all day, he was too tired to stand up, and he folded up his overcoat and sat on it on the platform, as it was against the rules of the company for passengers to stand on the platform, and it was dangerous to do so. The foregoing statement of the evidence is sufficient to show that there was no error in refusing defendant's motion for the direction of the verdict.

The duties and obligations of carriers to furnish passengers with seats, and the correlative rights and remedies of passengers where seats are not furnished, are well expressed in the note to the case of Chesapeake & O. R. Co. v. Austin, 136 Am. St. Rep. 312, as follows: "It is a well-settled rule that carriers of passengers must furnish such accommodations as are practicable, and that this requirement includes seats. The carrier is bound in fulfilment of its contract to provide seats for its passengers when practicable. Failing in this,

to ride or stand upon the platform of a car."

But upon notice to a passenger offering to enter the car of its crowded condition and of the present impossibility or uncertainty of obtaining a seat thereon, there is afforded the passenger by the carrier on the contract of passage the privilege to continue the journey on the train and waive the inconvenience of riding thereon without a seat, or to wait for another train if unwilling or in any manner physically unable to make the journey without a seat. St. Louis Southwestern R. Co. v. Tittle, — Tex. Civ. App. —, 115 S. W. 640.

A passenger who remains on a crowded train and voluntarily takes a seat in a colored coach cannot complain if furnished such accommodations as could reasonably be furnished on the train. Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 307, 126 S. W. 144.

b. Right to particular seat.

A carrier is not bound to furnish a passenger with a seat in a particular car, the seats in such car all being occupied and there being empty seats in another car. Pittsburgh, C. & St. L. R. Co. v. Van Houten, 48 Ind. 90.

So, in Louisville & N. R. Co. v. Smith, 10 Ky. L. Rep. 497, where the train consisted of two coaches, in one of which smoking was allowed, a woman passenger requested a seat in the car in which smoking was not allowed, and was informed that the seats were all taken, but was offered one in the other car, and it was held that if there were no seats in the car in which she wished to ride, and she was sent forward and requested to take a seat in another car, which was safe and secure and as comfortable as could be with reasonable respect to the habits and comforts of the traveling public generally, then it was her duty to take a seat therein or await another train, and so an instruction that the carrier could not excuse its refusal to allow such passenger to enter the car, unless it "offered plaintiff a seat in a car as comfortable and convenient and suitable for a woman to occupy as those in the car she tried to enter," was erroneous.

So, also, in Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. 5, where a passenger was ejected for refusal to pay fare or surrender his ticket unless given a seat in a car set apart for ladies or gentlemen accompanying ladies, which was crowded, the court said: "We think a regulation setting apart a car for ladies or gentlemen accompanied by ladies, a reasonable regulation. A passenger may not dictate where he will sit or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train he cannot complain." The court said further that in this case the passenger took passage with knowledge that the ladies' car was crowded, and that he would either have to ride standing in that car or go into the car designed exclusively for gentlemen, and so the requirement that he go temporarily into the smoking car was not under the circumstances unreasonable.

And unless seats are numbered and a ticket is bought for a seat so numbered, or unless a ticket is bought for a particular seat identified in some other way, there is no right to occupy any particular seat. Brazeau v. Canadian P. R. Co. 8 Can. Ry. Cas. 477. And so it was held that a passenger could not recover for assault or for removal from a seat by the conductor, where, there being other vacant seats, the passenger insisted on taking one temporarily abandoned by its occupant, and obstinately refused to leave the seat although politely requested to do so by the first occupant and his friends, who had seats near, they explaining that they were business associates and desired to talk concerning matters common to all.

c. Excuse for failure to furnish seat.

When the accommodations are insufficient for all on account of an unforeseen demand, the full duty of the railway company under the law is performed by furnishing accom-

it has violated one of the essential obligations of its agreement. It can no more claim a performance of the contract created by the sale of a ticket or the proffered payment of fare for transportation without a seat than to furnish a seat without the transportation. The one implies the other, and both must go together, else the company has failed in its obligation. The supplying a seat is not only a reasonable and practicable duty, but it is an imperative requirement that cannot be avoided by any act of the company. . . . Extreme cases of extra, unexpected travel, of which the carrier had no notice, and where the passenger, when he presents himself for transportation, is advised by the company of the crowded condition of the train, or when it can be shown that he had independent knowledge of such fact, together with the fact that its usual trains were run, that such were sufficient under ordinary circumstances, also that it exercised due care in calling into operation all its means at hand, may serve as an excuse for not furnishing seats sufficient to meet the extra demand of the moment. But, even under such circumstances, the passenger must be advised or have knowledge of the inability of the company to supply him with a seat before it can escape its contract obligation. . . . Being entitled to a seat, a passenger has a right to refuse to accept anything less than the complete fulfilment of the contract on the part of the company, and, if not provided with a

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modations as far as possible to those who apply. St. Louis & S. F. R. Co. v. Petties, 99 Ark. 415, 138 S. W. 961.

So, a railway company will not be held guilty of a breach of a duty to provide a seat for a passenger where, under proper pleadings, it is established as a fact that the railway company has exercised due care and diligence to adequately meet all demands that it has reason to expect along the trip; that an unusual number of people had unexpectedly presented themselves as passengers on the trip, who were not reasonably to be expected by the carrier at the time of starting the train from the place where means of transportation were at hand and accessible, and had thus rendered the equipment insufficient to suitably and conveniently accommodate all passengers who might wish to ride, and that a particular passenger at the time he presented himself to enter the car was informed, or ought to have known, of the crowded or about to be crowded situation of the car, and the impossibility or uncertainty of being provided a seat. St. Louis Southwestern R. Co. v. Tittle, supra.

It is unreasonable to hold a railway company bound under all circumstances to provide a sufficient number of cars so that all who may apply for transportation may be furnished with seats. Unforeseen emergencies may often arise where the performance of such duty would involve impossibilities. Crowds of people of whom the company has had no notice, or crowds whose numbers exceed all reasonable anticipation, may unexpectedly present themselves; and the duty of being prepared on all such occasions to furnish cars and equipments sufficient to suitably and conveniently accommodate all who may wish to ride would necessarily involve such a constant accumulation of the means of transportation at every point where any extraordinary number of people may on any special occasion present themselves as passengers, as would in all probability make the business of carrying passengers by railroad too expensive to be profitable. It is undoubtedly the duty of these companies to furnish suitable seating accommodations for its ordinary number of passengers, or even for an extraordinary number on reasonable notice. But where passengers apply for transportation in extraordinary and unexpected numbers, they should be held to the exercise of only such reasonable diligence in providing cars as may be consistent with the particular circumstances of each case. Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 201.

And while a railway company which fails to furnish comfortable seating accommodations for its ordinary number of passengers, or even for an extraordinary number upon due notice, is certainly negligent, and should be held to strict accountability, it would be unreasonable to apply the same strictness when a train is unexpectedly crowded by a funeral party going only a few miles. Quinn v. Illinois C. R. Co. 51 Ill. 495, 9 Am. Neg. Cas. 246.

Also, where an unanticipated emergency renders it impossible for a carrier to furnish all passengers with seats, and white passengers crowd into the coach set aside for colored passengers, failure of the carrier to eject white passengers from the colored coach will not render the carrier liable to a colored passenger for failure to furnish her with a seat. St. Louis & S. F. R. Co. v. Petties, 99 Ark. 415, 138 S. W. 961.

d. Failure to provide seat as negligence.

The failure of a railroad company to furnish accommodations for its passengers on a train, so that a large number of them are compelled to stand in the aisles and upon the platforms of the cars, constitutes negligence. Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631, 5 Am. Neg. Rep. 484.

Also, a carrier which advertised an excursion, and had ample notice that there would be an extraordinary number of passengers on that occasion, is negligent in not furnishing reasonable seating accommodations for its passengers. Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891.

In an action for personal injuries sus-

seat, may refuse to give up his ticket or to pay fare; he has, however, no claim to a free ride, and, if he accepts such accommodations as are afforded, he is in duty bound to pay fare. . . . From the foregoing considerations there is but one of two alternatives for the passenger without a seat; that is, to either pay fare or leave the train. If he is willing to accept part performance and remains on the train, he must pay fare. If he desires complete fulfilment, he must leave the train at the first convenient opportunity. . . . If a passenger rides on a train and refuses to pay fare for want of a seat, he may be ejected. He must, however, be put off at a safe and convenient place, which would necessarily mean a station. It is the duty of the conductor to take up tickets, or collect fare of everyone accepting passage on a train, with or without a seat, and a passenger refusing to comply with this reasonable regulation may be ejected without liability for the ejection." For the breach of the carrier's contract or of its duty to the public, the passenger's remedy is an action for damages. 136 Am. St. Rep. 315.

When the plaintiff alleged his contract and the breach thereof, if the defendant desired to avail itself of the defense that the demand on its facilities of conveyance was so sudden and unexpected that it could not have been anticipated and provided for by the exercise of due care and diligence, it should have alleged the facts necessary to establish that defense, and should have

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tained in whole or in part by reason of a passenger being compelled to stand in a crowded car, the fact that at certain hours of the day insufficient seating accommodations were furnished, and that this was known to the company, may be treated as a circumstance of substantive negligence as well as aggravation. Lyndon v. Georgia R. & Electric Co. 3 Ga. App. 534, 60 S. E. 278.

But failure of a carrier to furnish a seat has no weight as a ground of negligence in an action by a passenger to recover for injuries sustained by being thrown from a crowded platform, where, according to the passenger's own statement, he boarded the train at a way station after seeing and knowing that the train was crowded, and voluntarily took his place on the platform. Oliver v. Louisville & N. R. Co. 43 La. 804, 9 So. 431, 3 Am. Neg. Cas. 566.

Failure of a carrier to furnish a seat is not negligence *per se;* it is only evidence of negligence to be weighed and considered by the jury. Houston & T. C. R. Co. v. Bryant, 31 Tex. Civ. App. 483, 72 S. W. 885; Galveston, H. & S. A. R. Co. v. Morris, 94 Tex. 505, 61 S. W. 709.

II. Rights of passenger entitled to a seat, which is not provided.

a. Right to refuse to surrender ticket or pay fare; ejection.

In some cases it is said that a passenger who is entitled to a seat may refuse to surrender his ticket or pay his fare until he is provided with a seat.

Thus, a passenger may refuse to pay his fare or surrender his ticket unless furnished with a seat. Hardenbergh v. St. Paul, M. & M. R. Co. 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. 625.

In the Leigh Case infra, the court said that a "carrier cannot claim a surrender of the ticket upon a proffer by it of transportation alone, because the contract calls for transportation and a seat. The passenger cannot avail himself of the benefit of the transportation offered him under his contract, and at the same time withhold from the carrier the effective evidence of the payment of his fare . . . [that is], the ticket. If he desires to repudiate the contract on his part, he must do so *in toto*. He cannot appropriate its benefits and get rid of its burdens."

As implied in the language just quoted, it does not follow from the right of the passenger to withhold his ticket or fare unless he is provided with a seat, that he may recover damages for his ejection because of such refusal.

Upon the other hand, it is the duty of a passenger who refuses to surrender his ticket or pay fare unless a seat is provided, to leave the train. St. Louis, I. M. & S. R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558; Davis v. Kansas City, St. J. & C. B. R. Co. 53 Mo. 317, 14 Am. Rep. 457; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. 5.

And he must leave at the first reasonable opportunity afforded him. Hardenbergh v. St. Paul, M. & M. R. Co. 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. 625.

And so a carrier may eject a passenger who refuses to pay or leave the train unless a seat is provided for him. St. Louis, I. M. & S. R. Co. v. Leigh; Memphis & C. R. Co. v. Benson; and Hardenbergh v. St. Paul, M. & M. R. Co. supra.

And especially where it is demanded that a seat be provided in a particular car, and there are vacant seats in another car. Pittsburgh, C. & St. L. R. Co. v. Van Houten, 48 Ind. 90.

But a passenger who refuses to pay fare unless a seat is provided him does not become a trespasser until he refuses to leave the train on reasonable opportunity being afforded. Hardenbergh v. St. Paul, M. & M. R. Co. supra.

And so he can be ejected only at a regular station. Ibid.

In Davis v. Kansas City, St. J. & C. B. R. Co. 53 Mo. 317, 14 Am. Rep. 457, a passenger boarded a train at a certain station, having a ticket to the point of his destination, and refused to pay fare unless provided with a seat, and, upon being pro-

proved them at the trial. But that defense was not set up in the answer, and there was no evidence tending to prove it, except the fact that the crowd was unusually large, but not that it was unusually large for such an occasion; and there was no evidence that defendant should not have reasonably anticipated such a crowd, or that, anticipating it, it could not by the exercise of due diligence have provided for its accommodation. The only evidence of any effort to provide accommodation for the extra crowd of passengers was that of the conductor, who said he asked the station master at Savannah for an extra car, and he said they did not have one, as they were all in service. But there was no evidence that it was the duty of the station master to provide extra cars, or that defendant used due diligence in calling into operation all the means at hand or accessible to provide for the emergency. It was apparent before the train left Savannah that the accommodations were not sufficient to meet the demand.

There was no error in submitting to the jury the issue of punitive damages, for the evidence in the case, and the lack of evidence which it was incumbent on the defendant to introduce, afforded reasonable ground for an inference of indifference to the rights of the passengers on the part of defendant in failing to provide adequate accommodations for them. The defendant knew, or should have known, that its train would not accommodate all who offered

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vided with a seat at an intermediate station, he tendered fare from that point, which was refused, and he was ejected upon refusing to pay fare from original starting place or surrender his ticket. In action for damages based on the original contract of carriage, it was held that there could be no recovery, although the court intimated that recovery might have been had if the action had been based on a new contract, as having been entered into at the place where a seat was obtained.

And a passenger who is ejected because he declines to deliver a ticket or pay fare without receiving a seat may maintain an action upon the contract and recover for any damages that are the proximate result of its breach, just as though he had disembarked of his own will. St. Louis, I. M. & S. R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558, 8 Am. Neg. Cas. 31.

But if he is ejected without unnecessary force or violence because of his refusal to pay for his ride, he cannot recover for the ejection. Ibid.

b. Right of action for breach of contract or for injuries due to failure to provide seat.

In St. Louis, I. M. & S. R. Co. v. Leigh, supra, the court, while denying a recovery in an action brought upon the theory that the passenger, who refused to surrender his ticket or pay fare unless he was provided with a seat, was unlawfully expelled from the train, said in effect that in such circumstances the passenger may maintain his action to recover for any damages that are the proximate result of the breach of the contract, just as though he had disembarked of his own will.

In St. Louis, I. M. & S. Co. v. Leigh, supra, the court said that it was unnecessary to decide whether a passenger entitled to a seat may remain on the train upon complying with reasonable regulations of the company, without waiving his right to recover damages under the contract for the inconvenience of riding without a seat.

And one who abandons a train because unable to procure a seat, and secures passage and proper accommodations on another train, has cause of action for such damages as he sustains by reason of delay. Texas & P. R. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115.

But it has been held that one who enters a crowded car, surrenders his ticket, and remains in the car, relinquishes his contract right to a seat. Weeks v. Auburn & S. Electric R. Co. 60 Misc. 400, 113 N. Y. Supp. 636.

It is to be observed that, to come strictly within the scope of the present note, an action for damages by a passenger injured while standing in a car must have been based upon the theory that the injury was the proximate result of the carrier's failure to provide a seat as required by its contract, irrespective of any question of negligence in the operation of the train or car. In other words, if, apart from the breach of contract to furnish a seat, the injury may be attributed to the negligence of the carrier in operating the train or car in view of the fact that the passenger was standing, and therefore exposed to perils from which he would have been immune if seated, an element of negligence is added which may itself be the basis of recovery regardless of the question whether the carrier owed the passenger any duty to provide a seat or not.

Again, when, as in the cases strictly within the scope of this note, the action is for the recovery of damages for injuries proximately resulting from the breach of the contract to furnish a seat, and not upon negligence, the question of contributory negligence on the part of the passenger is not directly involved, and the cases on that question have therefore not been included. It would seem, however, that the cases on that question might have an indirect bearing, for the reason that if a passenger, in standing on the platform when all the seats inside the care are occupied, would be guilty of contributory negligence which would have precluded recovery in an action based on negligence in the operation of the train, it might be argued in an action based on the breach of a contract in

themselves as passengers thereon. Nevertheless the testimony shows that thirty-eight passengers who had tickets for another train were admitted to this train, which was a special excursion train, and there was testimony that less than that number had to stand. Moreover, there is no evidence that the passengers were informed before the train started that seats could not be provided for all of them. True, they might have seen for themselves that such was the case, but how were they to know that the defendant would not, at any moment, provide additional accommodations by attaching another car to the train before it started, or even after it had started, at some near-by station or side track, where the company may have had extra cars stored? It is within the observation of all who have traveled much that this is frequently done. To a passenger who left the train on account of its crowded condition, and thereafter sued for damages for breach of his contract, the defendant might have said: If you had stayed on the train, you would have been given a seat before the train left the station, or within a reasonably short time thereafter. Of all such matters passengers cannot be presumed to know; that it is the duty of the carrier to inform them. Besides, there was another ground which required submission of the issue of punitive damages to the jury. The plaintiff alleged that the conductor insulted him, and held him up to the scorn of the other passengers. Upon this point, the conductor, after testifying to plaintiff's insistence upon being given a seat before surrendering his ticket, and of his compelling him to give it up by threatening to put him off the train, was asked this question: "Did you have any further conversation with him?" His answer was: "No; but I told him I had a lady friend and would ask her to give him her seat, and two gentlemen got up and offered him their seat."

Another of defendant's witnesses testified.

Q. Did the conductor say anything about getting a seat for them?

A. I think he said he had a lady friend up in the car, and he would ask her to get up and give him the seat.

Q. What happened then?

A. Two gentlemen in the end of the day coach sitting in the little seat down by the door got up, and said: "No, don't do that; if he must have a seat, let him have this seat." Both doors were open, and some people were attracted by the noise.

It is doubtful if the conductor could, upon mature deliberation, have adopted a

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failing to furnish him a seat, that his injury was not the proximate result of that breach, but of his own negligence. Generally, whether riding on platform or running board of a street car constitutes contributory negligence, see note to Capital Trust Co. v. Central Kentucky Traction Co. 49 L.R.A.(N.S.) 135, and earlier notes there referred to. And for the same question with reference to the platform of a railroad car, see note to Rose v. Northern P. R. Co. ante, —, and earlier notes there referred to. For contributory negligence of passenger standing inside of car, see note to Louisiana & N. W. R. Co. v. Willis, 50 L.R.A.(N.S.) 441.

Where the proximate cause of injury to passengers is the carrier's failure to furnish a seat, the carrier is liable. Camden & A. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 120, 10 Am. Neg. Cas. 198.

So, in an action against a carrier to recover for personal injuries alleged to be the result of the failure of the carrier to provide a seat, evidence that the car upon which the passenger was riding was so crowded that he was compelled to stand in the aisle, holding onto a strap; that by reason of the car coming to a sudden and violent stop, the passengers who were standing were thrown forward, some of them violently against the plaintiff, and that, in order to prevent his being thrown off his feet, he held onto the strap and at the time felt a sharp pain in his right groin, and later discovered that hernia had developed, L.R.A.1915B.

tends to support a verdict in the passenger's favor against the carrier. Chicago City R. Co. v. Morse, 197 Ill. 327, 64 N. E. 304.

And if a railroad company breaches its contract with a female passenger, and she is required to stand, and it is rendered necessary in protecting a child from injury for her to hold it in her arms, and she is injured thereby, it cannot be said as a matter of law that the damage is too remote, as it is to be determined from the evidence whether it was the natural and probable result of the railroad company's wrongful act. Texas & P. R. Co. v. Rea, 27 Tex. Civ. App. 549, 65 S. W. 1115.

Nor is it material that the child was not the child of such female passenger, and that the father and mother of the child were on board the train, such child being in the care and custody of such passenger. Ibid.

Also, a carrier which has failed to furnish reasonable seating accommodations for an advertised excursion is liable for injuries sustained by a passenger through being jostled off the platform, he having been pushed onto the platform by reason of the crowded condition of the car. Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891.

Nor will the fact that such passenger had a seat, but gave it up to an old infirm passenger, defeat recovery. Ibid.

And negligence of a carrier in failing to furnish seating accommodations was held in International & G. N. R. Co. v. Williams, 20 Tex. Civ. App. 587, 50 S. W. 732, to

more effectively delicate way to insult a gentleman and humiliate him before others than to intimate that he was so far lacking in that courtesy, consideration, and respect which is generally recognized as due from gentlemen to ladies, according to the standards which obtain in decent and polite social intercourse, as to permit a lady to be asked to give up her seat for him. Observe the prompt protest of the two gentlemen "in the little seat down by the door:" "No, don't do that; if he must have a seat, let him have this seat." Doubtless the plaintiff felt that he was held up to the scorn and contempt of all who heard it. If the thrust was intended to have that effect (and that was a question for the jury), it was such a wanton invasion of plaintiff's right to civil treatment as a passenger as to warrant the infliction of exemplary damages. For the plaintiff was strictly within his rights in demanding a seat, and it was the duty of the conductor to furnish it, or give him a reasonable explanation of his inability to do so. At any rate, he had no right to meet his lawful demand with any such contemptuous insinuation, and it was properly left to the jury to say what weight they would give it in awarding damages. It was certainly an aggravating circumstance.

In Daniels v. Florida C. & P. R. Co. 62 S. C. 1, 39 S. E. 762, the company asked the court to charge that it was not liable for rude language used by the conductor lawfully requiring a passenger to get off the train. The court refused to charge, but modified the request by saying that if the language used by the conductor should go to an unreasonable extent, so as to become abusive, the company would be liable. On appeal this court held, in response to an exception assigning error in so modifying the request: "We do not see any error in the modification of this request, which appears in the judge's charge, for he practically instructed the jury that the company would not be liable for any language used by the conductor, unless it was abusive, and there was no pretense that any such language was used; for, according to the plaintiff's own testimony, the language used was: 'Get in there, get your things and get out of here, got no time to waste.' While it is quite probable that the conductor spoke in a quick, peremptory tone, there was no element of abuse in what he said to her when she went to the door of the car, seeing the people in front of her getting off." This was far from holding as a general proposition that a carrier is not liable for any language used by the conductor, unless it

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be the proximate cause of injury to a passenger who was pushed off the platform of a moving car by the jostling of the crowd. It was shown in this case that there was a large crowd to take the train, which fact was or should have been known to the railroad company, and that at the place from which the train started were kept the headquarters, shops, and coaches of the company.

A passenger has a right of action against a carrier for personal discomfort and humiliation sustained, where there is a failure of duty to provide the train with coaches reasonably sufficient to seat and carry comfortably as many persons as, in the exercise of ordinary care, the carrier should reasonably have anticipated would demand to be carried thereon. Chesapeake & O. R. Co. v. Austin, 137 Ky. 611, 136 Am. St. Rep. 307, 126 S. W. 144.

So, also, a railroad passenger holding a first-class ticket may recover damages from the company if his request to the conductor for a seat in a first-class coach is met by an explosion of profane and contemptuous wrath, and he is compelled to stand, although passengers in the car are occupying more seats than they are entitled to. Louisville, N. O. & T. R. Co. v. Patterson, 69 Miss. 421, 22 L.R.A. 259, 13 So. 697.

And it is not error to refuse a bare instruction to the jury which declares as a matter of law that if a railroad company has provided its night trains with sufficient equipment to accommodate the number of

passengers which it reasonably might expect to board and ride thereon in the seats, a passenger cannot recover for any discomfort or injury caused by failure to obtain a seat, where the record does not disclose that some of the passengers did not occupy more seats than they were entitled to, and that the employees could not furnish a seat. St. Louis, Southwestern R. Co. v. Tittle, — Tex. Civ. App. —, 115 S. W. 640.

But a carrier will not be liable for injuries sustained by one by reason of being compelled to stand in a crowded car, where there has been no demand that the conductor should furnish a seat. St. Louis & S. F. R. Co. v. Petties, 99 Ark. 415, 138 S. W. 961.

And recovery in an action for injuries alleged to be due to the failure of a carrier to furnish a seat must be denied where there is no proof of the failure of the company to furnish other cars, or where there is affirmative proof that the company did furnish additional cars. Weeks v. Auburn & S. Electric R. Co. 60 Misc. 400, 113 N. Y. Supp. 636.

To exempt a carrier from liability for injuries sustained by one riding in a baggage car, the carrier must post up in its passenger cars in a conspicuous place printed regulations forbidding passengers to ride in such place, and must also furnish sufficient accommodations in its coaches, which means a seat. Lane v. Choctaw, O. & G. R. Co. 19 Okla. 324, 91 Pac. 883.

J. H. B.

was abusive. On the contrary, it merely holds that a carrier would be liable for abusive language of its conductor to a passenger, but that the language in that case was not abusive.

The courts have not defined, and it would be unwise to attempt to define accurately, the kind of language which must be used by a conductor to a passenger before liability will be imposed upon the carrier. Ordinarily, too much depends upon the circumstances, the relation of the parties, the tone and manner in which a thing is said, for any exact definition or rule to be laid down. But there can be no doubt that where a conductor uses language to a passenger which is calculated to insult, humiliate, or wound the feelings of a person of ordinary feelings and sensibilities, and it is intended to have that effect, the carrier is liable, for the contract of carriage impliedly stipulates for decent, courteous, and respectful treatment at the hands of the carrier's servants. Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665; Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530; Savannah, F. & W. R. Co. v. Quo, 103 Ga. 125, 40 L.R.A. 483, 68 Am. St. Rep. 85, 29 S. E. 607, 3 Am. Neg. Rep. 777; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; 6 Cyc. 602; 5 Am. & Eng. Enc. Law, 2d ed. 550.

The judgment is affirmed.

Gary, Ch. J., and **Watts**, J., concur.

Woods, J., concurring:

I concur in the conclusion of Mr. Justice Fraser, that there was no language imputed to the conductor by the witnesses which warranted a verdict for the plaintiff on the ground that it was insulting or abusive or actionable. The plaintiff and his witnesses on this point testified to nothing more than that the conductor threatened to put him off unless he paid his fare; and it is not claimed that this threat of the conductor amounted to such opprobrious language as to warrant the finding of punitive damages. It is true that the conductor and another witness testified that the conductor told the plaintiff that he "had a lady friend and would ask her to give him her seat." But it would be quite unfair to take this language out of its connection. The witness Sapp testified that, when the conductor said this, the plaintiff was cursing and acting as if there would be a fight; and the conductor testified that his behavior was boisterous. The record makes it evident that the plaintiff did not regard this remark of the conductor as an insult, for it was not alluded to by the plaintiff or any of his witnesses. Under these circumstances, it seems to me to be going too far to say that the remark of the conductor was meant as insulting or opprobrious, rather than an effort to placate a noisy and boisterous passenger.

I do not think, however, the judgment should be reversed. The verdict of $200 was a reasonable one, and well sustained by the evidence of the failure of the defendant to furnish sufficient accommodations for its passengers without any plausible explanation or excuse, and of the sickness and suffering which resulted to the plaintiff. It seems to me there is no doubt that any fair jury under the evidence would have found a verdict for the plaintiff, and that found being beyond doubt reasonable, the error of the circuit court should not be regarded prejudicial. Edgefield Mfg. Co. v. Maryland Casualty Co. 78 S. C. 73, 58 S. E. 969.

Fraser, J., dissenting:

This is an action for damages to a passenger. The plaintiff claims that he was a passenger on the defendant's road from Estill, South Carolina, to Savannah, Georgia, with a return ticket, and returned on an excursion train; that no seat was provided for him, and he was forced to ride a part of the way on the platform of the coach, and caught cold, from which he suffered considerably; that when he demanded a seat from the agent of the defendant, the agent insulted the plaintiff, and held him up to the scorn of the other passengers. The plaintiff claimed that his injuries were negligently and wilfully inflicted. The defendant put in a general denial, and also pleaded contributory negligence, in that it was not necessary for plaintiff to stand on the platform, and he did so in violation of instructions to passengers. On the trial the defendant claimed that, if the train was overcrowded, the plaintiff could not recover because he was guilty of contributory negligence in boarding an overcrowded train. The jury found a verdict for plaintiff for $200. From the judgment on this verdict defendant appealed.

There are five exceptions, but they raise but three questions:

(1) Was there any evidence of actionable language?

(2) Was there any evidence of negligence or wilfulness?

(3) Was there indisputable evidence of contributory negligence?

1. Was there any evidence of actionable language? The exact language used was

not given on the trial, and as this court has held in Daniels v. Florida C. & P. R. Co. 62 S. C. 16, 39 S. E. 767, that a railroad company is "not liable for any language used by the conductor unless it was abusive," the exception that embodies this proposition should be sustained.

2. Was there any evidence of negligence or wilfulness? There was some evidence. There was evidence as to the crowd in Savannah at the time. The size of this special excursion train was shown. It was for the jury to say whether reasonable care for the safety and convenience of its passengers required better accommodations, and, if the jury thought that reasonable care did require more room, then it was also their province to say whether the failure to provide for the crowd they might reasonably expect was wilful and wanton or no. Inasmuch as this case will have to go back for a new trial, this court ought not to discuss the evidence further.

3. Was there indisputable evidence of contributory negligence? This court cannot say that there was. Whether it was negligence in the plaintiff to get on the train, whether it was too crowded to allow him standing room inside, whether it was his duty to put on his overcoat, or whether the want of an overcoat was the cause of plaintiff's sickness, were all questions for the jury. So far as I can know, the jury may have based its finding solely on insulting language, and I think the judgment of this court should be that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

SOUTH DAKOTA SUPREME COURT.

MINNESOTA, DAKOTA, & PACIFIC RAILWAY COMPANY, Appt.,
v.
THOMAS A. WAY et al., Respts.

(— S. D. —, 148 N. W. 858.)

Railroad — contract to locate stations — validity.

1. A contract by a railroad company in consideration of a grant of a right of way and depot sites, to furnish the grantor information as to the points where stations would be located, and permit him to purchase and lay out town sites, the profits of which he is to share with the railroad company, is both *ultra vires* and illegal.

Estoppel — acceptance of benefit of contract — contesting legality.

2. That one has received the benefit of a contract by a railroad company to furnish him information as to location of stations, in consideration of a grant of right of way and depot sites and a share of the profits of town sites which he may locate, does not estop him from setting up the illegality of the contract in defense of an action by the railroad company to recover damages for its breach.

(October 6, 1914.)

APPEAL by plaintiff from a judgment of the Circuit Court for Coddington County in defendants' favor in an action brought to recover damages for breach of a contract to convey to plaintiff a right of way and depot sites and account to it for a portion of the profits to accrue from the laying out of town sites, in consideration for information as to the location of railroad stations. Affirmed.

The facts are stated in the opinion.

Messrs. **W. H. Bremner** and **Case & Case**, for appellant:

A contract to pay a certain sum upon the performance of certain acts by another becomes a binding obligation upon the promisor on the performance of said act before the revocation of the contract, although it expresses no consideration, past or present, and contains no promises that such acts shall be performed.

Des Moines Valley R. Co. v. Graff, 27 Iowa, 99, 1 Am. Rep. 256.

To the same effect are Bigelow v. Bigelow, 95 Me. 17, 49 Atl. 49; Devecmon v. Shaw, 69 Md. 199, 9 Am. St. Rep. 422, 14 Atl. 464; King v. Thompson, 9 Pet. 204, 9 L. ed. 102; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Hamer v. Sidway, 124 N. Y. 538, 12 L.R.A. 463, 21 Am. St. Rep. 693, 27 N. E. 256; Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Minneapolis Mill Co. v. Goodnow, 40 Minn. 497, 4 L.R.A. 202, 42 N. W. 356; Willets v. Sun Mut. Ins. Co. 45 N. Y. 45, 6 Am. Rep. 31; Johnson v. Staenglen, 29 C. C. A. 369, 52 U. S. App. 537, 85 Fed. 603; Wilson v. Clonbrock Steam-Boiler Co. 105 Fed. 846; Sheffield Furnace Co. v. Hull Coal & Coke Co. 101 Ala. 446, 14 So. 672.

A contract between a landowner and a railroad company, by which the landowner agrees to pay the railway company a certain sum in consideration that the road be

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Note. — As to validity of contract made to influence location of railroad, see note to McCowen v. Pew, 21 L.R.A.(N.S.) 800, and analogous notes there referred to.

The general question as to implied power of a railroad company to engage in or guarantee enterprise other than the transportation of goods or passengers is considered in the notes to Western Maryland R. Co. v. Blue Ridge Hotel Co. 2 L.R.A.(N.S.) 887, and Louisville Property Co. v. Com. 38 L.R.A.(N.S.) 830.

extended through the owner's land, or that a depot be maintained at a particular place, is a valid contract.

English v. Carlton, 97 Ga. 384, 24 S. E. 127; Pixley v. Gould, 13 Ill. App. 565; Cedar Rapids & St. P. R. Co. v. Spafford, 41 Iowa, 292; McCowen v. Pew, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, 15 Ann. Cas. 630; First Nat. Bank v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153; McClure v. Missouri River, Ft. S. & G. R. Co. 9 Kan. 373; Berryman v. Cincinnati Southern R. Co. 14 Bush, 755; Harris v. Roberts, 12 Neb. 631, 41 Am. Rep. 779, 12 N. W. 89; Herzog v. Atchison, T. & S. F. R. Co. 153 Cal. 496, 17 L.R.A.(N.S.) 428, 95 Pac. 898; Baltimore & O. C. R. Co. v. Ralston, 41 Ohio St. 573; Texas & St. L. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404.

The contract was not *ultra vires*.

Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543; Citizens' State Bank v. Pence, 59 Neb. 579, 81 N. W. 623; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379; 10 Cyc. 1156; Lurton v. Jacksonville Loan & Bldg. Asso. 187 Ill. 141, 58 N. E. 218; Clarke v. Olson, 9 N. D. 364, 83 N. W. 519; Kadish v. Garden City Equitable Loan & Bldg. Asso. 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; Bloomington Mut. Ben. Asso. v. Blue, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; 2 Elliott, Railroads, § 369; Chicago & A. R. Co. v. Derkes, 103 Ind. 520, 3 N. E. 239.

The contract is not void and against public policy.

9 Cyc. 481; English v. Carlton, 97 Ga. 384, 24 S. E. 127; Pixley v. Gould, 13 Ill. App. 565; Cedar Rapids & St. P. R. Co. v. Spafford, 41 Iowa, 292; First Nat. Bank v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153; McClure v. Missouri River, Ft. S. & G. R. Co. 9 Kan. 373; Berryman v. Cincinnati Southern R. Co. 14 Bush, 755; Baltimore & O. & C. R. Co. v. Ralston, 41 Ohio St. 573; Texas & St. L. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404; McCowen v. Pew, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, 15 Ann. Cas. 630; Telford v. Chicago, P. & M. R. Co. 172 Ill. 559, 50 N. E. 105; Davis v. Williams, 121 Ala. 542, 25 So. 704; Farrington v. Stuckey, 7 Ind. Terr. 364, 104 S. W. 647, affirmed in 91 C. C. A. 311, 165 Fed. 325; Missouri P. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Guss v. Federal Trust Co. 19 Okla. 138, 91 Pac. 1045; Cumberland Valley R. Co. v. Babb, 9 Watts, 458, 36 Am. Dec. 132; L.R.A.1915B. Chapman v. Mad River & L. E. R. Co. 1 Ohio Dec. Reprint, 565.

Messrs. **Lancaster, Simpson, & Purdy**, with Mr. **J. G. McFarland**, for respondents:

The plaintiff did not, in and by this contract, promise or agree to do anything which in law is a valid consideration for the promises of the defendant which the plaintiff is now trying to enforce.

9 Cyc. 329; Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796; Esch v. White, 76 Minn. 220, 78 N. W. 1114; King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105; First State Bank v. Schatz, 104 Minn. 425, 116 N. W. 917; Central Transp. Co. v. Pullman's Palace Car Co. 138 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

Plaintiff is seeking to recover upon an executory contract which is obviously *ultra vires*.

Wallo v. Chicago, St. P. & F. du L. R. Co. 14 Wis. 575; Case v. Kelly, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

McCoy, J., delivered the opinion of the court:

Appellant, who was plaintiff below, is a railway corporation organized under the laws of this state. There are two alleged causes of action set out in the complaint, to each of which demurrer was interposed on the ground that the facts stated were not sufficient to constitute a cause of action. The demurrers were sustained, and plaintiff appeals.

By the first alleged cause of action it appears, in substance, that in January, 1906, plaintiff was about to construct a certain line of railway in a westerly direction from the city of Watertown across this state, and that it entered into a contract with defendant Thomas A. Way, wherein and whereby he promised and agreed, at his own expense, to secure and convey and transfer, free of encumbrance, by good title, to plaintiff, between certain designated points, all the necessary right of way and depot grounds sufficient for the construction and operation of said contemplated railway, in consideration of the agreement that plaintiff would permit said Way to purchase and lay out town sites upon and along said contemplated line of railway, between said designated points, at such points as the chief engineer of said railway company should designate; that plaintiff performed said contract on its part, but that said Way has failed to purchase and convey to plaintiff a large part of said right of way

and depot grounds, and by reason thereof plaintiff was compelled to, and did, expend large stated sums of money in itself securing such right of way contracted to be secured by said Way; that said Thomas A. Way, to secure the faithful performance of said contract, entered into a bond with others of the respondents as sureties; and that there has been a breach in the conditions of said bond to plaintiff's injury.

By the second alleged cause of action it, in substance, appears that under said contract alleged in the first cause of action, and upon the same consideration, said Thomas A. Way, along portions of said contemplated line of railway, agreed to purchase at his own expense lands for town sites, to lay out and to plat into lots and blocks such towns at such points as the chief engineer of plaintiff should designate; that said Way should sell and dispose of said lots and blocks, and that when so sold the entire proceeds arising from such sales, after deducting the actual cost of the land and platting and 5 per cent commission for sales, should be divided between plaintiff and said Way; that for the purpose of facilitating the purposes of said contract, the said Way caused to be organized the defendant Dakota Town Lot Company; that said Way and said town lot company secured real estate at certain designated stations along said line of railway in the counties of Codington, Clark, and Day, and platted the same into lots and blocks, and made many sales of such lots and blocks, and has accounted to plaintiff for only a portion of its share of the proceeds of such sales, and that there is still due and unpaid to plaintiff large sums of money by reason thereof, and demand has been made upon defendants for payment, which has been refused, and that by reason thereof another breach of the condition of said bond exists to plaintiff's injury.

It is contended by respondents that the said contract, which constituted the basis of said alleged causes of action on the part of plaintiff, is wholly without consideration and *nudum pactum*, on the ground that said contract is illegal and void as being against public policy. We are constrained to the view that respondents are right in this contention. The statute of this state (§ 1271, Civ. Code) provides: "That is not lawful which is: (1) Contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals."

It is not always easy to define just what facts will constitute "contrary to good morals" within the meaning of this statute; but

every case must stand generally upon its own peculiar facts and circumstances.

Public service corporations, such as railway companies, are charged with a trust, and owe a duty to the general public in the matter of the location of stations and depots, which duty is to so locate such stations and depots as will best serve the public interests; and any contract entered into by such corporations which has a tendency to interfere or come in conflict with the full and proper exercise of such trust duty will be an illegal contract and against good morals, within the meaning of the statute. In Holladay v. Patterson, 5 Or. 177, it was held that a railway company is a quasi public corporation, and that the public has an interest in the location of their lines of road and depots, and that an agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others, to violate or betray them, will not be enforced. This decision is recognized as one of the leading authorities upon this proposition. Elliott, Contr. §§ 750, 751. The following from Cyc. is a good exposition of the rule: "If an agreement binds the parties or either of them, or if the consideration is to do something opposed to the public policy, . . . it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements, it would employ its functions in undoing what it was created to do. It is not easy to give a precise definition of public policy. It is perhaps correct to say that public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law. Where a contract belongs to this class, it will be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good, and no injury to the public would result in the particular case. The test is the evil tendency of the contract, and not its actual injury to the public in a particular instance. Thus, an agreement for a pecuniary consideration made by a railroad company for the location of a [station or] depot [at some particular place] is void, although the location in the particular case may be advantageous to the public. An agreement to influence legislation is void, although the legislation sought may be clearly beneficial. An agreement to in-

fluence an appointment to office is void, although the intent may be to secure the best qualified person. . . . The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of its courts." 9 Cyc. 481–498.

The fair and reasonable inference to be drawn from the spirit and intent of the contract set out in the complaint was that, as consideration for the said Way securing and conveying to appellant free of cost a right of way on which to construct its line of road, it would secretly impart to him inside advance information as to the points where stations and depots were to be located on said contemplated line of railway, to the end that said Way might, in advance of all other persons, purchase the lands for town sites at such points as the chief engineer of the road should designate, and that appellant would protect him by erecting depots and establishing stations at such points as he might purchase such lands for town-site purposes. The direct tendency of this contract was to cause the location of stations and depots at such points as best conserved the pecuniary interests of said parties thereto. Thereby the appellant secured its right of way and an interest in the proceeds of the sales of certain town lots. Thereby all other persons who might have desired to locate town sites along said line were indirectly deterred from so doing. The dickering and speculating in town-site properties is not within the scope of the authority of railway companies organized under the laws of this state. The securing by appellant of its right of way and an interest in the proceeds of said town-site sales by this method was in direct conflict with the trust duties the appellant owed to the general public. It seems to be a settled policy of the law to remove such opportunities and temptations by refusing to take cognizance of or enforce such contracts. Therefore, we are of the view that the contract which forms the basis of this action was without consideration, *ultra vires*, and illegal and void. The appellant had no legal authority to "permit" that which constituted the consideration for this contract. It was an illegal consideration, which, in effect, was no consideration. Many authorities sustain this view, among which are the following: Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 Am. Rep. 206, 4 N. W. 870; Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Western U. Teleg. Co. v. Union P. R. Co. (C. C.) 1 McCrary, 418, 3 Fed. 1; Woodstock Iron Co. v. Richmond & D. Extension Co. 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; Bestor v. Wathen, 60 L.R.A.1915B. Ill. 138; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 112; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Page, Contr. § 416; Elliott, Contr. §§ 750, 751.

Appellant contends that, notwithstanding the contract might have been *ultra vires* and void, respondent, having received the full benefits thereunder, is now estopped to assert the invalidity thereof. The contract here involved was not only void by reason of its being *ultra vires*, but it was also void on the ground of illegality. There is a marked distinction between contracts which are void merely by reason of being *ultra vires*, and contracts which are void by reason of being both *ultra vires* and illegal. Page, Contr. § 506; Elliott, Contr. § 645. Validity cannot be given to an illegal contract through any principle of estoppel. As between parties *in pari delicto*, the courts will leave them where it has found them. Courts will not adjudicate rights under illegal contracts. Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 Am. Rep. 206, 4 N. W. 870; Page, Contr. § 507.

The judgment and order appealed from are affirmed.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

RALEIGH COUNTY BANK
v.
J. H. POTEET et al., Plffs. in Err.

(— W. Va. —, 82 S. E. 332.)

Bills and notes — collection and attorneys' fees — validity.

1. A stipulation in a negotiable promissory note for the payment of "5 per cent

Headnotes by POFFENBARGER, J.

Note. — Validity of stipulation for attorneys' fees.

I. Introduction, 929.
II. Distinction between stipulations in notes and mortgages, 929.
III. General rules.
  a. Where no definite amount or per cent is specified.
    (1) Rule that stipulation is valid, 930.
    (2) Rule that stipulation is invalid, 932.

collection fees" on the principal thereof, and in addition thereto "$10 attorney fee in addition to the attorney's fee taxed or allowed by law," is, in this state, forbidden by the policy of the law, and void and unenforceable.

Same — negotiable instruments law — effect.

2. Chapter 81 of the acts of 1907, chapter 98A (§§ 4172–4368) of the Code, known as the negotiable instruments law, does not legalize contracts expressly condemned and declared void by the statutes of this state, nor those forbidden by the policy of its laws.

(Miller, P., and Williams, J., dissent.)

(June 16, 1914.)

ERROR to the Circuit Court for Raleigh County to review a judgment in plaintiff's favor in an action on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. **H. E. Stansbury** and **File & File**, for plaintiffs in error:

The court erred in holding that the plaintiff was entitled to recover the 5 per cent commission provided by the note to be paid, and in rendering judgment against defendants for such commission.

Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 498; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Miller v. Kyle, 85 Ohio

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III.—continued.
- b. Where definite amount or per cent is specified.
  - (1) Rule upholding validity generally, 933.
  - (2) Rule denying validity, 936.
  - (3) Rule upholding stipulation as for indemnity only, 938.
  - (4) Rule upholding stipulation as for liquidated damages, 942.

IV. Theories on which stipulations are held valid or invalid.
- a. Sustaining validity, 943.
- b. Denying validity, 946.

V. Statutory provisions, 947.

I. Introduction.

In general only cases are included in this note in which the question of the validity of stipulations for attorneys' fees was distinctly presented or considered. Therefore, cases which turn upon the construction or effect of such stipulations, their validity being assumed, are not included. The question of the negotiability of instruments containing stipulations for attorneys' fees is also beyond the scope of the note.

As to effect of stipulation for attorneys' fees in mortgage, upon negotiability of note secured thereby, see note to Farmers' Nat. Bank v. McCall, 26 L.R.A.(N.S.) 217.

As to validity of statutory provision for attorneys' fees, see note to Builders' Supply Depot v. O'Connor, 17 L.R.A.(N.S.) 909.

And as to stipulation in contract for attorneys' fees as measure of compensation to which attorney is entitled, see note to Rogers v. Kemp Lumber Co. 51 L.R.A.(N.S.) 594.

II. Distinction between stipulations in notes and mortgages.

So far as appears from the principles discussed in the cases in this note, there seems to be no substantial ground for making a distinction as to the validity of stipulations in notes for payment of attorneys' fees, and similar stipulations in mortgages. The decisions generally recognize no distinction, and in a few instances it has been expressly stated that the same principles should apply in both classes of cases. In one case, however (Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555), where a mortgage provided for payment of counsel fees at the rate of 10 per cent on the amount found due on foreclosure, the court said that in considering this question "a clear distinction must be made between such a stipulation in a promissory note and a like agreement in a mortgage. While it is apparent that an adjudication sustaining such an agreement in a note would be authority for sustaining a like stipulation in a mortgage, it does not follow that adjudications sustaining an agreement for attorneys' fees in a mortgage would sustain a like agreement in a promissory note." No reason, however, was given for the distinction, and authorities were cited holding such stipulations valid either in a note or mortgage. The court reached the conclusion that the weight of authority is clearly in favor of sustaining a stipulation in a mortgage for an attorney's fee, it being admitted that the stipulated fee of 10 per cent in this instance was reasonable.

On the other hand, in Jarvis v. Southern Grocery Co. 63 Ark. 225, 38 S. W. 148, the court, after citing one of its former decisions to the effect that a stipulation in a note for attorneys' fees is void, said: "In the case at bar the stipulation is in the mortgage or deed of trust. There does not appear to us to be any difference of principle between the two cases. If void in a suit at law, there is no reason why it should not be held as void in a suit in equity. The mere matter of difference of trouble in collecting the debt in the one case and that of the other, we think, is not sufficient to make a difference between the rule to be applied in the one, from that to be applied in the other case." And while it was said that, were this a new question, the court would not be agreed as to the doctrine of the validity of such a stipulation either in a note or a mortgage, they were agreed that the rule should be applied to a stipulation in a mortgage the same as to a stipulation in a note.

And in McAllister's Appeal, 59 Pa. 204, the court regarded the same principles in

St. 186, 97 N. E. 372; Fields v. Fields, 105 Va. 714, 54 S. E. 888.

The tender made by defendants was not coupled with a demand for change or any balance. The fact that the amount tendered was in excess of the debt, interest, and costs does not make the tender bad.

28 Am. & Eng. Enc. Law, 2d ed. 18; 38 Cyc. 139; 5 Lawson's Rights, Rem. & Pr. p. 4189, § 2532; Page, Contr. § 1419.

Mr. J. E. Summerfield for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

In this action on a note, a tender of the amount conceded to be due was made after the institution of the action. Coming too late, it was wholly unavailing and futile, stopping neither interest nor costs, since we have no statute on the subject modifying the common law. 28 Am. & Eng. Enc. Law, 21; 38 Cyc. 147, 149,—both citing numerous authorities.

Professing to be in debt, the writ claimed damages in the sum of $2,500 and failed to specify the amount of the debt; wherefore it varied from the declaration claiming $2,200 as the principal of a note, $110 as commission for collection thereof, and $10 as an attorney's fee in addition to the fee allowed by law. To cure this defect, the plaintiff amended the writ, with leave of the court and over an objection by the defendants. The amendment was properly allowed. Code, chap. 125, § 15 (§ 4769);

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regard to the enforcement of stipulations for attorneys' fees as applying in the case of mortgages, notes, and other contracts for the payment of money, it being said that it should be considered as firmly established in that state that a creditor, in taking a security from his debtor, whether mortgage, judgment bond, or note, might lawfully include a stipulation for payment of reasonable expenses of collection by suit; and, after stating that in case the amount stipulated for was unreasonable, it might be reduced independently of the usury laws, under the general powers which courts of equity exercise, the court said that, although it was applied more particularly to mortgages, it could not be doubted that the principle was as well applicable to all other securities for money.

Also in First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67, the court said that as it had held stipulations for the payment of an attorney's fee valid in case of mortgages, to be consistent they must be held valid when applied to the collection of money on notes or securities other than mortgages. In this case a stipulation in a note for payment of 10 per cent attorneys' fees was upheld.

In holding a stipulation in a trust deed for payment of 5 per cent attorneys' fees in case the property was sold under the deed invalid as contrary to public policy, the court in Turner v. Boger, 126 N. C. 300, 49 L.R.A. 590, 35 S. E. 592, after citing cases to the effect that a stipulation in a note for payment of collection fees is invalid, said that if the stipulation is contrary to public policy in a note which has to be collected by aid of the court, for a stronger reason the stipulation would be invalid in a mortgage or deed of trust, for the opportunity for oppression is greater.

III. General rules.

a. Where no definite amount or per cent is specified.

(1) Rule that stipulation is valid.

As stated in RALEIGH COUNTY BANK v. POTEET, while the authorities are conflicting as to the validity of stipulations for attorneys' fees, the decided preponderance in number favors their validity. And it seems also that the better reasoning supports this view. The question, however, is one which is now largely governed by statute and precedent.

The following cases support the validity of stipulations in notes, mortgages, and other evidences of indebtedness, for an attorney's fee or for a reasonable attorney's fee, no particular amount or per cent being specified (in addition to these cases this rule is, of course, sustained by the cases cited infra, III. b, 1):

Ala.—Bynum v. Frederick, 81 Ala. 489, 8 So. 198; Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. 232; Harmon v. Lehman, 85 Ala. 379, 2 L.R.A. 589, 5 So. 197; Johnson v. Durner, 88 Ala. 580, 7 So. 245; Ginn v. New England Mortg. Secur. Co. 92 Ala. 135, 8 So. 388; Boyd v. Jones, 96 Ala. 305, 38 Am. St. Rep. 100, 11 So. 405; Faulk v. Hobbie Grocery Co. 178 Ala. 254, 59 So. 450 (the stipulations in the cases in this state being in mortgages).

Dak.—Danforth v. Charles, 1 Dak. 285, 46 N. W. 576 (mortgage); Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594 (note).

Fla.—L'Engle v. L'Engle, 21 Fla. 131 (mortgage); Long v. Herrick, 26 Fla. 356, 8 So. 50 (same).

Ga.—Merck v. American Freehold Land Mortg. Co. 79 Ga. 213, 7 S. E. 265 (note); National Bank v. Danforth, 80 Ga. 55, 7 S. E. 546; Ray v. Pease, 97 Ga. 618, 25 S. E. 361 (note; decided under law before Georgia statute of 1891, for which see V., infra).

Idaho.—Warren v. Stoddart, 6 Idaho, 692, 59 Pac. 540, later appeal, 8 Idaho, 210, 67 Pac. 650 (mortgage); Rinker v. Lauer, 13 Idaho, 163, 88 Pac. 1057 (note).

Ill.—Clawson v. Munson, 55 Ill. 394 (mortgage); Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881 (warrant of attorney); Telford v. Garrels, 132 Ill. 550, 24 N. E. 573 (trust deed); Guignon v. Union Trust Co. 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556 (trust

Ryan v. Piney Coal & Coke Co. 69 W. Va. 692, 73 S. E. 330; Barnes v. Grafton, 61 W. Va. 410, 56 S. E. 608.

The inclusion in the judgment of the stipulated commission of 5 per cent, $110, is the basis of the principal complaint. Such notes have not been in common use in this state, and the validity of such a stipulation has never been passed upon by this court. An inference of a consensus of opinion among the members of the legal profession against it naturally arises from the absence of notes of that kind in the commercial paper of the state. Had it been regarded as legal and valid, no doubt they would have been abundant here as they are in other states in which such an addition is deemed valid; and our reports would afford many decisions affirming their validity and defining their operation, as do those of the states in which they have been sustained.

As to the validity of the stipulation, the authorities in the various jurisdictions are in conflict. The following decisions uphold it: Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. 232; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Duluth Loan & Land Co. v. Klovdahl, 55 Minn. 341, 56 N. W. 1119; Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520; Imler v. Imler, 94 Pa. 372; Parham v. Pulliam, 5 Coldw. 497; Krause v. Pope, 78 Tex. 478, 14 S. W. 616; McIntire v. Cagley, 37 Iowa, 676; Siegel v. Drumm, 21 La. Ann. 8; McCornick v. Swem, 36 Utah, 6, 102 Pac. 626, 20 Ann. Cas.

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deed); Piasa Bluffs Improv. Co. v. Evers, 65 Ill. App. 205 (mortgage); Salomon v. Stoddard, 107 Ill. App. 227 (trust deed).

Ind.—Billingsley v. Dean, 11 Ind. 331 (note); Smith v. Silvers, 32 Ind. 321 (note); Daniels v. Silvers, 32 Ind. 322, following Smith v. Silvers, supra; First Nat. Bank v. Canatsey, 34 Ind. 149 (bill of exchange); Johnson v. Crossland, 34 Ind. 334 (note); Jones v. Schulmeyer, 39 Ind. 119 (mortgage); Mathews v. Norman, 42 Ind. 176 (note); Stingley v. Second Nat. Bank, 42 Ind. 580 (note); Starnes v. Schofield, 5 Ind. App. 4, 31 N. E. 480 (note); Moore v. Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 665 (note); Boyd v. Smith, — Ind. App. —, 39 N. E. 208 (note); Shoup v. Snepp, 22 Ind. App. 30, 53 N. E. 189 (note).

Iowa.—Nelson v. Everett, 29 Iowa, 184 (mortgage); Williams v. Meeker, 29 Iowa, 292 (mortgage); Weatherby v. Smith, 30 Iowa, 131, 6 Am. Rep. 663 (mortgage); McGill v. Griffin, 32 Iowa, 445 (note); First Nat. Bank v. Breese, 39 Iowa, 640 (note).

La.—Bacas v. Klein, 14 La. Ann. 408 (mortgage); Mullan v. His Creditors, 39 La. Ann. 397, 2 So. 45 (mortgage).

Md.—Maus v. McKellip, 38 Md. 238 (mortgage); Maryland Fertilizing & Mfg. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750 (note); Bowie v. Hall, 69 Md. 433, 1 L.R.A. 546, 9 Am. St. Rep. 433, 16 Atl. 64 (note); Gaither v. Tolson, 84 Md. 637, 36 Atl. 449 (mortgage).

Minn.—Harris Mfg. Co. v. Anfinson, 31 Minn. 182, 17 N. W. 274 (note).

Miss.—Meacham v. Pinson, 60 Miss. 217 (note); Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615 (note); Duncan Bank v. Brittain, 92 Miss. 545, 46 So. 163 (note).

Mo.—German-American Bank v. Martin, 129 Mo. App. 484, 107 S. W. 1108 (note).

Mont.—Bank of Commerce v. Fuqua, 11 Mont. 285, 14 L.R.A. 588, 28 Am. St. Rep. 461, 28 Pac. 291 (bill of exchange); Morrison v. Ornbaum, 30 Mont. 111, 75 Pac. 953 (note).

Nev.—Rickards v. Hutchinson, 18 Nev. 215, 2 Pac. 52, 4 Pac. 702 (note).

Okla.—Baker Gin Co. v. N. S. Sherman Mach. & Iron Works, 31 Okla. 484, 122 Pac. 235 (note).

Or.—Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520 (note); Cox v. Alexander, 30 Or. 438, 46 Pac. 794 (note).

Pa.—Franklin v. Kurtz, 3 Del. Co. Rep. 590 (mortgage); Re Ihmsen, 29 Pittsb. L. J. 218 (mortgage); Huling v. Drexell, 7 Watts, 126 (mortgage); Johnson v. Marsh, 21 W. N. C. 570 (note); Imler v. Imler, 94 Pa. 372 (note); Lewis v. Germania Sav. Bank, 96 Pa. 86 (mortgage).

S. C.—Aultman & T. Co. v. Gibert, 28 S. C. 313, 5 S. E. 806 (note); Columbian Bldg. & L. Asso. v. Rice, 68 S. C. 237, 47 S. E. 63, 1 Ann. Cas. 239 (provision in bond and mortgage for payment of all fees and expenses of litigation).

Tenn.—Parham v. Pulliam, 5 Coldw. 497 (note); Tyler v. Walker, 101 Tenn. 306, 47 S. W. 424 (note).

Tex.—Laning v. Iron City Nat. Bank, 89 Tex. 601, 35 S. W. 1048 (note); Roberts v. Palmore, 41 Tex. 617 (note); Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975 (note); McIlhenny v. Planters' & M. Nat. Bank, — Tex. Civ. App. —, 46 S. W. 282 (note).

Utah.—McCornick v. Swem, 36 Utah, 6, 102 Pac. 626 (note).

Wash.—Cloud v. Rivord, 6 Wash. 555, 34 Pac. 136 (stipulation in note for payment of an attorney's fee in case of suit, to be taxed as the attorney's fee in the judgment recovered, construed to entitle plaintiff to recover a reasonable fee, and not simply the statutory attorney's fee).

Wis.—Voechting v. Grau, 55 Wis. 312, 13 N. W. 230 (mortgage).

U. S.—Fowler v. Equitable Trust Co. 141 U. S. 411, 35 L. ed. 794, 12 Sup. Ct. Rep. 8 (trust deed; decided under laws of Illinois).

Fed.—Bank of British N. A. v. Ellis, 6 Sawy. 102, 2 Fed. 44 (note); American Mortg. Co. v. Downing, 17 Fed. 660 (mortgage); Union Mortg. Bkg. & T. Co. v. Hagood, 97 Fed. 360 (mortgage: decided under laws of South Carolina); Glover v.

1368; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Morgan v. Kiser, 105 Ga. 104, 31 S. E. 45; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24; Cloud v. Rivord, 6 Wash. 555, 34 Pac. 136; Rinker v. Lauer, 13 Idaho, 163, 88 Pac. 1057.

In the following cases, it is denounced as a cover for usurious interest and a means of exacting the same, or as a mere unenforceable penalty: Witherspoon v. Musselman, 14 Bush, 214, 29 Am. Rep. 404; State use of Fund Comrs. v. Taylor, 10 Ohio, 378; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Dow v. Updike, 11 Neb. 95, 7 N. W. 857; Tinsley v. Hoskins, 111 N. C. 340, 32 Am. St. Rep. 801, 16 S. E. 325; Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 498; Boozer v. Anderson, 42 Ark. 167.

By this collation, which does not include all the cases, by any means, but enough to disclose the attitudes of the various courts of last resort, a decided preponderance in number favoring the validity of the stipulation appears. But, in some of the states, it is authorized by statute. How many need not be ascertained. It is in Iowa for one. Notwithstanding the admitted preponderance, the solution of the question is one of reason as well as of authority, and we are under no duty to yield to the mere force of numbers. Besides, the policy of this state, as disclosed by its statutes relating to costs and interest, and the consensus of legal opinion as revealed by a settled and long-continued course of conduct in business, must be considered.

Equitable Mortg. Co. 31 C. C. A. 105, 59 U. S. App. 151, 87 Fed. 518 (trust deed).

"The courts have almost universally held that a contract in a mortgage for a reasonable attorney's fee will be enforced." Vermont Loan & T. Co. v. Greer, 19 Wash. 611, 53 Pac. 1103.

In Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520, the court said that while it would hardly be deemed accurate to say that the question had yet been settled either way by a controlling weight of authority, it could scarcely be controverted that the current of adjudication is in favor of the validity of stipulations for payment of attorneys' fees, subject to the general supervisory power of the courts as to their bona fides and reasonableness.

"A mortgagor or grantor in a trust deed may, if he desires to do so, insert a clause in the instrument binding himself to indemnify the grantee or any owner of the indebtedness, not only for an attorney's fee incurred in connection with the foreclosure of the deed, but also any and all attorneys' fees and necessary expenses paid out or incurred in any collateral litigation in which the grantee or owner of the indebtedness may be a party by reason of his relation to the debt or the deed securing the same." Huber v. Brown, 243 Ill. 274, 90 N. E. 748.

In Ray v. Pease, 97 Ga. 618, 25 S. E. 361, it was held that the plaintiff in an action on a note containing a stipulation for the payment of all costs of collection, including attorneys' fees, was entitled to recover a reasonable attorney's fee, although he had contracted with the attorney prosecuting the action that the latter should receive no compensation for his services other than what might be recovered from the defendant. (The note in question was executed before the enactment of the Georgia statute of 1891, as to which see V. infra.)

(2) Rule that stipulation is invalid.

In the following cases stipulations in notes or mortgages for an attorney's fee or for a reasonable attorney's fee have been held invalid, the reasons for the decisions usually being that such stipulations tend to usury and are against public policy: Jarvis v. Southern Grocery Co. 63 Ark. 225, 38 S. W. 148 (stipulation in mortgage held invalid on the authority of Boozer v. Anderson, 42 Ark. 167, cited under III. b, 2, infra, the court saying, however, that, were this a new question, it would not be agreed as to the validity of the stipulation); Thomasson v. Townsend, 10 Bush, 114 (mortgage); Rilling v. Thompson, 12 Bush, 310 (same); Witherspoon v. Musselman, 14 Bush, 214, 29 Am. Rep. 404 (note); Myers v. Wise, decided by Kentucky supreme court and cited in 14 Bush, 216, 29 Am. Rep. 405; Pryse v. People's Bldg. Loan & Sav. Asso. 19 Ky. L. Rep. 752, 41 S. W. 574 (mortgage); Equitable Loan & Invest. Asso. v. Smith, 23 Ky. L. Rep. 1567, 65 S. W. 609 (mortgage); Oman v. American Nat. Bank, 32 Ky. L. Rep. 502, 106 S. W. 277; Dow v. Updike, 11 Neb. 95, 7 N. W. 857 (note); Hardy v. Miller, 11 Neb. 395, 9 N. W. 475; Re Breckinridge, 31 Neb. 489, 48 N. W. 142; National Bank v. Thompson, 90 Neb. 223, 133 N. W. 199 (note); Tinsley v. Hoskins, 111 N. C. 340, 32 Am. St. Rep. 801, 16 S. E. 325 (stipulation in note for "usual collection fee"); Leavans v. Ohio Nat. Bank, 50 Ohio St. 591, 34 N. E. 1089 (mortgage); Miller v. Kyle, 85 Ohio St. 186, 97 N. E. 372 (mortgage).

This rule is also supported generally by the cases cited infra, III. b, 2, with the exception of the Oregon cases, which make a distinction between a stipulation that specifies the amount and one that does not.

As appears from the above Nebraska cases, a statute was enacted in that state in 1873 allowing attorneys' fees in certain actions where the instrument sued on provided for such fees, but in 1879 this statute was repealed, so that the above decisions, decided since the repeal, cannot be considered entirely apart from legislative action.

Following the decisions in Nebraska since the repeal of the statute of 1873, the court in Gray v. Havemeyer, 3 C. C. A. 497, 10

Impartial writers of recognized ability, after having considered both classes of cases and the reasoning upon which they stand, have unhesitatingly given their approval to those decisions which condemn the stipulation and refuse to enforce it. Mr. Daniel, in his work on negotiable instruments, expresses himself thus: "Unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments; and they are therefore against the policy of the law and void." [1 Dan. Neg. Inst. 4th ed. § 62a.]

Judge Caldwell, in Merchants' Nat. Bank v. Sevier (C. C.) 14 Fed. 662, quotes from 14 Am. L. Rev. 858, as follows: "It seems to us to be more consistent with public policy to consider all such agreements as absolutely void. They can readily be used to cover usurious agreements, and excessive exactions may be made under the guise of an attorney fee."

Judge Cooley, of Michigan, a great author as well as an able judge, expressed himself thus in Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356: "A stipulation for such a penalty, we think, must be held void. It is opposed to the policy of our laws concerning attorneys' fees, and it is susceptible of being made the instrument of the most grievious wrong and oppression. It would be idle to limit interest to a certain rate, if under auother name forfeitures may be imposed to an amount without limit.

U. S. App. 456, 53 Fed. 174, held that a stipulation in a mortgage governed by the Nebraska law, for a reasonable attorney's fee on foreclosure, was invalid.

And the rule in Nebraska that stipulations in notes for attorneys' fees are invalid was held in Hallam v. Telleren, 55 Neb. 255, 75 N. W. 560, to render unenforceable a stipulation in a note for payment of a reasonable attorney's fee in case of suit thereon, although such stipulations were valid and enforceable by the laws of the state where the note was executed and was payable.

In Rogers v. Rains, 100 Ky. 295, 38 S. W. 483, it was held that a stipulation in a mortgage for the payment of reasonable attorneys' fees in case of collection of the debt by suit was unenforceable in that state, although valid according to the laws of the state where the contract was by its terms to be performed.

The rule in Kentucky that stipulations for payment of attorneys' fees are void as against public policy has been held not to be changed by the fact that the suit in which it is attempted to collect the fees, instead of being the ordinary one of foreclosure directly by the creditors, is by a trustee to foreclose a mortgage given to secure bondholders, the trust deed providing that, in case of sale of the property under it, the debtor would pay necessary attorneys' fees. Kentucky Trust Co. v. Third Nat. Bank, 106 Ky. 232, 50 S. W. 43; Colston v. Shotwell, 10 Ky. L. Rep. 156; Southern Warehouse & Transfer Co. v. Mechanics Trust Co. 21 Ky. L. Rep. 1734, 56 S. W. 162.

And the rule in Kentucky that stipulations for an attorney's fee are void as against public policy was held in Clark v. Tanner, 100 Ky. 275, to render unenforceable in that state a stipulation in a note for payment of a reasonable attorney's fee in case of collection by suit, even though such stipulations were valid in the state where the note was executed. To a similar effect is Carsey v. Swan, 150 Ky. 473, 150 S. W. 534.

L.R.A.1915B.

b. Where definite amount or per cent is specified.

(1) Rule upholding validity generally.

In a number of cases the validity of stipulations for a specific sum or per cent as an attorney's fee has been sustained and the plaintiff held entitled to recover the stipuluated fee, the reasonableness thereof not being contested or being found or presumed. The point whether the contract was one for indemnity or for liquidated damages was not involved, although it should be observed that the majority of the cases were decided in jurisdictions which have taken the former view of the contract. The following cases support the validity generally of stipulations for an attorney's fee under the circumstances indicated:

Ala.—Munter v. Linn, 61 Ala. 492 (mortgage, stipulation for fee of 10 per cent); Wood v. Winship Mach. Co. 83 Ala. 424, 3 Am. St. Rep. 754, 3 So. 757 (note, 10 per cent); Falls v. United States Sav. Loan & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25 (mortgage, fee of $200 on loan of $10,000); Ledbetter v. Vinton, 108 Ala. 644, 18 So. 692 (note, 10 per cent); Stephenson v. Allison, 123 Ala. 439, 26 So. 290 (same); Langley v. Andrews, 142 Ala. 665, 38 So. 238.

Cal.—Alexander v. McDow, 108 Cal. 25, 41 Pac. 24 (stipulated fee of 10 per cent in note presumed reasonable); Mason v. Luce, 116 Cal. 232, 48 Pac. 72 (note, 5 per cent).

Colo.—Florence Oil & Ref. Co. v. Hiawatha Gas, Oil, & Ref. Co. 55 Colo. 378, 135 Pac. 454 (stipulation in note for 10 per cent attorney's fee presumed reasonable and held valid, especially in view of the implied recognition of the validity of such stipulations by the legislature by providing in the negotiable instruments law that they should not affect the negotiability of the note); Byers v. Bellan-Price Invest. Co. 10 Colo. App. 74, 50 Pac. 368 (note).

Dak.—Farmers' Nat. Bank v. Rasmussen, 1 Dak. 60, 46 N. W. 574 (note).

Fla.—Carhart v. Allen, 56 Fla. 763, 48 So. 47 (holding stipulated fee of 10 per

The provision in those notes is as much void as it would have been had it called the sum imposed by its true name of penalty or forfeiture. There is no consideration . . . that can support it."

This suggestion of lack of consideration prompts the inquiry as to what the borrower gets in exchange for his promise, and discloses the necessity of resort, on the part of courts in which the agreement is held valid, to the theory of indemnity. The agreement to pay costs and attorneys' fees is obviously not an agreement to pay for any service to be rendered to the promisor, the maker of the note, for such services are always rendered to and for the promisee, the payee of the note. It is a promise to pay for something done against the promisor and to his material injury. He derives no benefit from it. The detriment to the other party, occasioned by the default in payment, is the only circumstance that could possibly constitute consideration for the promise. In that case, the injury is deprivation of the use of the money and the compensation for that is fixed and limited by the statutes, allowing only the legal rate of interest and the legal costs, including the attorney's fee prescribed by law. Our statutes limit the interest to 6 per cent, fix the costs in court, and prescribe the amount to be included as an attorney's fee. Nothing more can be obtained by force of the law. At the common law costs or expenses of recovering a debt were not allowed at all, and they were never allowed

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cent in note recoverable without evidence of its reasonableness); Logan v. Slade, 28 Fla. 699, 10 So. 25.

Idaho.—Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555 (mortgage, 10 per cent).

Ill.—McIntire v. Yates, 104 Ill. 491 (mortgage, 2 per cent); Haldeman v. Massachusetts Mut. L. Ins. Co. 120 Ill. 390, 11 N. E. 526 (stipulation in trust deed for fee of $100); Barton v. Farmers' & M. Nat. Bank, 122 Ill. 352, 13 N. E. 503 (stipulation in note for fee of $30); Dorsey v. Wolff, 142 Ill. 589, 18 L.R.A. 428, 34 Am. St. Rep. 99, 32 N. E. 495 (note, 10 per cent); Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47 (trust deed, 5 per cent); Heffron v. Gage, 149 Ill. 182, 36 N. E. 569 (trust deed, stipulation for fee of $1,000); Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617 (note, 5 per cent); Abbott v. Stone, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328 (trust deed, 2½ per cent); Thornton v. Commonwealth Loan & Bldg. Asso. 181 Ill. 456, 54 N. E. 1037; Baker v. Jacobson, 183 Ill. 171, 55 N. E. 724 (stipulation in trust deed for fee of $100); Keenan v. Blue, 240 Ill. 177, 88 N. E. 553 (stipulation in warrant of attorney to confess judgment on notes for $400 attorneys' fees); Ricker v. Scofield, 28 Ill. App. 32 (note, 10 per cent); Matzenbaugh v. Troup, 36 Ill. App. 261 (stipulation in mortgage for fee of $75); Shaffner v. Healy, 57 Ill. App. 90; Springer v. Cochrane, 84 Ill. App. 644 (mortgage, 5 per cent); Junk v. Zieske, 177 Ill. App. 103 (stipulation in trust deed for $100 fee).

Ind.—Smiley v. Meir, 47 Ind. 559 (stipulation in note for 10 per cent attorney's fee, the court saying that prima facie the amount or rate stipulated is to govern).

Kan.—Tholen v. Duffy, 7 Kan. 405 (fee of 10 per cent on $1,000 mortgage); Sharp v. Barker, 11 Kan. 381 (stipulation in mortgage for 10 per cent attorney's fee on foreclosure, the court saying that the amount of the mortgaged debt [$4,000] was not so large that a 10 per cent attorney's fee would be grossly excessive, or that a court of equity would refuse to enforce a stipulation therefor).

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La.—Race v. Bruen, 11 La. Ann. 34 (note, 5 per cent); Siegel v. Drumm, 21 La. Ann. 8 (mortgage, 5 per cent); Simon v. Haifleigh, 21 La. Ann. 607 (mortgage, 2 per cent); State v. Citizens' Bank, 33 La. Ann. 705; Hansen v. Their Creditors, 49 La. Ann. 1731, 22 So. 923.

Minn.—Griswold v. Taylor, 8 Minn. 342, Gil. 301 (stipulation in mortgage for $50 attorneys' fees); Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. 252 (stipulation in note for $10 attorney fee); Mjones v. Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072 (stipulation in mortgage for $25 attorneys' fees).

Miss.—Brahan v. First Nat. Bank, 72 Miss. 266, 16 So. 203 (note, 10 per cent); Duggan v. Champlin, 75 Miss. 441, 23 So. 179 (same); Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369 (note); Duncan Bank v. Brittain, 92 Miss. 545, 46 So. 163 (note, 10 per cent).

Mo.—North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479 (note, 10 per cent); Bank of Neelyville v. Lee, — Mo. App. —, 168 S. W. 796 (same); First Nat. Bank v. Stam, — Mo. App. —, 171 S. W. 567 (note, stipulated fee of 10 per cent held properly allowed without proof of its reasonableness, where defendant did not on the trial raise the question of reasonableness of the stipulated amount).

Neb.—Bond v. Dolby, 17 Neb. 491, 23 N. W. 351 (note executed before 1879, 10 per cent).

Nev.—Cox v. Smith, 1 Nev. 161, 90 Am. Dec. 476 (note, 10 per cent); McLane v. Abrams, 2 Nev. 199 (same).

N. M.—Exchange Bank v. Tuttle, 5 N. M. 427, 7 L.R.A. 445, 23 Pac. 241 (it being presumed that the stipulated fee of 10 per cent was reasonable); Armijo v. Henry, 14 N. M. 181, 25 L.R.A.(N.S.) 275, 89 Pac. 305 (note, 10 per cent); Howey v. Gessler, 16 N. M. 319, 117 Pac. 734.

Okla.—Cooper v. Bank of Indian Territory, 4 Okla. 632, 46 Pac. 475 (stipulation in a mortgage note for 10 per cent attorneys' fees held valid, the court saying that in allowing the fee it was only giving effect to the contract itself, and "there could

eo nomine. In actions for damages, some sort of compensation for trouble or expense was included in the verdict. 3 Bl. Com. 399; 4 Minor, Inst. 699; Wilkinson v. Hoke, 39 W. Va. 403, 19 S. E. 520; Roberts v. Paul, 50 W. Va. 531, 40 S. E. 470; West v. Ferguson, 16 Gratt. 270. Whether inability to obtain relief from this defect by contract may be inferred from the resort to the legislature or enabling statutes, it is unnecessary to inquire. It suffices to say the legislature passed laws dealing fully and comprehensively with the subject, and presumptively made what was deemed an adequate provision; wherefore, under a well-settled rule of construction, it is not in the power of the courts, by their judgments, or private persons, by their contracts, to extend or broaden it. If it be conceded that there was common law on the subject, these statutes necessarily repealed it by implication. By them, the Parliament in England substituted a system of statutory law for the common law, as to costs, covering the whole subject, and omitting any supposed right to recover them by virtue of a stipulation in the contract; and that statutory system, as revised and extended by our legislature, still omits it, and has actually provided against it.

"Whenever a statute undertakes to provide for a specific matter or thing already covered by a common-law rule, omissions in its provisions of certain portions of the rule may be taken as indicative of a legis-

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hardly be any question as to the excessiveness of the attorney's fee, when the amount adjudged was expressly stipulated for by the parties themselves").

S. C.—Branyan v. Kay, 33 S. C. 283, 11 S. E. 970 (note); Montague v. Stelts, 37 S. C. 202, 34 Am. St. Rep. 736, 15 S. E. 968 (note, 10 per cent); Equitable Bldg. & L. Asso. v. Hoffman, 50 S. C. 303, 27 S. E. 692 (bond, 10 per cent).

Tenn.—Daly v. Sumpter Drug Co. 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101 (note, 5 per cent).

Tex.—Miner v. Paris Exch. Bank, 53 Tex. 559 (note, 10 per cent); Carver v. J. S. Mayfield Lumber Co. 29 Tex. Civ. App. 434, 68 S. W. 711 (held not error to allow stipulated fee of 10 per cent in note without evidence of its reasonableness); Garza v. Jesse French Piano & Organ Co. — Tex. Civ. App. —, 126 S. W. 906 (note, 10 per cent); Miller v. Gaar-Scott & Co. — Tex. Civ. App. —, 141 S. W. 1053 (judgment by default on note held properly to include stipulated fees). See also the following Texas decisions, where creditors were held entitled to recover stipulated fees of 10 per cent in notes, the general question of the validity of such stipulations not being, however, particularly considered: Simmons v. Terrell, 75 Tex. 275, 12 S. W. 854; Krause v. Pope, 78 Tex. 478, 14 S. W. 616; Morrill v. Hoyt, 83 Tex. 59, 29 Am. St. Rep. 630, 18 S. W. 424; Huddleston v. Kempner, 1 Tex. Civ. App. 211, 21 S. W. 946; Childs v. Juenger, — Tex. Civ. App. —, 162 S. W. 474. And see Texas decisions under III. b, 3, infra.

Wis.—Tallman v. Truesdell, 3 Wis. 443 (stipulation in a mortgage for fee of $40 on foreclosure, in addition to costs and fees allowed by law); Boyd v. Sumner, 10 Wis. 41 (stipulations in several mortgages for fees aggregating $70); Rice v. Cribb, 12 Wis. 179 (stipulation in mortgage for fee of $50); Mosher v. Chapin, 12 Wis. 453; Hitchcock v. Merrick, 15 Wis. 522 (stipulation in mortgage for fee of $25, the court saying that it was competent for the parties to stipulate for a reasonable attorney's fee in case of foreclosure, and that it must be presumed that such stipulations were made with reference to the costs given by law and as an additional allowance); Pierce v. Kneeland, 16 Wis. 672, 84 Am. Dec. 726 (stipulation in mortgage for fee of $100); Reed v. Catlin, 49 Wis. 686, 6 N. W. 326 (stipulation in mortgage for fee of $50); First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67 (note, 10 per cent); see also Pirie v. Stern, 97 Wis. 150, 65 Am. St. Rep. 103, 72 N. W. 370.

Fed.—Wilson Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806 (stipulation in bond for fee of $100); Adams v. Addington, 4 Woods, 389, 16 Fed. 89 (stipulation in note for 10 per cent attorney's fee held valid under laws of Texas); Re Keeton, 126 Fed. 426 (same); Re Roche, 42 C. C. A. 115, 101 Fed. 956 (similar stipulation in mortgage held valid under laws of Texas); American Freehold Land Mortg. Co. v. Whaley, 63 Fed. 743, affirmed in 20 C. C. A. 306, 42 U. S. App. 90, 74 Fed. 77 (provision in note for 10 per cent attorneys' fees held not usurious under the laws of South Carolina); Fechheimer v. Baum, 43 Fed. 724 (following Georgia decisions upholding stipulation in mortgage for 10 per cent attorneys' fees); Best v. British & A. Mortg. Co. 79 Fed. 401 (trust deed, 10 per cent).

"Contracts by the makers of notes to pay stipulated attorney fees in the event suits become necessary for the collection of such notes are legal and valid contracts; . . . it is immaterial in that regard whether a stated sum is agreed upon as the fee, or the provision is for a reasonable fee, or the fee is fixed at a certain per cent upon the amount of either the debt or the judgment." Ricker v. Scofield, 28 Ill. App. 32.

In Sweeney v. Kaufmann, 168 Ill. 233, 48 N. E. 144, a stipulated attorney's fee of $200 was allowed on foreclosure of a mortgage, the court dismissing the point by saying that the objection that the amount allowed as an attorney's fee is excessive was not well taken, as the amount was fixed and agreed upon in the mortgage.

In Baker v. Jacobson, 183 Ill. 171, 55 N. E. 724, it was said that parties will be con-

lative intent to repeal or abrogate the same. And this, though in all other respects the statute and common law are in exact conformity." Re Lord & P. Chemical Co. 7 Del. Ch. 248, 44 Atl. 775.

To the same general effect, see Com. v. Cooley, 10 Pick. 37; Pearce v. Atwood, 13 Mass. 324; Com. v. Dennis, 105 Mass. 162.

On this principle, the Supreme Court of the United States held that wager of law, if it ever existed in this country as a mode of trial, had been abolished. Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705. See also 8 Cyc. 376, citing numerous other cases. Having specified what may be recovered, whether the common law would have permitted more or not, by its prescription of rules, the legislature has impliedly negatived any supposed right to obtain anything in addition thereto. The detriment to the payee or holder resulting from default in payment is compensated as fully as the legislature intended it to be, by the costs and fees prescribed by the statute; wherefore there can be no consideration for the promise, even in the sense of detriment.

Viewed as a contract of indemnity, the stipulation fails on the same principle. It is indemnity against what a debtor, unable or unwilling to pay, has a legal right to do, avail himself of the delay in payment, accorded him by law, subjecting himself to the incidental punishment inflicted in the form of costs and fees prescribed, and recoverable. This legal, though not moral, right in the debtor precludes the existence

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cluded by the amount agreed upon in a mortgage or trust deed as an attorney's fee, unless it appears that the amount was inserted as a cover for usury, or was unreasonable or excessive. And to the same effect are Heffron v. Gage, 149 Ill. 182, 36 N. E. 569; Baker v. Aalberg, 183 Ill. 258, 55 N. E. 672, and Springer v. Cochrane, 84 Ill. App. 644.

In R. S. Oglesby v. Bank of New York, 114 Va. 663, 77 S. E. 468, a stipulation in a note for payment of 10 per cent for collection by an attorney was held valid under the laws of New York. The court took the position that, the note being a New York contract, the laws of that state controlled the question of the validity of the stipulation, and that as it was valid in New York it would be enforced in Virginia, even if a similar contract made in Virginia would not be enforced in the latter state. However, it was intimated that in Virginia, since the passage of the negotiable instruments law, such stipulations were not invalid, the court saying that the cases of Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 498, and Fields v. Fields, 105 Va. 714, 54 S. E. 888, holding that such stipulations were for penalties and not enforceable, were decided before the enactment of that law; and several earlier Virginia cases were cited as supporting the validity of such stipulations.

And in Martin v. Berry, 1 Ind. Terr. 399, 37 S. W. 835, a stipulation in a note for 10 per cent attorney's fee was held valid under the laws of Texas.

See also Campbell v. Shields, 6 Leigh, 517, which is sufficiently set out in RALEIGH COUNTY BANK v. POTEET.

(2) Rule denying validity.

It should be noted that generally in the cases under this subdivision, except those in Oregon, stipulations for attorneys' fees were held invalid because of general objections to this kind of stipulations, and not because a particular amount was specified.

The following cases hold that stipulations in notes for payment of a specific sum or per cent as an attorney's fee in case of suit to enforce collection, or of collection by an attorney, are invalid, the principal grounds being that such stipulations tend to usury and are against public policy: Boozer v. Anderson, 42 Ark. 167; Arden Lumber Co. v. Henderson Iron Works & Supply Co. 83 Ark. 240, 103 S. W. 185 (stipulation for 10 per cent attorneys' fees held unenforceable in Arkansas, even though such stipulations were valid in the state where the note was executed and was payable); White-Wilson-Drew Co. v. Egelhoff, 96 Ark. 105, 131 S. W. 208 (same); Handley v. Tebbetts, 13 Ky. L. Rep. 280, 16 S. W. 131, 17 S. W. 166 (stipulation for payment of all costs of collection, not less than 10 per cent); Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Wright v. Traver, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517; Brisco v. Norris, 112 N. C. 671, 16 S. E. 850; Williams v. Rich, 117 N. C. 235, 23 S. E. 257; Exchange Bank v. Apalachian Land & Lumber Co. 128 N. C. 193, 38 S. E. 813; Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 498; Fields v. Fields, 105 Va. 714, 54 S. E. 888; Merchants' Nat. Bank v. Sevier, 14 Fed. 662.

The same rule has been applied in the case of stipulations for specific amounts or per cents as attorneys' fees in mortgages, deeds of trusts, and warrants of attorney, the following cases supporting the proposition that such stipulations are unenforceable: Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553 (the general rule being approved, although the point was not necessarily decided); Parks v. Allen, 42 Mich. 482, 4 N. W. 227; Millard v. Truax, 47 Mich. 251, 10 N. W. 358; Millard v. Truax, 50 Mich. 343, 15 N. W. 501; Louder v. Burch, 47 Mich. 109, 10 N. W. 129; Vosburgh v. Lay, 45 Mich. 455, 8 N. W. 91; Botsford v. Botsford, 49 Mich. 29, 12 N. W. 897; Damon v. Deeves, 62 Mich. 465, 29 N. W. 42; Klein v. Bayer, 81 Mich. 233, 45 N. W. 991; Wilkinson v. Baxter, 97 Mich. 536, 56 N. W. 931; Kittermaster v. Brossard, 105 Mich. 219, 55 Am. St. Rep. 437, 63 N. W. 75; Security Co. v. Ever, 36 Neb. 507, 38 Am. St. Rep. 735, 54 N. W. 838 (holding that

of any consideration for the contract as one of indemnity, and the agreement amounts to no more than one to bear the burden imposed by law upon the person in whose favor it is made, an agreement to give something for nothing. For reasons of public policy, the legislature has, in effect, declared that the lender or creditor shall take the risk of expense of collection in excess of the allowance it has made by way of indemnity or reimbursement. It has not left the matter in the hands of the parties to be provided for by agreement. It has acted upon the subject itself and declared its will, for the same reason that impelled it to act upon the subject of interest, to the end there should be no open door to oppression and undue advantages, attended by constant temptation to money lenders to violate the law against usury, and, on the part of collectors, to encourage litigation and inflict unnecessary costs and expenses amounting, in an economic sense, to waste and loss. It would encourage the employment of collectors and attorneys, and be an inducement to attorneys to seek claims for collection and institute actions unnecessarily.

In this connection, the following observations of Woods, Judge, in State use of Fund Comrs. v. Taylor, 10 Ohio, 378, are apropos: "What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans, at banks, that the borrower should pay the expense of collection, and, perhaps, the tax thereon. The brokers in

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a stipulation in a mortgage for payment of a certain amount as attorneys' fees in case of foreclosure would not be enforced in that state in view of its decisions holding such stipulations invalid, even though it should be assumed that the mortgage was an Iowa contract, that the laws of that state governed its construction, and that such stipulations were valid and enforceable in that state); Turner v. Boger, 126 N. C. 300, 49 L.R.A. 590, 35 S. E. 592 (trust deed); State use of Fund Comrs. v. Taylor, 10 Ohio, 378 (stipulation in warrant of attorney to confess judgment for a certain additional amount as attorneys' fees); Shelton v. Gill, 11 Ohio, 417 (same); Oregon cases, infra; Bendey v. Townsend, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482 (holding stipulation in mortgage for $100 attorney's fee invalid under laws of Michigan); Dodge v. Tulleys, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728 (holding stipulation in trust deed for fee of $1,000 unenforceable under laws of Nebraska); Vitrified Paving & Pressed Brick Co. v. Snead & Co. Iron Works, 5 C. C. A. 418, 12 U. S. App. 336, 56 Fed. 64 (similar holding as to stipulation in mortgage for fee of 10 per cent).

In Oregon, while a stipulation in a note for the payment of reasonable attorneys' fees in case action is instituted to collect the note is valid (Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520), it is held that no allowance will be made for attorneys' fees where the parties stipulate for payment of a definite per cent; that the court will not inquire into its reasonableness and allow a reasonable amount, if it considers the specified amount unreasonable. Balfour v. Davis, 14 Or. 47, 12 Pac. 89; Kimball v. Moir, 15 Or. 427, 15 Pac. 669; Levens v. Briggs, 21 Or. 333, 14 L.R.A. 188, 28 Pac. 15. In the Kimball Case it is said that if a party wishes to indemnify himself for attorneys' fees in case of suit upon a note, he may do so by providing therein for a reasonable attorney's fee, but that it is not practicable nor consistent with sound public policy to allow parties at the inception of a transaction to determine the amount of attorneys' fees to be paid in case of default, it being impossible for them to know the extent or value of the services to be rendered, and the amount always being placed at the highest possible limit; that some authorities hold that the amount fixed is to be regarded as a penalty, from which the court may vary according to the circumstances, but that this is not the nature of the transaction nor the intention of the parties, it being a liquidated sum to be paid at all events if suit is brought. In the Balfour Case it was suggested that if the court inquired into the reasonableness of the specified amount and reduced it, if necessary, to such amount as it deemed reasonable, this would be in effect making a new contract for the parties, and in the Levens Case it was said that, had the note provided for a reasonable attorney's fee to be ascertained by the court, there would have been no legal objection thereto, but that where the parties stipulate for an oppressive and unconscionable amount, no court ought to enforce it; and because that method had grown into an oppressive abuse, and the courts were being used to make it effectual, it was thought best in that state to announce the rule that no attorney's fee would be allowed by the courts if the amount thereof was specified in the contract.

In regard to the Oregon rule, it was said in Commercial Nat. Bank v. Davidson, 18 Or. 57, 22 Pac. 517, that "it may be claimed with apparent reason that where the parties fix a just and fair amount for collecting the note, that the court should allow it. But it is not consistent with public policy to permit parties to agree upon such amount. They do not stand upon an equality of footing;" and the sanctioning of agreements to pay a definite sum or per cent for collection, it was said, would be liable to open a door to fraud and extortion.

The Oregon rule that, while a stipulation in a note for payment of reasonable attorneys' fees is valid, such a stipulation for payment of a definite sum is invalid, was applied in Commercial Nat. Bank v. David-

this state would hold a general jubilee; and as their sense of morality and law usually expands with their hopes of gain, in proportion to the borrower's necessity, they would find, probably, additional items of costs, as the means of a legalized extortion upon their loans."

In Witherspoon v. Musselman, 14 Bush, 214, 29 Am. Rep. 404, the court held as follows: "Agreement to pay a reasonable attorney's fee, in the body of a promissory note, if it is 'collected by suit,' is absolutely void; it is contrary to the policy of our laws,—it is an agreement to pay a penalty, tends to the oppression of the debtor, and to encourage litigation."

The decisions upholding such contracts themselves disclose the abuses indicated. Some of them inquire only as to whether the stipulated amount is reasonable. This permits the holder of the paper to take as profit on the transaction all he can save out of the amount recovered, and it amounts to additional interest. Wood v. Winship Mach. Co. 83 Ala. 424, 3 Am. St. Rep. 754, 3 So. 757; Toler v. Keiher, 81 Ind. 383; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67; Exchange Bank v. Tuttle, 5 N. M. 427, 7 L.R.A. 445, 23 Pac. 241; Morgan v. Kiser, 105 Ga. 104, 31 S. E. 45; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24. In others an effort is made to avoid this result by treating the contract as one of indemnity and allowing only the actual expense. First

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son, supra, to a stipulation in a note for payment of 10 per cent as cost of collection in case the note was not paid at maturity, so as to render such a stipulation invalid and unenforceable in Oregon, even though it was valid in the state where the note was executed.

A stipulation in a mortgage to pay the principal and interest and the costs in case of foreclosure, and also "$50 as liquidated damages for the foreclosure," was held void in Foote v. Sprague, 13 Kan. 155, as to the provision for liquidated damages; and it was therefore held error to render judgment under this provision for $50 attorneys' fees. The ground of the decision, however, was not that the stipulation was invalid because it was for attorneys' fees, but because it did not appear whether the peyment was for something legal or illegal.

See also Fidelity Trust & S. V. Co. v. Ryan, 109 Ky. 240, 58 S. W. 610, where an agreement to pay an attorney's fee of $300, in addition to future interest, in consideration that the creditor would suspend execution on his judgment for six months, was held usurious; and Toole v. Stephen, 4 Leigh, 581, which is sufficiently set out in RALEIGH COUNTY BANK v. POTEET.

(3) Rule upholding stipulation as for indemnity only.

Although there are several decisions to the contrary (see III. b, 4, infra), it is now the general rule that a stipulation in a note or mortgage for payment of a specific amount or per cent as an attorney's fee will be construed and enforced as a contract for indemnity only, and not for payment absolutely of the specified amount. The following cases support the proposition that while a stipulation in a note, mortgage, or other evidence of indebtedness, for payment of a specific sum or per cent as an attorney's fee, is valid, it is not conclusive as to the amount to which the creditor is entitled, but the contract should be treated as one of indemnity, and the stipulation enforced to the extent of allowing a reasonable attorney's fee, or such a fee as the creditor has contracted to pay or has paid to his attorney, not exceeding the specified amount: Montgomery v. Crossthwait, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498; Williams v. Flowers, 90 Ala. 136, 24 Am. St. Rep. 772, 7 So. 439; Moran v. Gardemeyer, 82 Cal. 96, 23 Pac. 6 (the court saying that where a mortgage provides for payment of attorneys' fees on foreclosure, it is in the discretion of the trial court to make such an allowance for fees as in its judgment is reasonable and just, without regard to the amount or percentage specified in the mortgage); see also California cases under V. infra; Florence Oil & Ref. Co. v. Hiawatha Gas, Oil, & Ref. Co. 55 Colo. 378, 135 Pac. 454; Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555; Porter v. Title Guaranty & Surety Co. 17 Idaho, 364, 27 L.R.A.(N.S.) 111, 106 Pac. 299 (the rule being laid down that to allow an attorney's fee on foreclosure, the plaintiff must prove that he has agreed to pay his attorney a stipulated or a reasonable fee, and the reasonableness of the fee agreed upon or what is a reasonable fee; and in the absence of this evidence, it was held there could be no recovery of an attorney's fee, although the mortgage provided for a specified fee on foreclosure as a reasonable and proper fee); Henke v. Gunzenhauser, 195 Ill. 130, 62 N. E. 896; Kennedy v. Richardson, 70 Ind. 524; Goss v. Bowen, 104 Ind. 207, 2 N. E. 704; Rouyer v. Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674 (the court saying, however, that where the amount is fixed in the note this is prima facie the sum recoverable as attorneys' fees, subject to be reduced by proof that it is unreasonable, or that the plaintiff has not really incurred a liability for that amount); White v. Lucas, 46 Iowa, 319; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668 (it being said that if such stipulations were not mere agreements for indemnity, they were merely penal and void; also that the plaintiff must prove the reasonable value of the attorney's services); McAllister's Appeal, 59 Pa. 204; Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457; Warwick Iron Co. v. Mor-

Nat. Bank v. Robinson, 104 Tex. 166, 135 S. W. 372; Dunovant v. R. E. Stafford & Co. 36 Tex. Civ. App. 33, 81 S. W. 101. These decisions disclose a futile effort on the part of the courts to prevent abuse of it. As the matter is all in the hands of the creditor and his attorney, neither the debtor nor the court can know what fees are actually paid.

It is hardly necessary to say the legislature has ample power to forbid such contracts, in view of the evils they carry or of which they are, to say the least, susceptible; for nobody is likely to dispute it. Hence the inquiry is one of legislative intent only, and that seems perfectly clear, when the statutes are considered in the light of the rules of interpretation. Indeed, the nonrecognition of such an oppressive and evil working contract reflects credit upon the common law itself. In those courts which recognize it, liberty of contract and increased efficiency of negotiable paper as an instrumentality of commerce are the principal grounds of justification. The statutes marking out inhibitive public policy are seldom mentioned and never fully analyzed. The inquiry goes only to the question of usury. No effort is made to escape the common-law inhibition of costs or the limitation of statutory costs,—both of which are more directly applicable than the usury statute. If these statutes have the scope and effect here claimed, there is no such liberty of contract. And, however beneficial these contracts may be in com-

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ton, 148 Pa. 72, 23 Atl. 1065; Franklin v. Kurtz, 3 Del. Co. Rep. 590; Lesher v. Brown, 3 Del. Co. Rep. 69; Waln v. Massey, 7 W. N. C. 312; Landis v. Aldrich, 9 W. N. C. 192; Reed v. Worthington, 9 W. N. C. 192; Salsburg v. Mack, 11 Pa. Co. Ct. 408; Philadelphia Trust & S. D. Co. v. McDaniel, 2 Pa. Co. Ct. Rep. 102; Weigley v. Charlier, 9 Pa. Dist. R. 670; Scott v. Carl, 24 Pa. Super. Ct. 460; Jarvis v. Stoffal, 54 Pa. Super. Ct. 362; Matheson v. Rogers, 84 S. C. 458, 65 S. E. 1054, 67 S. E. 476, 19 Ann. Cas. 1066; Coley v. Coley, 94 S. C. 383, 77 S. E. 49; Holston Nat. Bank v. Wood, 125 Tenn. 6, 140 S. W. 31; First Nat. Bank v. Robinson, 104 Tex. 166, 135 S. W. 372, see also subsequent proceedings in this case in — Tex. Civ. App. —, 135 S. W. 1115; Lanier v. Jones, 104 Tex. 247, 136 S. W. 255; Luzenberg v. Bexar Bldg. & L. Asso. 9 Tex. Civ. App. 261, 29 S. W. 237; Hammond v. Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600; Dunovant v. R. E. Stafford & Co. 36 Tex. Civ. App. 33, 81 S. W. 101; Texas Land & Loan Co. v. Robertson, 38 Tex. Civ. App. 521, 85 S. W. 1020; Bolton v. G. C. Gifford & Co. 45 Tex. Civ. App. 140, 100 S. W. 210; O'Connell v. Rugely, 48 Tex. Civ. App. 456, 107 S. W. 151; First Nat. Bank v. J. I. Campbell Co. 52 Tex. Civ. App. 445, 114 S. W. 887; Young v. State Bank, 54 Tex. Civ. App. 206, 117 S. W. 476; Reed v. Taylor, — Tex. Civ. App. —, 129 S. W. 864; Miller v. West Texas Lumber Co. — Tex. Civ. App. —, 131 S. W. 608; Hassell v. Steinmann, — Tex. Civ. App. —, 132 S. W. 948; Daniel v. Brewton, — Tex. Civ. App. —, 136 S. W. 815; Beckham v. Scott, — Tex. Civ. App. —, 142 S. W. 80; Miller v. Laughlin, — Tex. Civ. App. —, 147 S. W. 713; Salisbury v. Stewart, 15 Utah, 308, 62 Am. St. Rep. 934, 49 Pac. 777; Utah Nat. Bank v. Nelson, 38 Utah, 169, 111 Pac. 917 (holding that plaintiff could recover stipulated fee of 10 per cent in note, where its reasonableness was not contested, although there was no evidence that he had agreed to pay that amount to an attorney); First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67; Burns v. Scoggin, 9 Sawy. 73, 16 Fed. 734; Chestertown Bank v. Walker, 90 C. C. A. 140, 163 Fed. 510 (decided under the laws of Maryland); Mechanics' American Nat. Bank v. Coleman, 122 C. C. A. 338, 204 Fed. 24 (it being held that the plaintiff must prove the reasonable value of the attorney's services).

In McAllister's Appeal, 59 Pa. 204, the court said: "It ought to be considered as firmly settled by the former decisions of this court, that a creditor, in taking a security from his debtor, whether mortgage, judgment bond, or note, may lawfully include a stipulation that in the event of his being compelled to resort to legal proceedings to collect his debt, he shall be entitled to recover also with it the reasonable expenses to which he may be subjected, or a reasonable sum or commission on the amount to cover such expenses; . . . nor do I think that if 5 per cent can be added for attorneys' commissions, that it follows, by any means, that 25 or 50 per cent may be stipulated for. . . . Undoubtedly a provision for an unreasonable and extravagant sum would not only be an evasion of the usury laws, but it could be set aside or reduced independently of those laws, under the general powers which courts of equity . . . exercise in regard to oppressive terms imposed by the creditor on the necessitous debtor. . . . The commission ought never to exceed 5 per centum, and even that should not be allowed when the sum collected is large."

However, in regard to the above statement that the commission for collection ought never to exceed 5 per cent, it was said in Lesher v. Brown, 3 Del. Co. Rep. 69, that while the statement was entitled to great weight and consideration, it was simply of general application, and would not apply in special localities where custom, the action of the profession, or the court had established a different rule in relation to fees; and in this case a stipulated fee of 7 per cent was held not excessive, and was allowed.

In Wilson v. Ott, 173 Pa. 253, 51 Am. St. Rep. 767, 34 Atl. 23, stipulations for attorneys' fees were said to be for penalties, and their enforcement a matter within

merce, it is the province of the legislature, not the courts, to legalize them, and the courts have no power to do so in the face of a clearly manifested public policy condemning them.

Through all the refinements in argument upon which validity of this sort of an argument is predicated, the reader feels the weight of conviction that the real inducement to the stipulation is the loan of the money, not any wish or desire on the part of the borrower to relieve the lender of any burden. It is inseparably connected with the loan, and can have no separate or distinct existence. It is entered into to obtain the loan and for no other purpose. That being the intent of the borrower, concurred in by the lender, it is difficult to see how, in point of intent and purpose, there can be any other consideration. As legally there can be no other, the indemnity is a mere benefit to the lender in addition to the interest for which the law permits him to contract.

In opposition to the conclusion here indicated and the reasoning upon which it is predicated, certain early Virginia decisions are relied upon, one of which, Campbell v. Shields, 6 Leigh, 517, holding a bond given for a past-due debt, and including a sum equal to 5 per cent of the debt to cover commissions which the creditor might be compelled to pay to an agent for collection, not to be usurious, apparently conflicts with it to some extent. In the opinion, Judge Carr declared it lawful to charge a reason-

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the control of the court in the exercise of its equitable powers.

In Broadbent v. Brumback, 2 Idaho, 366, 16 Pac. 555, the court said: "We think it to be the duty of a court granting a decree of foreclosure, whenever the fee is contested, and in all cases of default, to limit the amount of such fee to that actually paid, or to be paid, and in all cases to allow no more than is reasonable. . . . It may be observed that the theory upon which stipulations in mortgages are sustained is that they provide for expenses incurred by the plaintiff in foreclosure for the services of an attorney. If there is no attorney, such expense is not incurred. If there is an attorney, the plaintiff's expense is limited to the amount paid therefor, provided it is reasonable."

And in Matheson v. Rogers, 84 S. C. 458, 65 S. E. 1054, 19 Ann. Cas. 1066, where a mortgage provided for 10 per cent attorneys' fees on foreclosure, the court, after citing a number of cases in that state in which contracts for specific amounts as attorneys' fees had been enforced for the amount named, said: "It does not follow, however, that a contract for 10 per cent attorneys' fees, regardless of the amount involved, would be sustained. The true rule deducible from the weight of authority is that such contracts are subject to the control of a court of equity, when the creditor invokes such jurisdiction to enforce his claim, and the court will enforce the contract where it is not clearly unreasonable and oppressive." In this case, where the amount of principal and interest was over $11,000, it was found that an attorney's fee of 10 per cent would be excessive and oppressive, and a fee of only $300 was allowed.

Also in Wilson Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806, it was said that where the fee is so large as to suggest that it is a mere device to secure illegal interest, the court will be slow to enforce its payment, and probably upon slight additional evidence to that effect would refuse to allow it, or reduce it to a reasonable sum.

In Coley v. Coley, 94 S. C. 383, 77 S. E. L.R.A.1915B. 49, the court regarded it as proper for equity to relieve against a stipulation for an excessive attorney's fee, especially in view of the fact that attorneys are officers of the court, sustaining a relation of trust to the public, and that the contract for attorneys' fees should be considered as affecting only the attorney, and not the creditor.

The Texas decisions in the court of civil appeals were conflicting as to whether it was necessary for the plaintiff to prove what would be a reasonable attorney's fee or what was the amount for which he had become liable, or whether, without such proof, the stipulated amount should be allowed on the ground that it was prima facie reasonable. The matter was, however, finally settled in the cases of First Nat. Bank v. Robinson, 104 Tex. 166, 135 S. W. 372, and Lanier v. Jones, 104 Tex. 247, 136 S. W. 255, where it was held that in actions on notes containing stipulations for payment of 10 per cent attorneys' fees, it was not error to render judgment for the stipulated fee, even though there was no proof that the plaintiff had agreed to pay his attorney that amount, or that the stipulated fee was only reasonable compensation, in the absence of allegation or proof that the stipulated fee was unreasonable. Following these cases is Brown v. Gatewood, — Tex. Civ. App. —, 150 S. W. 950. It was not, however, decided whether this rule should apply where the holder of the note had in fact agreed with his attorney for a less sum than that stipulated, or whether relief would be granted in case it was shown the stipulated fee was unreasonable.

It has been held proper to allow a stipulated attorney's fee of 10 per cent, as provided in a note, where the plaintiff had agreed to pay his attorney that amount. Stuart v. Tenison Bros. Saddlery Co. 21 Tex. Civ. App. 530, 53 S. W. 83; Tomlinson v. Drought, — Tex. Civ. App. —, 27 S. W. 262; Rutherford v. Gaines, 103 Tex. 263, 126 S. W. 261, the court holding in the latter case that it was immaterial that the plaintiff had not become personally liable for the fee, but had only agreed to pay his

able commission for trouble and expense. The defense was usury and had for its purpose the defeat of the entire debt, under the statute forfeiting the whole debt for the offense of usury. As the statute was so highly penal, it was perfectly natural for the court to struggle against the establishment of the offense, and, to that end, give the statute a strict construction, under the rule requiring it in the case of a penal statute. No reference was made to the statute limiting costs, and much stress was laid upon the question of intent. Our statute against usury is not penal. Forfeiting only the interest in excess of the legal rate, it is purely remedial and falls under the rule of liberal construction. Had Judge Carr been deciding the case under it, his opinion might, and likely would, have pursued an entirely different course and led to an opposite conclusion. He founded his conclusion in part on Stratton v. Mutual Assurance Soc. 6 Rand. (Va.) 22, involving the collection of a penalty of 7½ per cent imposed upon a delinquent member of a fire insurance society, by one of its by-laws. Of course, there was no semblance of usury in that, for there was no loan of money, nor any debt other than that incident to membership in the society, which included the percentage for delinquency. Greenhow v. Buck, 5 Munf. 263, was a case of the same kind. In Pollard v. Baylor, 6 Munf. 433, there was involved a commission on a contract for the sale of tobacco, which contract, the court said, the debtor could make with

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attorney the stipulated amount in case it was collected out of the land, the note being given for the purchase price of land.

And if the holder of a note containing a stipulation for payment of a certain sum as attorneys' fees contracts in good faith with his attorney for payment of that sum, it has been held that the maker of the note cannot defeat recovery of the stipulated fees on the ground that they are unreasonable. Dunovant v. R. E. Stafford & Co. 36 Tex. Civ. App. 33, 81 S. W. 101; Robertson v. Holman, 36 Tex. Civ. App. 31, 81 S. W. 326; First Nat. Bank v. J. I. Campbell Co. 52 Tex. Civ. App. 445, 114 S. W. 887; Mosteller v. Astin, — Tex. Civ. App. —, 129 S. W. 1137, see also subsequent proceedings in this case in — Tex. Civ. App. —, 144 S. W. 701, and — Tex. Civ. App. —, 152 S. W. 495; Hassell v. Steinmann, — Tex. Civ. App. —, 132 S. W. 948; Frantz v. Masterson, — Tex. Civ. App. —, 133 S. W. 740.

In Frantz v. Masterson, supra, where it appeared that the plaintiff had made an absolute agreement with his attorney for 10 per cent of the judgment recovered as an attorney's fee, it was held that the plaintiff was entitled to recover the 10 per cent fee stipulated in the note, although it was found that a reasonable fee would be only $3,000, while the fee of 10 per cent amounted to over $20,000.

In Luzenberg v. Bexar Bldg. & L. Asso. 9 Tex. Civ. App. 261, 29 S. W. 237, where it appeared that in case of recovery of a stipulated attorney's fee of 10 per cent only part of the amount recovered would be paid to the attorney, but it did not appear what part he would receive, it was held there could be no recovery of attorneys' fees, as the contract between the holder of the note and his attorney inured to the benefit of the maker of the note, and limited the amount of recovery on account of attorneys' fees. The note in this case bore interest at the rate of 12 per cent, and it was said that any other view would permit the holder to recover a greater compensation for the detention of money than the law permitted.

And in Hammond v. Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600, where a receiver made a contract with an attorney that the latter should prosecute claims owing to the estate for one half of the 10 per cent attorneys' fees stipulated for in the claims, it was held that this agreement inured to the benefit of the debtors, and was available to them as a defense *pro tanto*, so that in an action on the obligation the estate was held entitled to recover only 5 per cent attorneys' fees.

So in Kennedy v. Richardson, 70 Ind. 524, it was held to be a good defense to a claim by the plaintiff in a foreclosure action, to recover 5 per cent attorneys' fees, that he had contracted with his attorneys for a smaller sum, which only he was entitled to recover. The court said that, as the contract was one of indemnity only, the holder could not recover any larger sum than would be sufficient to indemnify him, and if he agreed with his attorneys for smaller fees than were stipulated for, such agreement would inure to the benefit of the maker of the contract, and would limit the amount of the holder's recovery on account of attorneys' fees.

The rule was laid down in Henke v. Gunzenhauser, 195 Ill. 130, 62 N. E. 896, that if there is an agreement to pay a certain amount as attorneys' fees, that amount limits the allowance and it cannot be increased, though if unreasonable it may be diminished.

As opposed to the views above indicated, see, however, Merchants' Nat. Bank v. Sevier, 14 Fed. 662, where the court, in holding invalid a stipulation in a note for payment of 10 per cent attorneys' fees in case of collection by suit, said: "The suggestion of some of the courts which maintain the validity of such a provision, that the fee stipulated for must be reasonable in amount, and that the court should reduce it when in its opinion it is excessive, only proves the unsoundness of the doctrine. For if the parties can lawfully stipulate for the payment of an attorney's fee in addition to the principal and interest of the debt, and the costs and fees allowed by law, then they can agree upon the amount of the

the creditor and entitle him to commissions as well as the debt, and, besides, as in the case of Campbell v. Shields, the debt had been previously made and was free from the suspicion of usury when made, and the court said a debt valid in its inception could not be vitiated by a subsequent usurious transaction. In neither case was the question at issue the collection of the commission. In Pollard v. Baylor, the purpose of the plea was to invalidate a deed in an action of ejectment, and, in the other, to escape payment of the whole debt, and the commissions were only collaterally involved by efforts to accomplish vastly larger purposes than relief from the commission contracts.

The Virginia court has not acknowledged these decisions as binding it in the disposition of the question here presented. In its later decisions, it has uniformly held stipulations for expenses of collection void as being inhibited by public policy. Fields v. Fields, 105 Va. 714, 54 S. E. 888; Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 498; Ronald v. Bank of Princeton, 90 Va. 813, 20 S. E. 780. Moreover, the principle here declared was enunciated and applied in Toole v. Stephen, 4 Leigh, 581. There a note given by a debtor to the attorney of a bank for part of his commission for reducing its claim for judgment was declared usurious. This commission differed from those involved in Pollard v. Baylor and Campbell v. Shields in this only, that it had been earned, while the other had not. It was not payable to the creditor, but to the attorney who

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fee, and the court has no more power over such a contract than it has over any other contract entered into between parties capable of contracting."

And in Vosburgh v. Lay, 45 Mich. 455, 8 N. W. 91, where a stipulation in a mortgage for $50 attorneys' fees on foreclosure was held invalid, it was said that courts are not vested with authority to draw a line and decide that the fee specified in one mortgage is proper and its payment compulsory, and that the fee contained in another is excessive and its payment voidable; that neither is there any criterion in law for apportioning the sums expressed to the service rendered, and if the payment of $50 can be made imperative by expressing it in the mortgage as a fee for future service under the power of sale, however slight, it would follow that payment of $500 could also be made imperative in the same way and on the same principle.

(4) Rule upholding stipulation as for liquidated damages.

Although, as indicated in the last subdivision, it is now generally held that a stipulation for a specific amount as an attorney's fee will be treated as valid only to the extent of permitting recovery of a reasonable fee, or of the fee paid or agreed to be paid to the attorney, there are a few decisions to the contrary (several of which have been in effect overruled), holding that such stipulations should be deemed contracts for liquidated damages and the specified amounts allowed, apparently without regard to their reasonableness or to the amount that was in fact paid the attorney. To this effect are Robinson v. Loomis, 51 Pa. 78, and Sturgis Nat. Bank v. Smith, 9 Tex. Civ. App. 540, 30 S. W. 678. In the former case it was held that an instruction was properly refused that the plaintiff was not entitled to recover the stipulated attorneys' fees of 5 per cent, but only his actual legal expenses; and in the latter case the court said it would not affect the legality of the demands for the stipulated fees of 10 per cent, if it were true, as alleged, that the provision was inserted in the note for the sole benefit of the plaintiff (the payee), and not with any purpose of paying that amount to an attorney; and that if the plaintiff could and did obtain the services of an attorney free, that fact would not relieve the defendant of his obligation. These cases have, however, been in effect overruled, the former by the case of Daly v. Maitland, 88 Pa. 384, 32 Am. Rep. 457, holding that a stipulation for payment of a certain per cent of the attorneys' fees would be enforced only to the extent of allowing a reasonable fee not exceeding that agreed upon; and the latter case by the Texas decisions set out in the previous subdivision. See particularly Dunovant v. R. E. Stafford & Co. 36 Tex. Civ. App. 331, 81 S. W. 101.

In McIntire v. Cagley, 37 Iowa, 676, a stipulation in a note for payment of an attorney's fee of 10 per cent if the note should be collected by suit was construed as a provision for liquidated damages, and not for a penalty, the position of the lower court being held untenable, that the stipulation provided for a penalty to cover the expense of collecting the note by action, and was therefore recoverable only to the extent of such actual expense, which must be shown by evidence. It was said that the sum agreed upon would not be treated as a penalty unless it was so obviously excessive and disproportionate to rational expectation of injury as to make it clear that the principle of compensation was wholly disregarded; that as the extent of the injury in this regard was uncertain, the parties might in advance agree upon a sum which would probably cover it, although if the agreement was resorted to as a cloak for usury, it would be treated as any other usurious contract.

And in Renshaw v. Richards, 30 La. Ann. 398, a stipulation in a mortgage to pay all attorneys' fees, costs, and expenses incurred by the holder of the mortgage in case of nonpayment at maturity, "said attorneys' fees, however, to be fixed at 5 per cent on the amount so in suit," was held to be a fixed obligation by the mortgagor to pay 5

had rendered the service. Nevertheless the court refused enforcement of the contract to pay it. This was, in substance and effect, a declaration of want of consideration. Had the commissions only been involved in the other two cases, they would probably have met a like fate. R. S. Oglesby Co. v. Bank of New York, 114 Va. 663, 77 S. E. 468, decided by the Virginia court, involves no departure from the law as declared in Rixey v. Pearre Bros. and other later cases. It upheld the stipulation under the laws of New York, holding the contract to be governed in respect of its performance by the laws of New York. The last point of the syllabus reads: "A contract valid at place of performance, another state, will be enforced in Virginia, though a similar contract made and to be performed in Virginia would not be upheld."

In this state, as has been indicated, the law upon the subject has been regarded as settled beyond question or doubt. Our decisions do not disclose a single case in which recovery has been sought on such an agreement. No effort has ever been made here to establish its validity. In all the states in which it has been upheld, the reports abound with decisions involving such contracts. In the reports of the courts of other states in which it is condemned appear many instances of effort to legalize it, as in Michigan, North Carolina, Arkansas, and Virginia. A thorough and general conviction on the part of members of the profession against its validity has restrained them

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per cent attorneys' fees absolutely, without reference to any contract that the mortgagee or holder might make with his attorney or to the amount that might actually be paid to the attorney.

To the same effect is First Nat. Bank v. Mayer, 129 La. 981, 57 So. 308, where a stipulation in a note for 10 per cent attorneys' fees if the note was placed in the hands of an attorney for collection was held to be a contract for liquidated damages, and not merely an agreement to pay whatever expense the plaintiff might show was incurred by him for attorneys' fees; so that it was held not necessary, to entitle plaintiff to recover the stipulated fees, for him to prove that he had incurred any expense for attorneys' fees.

IV. Theories on which stipulations are held valid or invalid.

a. Sustaining validity.

In Bank of British N. A. v. Ellis, 6 Sawy. 102, 2 Fed. 44, it is said: "A stipulation in a negotiable instrument for an attorney's fee, which in effect provides for the payment of certain expenses of collection in case the same is not paid without suit, so far gives security and currency to such instrument, and is therefore to be regarded with favor, as being a just and convenient means of promoting the general object and utility of the same."

And in Bowie v. Hall, 69 Md. 433, 1 L.R.A. 546, 9 Am. St. Rep. 433, 16 Atl. 64, an action on a note containing a stipulation for payment of all costs or expenses of collection, including attorneys' fees, the court said: "But even if the question were a new one, we can discover no ground whatever upon which to declare such a contract void. In the case before us the interest on the sum lent up to the maturity of the note is less than half the most reasonable commissions the lender will have to pay an attorney for collecting it, by suit or otherwise, so that by default of the borrower he would lose all the interest and part of the principal. What possible objection can there be in allowing parties to contract against a result like that? In our judgment such contracts violate no principle of law or public policy. It seems to us simply a stipulation intended to secure punctuality in the performance of the contract, and as such contains no element of oppression to the borrower. Its tendency in fact is to help him to borrow at a less rate of interest, as punctuality in payment is usually taken into consideration in fixing the terms of a loan."

Also in Huling v. Drexell, 7 Watts, 126, the court, in upholding a stipulation in a mortgage for payment of all costs, charges, and expenses of every kind which the mortgagee might sustain by reason of default in payment of the debt, said that the contract was advantageous to the borrower and to the lender; nor was there the slightest pretense to say that it was intended as a cover to usury; such stipulations enabled borrowers to obtain money at a less rate of interest, as punctuality in payment is taken into consideration in fixing the rate of the loan, and a failure to pay does not give the lender anything additional, but on the contrary the probability is he will not be reimbursed the expenses which he may incur.

In upholding the validity of a stipulation in a mortgage for payment of 10 per cent attorneys' fees on recovery of judgment on the note, it was said by Justice Brewer, in Tholen v. Duffy, 7 Kan. 405, regarding the stipulation: "It does not violate the usury law, because it is no stipulation to pay for the use of the money borrowed, but only an agreement to compensate the mortgagee for the expenses of compelling the mortgagor to perform his contract. . . . Nor is it against public policy that the expense of a litigation should be borne by the party whose breach of his contract necessitates such litigation. On the contrary, it accords fully with the soundest principles."

"The equity of such a stipulation [for payment of 5 per cent attorneys' fees in case of collection of the debt by suit] is obvious; it secures to the lender nothing

from presenting the question, and foundation for this impression appears in the judicial declaration of invalidity of contracts not usurious at all, but tending to usury, and because they have such tendency. A contract for compound interest is declared to be void and unenforceable because of such tendency, although it is admittedly not usurious in law or fact. In Childers v. Deane, 4 Rand. (Va.) 408, Judge Carr said: "But an agreement made at the time of the loan, that at the end of the year interest shall become principal, will not be allowed; not that it is usury and will render the contract illegal and void, but because the chancery considers it hard and oppressive and tending to usury."

So this court has uniformly held. Genin v. Ingersoll, 11 W. Va. 549; Hurst v. Hite, 20 W. Va. 183; Boggess v. Goff, 47 W. Va. 139, 34 S. E. 741. Here is an instance in which a contract not forbidden by any statute is held void because of its mere tendency to usury, and liberty of contract, accorded by the common law, denied and restrained by the public policy of the state. On the same principle, the uniformly admitted usurious tendency of the stipulation for attorneys' fees condemns it, although, in the absence of a defined public policy, it seems to fall within the power of individuals to make contracts.

The negotiable instruments law (chapter 81, Acts of 1907; chapter 98A of the Code) has not altered this policy. Negotiability of paper is one thing, and the policy of the

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more than the legal rate of interest stipulated for the use of his money. It does not inure to his benefit, but is allowed as compensation for professional services required to enforce the payment of the debt by suit. Had the defendant performed punctually his obligations as he had stipulated in the contract, it is certain that he would have had no just cause of complaint." Race v. Bruen, 11 La. Ann. 34.

"Contracts for the payment of attorneys' fees are only upheld upon the ground that they are reasonable indemnity against loss actually and necessarily incurred by the failure of the payor." Shoup v. Snepp, 22 Ind. App. 30, 53 N. E. 189.

Usury.

As to whether a stipulation in a note for the payment of a reasonable attorney's fee in case of action to collect the note is usurious, it was said in Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520: "The only question involving any serious difficulty, it seems to us, is whether such engagements are opposed to the policy of the statute against usury. If the effect of enforcing them would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But, while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not debarred from requiring as a condition of making the loan that he shall be secured in such a way as will enable him to receive the principal of the loan and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower. . . . It is no new or additional compensation for the use of money that is provided for by such a stipulation. Such an engagement is not in the nature of a contract for additional interest, but a provision simply against possible future loss or damage of a certain and definite character, which can only result as a consequence of the

neglect or default of the borrower, and against which there seems no good reason why he should not be held competent to indemnify. The lender only charges the rate of interest allowed by law upon his contract with the borrower for interest, but on account of the breach of a further stipulation, not forming any part of said contract, but founded on a valuable consideration, he claims such damages as he may sustain by being compelled to retain counsel to institute judicial proceedings to collect his debt. In legal contemplation, it is possible for the borrower to avoid making default in payment, and competent for him to indemnify the lender against any special damages it may occasion."

And in American Mortg. Co. v. Downing, 17 Fed. 660, the court said that it was absurd to say that a provision in a mortgage to pay an attorney's fee rendered it usurious: that interest was allowed for the loan or forbearance of money, and it was quite evident that when suit was begun to enforce the collection forbearance ceased, and the attorney's fee was provided not for the use of the money for any certain time, but as an incident to reimburse the owner in recovering the loan.

An agreement that if it became necessary to foreclose the mortgage, the court should allow a reasonable amount as an attorney's fee to be taxed as part of the costs of foreclosure, was said in Nelson v. Everett, 29 Iowa, 184, to negative all idea of usury under the cover or pretext of an attorney's fee.

And in Smith v. Silvers, 32 Ind. 321, the court said that "a stipulation whereby the debtor agrees to be liable for reasonable attorneys' fees in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand is not only not usurious, but is so eminently just that there should be no hesitation in enforcing it."

Also in Bowie v. Hall, 69 Md. 433, 1 L.R.A. 546, 9 Am. St. Rep. 433, 16 Atl. 64, the court said regarding a stipulation in a note for payment of an attorney's fee: "Nor can it be regarded as a cover to usury,

state as to usury and other oppressive practices quite another, and that statute deals with the former, not the latter. It says not a word about usury. Its purpose was to establish uniformity in the quality, characteristics, and incidents of negotiable paper, and to extend the principle of negotiability; but it assumed the validity of the paper contemplated. In other words, it assumed the paper to be such as the law permits the parties to make and allows the courts to enforce. No rule or principle of construction justifies the courts in saying its very general terms repeal positive statutes relating to subjects other than negotiability of valid paper. On the contrary, the rules of construction forbid it. Reeves v. Ross, 62 W. Va. 7, 57 S. E. 284; Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613; 36 Cyc. 1146; 26 Am. & Eng. Enc. Law, 640; Lewis's Sutherland, Stat. Constr. § 274, old ed. 157.

The trial court erroneously included the commission in its judgment. It likewise erred in the refusal of credit for usurious interest paid to the bank amounting to $39.66. As credit for this item was claimed in the pleadings, no principle upon which it could be disallowed is perceived. Deduction of these two items from the amount of the judgment leaves $2,270 as the amount for which it should have been rendered.

The judgment will be reversed and judgment entered here for said sum, as of the 4th day of September, 1912, with interest thereon from that date until paid and

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for its effect is clearly not to put any money above the legal rate of interest, into the pocket of the lender, but merely to enable him to get back his money with legal interest, and nothing more."

So, in Parhan v. Pulliam, 5 Coldw. 497, in upholding the validity of a stipulation in a note for payment in addition to 10 per cent interest, of attorneys' fees for collection in case of suit, the court said in regard to the contention that the stipulation was usurious: "The contract of the debtor to pay the attorney's commission in case of suit upon default of payment of the debt . . . adds nothing to the amount of interest to be paid to the creditor. If the debtor pays the 10 per cent interest stipulated, and also pays the attorney's commissions, the creditor has received no more than the 10 per cent interest. If he do not pay the attorney's commission, the creditor receives, to that extent, less than the 10 per cent interest."

"The ruling that such stipulation [for a specified fee] makes the note usurious is founded upon the unauthorized assumption of fact that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the real nature of the transaction it should be treated accordingly. But the fact cannot be assumed any more than that a like sum of the alleged principal is illegal interest in disguise. . . . An agreement by a debtor to pay a reasonable attorney's fee in case his creditor is compelled to incur the expense of an action to collect the debt is only an agreement to so far reimburse the creditor the loss which he may sustain by reason of the debtor's failure to perform his contract to pay his debt. In justice and fairness it stands on as high ground as the right to recover damages for the nonperformance of any contract." Wilson Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806.

See also Bank of Commerce v. Fuqua, 11 Mont. 285, 14 L.R.A. 588, 28 Am. St. Rep. 461, 28 Pac. 291.

Consideration.

In Weigley v. Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. 881, it is said: "A stipulation by which a debtor agrees to pay the fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt is an agreement which is not only eminently just, but which rests upon a good and valuable consideration. It is not in the nature of a gratuity, but is a contract by which the debtor, in part consideration of the credit given him, agrees to indemnify his creditor against the consequences of his neglect or refusal to pay, whereby the creditor may be subjected to the necessity of employing and paying an attorney."

And as to whether there was sufficient consideration to support a stipulation in a note for the payment of reasonable attorneys' fees in case action was begun to collect the note, it was said in Peyser v. Cole, 11 Or. 39, 50 Am. Rep. 451, 4 Pac. 520: "Upon the point of the sufficiency of consideration for such a stipulation, we think there can be no doubt. Making the loan itself, although at the highest rate of interest allowed by law, would constitute a valuable and sufficient consideration."

"The right of the payee to require the indemnity against loss, and the right of the maker of the note to contract to secure the payee against the same, necessarily dispose of the objection that the promise [to pay an attorney fee] was without consideration." Barton v. Farmers' & M. Nat. Bank, 122 Ill. 352, 13 N. E. 503. The making of the loan or the giving of the credit was regarded as a good consideration for the promise of indemnity by the debtor.

And where a warrant of attorney was given to confess judgment on a note for the amount of the note and for $400 attorney's fee, it was said: "The agreement to pay the attorneys' fees in case judgment should be confessed upon the note in question gave the note currency as well as security, and rendered the note more valuable than though a provision for the payment of attorneys' fees had not been

costs in the court below. Costs in this court will be adjudged to the plaintiff in error.

Miller, P., dissenting:

I am of opinion not to concur. Concededly the opinion is against the great weight of authority, including the leading case of Campbell v. Shields, 6 Leigh, 517, a case directly in point, and other Virginia cases antedating the separation of the states, and, as many times decided, binding on us. The decision in Campbell v. Shields was reached after the question involved had been a long time controverted in Virginia, and, so far as I have found, it was never thereafter questioned until Rixey v. Pearre Bros. 89 Va. 113, 15 S. E. 408, which makes no reference to the prior Virginia decisions, and refers only to the Michigan case of Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356.

Mr. Daniel has apparently with great care, in the last edition of his work on Negotiable Instruments, vol. 1, §§ 62 and 62a, collated in the notes to these sections all the decisions of the different states covering the subject, and it is only necessary to refer thereto to learn how overwhelming the decisions of the various states are against the position taken in the opinion. As a general rule these opinions are uninfluenced by statute, and like the early Virginia cases are merely declaratory of the general law. Most of them sustain not only the validity of such stipulations, but likewise

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incorporated in the note and power of attorney. Such agreement was supported by a good consideration." Keenan v. Blue, 240 Ill. 177, 88 N. E. 553.

In Johnson v. Durner, 88 Ala. 580, 7 So. 245, an action to enforce a vendor's lien evidenced by notes containing a stipulation for payment of a reasonable attorney's fee, it was said: "In equity, the promise to pay attorneys' fees in the event of a suit to enforce the payment of the purchase money is a part of the consideration agreed to be paid for the lands, the payment of which equity and good conscience require, and without the payment of which the vendor does not receive the full consideration money agreed to be paid. Such promise constitutes a part of the consideration, on the same principle on which a promise to pay, in addition to the amount specifically expressed in the conveyance, a debt of the vendor to a third person, constitutes a part of the price of the land."

And in Williams v. Meeker, 29 Iowa, 292, where a mortgage provided that in case of foreclosure a reasonable attorney's fee might be recovered and included in the judgment, the court said: "We know of no reason why parties cannot be permitted to enter into such contracts, and enforce them. A debtor, by refusing or neglecting to pay his creditor, imposes upon him the expense of resorting to the law to enforce his rights. It is equitable and just that the debtor, in such case, should pay the expenses which he has imposed upon his creditor. While the law makes no provision for enforcing such a conscionable obligation, it will certainly be esteemed a sufficient consideration upon which to base a contract whereby the party binds himself to do that which in conscience he ought to do, or to reimburse his creditor for expenses which his own wrong has made necessary to be incurred."

b. Denying validity.

In holding a stipulation for payment of a reasonable attorney's fee in case the mortgage was foreclosed invalid, the court in Thomasson v. Townsend, 10 Bush, 114, said that the fee was in the nature of a penalty imposed in case the mortgagor should fail to satisfy the debt before judgment, and that such agreements were inconsistent with the policy of the law; that the statute fixed attorneys' fees taxed as costs in equity cases at $5, and if parties by contract could increase this item of costs, there was no reason why all other costs might not be so increased; also that such contracts were in their nature usurious, not being enforceable without allowing the creditor to recover a greater sum than his debt with legal interest and costs.

Regarding the above case, however, the court in Gaar v. Louisville Bkg. Co. 11 Bush, 180, 21 Am. Rep. 209, said that when the whole opinion was construed together it was clear that the court therein did not regard the contract as usurious, but that the amount to be paid as attorneys' fees was a penalty merely. So that in the Garr Case, while it appears that attorneys' fees were not allowed in an action on a bill of exchange which contained an agreement to pay a reasonable attorney's fee in case of suit, the contract was not regarded as usurious so as to prevent the recovery of legal interest.

In Dow v. Updike Bros. 11 Neb. 95, 7 N. W. 857, the court, in holding a stipulation in a note for payment, in addition to the legal interest, of a reasonable attorney's fee for prosecuting a suit thereon if the note is not paid at maturity, invalid, said that "the reason is, the law fixes a limitation to the amount to be paid for the use of money. If the borrower may be compelled to pay 10 per cent collection fees in addition to lawful interest, in case suit is brought, could not a contract to pay 10, 20, or a greater per cent, as liquidated damages, in case of failure to pay promptly at the day the debt became due, be enforced, and thus the law regulating the rate of interest be virtually repealed?"

And in Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356, where provisions in notes for payment, in addition to the highest legal rate of interest, of an attorney's fee of $15, should any proceeding be instituted

the negotiability of the instrument. Many uphold the validity of the stipulations, while denying the negotiability of the instrument. A few hold the stipulations penal and void; and one or two cases, including the Ohio case of Shelton v. Gill, 11 Ohio, 417, hold them usurious and subject to the statutes against usury. In 3 Minor's Inst. pt. 1, p. 311, this great expounder of the Virginia law, referring among others to the case of Campbell v. Shields, places contracts or stipulations for collection expenses along with brokerage contracts, and holds such contracts not usurious. He says it is not usury for a creditor who gives indulgence to his debtor to include the commission which he would have to pay to an agent for collecting the debt for him.

The reason given in the opinion for going against the Virginia cases binding us, and against this great weight of authority, is that such stipulations tend to usury, oppression, and to the encouragement of litigation. I do not see how this is so in theory or in fact. If such was the fact it seems remarkable that so many of the great commercial states of the country continue to deny the usurious character of such stipulations, and to hold them collateral and enforceable, not necessarily to the full amount stipulated, but only for reasonable attorneys' fees and collection expenses, not exceeding the sum stipulated. Such construction robs them not only of the taint of usury, but also of any danger from oppression or the encouragement of litigation.

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for their collection, were held void, the court took the position that such stipulations were opposed to the policy of the laws in that state concerning attorneys' fees, it being said that attorneys' fees which the successful party was permitted to recover were prescribed by statute or by rule of court; also that such stipulations were also opposed to the policy of the law as indicated by the usury statute fixing a maximum of 10 per cent interest, which should not be exceeded under any circumstances.

In State use of Fund Comrs. v. Taylor, 10 Ohio, 378, where the loan was made at the highest legal rate of interest, the court said that if the agreement to pay 5 per cent attorneys' fees could be enforced, the statutes of that state regulating the rate of interest would be virtually repealed.

While the objections to stipulations for attorneys' fees have often been stated, the statements are for the most part mere repetitions in various forms of the views already indicated in the note and in RALEIGH COUNTY BANK v. POTEET, and quotations therein.

V. Statutory provisions.

A statute providing that on foreclosure the attorney's fee shall be fixed by the court having charge of the proceedings, any stipulation in the mortgage to the contrary notwithstanding, has been construed not to authorize the court to allow a larger attorney's fee than the one stipulated in the mortgage. Monroe v. Fohl, 72 Cal. 568, 14 Pac. 514. The court was regarded as having power only to fix an attorney's fee not exceeding the stipulated amount. To a similar effect is Hotaling v. Montieth, 128 Cal. 556, 61 Pac. 95. See also Bank of Woodland v. Treadwell, 55 Cal. 379; Grangers' Business Asso. v. Clark, 84 Cal. 201, 23 Pac. 1081; Edwards v. Grand, 121 Cal. 254, 53 Pac. 796; and Damon v. Quinn, 143 Cal. 75, 76 Pac. 818.

A stipulation in a note for payment of $10 attorneys' fees in case of suit thereon was held in Farmers' Nat. Bank v. Rasmussen, 1 Dak. 60, 46 N. W. 574, not to come within the provision of a statute that "penalties imposed by contract for any nonperformance thereof are void;" but to come within another provision of the statute, that parties to a contract may agree upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

So, in Danforth v. Charles, 1 Dak. 285, 46 N. W. 576, a stipulation in a mortgage for the payment of a reasonable attorney's fee if suit should be begun thereon was held not to be a contract for a penalty within the first provision of the above statute.

Under a statute providing that on foreclosure of a mortgage there shall be allowed an attorney's fee of "$10 and no more," it has been held that a stipulation in the mortgage for payment of a larger attorney's fee is not binding on a grantee of the land who takes it subject to the mortgage. First M. E. Church v. Fadden, 8 N. D. 162, 77 N. W. 615.

In South Dakota it was provided by statute in 1889 that a provision in a note, bond, mortgage, or other evidence of indebtedness, for the payment of an attorney's fee in case of default in payment, is void as against public policy. Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439. See also National Bank v. Fenney, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, rehearing on other points in 12 S. D. 156, 46 L.R.A. 736, 76 Am. St. Rep. 594, 80 N. W. 186, where a provision in a note for the payment of reasonable attorneys' fees in case the note should be collected by action was held void under the statute.

The earlier rule in Georgia that stipulations for attorneys' fees were valid (Merck v. American Freehold Land Mortg. Co. 79 Ga. 213, 7 S. E. 265; National Bank v. Danforth, 80 Ga. 55, 7 S. E. 546) was changed by a statute in that state enacted in 1891, which provided that "obligations to pay attorneys' fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are

Campbell v. Shields and other Virginia cases would so construe them. A creditor bound to collect his debt by law would not stop short of enforcing his rights by legal action, because of the expense he would incur in the litigation.

In reply to the suggestion that such contracts are usurious Mr. Daniel says: "Such stipulations do not, we think, render such instruments usurious. The additional amounts are in consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money." [1 Dan. Neg. Inst. 4th ed. § 62a.]

True the more recent Virginia decisions, referred to in the opinion, tend to unsettle the law of that state, but those decisions are not binding on and should not disturb us. While R. S. Oglesby Co. v. Bank of New York, 114 Va. 663, 77 S. E. 468, the most recent Virginia case, involved a New York contract, and for that reason may not be exactly in point, nevertheless it criticizes Rixey v. Pearre Bros. and Fields v. Fields, 105 Va. 714, 54 S. E. 888, and approves the earlier Virginia cases, including Campbell v. Shields, and the inference to be drawn from the argument is a purpose to adhere to the principles of the earlier cases. Reference is made in the opinion to Toole v. Stephen, 4 Leigh, 581, as being opposed to Campbell v. Shields, but it is not. Quite the contrary. The distinction noted between the two cases is important. In the Toole-Stephen Case the promise was abso-

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void, and no court shall enforce such agreement to pay attorneys' fees, unless a plea or pleas be filed by the defendant and not sustained." Demere v. Germania Bank, 116 Ga. 317, 42 S. E. 488, holding that the statute applied where there was a stipulation for payment of a certain per cent as attorneys' fees in a deed given to secure a note, the contention being denied that the statute applied only where the obligation to pay attorneys' fees was contained in the note or other evidence of indebtedness. And it was held that a judgment for attorneys' fees was invalid in this case, because the defendant did not appear or plead. Among possibly other cases construing and applying this statute, the question usually being as to the construction of the last clause thereof, are: Butler v. Mutual Aid Loan & Invest. Co. 94 Ga. 562, 20 S. E. 101; Goodrich v. Atlanta Nat. Bldg. & L. Asso. 96 Ga. 803, 22 S. E. 585; Mashburn v. Inman, 97 Ga. 396, 24 S. E. 39; Carlton v. White, 99 Ga. 384, 27 S. E. 704; Hall v. Pratt, 103 Ga. 255, 29 S. E. 764; Jones v. Harrell, 110 Ga. 373, 35 S. E. 690; Stoner v. Pickett, 115 Ga. 653, 42 S. E. 41; Glisson v. Weil & Co. 117 Ga. 842, 45 S. E. 221; Trentham v. Bluthenthal, 118 Ga. 530, 45 S. E. 421.

The above statute was, however, amended in 1900 by a provision that an obligation to pay an attorney's fee shall be enforceable where "the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same, provided the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought, of his intention to bring suit, and also the term of the court to which suit will be brought." Among possibly other cases construing and applying the statute as amended are the following, the question involved usually being as to the construction of that part of the statute relating to notice and the sufficiency of the notice given: Stoner v. Pickett, 115 Ga. 653, 42 S. E. 41 (amendment not applicable where debt was previously contracted); Holcomb v. Cable Co. 119 Ga. 466, 46 S. E. 671; Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525; Browne v. Edwards, 122 Ga. 277, 50 S. E. 110; Pritchard v. McCrary, 122 Ga. 606, 50 S. E. 366; Everett & Son v. Ferst's Sons & Co. 126 Ga. 662, 55 S. E. 916; Stocking v. Moury, 128 Ga. 414, 57 S. E. 704; Harris v. Powers, 129 Ga. 74, 58 S. E. 1038, 12 Ann. Cas. 475; Smith v. Baker, 137 Ga. 298, 72 S. E. 1093; Shaw v. Probasco, 139 Ga. 481, 77 S. E. 577; Mt. Vernon Bank v. Gibbs, 1 Ga. App. 662, 58 S. E. 269; Clements v. National Bank, 4 Ga. App. 270, 61 S. E. 146; Baskins v. Valdosta Bank & T. Co. 5 Ga. App. 600, 63 S. E. 648; Livingston Bros. v. Salter, 6 Ga. App. 377, 65 S. E. 60; Oliver Typewriter Co. v. Fielder, 7 Ga. App. 525, 67 S. E. 210; Edenfield v. Bank of Millen, 7 Ga. App. 645, 67 S. E. 896; Rylee v. Bank of Statham, 7 Ga. App. 489, 67 S. E. 383; Holland v. Mutual Fertilizer Co. 8 Ga. App. 714, 70 S. E. 151; Donovan v. Hogan, 8 Ga. App. 754, 70 S. E. 153; Miller v. Roberts, 9 Ga. App. 511, 71 S. E. 927; Linam v. Anderson, 12 Ga. App. 735, 78 S. E. 424; Turner v. Bank of Maysville, 13 Ga. App. 547, 79 S. E. 180; Walker v. Wood, 14 Ga. App. 29, 79 S. E. 905; Aycock v. Tillman, 14 Ga. App. 80, 80 S. E. 301; Langford v. Backus, 14 Ga. App. 300, 80 S. E. 723; Valdosta, M. & W. R. Co. v. Citizens' Bank, 14 Ga. App. 329, 80 S. E. 913.

A stipulation in a note to pay 10 per cent as attorneys' fees if the note is placed in the hands of an attorney for collection is a conditional contract, the condition being supplied by the above statute, which makes the giving of written notice of the intention to bring suit a condition precedent to the recovery of attorneys' fees. Valdosta, M. & W. R. Co. v. Citizens' Bank, 14 Ga. App. 329, 80 S. E. 913; Turner v. Bank of Maysville, 13 Ga. App. 547, 79 S. E. 180.

In Miller v. Roberts, 9 Ga. App. 511, 71 S. E. 927, it was held that the parties to a note containing a stipulation for payment of 10 per cent as attorneys' fees if collected by law could not, by a provision in the note, waive the statutory notice, as the provision in the statute was not merely

lute to pay judgments recovered by the creditor with costs and attorneys' fees, as the opinion concedes, already incurred. The promise held usurious was unconditional. There was no way for the debtor to escape payment. This is the exact point of distinction, and the reason why in the one case the promise was held usurious, and in the other not so. Pollard v. Baylor, 6 Munf. 433, Anno., and the cases cited in the note, make this distinction very plain. The first point of the syllabus in that case is: "A penalty inserted in a contract, from which the party may deliver himself, does not make such contract usurious." And in the second point of the syllabus it is said: "The question whether a contract is usurious or not is to be decided with reference to the time when it was entered into; for a contract legal at such time cannot be made usurious by subsequent events."

In Ward v. Cornett, 91 Va. 681, 49 L.R.A. 550, 22 S. E. 494, it was decided that, where a debtor by punctual payment of the debt may relieve himself and avoid the payment of the illegal interest stipulated for, it is not usury.

I do not see how it can be said that we have any policy in this state against this character of contracts. Prior to the recent Virginia cases I do not think any lawyer would have hesitated on looking to the Virginia decisions, binding us, and to Mr. Minor's statement of the law on the subject, and seeing the great weight of authority supporting these early Virginia cases,

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for the benefit of the debtor, but involved a matter of public policy.

And in British & A. Mortg. Co. v. Worrill, 168 Fed. 120, it was held that under the Georgia statute attorneys' fees could be recovered on foreclosure of a mortgage securing notes containing a stipulation for such fees, as well as in an action on the notes.

Under the Georgia statute a stipulation in a chattel mortgage for payment of attorneys' fees has been held void. Davenport v. Richards, 138 Ga. 611, 75 S. E. 648.

The Georgia statute, as amended in 1900, was held in Oliver Typewriter Co. v. Fielder, 7 Ga. App. 525, 67 S. E. 210, not to apply to a case where the creditor, "not having taken from the principal debtor any obligation to pay attorneys' fees, makes a distinct and separate contract with a third person, that if he will extend credit to his debtor, and if, as a result thereof, he has to expend any sum in collecting the indebtedness," the third party will repay to the creditor the amount expended. So that the statutory notice was not required to entitle the creditor to recover from the third party the amount expended for an attorney to collect the debt from the debtor.

In American Mortg. Co. v. Rawlings, 127 Ga. 82, 56 S. E. 110, where the original note on which action was brought (executed before the Georgia statute of 1891) contained a stipulation to pay 10 per cent attorneys' fees in case of collection by suit, it was held that the obligation to pay attorneys' fees was a part of the liability revived or extended by an agreement of the parties extending the time of payment, although the law in regard to contracts for attorneys' fees had been changed between the time of execution of the note and the date of the subsequent agreement (statute of 1891), and again between the date of that agreement and the commencement of the action (statute of 1900).

In Idaho it is provided by statute that parties may stipulate for payment of attorneys' fees in case the debt is not paid at maturity. Tipton v. Ellsworth, 18 Idaho, 207, 109 Pac. 134, holding that the fact that several notes are given for a loan, each providing for an attorney's fee, does not alone show usury, especially where the loan is for less than the legal rate.

In Barton v. Farmers' & M. Nat. Bank, 122 Ill. 352, 13 N. E. 503, it was held that the rule that a stipulation in a note for payment of a definite sum as an attorney's fee in case the note is placed in the hands of an attorney for collection is valid was not changed by a statute providing that all contracts for "interest or compensation" at a greater rate of interest than therein specified, "on account of nonpayment at maturity," are usurious, as the provision for an attorney's fee was not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee. To the same effect are Dorsey v. Wolff, 142 Ill. 589, 18 L.R.A. 428, 34 Am. St. Rep. 99, 32 N. E. 495, and Matzenbaugh v. Troup, 36 Ill. App. 261.

And in Ricker v. Scofield, 28 Ill. App. 32, where a note contained a stipulation for payment of 10 per cent attorneys' fees in case of default and the bringing of suit to collect the debt, it was said that the attorneys' fee thus provided for could not justly be regarded as "interest," "discount," or "compensation" received or contracted for by the payee, in such sense as to render the principal contract usurious within the statute.

As indicated above (see III. a, 1, supra), the early cases in Indiana sustained the validity of a stipulation for payment of an attorney's fee in case of failure to pay the debt or of institution of action thereon. But in 1875 a statute was enacted in that state providing that "all agreements to pay attorney fees depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void." Churchman v. Martin, 54 Ind. 380. Accordingly, it was held in that case that a stipulation in a note for payment of 10 per cent attorneys' fees if suit should be instituted on the note was invalid. But it was also held that attorneys' fees should be allowed on another note containing a clause,

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to advise his client that such contracts were enforceable in Virginia and in this state. One of the strong reasons noted by Mr. Daniel, given or implied in the many cases upholding the validity of such stipulations and the negotiability of the instrument containing them, is that, being an indemnity by the maker against the consequence of his own act or default, they are entirely consonant with public policy because they add to the value of the paper, and tend to lower the rate of interest and discount, and as these decisions say, how can contracts of this character be against public policy when the debtor may avoid their effect by prompt payment or payment before suit? To hold otherwise is to unduly hamper commerce and the freedom of contracts. In this day and age the business of the usurer has become unprofitable. Money, as a general rule, is plentiful and seeking investment at legal rates, and below legal rate in many instances, and the chances for hard bargains are few. A borrower does not have to submit to hard bargains these days. But why should it be thought a hardship or oppressive for him who has laid by a few dollars for old age, and on the income of which he depends for his existence, to bargain with the borrower that if he fails to pay the debt and interest, as agreed, he, and not the lender, shall bear the burden and expense of collection? All loans are not of this character, it is true. But even the banks are engaged in loaning the money of the people intrusted to them, and who depend on their earnings for daily support, and the principle is the same.

"and 5 per cent attorney's fees," because the statute did not apply to the latter note, there being no condition therein set forth upon which the payment of the attorneys' fees was dependent. It was said that the agreement in the latter note was for the unconditional payment of 5 per cent attorneys' fees, while in the former note it was to pay the attorneys' fees on the condition set forth in the note, namely if suit should be instituted thereon; that perhaps there would be an implied condition in the latter note that the attorneys' fees were to be paid only in case it became necessary to employ an attorney to collect it, but if so that would not bring the note within the statute, for the statute applied only where there was an express condition.

In accordance with the views last indicated, and following the case of Churchman v. Martin, supra, it was held in Brown v. Barber, 59 Ind. 533, that a stipulation for attorneys' fees was valid where the maker of the note promised to pay a certain sum with interest "and all costs and attorneys' fees."

And in Tuley v. McClung, 67 Ind. 10, a stipulation in a note for payment of "attorneys' fees for collecting the same" was held to fall within the above rule sustaining the validity of the stipulation, and not within the statute. The contention was denied that the agreement to pay the attorneys' fees in this case was really upon the condition of suit being brought upon the note, and hence void under the statute, the court saying that the statute embraced only agreements to pay attorney's fees depending upon conditions therein set forth, and not such as might have some impliedly conditional construction placed upon them.

The above statute was held in Farmers' Nat. Bank v. Sutton Mfg. Co. 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 L. ed. 191, not to apply to a stipulation in bill of exchange for payment of a certain sum with interest and attorneys' fees, although the stipulation for attorneys' fees was construed as becoming operative only after the bill had been dishonored, the court following the Indiana decisions, and holding that as the condition was not expressed in the bill, but was only implied, the statute did not apply.

And the Indiana statute has been held not to apply to a stipulation in a mortgage given to secure a bond, for payment of an attorney's fee on foreclosure, where the bond contains no such stipulation, as the bond, and not the mortgage, is the written evidence of indebtedness, the mortgage being a mere security. Barry v. Snowden, 106 Fed. 571, the statute being regarded as one which shoulud be strictly construed.

The case of Churchman v. Martin, supra, has been followed in a number of other Indiana cases in which the rule has been laid down that an unconditional stipulation in a note for the payment of attorneys' fees is valid. Sinker v. Fletcher, 61 Ind. 276; Smock v. Ripley, 62 Ind. 81 (stipulation in a note for payment of a certain sum "and 10 per cent attorneys' fees"); Garver v. Pontious, 66 Ind. 191 (similar stipulation); Bond v. Orndorf, 77 Ind. 583; Harvey v. Baldwin, 124 Ind. 59, 24 N. E. 347, 26 N. E. 222.

The Iowa statute of 1880 regulating and limiting the amount of attorneys' fees that may be taxed in suits on written contracts stipulating for the payment of attorneys' fees was held in Eikenberry v. Edwards, 71 Iowa, 82, 32 N. W. 183, not to apply to a note executed before the enactment of the statute and containing a stipulation for the payment of reasonable attorneys' fees.

And a statute providing that in an action on a written contract containing a stipulation for attorneys' fees, the fees allowed shall be certain graduated per cents depending on the amount of the debt, was construed in Bankers' Iowa State Bank v. Jordan, 111 Iowa, 324, 82 N. W. 779, to mean that the computation, as applied to an action on notes given at different times, and declared on in separate counts, should not be made on the total amount claimed, but upon each note separately, although the amount of the attorneys' fees was thereby increased.

The hundred years and more of judicial history in this country, and where these contracts have been upheld, has failed to develop the evils portended in the opinion. The uniform negotiable instruments law adopted in this state and in most of the other states recognizes the validity of such contracts, and specifically provides that they shall not render instruments uncertain or destroy their negotiability. It seems to me these laws are entitled to some consideration in this connection. The reason noted in some of the decisions why instruments bearing such stipulations are not rendered uncertain and non-negotiable is that they in no way affect the sum certain to be paid at maturity, the obligation of the contract maturing subsequently to the date of the maturity of the instrument.

The opinion I think finds no support in Genin v. Ingersoll, 11 W. Va. 549; Hurst v. Hite, 20 W. Va. 183, and Boggess v. Goff, 47 W. Va. 139, 34 S. E. 741. Those cases as I interpret them do no more than declare the rules applicable to partial payments with respect to the question of compounding interest. The Boggess-Goff Case would justify a new contract to pay interest on interest after interest has become due, without such new contract being affected by usury.

But it is unnecessary in a dissenting opinion already too extended to further elaborate the questions discussed. I would affirm the judgment, and Judge Williams, I am authorized to say, concurs with me in this dissent.

Under the Iowa statute attorneys' fees cannot be recovered unless the attorney claiming the fee files with the clerk at the time of commencing suit an affidavit that there is no agreement, express or implied, between him and his client for any division or sharing of the fee to be taxed. Re Hersey, 171 Fed. 1004.

Under a statute providing that the court should not tax over $2 as an attorney's fee in case of foreclosure of any mortgage or trust deed, it was held in Lender v. Caldwell, 4 Kan. 339, that it was error on foreclosure to allow an attorney's fee of $40, the court saying that a contract between the parties in derogation of the statute could not be enforced.

The above statute was, however, repealed in 1868, and in Tholen v. Duffy, 7 Kan. 405, it was held that a stipulation in a mortgage for payment of 10 per cent attorneys' fees was valid, and the stipulated amount was allowed, the court saying that it was true there might be cases where the amount stipulated to be paid was so excessive that a court of equity would not enforce it; that this was not one of those cases. The loan in this instance was for $1,000.

That in Kansas, however, a stipulation to pay attorneys' fees is unenforceable under a statute enacted in 1876, see Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603.

In Gaar v. Louisville Bkg. Co. 11 Bush, 180, 21 Am. Rep. 209, it was held that a stipulation in a bill of exchange for payment of a reasonable attorney's fee if suit should be brought thereon was not an agreement for payment of interest so as to render the contract usurious within a statute providing that if any rate of interest exceeding 10 per cent shall be charged, the whole interest shall be forfeited, the bill bearing interest at the rate of 10 per cent after maturity in addition to providing for payment of the attorney's fee.

It has been held that a contract by the debtor to pay attorneys' fees in case it is necessary to institute suit to collect the debt is not prohibited by a statute providing that the damages for delay in the performance of an obligation to pay money are interest, and whatever loss the creditor may have suffered he can recover no more. Bacas v. Klein, 14 La. Ann. 408.

And it has been held that a statute providing that no mortgage shall be a lien on any property for any other or different principal sum than such principal sum as shall appear on the face thereof does not prohibit the allowance in a foreclosure action of the mortgagee's attorney's fees, where the mortgage contains a covenant by the mortgagor to pay attorneys' fees in collecting the debt. Maus v. McKellip, 38 Md. 231.

In Minnesota it is provided by statute that the stipulated attorneys' fees in a mortgage, to be paid in case of foreclosure, shall not exceed stated sums, and that no attorney's fee shall be taxed or retained by the mortgagee unless he himself employs and pays an attorney. Morse v. Home Sav. & L. Asso. 60 Minn. 316, 62 N. W. 112. The court said that the mortgagee has no right to the stipulated attorneys' fees in a mortgage except to indemnify himself for such reasonable sum, not exceeding the amount limited by statute and named in the mortgage, as he actually pays or absolutely and unconditionally incurs for the services of an attorney in foreclosing the mortgage.

Under the Nebraska statute of 1873 providing that in an action for the foreclosure of a mortgage or on a written instrument for the payment of money only, there should be allowed to the plaintiff, upon a recovery of judgment by him, a sum to be fixed by the court in addition to the judgment, not exceeding 10 per cent of the recovery, as an attorney's fee, in all cases where the writing upon which the action is brought in express terms provides for the allowance of an attorney's fee, it has been held that a fee cannot be recovered unless it is allowed by the court, and only in cases where the instrument upon which the action is brought in express terms provides for its allowance; so that an at-

torney's fee paid by a judgment debtor in addition to 10 per cent interest, to secure an extension of time for payment, was held usurious, and the amount paid was regarded as a payment *pro tanto* upon the judgment. Rosa v. Doggett, 8 Neb. 48.

The repeal of the above statute in 1879 was held in White v. Rourke, 11 Neb. 519, 9 N. W. 689, not to affect the right to recover an attorney's fee provided for by a note executed in 1876.

In American Mortg. Co. v. Downing, 17 Fed. 660, the court said that the repeal of the Nebraska statute left the question as though no statute had ever been passed, and upon principle and authority it was clear that parties were fully competent to make their own contracts, and there was nothing in the policy of the law which forbade them to pay costs and expenses, including attorneys' fees, which they might cause by reason of their own default. And in this case an agreement in a mortgage to pay attorneys' fees on foreclosure was held valid by the Federal court in Nebraska. That the Nebraska courts, however, do not take this view, see III. a, 2, and III. b, 2, supra.

The provision of the negotiable instrument law prescribing as a requisite of a negotiable instrument that it must contain an unconditional promise to pay a sum certain, and that the sum payable is a sum certain within the meaning of the act, although it is to be paid with costs of collection or an attorney's fee in case payment is not made at maturity, has been held not to render valid a stipulation in a note for payment of an attorney's fee. Miller v. Kyle, 85 Ohio St. 186, 97 N. E. 372. The provision was construed as applying only to the question of negotiability.

And this provision has been held not to be a statutory recognition of the conclusiveness of the amount stipulated in a note as an attorney's fee, so as to entitle the holder to recover such amount irrespective of its reasonableness, where, prior to the statute, the validity of stipulations for attorneys' fees was sustained, but the negotiability of notes containing them was denied. Mechanics'-American Nat. Bank v. Coleman, 122 C. C. A. 338, 204 Fed. 24.

The Ohio statute of 1902 providing that a stipulation for an attorney's fee in a note if not paid at maturity is valid was held in Re Chadwick, 140 Fed. 674, not to apply to a stipulation in a chattel mortgage for attorneys' fees on foreclosure, in view of Ohio decisions before the enactment of the statute holding stipulations in mortgages for attorneys' fees void as against public policy. Accordingly, in this case a stipulation in a chattel mortgage for the payment of attorneys' fees was held invalid.

Statutory provisions that, in cases of foreclosure when an attorney's fee is claimed by the plaintiff, no greater amount shall be allowed than the sum which shall appear by the evidence to be actually charged by, and to be paid to, the attorney, and that in all cases of foreclosure the attorney's fee shall be fixed by the court in which the proceedings are had, any stipulation in the mortgage to the contrary notwithstanding, have been held to apply to foreclosure proceedings only, and not to an action on a note containing a stipulation for payment of a certain per cent as attorneys' fees. Utah Nat. Bank v. Nelson, 38 Utah, 169, 111 Pac. 907.

Under the above statute it was held in Kurtz v. Ogden Canyon Sanitarium Co. 37 Utah, 313, 108 Pac. 14, that the court was authorized to hear the testimony of other attorneys to aid it in fixing a reasonable attorney's fee, as it could fix the fee at a lesser sum than that stipulated.

The rule declared by statute in Washington previously to the change in the law made in 1895 was that in all judgments on notes and similar instruments in writing an attorney's fee might be allowed when specially contracted to be paid by the terms of the note or mortgage, "in any amount so specifically contracted." Under this statute it has been held that, where a note or mortgage contains a stipulation for payment of a specific sum for an attorney's fee, the court in an action on the note or mortgage must allow such sum, even though it appears unreasonable, and is not authorized to allow a smaller sum on the ground that a less amount would be reasonable. Exchange Nat. Bank v. Wolverton, 11 Wash. 108, 39 Pac. 248 (stipulation in note for $12,000, for payment of $1,000 attorneys' fees); Haywood v. Miller, 14 Wash. 660, 45 Pac. 307 (stipulation in mortgage given to secure a debt of $6,000, for payment of 20 per cent attorneys' fees); Poncin v. Furth, 15 Wash. 201, 46 Pac. 241 (stipulation in note for $23,000, for payment of 5 per cent attorneys' fees); Ames v. Bigelow, 15 Wash. 532, 46 Pac. 1046 (stipulation in note and mortgage for payment of $500 attorneys' fees on foreclosure); Scholey v. De Mattos, 18 Wash. 504, 52 Pac. 242 (stipulation in mortgage given to secure a debt of $12,000, for payment of an attorney's fee of $1,600); Gordon v. Decker, 19 Wash. 188, 52 Pac. 856 (holding it error to allow an attorney's fee of only $50, on the ground that that was a reasonable fee, where the mortgage stipulated for an attorney's fee of $300, the court saying that where an attorney's fee is provided for in terms in a note or mortgage, the same must be allowed by the court regardless of its reasonableness); Vermont Loan & T. Co. v. Greer, 19 Wash. 611, 53 Pac. 1103 (holding it error to allow an attorney's fee of only $100, where the mortgage provided for payment of a fee of $300, although the former amount was allowed on the ground that the amount stipulated for was unjust and unconscionable). See also Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710, and McDougall v. Walling, 19 Wash. 80, 52 Pac. 530.

The extent to which the above doctrine was carried is well illustrated in the case of Scholey v. De Mattos, supra, where the stipulated attorney's fee of $1,600 was al-

lowed, although the defendant offered to prove that $200 was a reasonable and usual fee for the services rendered, this evidence being excluded.

Whether or not a contract by the plaintiff with his attorney for a lesser sum would defeat the plaintiff's recovery of the stipulated attorney's fee was a question which it was said in Scholey v. De Mattos, supra, would require further consideration, if the question had been properly raised by the pleadings, evidence having been excluded, on the ground that it was immaterial, that the plaintiff's attorney was to receive not to exceed $200.

In Remington v. Willard, 15 Wis. 583, it was held that the court on foreclosure had statutory power to allow as an attorney's fee a sum greater than that stipulated in the mortgage. But see Palmeter v. Carey, 63 Wis. 472, 21 N. W. 793, 23 N. W. 586, holding that the allowance for an attorney's fee on foreclosure must be limited by the stipulation in the mortgage, and that it was error to allow for an attorney's fee a greater sum than that specified in the mortgage.

The term "costs" in a statute providing that in all equitable actions costs may be allowed or not to any parties, in the discretion of the court, includes attorneys' fees stipulated in a mortgage to be paid in addition to the taxable costs. Spengler v. Hahn, 95 Wis. 472, 70 N. W. 466.

In Boyd v. Sumner, 10 Wis. 41, the court said that where the parties by agreement fixed a reasonable amount for the entire fees of an attorney, it would probably be within the discretion of the court to refuse to tax the amount allowed by statute, but that the statute did not prevent parties from contracting for payment of a larger sum for attorneys' fees than was therein provided.

In Wilson Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. 806, it was held that a statute allowing the prevailing party to tax an attorney's fee of from $5 to $20 was not exclusive, and did not prohibit the parties from making a valid contract for a larger sum as an attorney's fee. To a similar effect see Wisconsin cases under III. b, 1, supra. R. E. H.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHARLES REBILLARD, Plff. in Err.,
v.
MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY.

(— C. C. A. —, 216 Fed. 503.)

Negligence — running automobile without light.

1. An automobilist who attempts to run after dark with only a dim oil light, which does not comply with the statute, along a little used section line trail with which he is not familiar, is so negligent that, in case the machine runs into an unguarded excavation made by a railroad company across the trail, he cannot hold the railroad company liable for the resulting injuries.

Same — guest in automobile.

2. A guest who consents to stay in an automobile when the driver attempts to run it after dark without light, along a road with which no one in the car is familiar, is so negligent that he cannot hold the one responsible for an unguarded excavation in the road liable for injury caused by the machine falling into it.

(July 27, 1914.)

ERROR to the District Court of the United States for the District of North Dakota to review a judgment in defendant's favor in an action brought to recover damages for personal injuries caused by the falling of the automobile in which plaintiff was riding, into an unguarded excavation made by defendant in the construction of its road. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Trieber and Reed, District Judges.

Note. — Imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury.

As to liability of owner or operator of automobile for injury to guest, see note to Beard v. Klusmeier, 50 L.R.A.(N.S.) 1100.

As to liability for injury to passenger by negligent operation of automobile, see notes to Johnson v. Coey, 21 L.R.A.(N.S.) 81, and Hinds v. Steere, 35 L.R.A.(N.S.) 658.

Imputed negligence.

Generally, as to imputed negligence of driver of vehicle to passenger, see notes to Schultz v. Old Colony Street R. Co. 8 L.R.A. (N.S.) 597, and Christopherson v. Minneappolis, St. P. & S. Ste. M. R. Co. L.R.A. 1915A, 761.

By the great weight of authority, the negligence of the driver of an automobile is not imputable to a guest or passenger riding in the machine who has no authority or control over the machine or the driver, and this rule was applied in the following cases: Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 641; Dale v. Denver City Tramway Co. 97 C. C. A. 511, 173 Fed. 787, 19 Ann. Cas. 1223; Lininger v. San Francisco, V. & N. Valley R. Co. 18 Cal. App. 411, 123 Pac. 235; Tousley v. Pacific Electric R. Co. 166 Cal. 457, 137 Pac. 31; Porter v. Jacksonville Electric Co. 64 Fla. 409, 60 So. 188; Indiana Union Traction Co. v. Love, 180 Ind. 442, 99 N. E. 1005; Lake Erie & W. R. Co. v. Reed, — Ind. App. —, 103 N. E.

Messrs. **William M. Anderson** and **Murphy & Toner**, for plaintiff in error.

Even if those using the road were mere licensees, the defendant owed them the duty of warning them by building a barrier, placing signal lights, or in some other manner, and neglect of that duty would render it liable to any person injured without contributing fault.

Cartright v. Belmont, 58 Wis. 370, 17 N. W. 237; Schuenke v. Pine River, 84 Wis. 669, 54 N. W. 1007; Bills v. Kaukauna, 94 Wis. 310, 68 N. W. 993.

The acts or negligence of the driver of a conveyance cannot be imputed to a guest, who does not control, and who is not in a position to control, the driver.

Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Dale v. Denver City Tramway Co. 97 C. C. A. 511, 173 Fed. 787, 19 Ann. Cas. 1223; Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 745, 2 Am. Neg. Rep. 100; Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174; Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445.

Even admitting that the driver and all those riding with him were violating the statute, the plaintiff is not precluded thereby from recovering damages, unless such violation of law was the proximate cause of the injury sustained.

Ordinarily only the driver can be held criminally liable.

Huddy, Automobiles, § 218.

127; Hubbard v. Bartholomew, — Iowa, —, 49 L.R.A.(N.S.) 443, 144 N. W. 13; Corley v. Atchison, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555; United R. & Electric Co. v. Crain, 123 Md. 332, 91 Atl. 405; Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737; Littlefield v. Gilman, 207 Mass. 539, 93 N. E. 809; Terwilliger v. Long Island R. Co. 152 App. Div. 168, 136 N. Y. Supp. 733, affirmed without opinion in 209 N. Y. 522, 102 N. E. 1114; Noakes v. New York C. & H. R. R. Co. 121 App. Div. 716, 106 N. Y. Supp. 522, affirmed without opinion in 195 N. Y. 543, 88 N. E. 1126; Ward v. Brooklyn Heights R. Co. 119 App. Div. 487, 104 N. Y. Supp. 95, affirmed without opinion in 190 N. Y. 559, 83 N. E. 1134; Tonseth v. Portland R. Light & P. Co. — Or. —, 141 Pac. 868; Hermann v. Rhode Island Co. — R. I. —, 90 Atl. 813; Latimer v. Anderson County, 95 S. C. 187, 78 S. E. 879.

And the negligence of a husband in operating an automobile will not be imputed to his wife, who is accompanying him, where no relation of principal and agent exists, and she has no control over the operation of the car. Gaffney v. Dixon, 157 Ill. App. 589; Denton v. Missouri, K. & T. R. Co. 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558; Louisville v. Zoeller, 155 Ky. 192, 160 S. W. 500; Senft v. Western Maryland R. Co. — Pa. —, 92 Atl. 553.

So, a girl sixteen years old who is riding in an automobile with her father and a chauffeur, and who has no charge over the machine, is not chargeable with the negligence of the chauffeur. Noakes v. New York C. & H. R. R. Co. 121 App. Div. 716, 106 N. Y. Supp. 522, affirmed without opinion in 195 N. Y. 543, 88 N. E. 1126.

And in Turney v. United R. Co. 155 Mo. App. 513, 135 S. W. 93, a young girl was held to be a guest of the driver of an automobile in which she was riding at the time it collided with a street car, and the driver's negligence was held not imputable to her, although they were nephew and niece of the owner of the automobile.

It is also held that the negligence of the driver of an automobile for hire is not imputable to a passenger who merely gives directions as to the desired destination and exercises no further control over the machine or the driver: Thompson v. Los Angeles & S. D. B. R. Co. 165 Cal. 748, 134 Pac. 709; Roby v. Kansas City Southern R. Co. 130 La. 880, 41 L.R.A.(N.S.) 355, 58 So. 696; Meyers v. Tri-State Automobile Co. 121 Minn. 68, 44 L.R.A.(N.S.) 113, 140 N. W. 184; Rush v. Metropolitan Street R. Co. 157 Mo. App. 504, 137 S. W. 1029; McFadden v. Metropolitan Street R. Co. 161 Mo. App. 652, 143 S. W. 884; Donnelly v. Philadelphia & R. R. Co. 53 Pa. Super. Ct. 78; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; Pla y Hernandez v. San Juan Light & Transit Co. 4 Porto Rico Fed. Rep. 138.

The courts of Michigan and Wisconsin appear to be alone in holding that a guest riding in an automobile is chargeable with the negligence of the driver. This rule was applied in the following cases: Colborne v. Detroit United R. Co. 177 Mich. 139, 143 N. W. 32; Kneeshaw v. Detroit United R. Co. 169 Mich. 697, 135 N. W. 903; Granger v. Farrant, 179 Mich. 19, 51 L.R.A.(N.S.) 453, 146 N. W. 218; Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629. The court in the last case emphasized the fact that the automobile was a private conveyance, and intimated that the same rule would not apply in the case of a public conveyance.

And in Galloway v. Detroit United R. Co. 168 Mich. 343, 134 N. W. 10, it was held that in Michigan the negligence of the driver of an automobile for hire is not imputable to a passenger in an action against a railway company for injuries occasioned by a collision of one of its cars with the machine, the court holding that where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one on whose vehicle the injured person is riding cannot be imputed to the passenger in an action by the latter against the other carrier.

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Mere presence at the time of the commission of an offense is not enough to make a party principal in a crime without some form of participation.

1 McClain, Crim. Law, § 205; 1 Greenl. Ev. § 41; True v. Com. 90 Ky. 651, 14 S. W. 684.

A collateral and unlawful act, not contributing to the injury, will not bar a recovery.

Hughes v. Atlanta Steel Co. 136 Ga. 511, 36 L.R.A.(N.S.) 547, 71 S. E. 728, Ann. Cas. 1912C, 394, 1 N. C. C. A. 429; 1 Thomp. Neg. §§ 82, 249; 37 Cyc. 573; Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co. 23 How. 209, 16 L. ed. 433; Knowlton v. Milwaukee City R. Co. 59 Wis. 278, 18 N. W. 17; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Sharp v. Evergreen Twp. 67 Mich. 443, 35 N. W. 67; Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274; Bigelow v. Reed, 51 Me. 325, 1 Am. Neg. Cas. 289; Illinois C. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665; Baldwin v. Barney, 12 R. I. 392, 34 Am. Rep. 670; Western U. Teleg. Co. v. McLaurin, 70 Miss. 26, 13 So. 36; Cooley, Torts, 269.

Mr. **A. H. Bright**, with Messrs. **Flynn & Traynor**, **P. J. McClory**, and **John L. Erdall**, for defendant in error:

Running the auto without sufficient light was negligence sufficient to defeat a recovery by plaintiff.

Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 428, 159 Fed. 10; Monongahela River Consol. Coal &

—in case of joint enterprise.

In Withey v. Fowler Co. — Iowa, —, 145 N. W. 923, where the plaintiff, while a guest in an automobile, was injured by being struck by a truck, the court, concerning the imputation of a driver's negligence in cases of joint enterprises, said: "It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps sufficiently accurate for present purposes to say that, to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation."

In Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774, where two occupants of an automobile were out riding under an agreement to share the expense, and the car became disabled, and one of them telephoned the defendant to tow the car, during the process of which an accident occurred, it was held that, so long as the joint enterprise of the occupants was in force, the contributory negligence of one would bar a recovery by the other, provided the negligence was in a matter within the scope of the joint agreement.

Personal negligence.

It is a well established rule that a passenger or guest in an automobile operated by another is bound to exercise reasonable care for his safety, and that a failure to do so constitutes contributory negligence and bars any right of recovery against a third person for an injury resulting in part from the latter's negligence. This rule was applied in the following cases: Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 641; Brommer v. Pennsylvania R. Co. 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; Thompson v. Los Angeles & S. D. B. R. Co. 165 Cal. 748, 134 Pac. 709; United R. & Electric Co. v. Crain, 123 Md. 332, 91 Atl. 405; Noakes v. New York C. & H. R. R. Co. 121 App. Div. 716, 106 N. Y. Supp. 522, affirmed in 195 N. Y. 543, 88 N. E. 1126; Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068; Senft v. Western Maryland R. Co. — Pa. —, 92 Atl. 553; Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; Hermann v. Rhode Island Co. — R. I. —, 90 Atl. 813; Pla y Hernandez v. San Juan Light & Transit Co. 4 Porto Rico Fed. Rep. 138.

And in Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523, it was held that the law fixes no different standard of duty for a gratuitous passenger in an automobile than for the driver, but that each is bound to use reasonable care, taking into consideration all of the circumstances, including the passenger's position. The court in this case said: "Does the fact that the plaintiff was a gratuitous passenger having no control of the automobile bring her within a different rule [from that applicable to the driver of the automobile]? That fact would have great weight in determining whether her conduct constituted due care. It would be one of the circumstances, and unquestionably an important one, to be considered in deciding whether her conduct was all that reasonable care on her part called for. A gratuitous passenger, in no matter what vehicle, is not expected ordinarily to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle, or other circumstances of the situation may be such, as to make it his duty to look out for threatened or possible dangers, and to warn the driver of such after their discovery. This might be necessary for the passenger's as well as for the driver's safety. On the other hand, the character of the vehicle in which he is a passenger may be such, or his location in it or the other circumstances may be such, that to look or listen for approaching cars or other dangers would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers, and entirely neglect to look out

Coke Co. v. Schinnerer, 117 C. C. A. 193, 196 Fed. 382; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; Huddy, Automobiles, 187; Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629.

The fact that this act was in violation of a positive statute of the state rendered it doubly culpable and negligent, and such violation of the statute was the proximate cause of the accident.

Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Feeley v. Melrose, 205 Mass. 329, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377; Zoltovski v. Gzella, 159 Mich. 620, 26 L.R.A. (N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944.

The negligence of the driver will be imputed to the occupants of the vehicle.

Griffith v. Baltimore & O. R. Co. 44 Fed. 574; Morris v. Chicago, M. & St. P. R. Co. 26 Fed. 22; Cable v. Spokane & I. E. R. Co. 50 Wash. 619, 23 L.R.A.(N.S.) 1224, 97 Pac. 744; Donnelly v. Brooklyn City R. Co. 109 N. Y. 16, 15 N. E. 733; Nelson v. Spokane, 45 Wash. 31, 8 L.R.A.(N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 Ann. Cas. 280.

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for dangers, or to observe the manner in which the vehicle is being operated, might be the conduct of a reasonably prudent person. It cannot be said, therefore, that in every case, and all the time, it is the duty of a gratuitous passenger to use his senses or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances, one of which is that he is merely a passenger having no control over the management of the vehicle in which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duty is the same, the conduct required to fulfil that duty is ordinarily different, because their circumstances are different."

And in that case it was held that if a woman who was injured while riding with her husband in an automobile could, by the exercise of reasonable care, have seen the car which struck the machine and have warned her husband in time to have avoided the collision, and such failure was the proximate cause of her injury, she could not recover, although she did not in fact see the danger in time to warn her husband. Ibid.

It has been held that, in determining whether a passenger in an automobile who was injured in a collision with a train was guilty of contributory negligence, the age, sex, and position of the person in the machine are circumstances to be considered. Noakes v. New York C. & H. R. R. Co. 121 App. Div. 716, 106 N. Y. Supp. 522; Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068.

These two cases, which arose out of the same accident, and also the two arising out of the accident in Brommer v. Pennsylvania R. Co. infra, in which one passenger was held free of contributory negligence, and another chargeable therewith, emphasize the fact that the position of the passenger in the car and other circumstances relating to the individual are important factors in determining the question of contributory negligence.

And in Noakes v. New York C. & H. R. R. Co. supra, it was assumed that the rule that a traveler approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity and avoid danger, notwithstanding the neglect of the railroad's servants, applies to a passenger in an automobile approaching a railroad, as well as to the persons in charge of the motive power of the vehicle.

In Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50, however, the court said that it would be an extreme case where the court would be warranted in announcing as a rule of law that a passenger in an automobile was required to warn, advise, or direct its driver, or to apply to such passenger the doctrine of "stop, look, and listen," and remarked that they were impressed with the counsel's statement that ordinarily the only obligation on such a passenger is to "sit tight."

In Gaffney v. Dixon, 157 Ill. App. 589, it was held that, in order to render a wife riding with her husband in an automobile negligent on account of knowledge of an injury to his hand which was alleged to have interfered with his driving, it would not only be necessary that she knew what his condition was, but also that, because of that condition, he was unable to manage the automobile with ordinary safety.

And it has been held that the fact that a plaintiff who was injured in an accident between a car and the automobile in which she was riding knew of the manner in which her husband was operating the machine, even if he was negligent in operating it, would not necessarily show that she was negligent in remaining in the automobile, although she acquiesced in his manner of driving, since there would be no acquiescence in his negligence so as to make it hers un-

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Trieber, District Judge, delivered the opinion of the court:

This is an action for personal injuries sustained by the plaintiff below, who is the plaintiff in error, and will be referred to herein as the plaintiff, caused by an automobile in which he was riding as a guest with a friend, running over an embankment into a deep cut made by the defendant in the construction of its road, and which was unguarded.

The allegations in the complaint are that the defendant constructed a line of railway through the city of Devil's Lake, North Dakota, which intersected a public highway located west of said city; that in building the railroad a cut 19 feet in depth at the point of intersection with the highway was made; that the cut was not bridged over, nor guarded in any way so as to warn travelers upon the highway of the dangerous situation there existing; that on April 26, 1913, at 11:45 P. M., while plaintiff was riding as a guest in the rear seat of an automobile driven by the owner of the car over the said highway, the car was driven over the embankment into the cut, thereby injuring plaintiff.

The answer is a general denial, and also pleads contributory negligence on the part of the plaintiff. At the conclusion of the evidence the court gave a peremptory instruction in favor of the defendant.

The evidence introduced on the part of the plaintiff tended to show that one Doyon, who was the owner of an automobile, had

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less she knew, or ought to have known, that his manner of operating the machine was negligent, and that, to charge her with his negligence it must have been so gross and so apparent that she was bound to know of it. Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523.

The mere fact that an invited passenger on the rear seat of an automobile made no attempt to ascertain whether or not a railroad track could be crossed in safety has been held not to render her guilty of negligence as a matter of law so as to prevent holding the railroad company liable for an injury due to a collision with a train at a crossing, where there was nothing to show the construction of the vehicle, or to show that she knew of the proximity of the crossing or could have known of it by the exercise of reasonable care. Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577, certiorari denied in 223 U. S. 718, 56 L. ed. 628, 32 Sup. Ct. Rep. 522. But see this case infra, where a contrary result was reached in respect of another person injured in the same accident.

And in Lininger v. San Francisco, V. & N. Valley R. Co. 18 Cal. App. 411, 123 Pac. 235, it was held that the plaintiff could not be charged with contributory negligence where it appeared that she was riding in an automobile as a guest when it was struck by a car, and that she had no control over the driver of the automobile, and knew nothing about its operation or the location of the car lines, and was not aware of the approach of the car until it was too late for her to escape.

And in Wachsmith v. Baltimore & O. R. Co. 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679, it was held that an attendant of a lunatic who was being transferred in an automobile which was struck by an engine was not guilty of contributory negligence where it appeared that he was looking and listening and giving such attention to his surroundings as could be spared from the man in his charge.

But it has been held that the fact that a passenger rode for 1,500 feet along a street in an automobile in something like twenty seconds without remonstrance, or even a suggestion to the driver that he stop the car or slacken its speed, is sufficient to warrant a finding of acquiescence in the driver's carelessness and render him chargeable therewith. Jepson v. Crosstown Street R. Co. 72 Misc. 103, 129 N. Y. Supp. 233.

And a guest or passenger not for hire injured in a collision was held to have been guilty of contributory negligence under the following circumstances:

—where a man guest thirty-six years of age, who was riding on the back seat of an automobile on the side from which the train which struck the machine approached, it appearing that for a distance of from 175 to 200 feet there was an unobstructed view of 2,000 feet of the railroad track; that he was acquainted with the locality; that he was talking with a fellow passenger seated on the opposite side of the machine; that he failed to look or listen for trains, and that the automobile was proceeding slowly and might, at a word of warning, have been stopped in time to have avoided the accident, Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068. This was the same accident involved in Noakes v. New York C. & H. R. R. Co. 121 App. Div. 716, 106 N. Y. Supp. 522, supra, in which a girl riding in the automobile was held not to have been guilty of contributory negligence;

— where an invited passenger in an automobile which collided with a train failed to request the driver to stop for the purpose of looking and listening when approaching a railroad crossing, Brommer v. Pennsylvania R. Co. supra. This case is cited supra for its holding in respect of another person injured in the same accident;

— where a woman passenger in an automobile of which her husband was in charge made no effort to get out after the machine had become stalled on a street car track on a dark night, notwithstanding that she saw the light of a rapidly approaching car when it was 700 feet away, but merely stood up and signaled the motorman with her hands when the car was about 100 feet

invited the plaintiff to take a trip in his car, plaintiff being associated with him in the mercantile business at Doyon, North Dakota; that at Church's Ferry they picked up two additional guests, Mr McLean, who was sheriff of that county, and Mr. Chambers, a newspaper man and postmaster at Church's Ferry. They left Church's Ferry about 8 o'clock, shortly before dark; the car was provided with a prest-o-lite tank for lighting purposes; when about 8 or 9 miles from Church's Ferry the gas gave out; there was an oil lamp on the dash of the car, but neither wick nor oil in it; they proceeded in the dark about 2 miles to Grand Harbor, where they tried to get a prest-o-lite gas tank or an ordinary lantern, but failed; they procured some kerosene and a wick there, but the latter was too large for the lamp on the car, and it was trimmed down so as to make it do, but the light afforded by the lamp was very dim; they then proceeded on their journey to Devil's Lake, which was about 6 miles. Mr. McLean was the only person who was at all familiar with the roads in that section, but he had not been over this road for some time, and not since the defendant built its line and made the cut, several months before the accident occurred. They traveled over what seemed to be a prairie trail on the section lines, grown over with grass and weeds, and which had never been treated as a public road, nor as a street or alley of the city of Devil's Lake, within whose corporate limits it was, and where the accident occurred, and was but little traveled. Mr. McLean was standing on the running board of the car for the purpose of keeping a lookout, while the plaintiff and Mr. Chambers were sitting on the back seat of the car. Shortly before reaching the place of the accident they got off the trail, which was very indistinct. They then tried to get back on the trail, but a large rock was in the way, which caused them to turn toward the section line, and in attempting to get back to the trail the car went over the embankment. The cut does not cross the trail at right angles, but a little "biased." It is undisputed that, had the car been supplied with proper lights, the party would not

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away, she having admitted that she could have gotten out, but did not do so because she thought the motorman would stop, Lawrence v. Fitchburg & L. Street R. Co. 201 Mass. 489, 87 N. E. 898;

— where a woman of mature years injured in a collision between a street car and an automobile which her husband was driving testified that she was familiar with the roads in the vicinity and knew the crossing at which the accident occurred; that one coming down the hill approaching the crossing could see the trolley wires at a distance of 400 or 500 feet, and also the top of the trolley pole, but that because of the shrubbery the car itself could not be seen unless one was looking for it; that immediately before the accident she was talking with a guest who was sitting beside her; that they were not particularly looking ahead, but that she depended on her husband to do that; and that the machine was under control and might have been stopped at a word of caution, Pouch v. Staten Island Midland R. Co. 142 App. Div. 16, 126 N. Y. Supp. 738.

The question whether a passenger or a guest who was injured while riding in an automobile was in the exercise of due care is generally held to be one for the jury. Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523; Corley v. Atchison T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555; Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50.

And in Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737, where the plaintiff was riding as a guest in an automobile at the time a car collided with it, it was held that it could not be said as a matter of law that she should have warned the driver against turning out from behind a car which he had been following, especially where he was turning both in the direction required by the statute, and the only direction in which the width of the bridge over which they were passing afforded room to pass the car.

And under the following circumstances where persons had been injured while riding as passengers in automobiles and sought recovery from third persons alleged to have been responsible for the injury, the question of contributory negligence was held to have been properly left to the jury:

— where there was evidence in an action growing out of a collision between a taxicab in which the plaintiff was riding and a train, that the night was very dark and rainy; that after entering the cab the plaintiff gave no further instructions to the driver; that he was unaware that they were approaching a railroad crossing, and was unable to see out of the cab because of the rain and darkness, Donnelly v. Philadelphia & R. R. Co. 53 Pa. Super. Ct. 78;

— where there was testimony that the plaintiff's intestate, who was killed in a collision between an automobile and a train, was riding on the front seat as a guest of the operator, who so far as appeared was a reasonably prudent man and competent to drive; that the deceased was conversing with a person on the back seat at the time of the accident; and that the car was being driven in the daytime through an open country with which it might be found that the deceased was familiar, Terwilliger v. Long Island R. Co. 152 App. Div. 168, 136 N. Y. Supp. 733, affirmed in 209 N. Y. 522, 102 N. E. 1114;

— where the plaintiff, when 40 feet from

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have taken this trail, but would have used the public road, which would have enabled them to avoid this cut, or, if on the trail, the cut could have been seen in time to avoid the accident.

Section 2171, North Dakota Rev. Code, prescribes: "Every automobile or motorcycle shall also be provided with lights, the automobile to carry not less than two lights in front of such machine, one of which to be on either side."

The evidence is undisputed that the trail was not treated or used as a public road, nor, being within the limits of a city, as a street or alley. It was a part of the city which had never been platted, nor any streets or alleys dedicated. It is claimed on behalf of plaintiff that the trail, being on the section lines, was under the provisions of § 2477, U. S. Rev. Stat. Comp. Stat. 1913, § 4919, and by reason of the acceptance of the grant of this strip as a public road by the territory of Dakota in 1877, a public road, and therefore it was the duty of the railway company to guard the cut at the intersection of this road. Several decisions of the supreme courts of South and North Dakota are cited to that point, but an examination of them shows that they are not in point, as all they decided was that the owner of the lands bordering on section lines takes them subject to the easement of the county and state to use them as public roads or streets, whenever they see proper to do so, a privilege which had never been exercised by either the city, county, or state in this case.

But it is claimed on behalf of the plaintiff, quoting from the brief, that "there was at least a road established by user which the defendant had no right to obstruct. This trail had been used for many years, and the defendant, in utter disregard of the safety of travelers, excavated a cut 30 feet wide and about 15 feet deep through the road without so much as putting up a warning signal. Even if the users of the road were mere licensees, the defendant owed them the duty of warning them by building a barrier, placing signal lights, or in some other manner. The conditions were such as to advise defendant of the long use

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the railroad crossing where the automobile in which she was riding was struck, told her husband, who was driving, to look out for a train, and he threw out the clutch, and while his car was drifting on an up grade rose to get a better view, looked at his watch, remarked that the train had passed, and threw in his clutch, and a few seconds after the accident occurred. Senft v. Western Maryland R. Co. — Pa. —, 92 Atl. 553;

— where it appeared that at the time deceased was killed by a collision between a train and an automobile, he was sixteen years old, had never been in an automobile before, and was riding at the invitation of the driver, an older person; that a carriage immediately ahead was driven safely over the crossing; and that he apparently did nothing to avoid the collision, Sherwood v. New York C. & H. R. R. Co. 120 App. Div. 639, 105 N. Y. Supp. 547;

— where a guest in an automobile was looking at the scenery at the time of a collision with a trolley car, and it appeared that the trolley poles and wires indicating the location of a railway crossing, about which the driver of the machine had spoken, were visible for some distance, but that she made no mention of them to the driver, United R. & Electric Co. v. Crain, 123 Md. 332, 91 Atl. 405;

— where at the time of a collision with a trolley car the plaintiff was being driven in an automobile by her husband across a street at a point which was familiar to her, Leete v. Anderson, 83 Conn. 229, 76 Atl. 466;

— where it was alleged in substance that the deceased was riding as a guest in an automobile which was traveling along a much used street; that as they approached the crossing of the defendant's tracks the deceased looked and listened for an approaching car; that she did not see or hear any until just before the driver of the automobile went upon the track; that she, together with other guests, called to him to stop, but that he continued to go on the tracks; that the view of the tracks was partially obstructed; that it was impossible for the deceased to jump from the machine at the time without being threatened with instant death; that she remained in the automobile, and that the defendant negligently ran its car into it and inflicted fatal injuries upon the deceased, Indiana Union Traction Co. v. Love, 180 Ind. 442, 99 N. E. 1005.

It was held in the last case that one in a position of peril not created by his own negligence has a right to make a choice of means to be used to avoid the peril, and that he is not held to a strict accountability if he takes an unwise course, and that this rule constituted one reason for leaving the question whether the deceased was guilty of contributory negligence in remaining in the automobile to the jury. Ibid.

And in Withey v. Fowler Co. — Iowa, —, 145 N. W. 923, it was held that the plaintiff was not guilty of contributory negligence as a matter of law where it appeared that she saw the near and dangerous approach of a truck which threatened to strike the automobile in which she was riding as a guest, and, realizing the danger, put up her hand, motioning the driver of the truck to hold up, when the forward thrust of the truck caused an injury to her hand, it not being clear whether the injury was caused by sheer accident or because of the instinctive movement on her part. J. T. W.

of this road for highway purposes, and it was bound to know that travelers might continue to use this road, and that it might, under conditions such as existed on the night in question, become a veritable death trap. This was the defendant's duty under the general law as to licensees, and neglect of that duty would render it liable to any person injured without contributing fault."

The evidence as to whether the trail indicated that it was used to any appreciable extent as a public road is conflicting, but the record shows that during the trial the jury and trial judge, by consent of all parties, made an ocular inspection of the place where the accident occurred. What that inspection conveyed to the minds of the court we cannot know from the record; in such case the appellate court cannot have the entire record before it. Choctaw, O. & G. R. Co. v. Holloway, 52 C. C. A. 260, 114 Fed. 458, affirmed in 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235.

Assuming that the above statement of the law made by counsel for plaintiff to be correct, the question arises whether the accident which caused plaintiff's injuries occurred "without contributing fault on his part." It is undisputed that the car on that occasion was not provided with lights as required by the laws of North Dakota, and even in the absence of such a statute no reasonably prudent person would, on a dark night, on a road with which he was unfamiliar, travel in a motor car without sufficient lights to enable him to see whether there were any dangerous places along the road of travel, especially when going to a city known to him to have several railroads whose tracks would have to be crossed. All the evidence tends to show that, had the car been supplied with proper lights, this road would not have been used by the party, and if used the cut would have been seen in time to have avoided it. This clearly was such negligence as to prevent a recovery on the part of those in charge of the car.

But it is claimed, and that is the main ground upon which a reversal of this cause is asked, that as the plaintiff was merely a guest of the owner and driver of the car, and exercised no control over the driver, the driver's negligence is not attributable to him.

In Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger. And this court in Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174, and Winona v. Botzet, 23 L.R.A. (N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who, with knowledge of the danger, remains in such dangerous position. Dyer v. Erie R. Co. 71 N. Y. 228, 12 Am. Neg. Cas. 347; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 294, 17 Am. St. Rep. 648, 24 N. E. 449; Covington Transfer Co. v. Kelly, 36 Ohio St. 86, 91, 38 Am. Rep. 558, 12 Am. Neg. Cas. 461; Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A. (N.S.) 424, 88 C. C. A. 488, 497, 159 Fed. 10, 19; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577, 581; Dean v. Pennsylvania R. Co. 129 Pa. 524, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718.

In Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 497, 159 Fed. 10, 19, this court quoted with approval the following extract from Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 293. 17 Am. St. Rep. 648, 24 N. E. 449: "The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an inclosure, and is without opportunity to discover danger, and to inform the driver of it. . . . It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and avoid it if practicable."

The same rule is laid down in Shultz v. Old Colony Street R. Co. 193 Mass. 323, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402; Partridge v. Boston & M. R. Co. 107 C. C. A. 49, 184 Fed. 219.

The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with full knowledge of that fact the plaintiff remained in the car, he was as guilty of negligence as the driver

himself. As stated by Judge Phillips in the Davis Case: "The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of one as of the other."

The action of the court in directing a verdict in favor of the defendant was right, and the judgment is accordingly affirmed.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

J. C. WILLMON, Respt.,
v.
A. S. KOYER, Appt.

(— Cal. —, 143 Pac. 694.)

Limitation of actions — payment by tenant in common — contribution.

1. The statute of limitations begins to run against a claim by a tenant in common who has attempted to exclude his cotenant from the property and repudiate the cotenancy, to contribution toward taxes, assessments, and attorneys' fees paid in protection of the property, at the time the payments are made.

Cotenants — contribution — claim to exclusive right when expense is incurred.

2. That a tenant in common is attempting to repudiate the cotenancy and exclude the other tenant from the property at the time he pays taxes and other expenses for the benefit of the property does not destroy his right to contribution from the other tenant to such expenses when the latter's rights are established.

Interest — contribution by cotenant — when runs.

3. Interest should be allowed on the amount which a tenant in common should contribute toward taxes and other expenses paid for the benefit of the estate only from the entry of the judgment, when, at the time the payments were made, the one making them was claiming exclusive title to the property and seeking to disaffirm the claim of the cotenant.

Partition — lien for share of expenses of property.

4. The amount which a cotenant should contribute toward expenses paid by the other cotenant for the benefit of the property may be made a lien on the share awarded him in partition.

(October 1, 1914.)

Note. — Repudiating cotenancy as affecting cotenant's right to contribution.

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I. Introductory.

This note presupposes improvements or other disbursements in relation to property made by a tenant in common in possession while claiming to be the exclusive owner, either with or without notice of his cotenant's interest.

A tenant in common, in the absence of agreement, has no personal claim for contribution against his cotenant. Any compensation or reimbursement, if any, must be from his cotenant's interest in the land or its proceeds, or by way of allowance from claims against him on account of rents, or use and occupation, or waste.

In the absence of statute it will be apparent, therefore, that in general the claim for allowance is not to be sought at law as distinguished from equity. In most jurisdictions under the modern practice, the matter, when not specially controlled by statute, arises in partition, which has come in general to be regarded as a remedy largely controlled by equitable principles.

Generally, as to liability of cotenant for improvements and repairs in general, see the note to Ward v. Ward, 29 L.R.A. 449.

For right of successor to share of cotenant, to latter's claim to allowance for improvements to common property, see the note to Helmken v. Meyer, 45 L.R.A.(N.S.) 738.

For liability of cotenants to account for use and occupation or rents and profits, see the notes to Gage v. Gage, 28 L.R.A. 829, and Schuster v. Schuster, 29 L.R.A.(N.S.) 224.

II. Improvements.

a. In general.

Theoretically, tenants in common in possession claiming to hold the exclusive ownership may be divided into four classes: (1) He who has no actual or constructive notice of any other claim; (2) he who, holding in good faith, has constructive notice of the actual state of the title; (3) he who, having actual notice of outstanding claims, disregards them; and (4) he who holds fraudulently. But actually it is difficult to tell to which class the possessor belongs, and the reports of the cases are not as a rule

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiff's favor, and from an order denying a new trial, in an action for partition of certain property and for an accounting. Reversed.

The facts are stated in the opinion.

Mr. **Robert Young**, for appellant:

Defendant is not liable for interest as, by the acts of plaintiff, he was excluded both from the title and possession of the property while these payments were being made.

Heald v. Hendy, 89 Cal. 632, 27 Pac. 67; Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758; Re Olvera, 70 Cal. 184, 11 Pac. 624; Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164, 18 Pac. 100; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. 811; Lane v. Turner, 114 Cal. 396, 46 Pac. 290; Re Cummins, 143 Cal. 525, 77 Pac. 479; Erickson v. Stockton & T. C. R. Co. 148 Cal. 206, 82 Pac. 961; Courteney v. Standard Box Co. 16 Cal. App. 601, 117 Pac. 778.

There is no personal liability for taxes in the state of California, except possibly where the tax amounts to $300 or more.

McPike v. Heaton, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

Defendant is not liable for any of the expenditures claimed to have been made by the plaintiff, because they were made while plaintiff held the legal title to the property by written conveyance, while he was in

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very illuminating on the point. There is in subdivision c, infra, some attempt in arrangement to separate the actual dissesor from one who merely supposes that he owns the whole property, but any distinct separation is hardly possible. It is in general difficult to say how far if at all, the matter is affected by the question of actual or constructive notice to the improver, as comparatively few of the cases go much into that question.

It will be seen that the fact that the cotenant making the improvements believed in good faith that he was the sole owner is in some cases held to be a positive reason for allowing the improvements, in distinction from the case where he acknowledged the cotenancy. Thus, in a jurisdiction where the allowance seems to be limited to an offset to rents and profits, the court, in allotting the improved part of the land to the improver, said: "The authorities generally, both in cases where compensation for improvements is allowed, and in cases where the improved portion of the estate is allotted to the cotenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be legally entitled to the whole premises, as an equitable consideration in his favor." Ferris v. Montgomery Land & Improv. Co. 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607.

b. Allotting to improver the part containing his improvements.

If a tenant in common makes improvements supposing that he is the exclusive owner, the land containing the improvements may be set off to him in actual partition. Ferris v. Montgomery Land & Improv. Co. supra; Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246 (*obiter*); St. Felix v. Rankin, 3 Edw. Ch. 323; Cox v. Ward, 107 N. C. 507, 12 S. E. 379; William v. Holmes, 4 Rich. Eq. 475.

The same was held in McGill v. Cromwell, 5 Ky. L. Rep. 246, where the court said that if this could not be done, he should be allowed to remove his improvements.

So, where a tenant in common of the remainder, supposing he owned all the remainder, built a house during the life tenancy, he was allowed to have the part of the land on which the house was built set off to him in partition. Pope v. Whitehead, 68 N. C. 191.

Where the holder of the legal title, being in equity a cotenant, sells part of the land to a purchaser with notice, the court, in dividing the land, will regard the improvements of the purchaser "if the just proportions can be otherwise obtained in reasonable form." Hart v. Hawkins, 3 Bibb, 510, 6 Am. Dec. 666.

In Cox v. Ward, 107 N. C. 507, 12 S. E. 379, where the defendant apparently claimed exclusively, the court on partition said: "The defendant is not entitled to hold a particular part of the common property till the plaintiff compensates him for any improvement made on the land. This is a proceeding for partition, and if one of the tenants in common should make it appear to the court that he has made valuable improvements on any part of the land, the commissioners appointed to make the partition may be directed to assign to him the portion of the land so improved, and to assess its value as if no such improvements had been made."

Where one purchasing at a partition sale in a suit which omitted some of the owners filled up a marsh on the property at great expense, it was held, on a further partition suit, that the other tenants should receive the part of the land on which the improvements had not been made, as that could be done. Williman v. Holmes, 4 Rich. Eq. 475.

c. Compensation for improvements.

1. Improver supposing he owns exclusively.

See also cases cited infra, II. c, 2.

A tenant in common in possession, who makes improvements supposing he is the exclusive owner, may on partition be compensated therefor. McClaskey v. Barr, 62 Fed. 209 (Ohio); Mahoney v. Mahoney, 65

possession of the property adversely to defendant, excluding the defendant from the use and enjoyment thereof.

Owsley v. Matson, 156 Cal. 401, 104 Pac. 983; Bell v. Germain, 12 Cal. App. 375, 107 Pac. 630; Barrett v. Amerein, 36 Cal. 322; McMinn v. Whelan, 27 Cal. 318; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Coppinger v. Rice, 33 Cal. 408; Reily v. Lancaster, 39 Cal. 353; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Harper v. Rowe, 53 Cal. 234; Victoria Copper Min. Co. v. Rich, 113 C. C. A. 238, 193 Fed. 318; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Dubois v. Campau, 24 Mich. 360; Taylor v. Roniger, 147 Mich. 100, 110 N. W. 503; Wistar's Appeal, 125 Pa. 526, 17 Atl. 460; Clute v. Clute, 197 N. Y. 440, 27 L.R.A.(N.S.) 146, 134 Am. St. Rep. 891, 90 N. E. 988; Cole v. Cole, 57 Misc. 490, 108 N. Y. Supp. 124; Douglas v. Dangerfield, 10 Ohio, 152; Bryant v. Nelson-Frey Co. 94 Minn. 305, 102 N. W. 859; Cooley, Taxn. pp. 467, 468; Iowa Homestead Co. v. Valley R. Co. 17 Wall. 153, 21 L. ed. 622; Garrigan v. Knight, 47 Iowa, 525; Iowa R. Land Co. v. Davis, 102 Iowa, 128, 71 N. W. 229.

In cases of partnership or other trust relations, the statute of limitations begins to run from the time of the repudiation of the trust by the trustee, and the communication of the repudiation to the beneficiary.

Schroeder v. Jahns, 27 Cal. 274; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384;

Ill. 406; Noble v. Tipton, 219 Ill. 182, 3 L.R.A.(N.S.) 645, 76 N. E. 151 (on principle); Carver v. Coffman, 109 Ind. 547, 10 N. E. 567; Alleman v. Hawley, 117 Ind. 532, 20 N. E. 441; Parish v. Camplin, 139 Ind. 1, 37 N. E. 607; Killmer v. Wuchner, 79 Iowa, 722, 8 L.R.A. 289, 18 Am. St. Rep. 392, 45 N. W. 299; Moy v. Moy, 111 Iowa, 161, 82 N. W. 481; Sarbach v. Newell, 28 Kan. 642 (on principle, modified on facts in 30 Kan. 102, 1 Pac. 30); Vermillion v. Nickell, — Ky. —, 114 S. W. 270; Respass v. Breckenridge, 2 A. K. Marsh. 581; McLaughlin v. Barnum, 31 Md. 425; Bennett v. Bennett, 84 Miss. 493, 36 So. 452 (where the denial was not of the cotenancy, but of the real extent of the cotenant's share); Burford v. Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720; Atha v. Jewell, 33 N. J. Eq. 417 (cited in Keneaster v. Erb, — N. J. —, 92 Atl. 377); Sailer v. Sailer, 41 N. J. Eq. 398, 5 Atl. 319; Conklin v. Conklin, 3 Sandf. Ch. 64; Jones v. Duerk, 25 App. Div. 551, 49 N. Y. Supp. 987; Youngs v. Heffner, 36 Ohio St. 232; Scaife v. Thomson, 15 S. C. 368; Annely v. De Saussure, 17 S. C. 389; Jacobs v. Bush, 17 S. C. 594; Johnson v. Pelot, 24 S. C. 255, 58 Am. Rep. 253; Leake v. Hayes, 13 Wash. 213, 52 Am. St. Rep. 34, 43 Pac. 48.

See also, where it is probable, but perhaps not entirely clear from the report, that the tenant thought he had good title to the whole. Dean v. O'Meara, 47 Ill. 120; Vaughan v. Langford, 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91.

The same principle seems to have been held in Eighmey v. Thayer, 135 Mich. 682, 98 N. W. 734 (action to remove cloud on title), where the court found that the improvements and the rents and profits equalized each other.

"If, upon the supposition that he was entitled to the whole of the premises, he has made valuable improvements, he should have the benefit thereof in making equitable partition, and if that cannot be done, he should be allowed compensation. If the value of the farm has been enhanced by the ordinary repairs and improvements necessary for its use and preservation, he should have remuneration therefor." Mahoney v. Mahoney, 65 Ill. 406.

Thus, a tenant in common who improves property supposing he has acquired title free from a mortgage given on an undivided share will, on foreclosure of such mortgage, be compensated for such improvements. Annely v. De Saussure, 17 S. C. 389.

And such a tenant making improvements on land allotted to the other party will be compensated therefor. Johnson v. Pelot, 24 S. C. 255, 58 Am. Rep. 253.

And where a husband after the death of his wife gave bond to convey community property and died, the purchaser, having made improvements, ought on partition to be allowed compensation for them, either by actual partition or otherwise. Robinson v. McDonald, 11 Tex. 385, 62 Am. Dec. 480.

So, one in possession claiming the whole, having it seems constructive, if not actual, notice of the claims of his cotenant, was allowed on sale in partition his improvements, accounting for rental value. Vermillion v. Nickell, — Ky. —, 114 S. W. 270, supra (where the rental value was the greater).

In Noble v. Tipton, 219 Ill. 182, 3 L.R.A. (N.S.) 645, 76 N. E. 151, the court considered on principle that on partition a tenant in common should have compensation for his improvements where he claimed the property by deed from his father, and set up the making of the improvements while he was in possession before the delivery of the deed as a ground for its validity, and it was found that the deed was void as not delivered in the father's lifetime. See in this connection, Biehn v. Biehn, 18 Grant, Ch. (U. C.) 498, and Hovey v. Ferguson, 18 Grant, Ch. (U. C.) 498, infra, II. c. 4. Compare Glass v. Glass, infra.

Where a tenant in common of one half of the land was in partition held to have contracted to give up to the complainants two thirds of such one half, it was held that purchasers from him subsequently to such contract "must have a right to an undivided third of their respective parcels, without regard to the time they had notice of the complainants' claim; and as to the residue, respect should be had to their

Roach v. Caraffa, 85 Cal. 437, 25 Pac. 22; Watson v. Sutro, 86 Cal. 501, 24 Pac. 172, 25 Pac. 64; Hearst v. Pujol, 44 Cal. 231; Janes v. Throckmorton, 57 Cal. 368; Broder v. Conklin, 77 Cal. 331, 19 Pac. 513; Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077; Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482; Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108; 28 Am. & Eng. Enc. Law, p. 1134, ¶ 3.

Mr. **Sidney J. Parsons**, for respondent:

A partner who makes any advances of money for the purposes of the partnership, or to protect its property, is entitled to the customary legal rate of interest.

McMillan v. James, 105 Ill. 194; Coldren v. Clark, 93 Iowa, 352, 61 N. W. 1045; Winchester v. Glazier, 152 Mass. 316, 9 L.R.A. 424, 25 N. E. 728; Baker v. Mayo, 129 Mass. 517; Folsom v. Marlette, 23 Nev. 459, 49 Pac. 39; Collender v. Phelan, 79 N. Y. 366; Rodgers v. Clement, 162 N. Y. 422, 76 Am. St. Rep. 342, 56 N. E. 901; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; Re German Min. Co. 4 DeG. M. & G. 19, 18 Jur. 710, 2 Week. Rep. 543; Berry v. Folkes, 60 Miss. 576; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Liotard v. Graves, 3 Caines, 243; Gillet v. Van Rensselaer, 15 N. Y. 397; Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297; Morris v. Allen, 14 N. J. Eq. 44; Holloway v. Turner, 61 Md. 223; Marshall v. Levy, 66 Cal. 236, 5 Pac. 155; McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

One partner cannot sue the other at law

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improvements in making the allotment to the complainants, and if it should so happen that an equal third of the whole tract cannot be allotted to the complainants, without encroaching upon the improvements of those claiming under" the owner of the other half, "the complainants should pay therefor, allowing a discount for the rents and profits." Respass v. Breckenridge, 2 A. K. Marsh. 581.

In Strong v. Hunt, 20 Vt. 614 (a case of great obscurity), a cotenant who possibly had claimed the whole, and who had suffered recovery against him in ejectment for an undivided portion of the land, was later on a separate action by him, held entitled to recover some compensation for his improvements.

But no compensation for improvements was allowed in the briefly reported case of Glass v. Glass, 7 Ky. L. Rep. 437, where a son in possession claimed the land by virtue of an alleged agreement that he was to have it on his promise to support his father and mother. In an action by the other heirs it was held that there had been no adverse possession (or at least none sufficient in length); that he could not recover for maintaining his father and mother, as such a recovery was barred by the statute; that, having had the use of the land for many years, he was more than compensated for his labor and expenditures, and that he could not recover anything for improvements, but should be charged with rents from the time of the filing of the action.

For cases where improvements by a tenant in common claiming the whole have been credited against rents, see Anderson v. Northrop, 44 Fla. 472, 33 So. 419; Cooter v. Dearborn, 115 Ill. 509, 4 N. E. 388.

And in some cases the court in general terms directed an account. Thus, where the complainant claimed in equity to be entitled to the defendant's interest and made improvements, the court, in ordering partition, directed an account as to improvements and rents. Doughaday v. Crowell, 11 N. J. Eq. 201. So, in Nelson v. Leake, 25 Miss. 199, where it seems probable that the possessor denied the right of his cotenant, the court, on a bill against him for division and for rents and profits, directed that an account be taken of his improvements.

In North Carolina the cases are not very distinct. In Cox v. Ward, 107 N. C. 507, 12 S. E. 379, I. b, supra, it is not entirely clear whether the court means to limit the compensation to allotting the improvements to the improver.

In Smith v. Smith, 150 N. C. 81, 63 S. E. 177 (not very fully reported), where one tenant in common permitted the lands to be sold for taxes and acquired the tax deed, the court, in letting his cotenants into possession, said: "His Honor properly provided in the judgment that the plaintiffs, cotenants, be let into possession, and for a reference to state an account as to any waste and betterments, disbursements for taxes, and receipts of rents and profits within three years before commencement of this action."

Contrary doctrine.

While it arose in ejectment a contrary view of the subject was taken in Gregg v. Patterson, 9 Watts & S. 197, an action of ejectment against a tenant in common who, supposing in good faith that he owned the whole, had made improvements, and it was held that compensation could not be made therefor, unless perhaps in a case where the cotenants stood by in silence and permitted the repairs to be made. There is a suggestion in the headnote that there might be reimbursement from rents, etc.

And see also "New York cases," infra, II. c, 3.

Compensation for improvements limited to offsets.

In Alabama the compensation of one improving in the belief that he owns the whole has been limited to an offset to rents. Ormond v. Martin, 37 Ala. 598; but compare Sanders v. Robertson, 57 Ala. 465, infra. This doctrine is not abandoned in Ferris v. Montgomery Land & Improv. Co. 94 Ala. 557, 33 Am. St. Rep. 146, 10 So. 607,

until a settlement of the accounts between them has been had.

Russell v. Ford, 2 Cal. 86, 1 Mor. Min. Rep. 75; Fisher v. Sweet, 67 Cal. 228, 7 Pac. 657; Ross v. Cornell, 45 Cal. 133.

An action for an accounting is properly joined with an action for partition.

Robinson v. McDonald, 62 Am. Dec. 480 and note, 11 Tex. 385; Western v. Skiles, 35 Fed. 674; Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886; Freeman, Cotenancy & Partition, § 512.

Partnership real estate is considered personalty, and a partner has an equitable lien for advances.

Bates v. Babcock, 95 Cal. 479, 16 L.R.A. 745, 29 Am. St. Rep. 133, 30 Pac. 605; Gray v. Palmer, 9 Cal. 616.

The statute of limitations does not begin to run between partners or between a trustee and his *cestui que trust* until the partnership has been dissolved or the trust extinguished.

Gleason v. White, 34 Cal. 258; White v. Conway, 66 Cal. 383, 5 Pac. 672; Hendy v. March, 75 Cal. 567, 17 Pac. 702; Harris v. Mathews, 107 Ga. 46, 32 S. E. 903; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160; Storm v. Cumberland, 18 Grant, Ch. (U. C.) 245; Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Ahl v. Ahl, 186 Pa. 99, 40 Atl. 405; Horne v. Ingraham, 125 Ill. 198, 16 N. E. 868; Askew v. Springer, 111 Ill. 662; Petty v. Haas, 122 Iowa, 257, 98 N. W. 104; Broderick v. Beaupre, 40 Minn. 379,

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supra, II. b, holding that improvements may be set off to the improver on an actual partition.

Thus, it was held in Ormond v. Martin, supra, that one claiming in good faith under color of title the exclusive ownership of land as to which there is an outstanding interest is entitled on partition to compensation for his improvements not exceeding the rents charged against him.

The authority given for the Ormond Case is Horton v. Sledge, 29 Ala. 478, where it was held that a custodian or trustee for two tenants in common, who erroneously supposed that he had legally purchased the interest of one of such tenants, and therefore makes improvements, cannot, as against such interest, be allowed in partition any compensation for improvements beyond rents charged against him; nor can he be allowed as against such interest any compensation at all except for improvements made under a bona fide belief of ownership of such interest. (The question as against the other tenant in common was not decided.)

But in Sanders v. Robertson, supra, the court did not so limit its decision. It was there held that one tenant in common claiming all the land in good faith, though perhaps with constructive notice of another's claim, ought in partition to have set off his improvement, and if that cannot be entirely done, he should have compensation therefor by more land or otherwise, rents for one year only being charged against him, as he entered in good faith under color of title.

In Tennessee also the allowance seems limited to offsets. Thus, the improver was not allowed for any excess in Renshaw v. First Nat. Bank, — Tenn. —, 63 S. W. 194, where it claimed the whole either in ignorance of its cotenant's (complainant's) claim, or else considering it of no importance. It was held that, while its improvements would on partition be set off to it if possible, on the other hand, if an equal division required that some of the improvements be set off to the other tenant, then they would be so set off; that the possessor must be charged with the rental value (and certain interest), and credited with the permanent enhanced value of the property by the improvements, any excess of rents to go to said other tenant, but the possessor not to have any allowance for any excess of betterments; the rents to be so adjusted without regard to whether any of the improvements were assigned to said other tenant's share or not.

It was held in Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19, that while a tenant in common in possession claiming the whole, who has notice of the claims of his cotenants, cannot in general claim for permanent improvements, when he takes oil for which he must account he will be allowed as an offset all cost of production, including cost of boring productive wells.

Compare Foster v. Weaver, 118 Pa. 42, 4 Am. St. Rep. 573, 12 Atl. 313, 15 Mor. Min. Rep. 551, infra, IV.; and see, as to developing a salt well, Ruffner v. Lewis, infra, II. c, 2.

In Bazemore v. Davis, 55 Ga. 504, a suit by a tenant in common to enjoin recovery of the property, as equity could better settle the controversy, it was held that, "as between tenants in common, where one has held out the other, ignorantly believing himself sole owner, and, pending such exclusion, has made permanent improvements, the cotenant, unless he resorts to equity himself, cannot be compelled to contribute anything for the cost or value of the improvements beyond such portion of the rents as may be chargeable to the party erecting them."

See the North Carolina cases in the preceding subdivision.

The compensation was limited to the rents under the peculiar circumstances in the Arkansas case of Jones v. Johnson, 28 Ark. 211; but a tenant in common improving in good faith under belief of sole ownership is held entitled to the benefits of the betterment act, in Shepherd v. Jernigan, 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765, infra, VI.

In Jones v. Johnson, supra, where a

42 N. W. 83; Allen v. Woonsocket Co. 11 R. I. 288.

Defendant was liable to contribute his half of the taxes and other expenditures for the benefit of the property.

Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886; Eads v. Retherford, 114 Ind. 273, 5 Am. St. Rep. 611, 16 N. E. 587; Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Clark v. Lindsey, 47 Ohio St. 437, 9 L.R.A. 740, 25 N. E. 422.

Messrs. **T. O. Toland, L. W. Andrews,** and **C. E. Johnson** also for respondent.

Lorigan, J., delivered the opinion of the court:

Defendant appeals from a decree in partition of a lot owned by the parties as tenants in common, and from an order denying his motion for a new trial.

Plaintiff, in addition to asking for a partition of the property, prayed for an accounting between himself and defendant, and a judgment in his favor for one half of certain moneys claimed to have been paid by him for the common benefit of the joint property, and that a lien be fixed on the portion of the property set apart to defendant to secure its payment. The court decreed a partition, finding that plaintiff had made the expenditures claimed to the extent of $1,045.60, and that defendant was liable for one half thereof, $522.80, gave judgment in favor of plaintiff therefor, and established the lien as prayed for. The only question presented on the appeal from

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mother claiming in fee, and living on the property with her children, made the improvements, and the suit was brought by certain heirs of her brother-in-law against her and her children, who were also his heirs, it was held on directing a division of the proceeds of the land among the heirs of such brother-in-law, that the improvements might be set off against the rents and profits, but not allowed in excess thereof. But the said mother was allowed money advanced by her in the purchase of the property by her brother-in-law.

2. Improvements by disseisor.

It is intended in general under this heading to group the cases where the holding seems to have been adverse.

But, as has been heretofore pointed out, it is not possible to make a distinct or precise classification, and this subdivision should be considered in connection with II. c, 1, supra.

Compensation allowed.

It has been held in a number of cases that a tenant in common holding adversely will not be refused compensation for his improvements.

Thus, a tenant in common who had held adversely, and resisted ejectment commenced before the improvements were made, was allowed the excess of his improvements over rental value on a sale in partition. Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

So, it was held in Duke v. Reed, 64 Tex. 705, that a tenant who had repudiated the tenancy would be allowed in partition payment of encumbrances and the value of the improvements when the suit was brought, and be charged the value of the rents, he being allotted if possible the part on which the improvements were located.

So, where the improver apparently denied the cotenancy, it was held that he would be allowed the permanent value of his improvements in partition. Mateer v. Jones, — Tex. Civ. App. —, 102 S. W. 734.

Where one considered as a tenant in common holding adversely had developed a salt well on the land, he was in equity held entitled to compensation for his improvements and services, including the expense of abortive attempts to find salt, and was to be charged rents and profits. Ruffner v. Lewis, 7 Leigh, 720, 30 Am. Dec. 513.

In Scantlin v. Allison, 32 Kan. 376, 4 Pac. 618, an ousting cotenant was allowed in partition to offset his necessary and proper improvements and taxes against rents and profits.

— fraud.

Eury v. Merrill, 42 Ill. App. 193, a case of peculiar facts where there was fraud, was decided on the principle that a wrongdoer might, on sale in partition, receive compensation for his improvements.

But whatever may be said in favor of allowing compensation for improvements to a tenant in common holding in fraud, it would seem surprising that a statute could be construed as enabling the voluntary grantee (apparently an accomplice) of a guardian who had defrauded her wards of their land, to have compensation out of the wards' land for the guardian's improvements thereon, as was done in Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497, 198 Mass. 137, 84 N. E. 334, 204 Mass. 448, 90 N. E. 561. In that case a mother and guardian of three children had the infants' real estate conveyed to herself, without compensation to them, and improved it, and later conveyed it voluntarily to one of her said children. After her death the two defrauded children, learning of the fraud, brought an action against the other child, and it was held that the plaintiffs were entitled to a deed of their interests from the defendant upon compensating him for such improvements. The allowance was not under the statute allowing improvements where the possessor had reason to believe his title good, but under the statute allowing for betterments where land had been held adversely for six years. The taxes exceeded the rental value for the period ending with the filing of the bill, and the ousted parties were not liable for such

the order denying defendant a new trial is relative to the validity of this allowance, and on the appeal from the judgment the validity of the lien to secure its payment.

The expenditures claimed to have been made by plaintiff consisted entirely of the payment of taxes, a street assessment, and attorneys' fees in defending an action brought by a third party affecting the common property, all paid at different dates between December 19, 1902, and October 26, 1909. There were no rents or profits from the cotenancy property. There is no dispute as to the correctness of the amounts paid out by plaintiff, nor the fact of their payment. The claim of defendant is that by reason of certain facts set up in his answer, and found in his favor by the court, no allowance in the nature of contribution by defendant for one half of these expenditures should have been awarded at all, and, in any event, the right of plaintiff to the greater part of them, if it ever existed, was barred by the statute of limitations (subdivision 1, § 339, Code Civ. Proc.), which defendant had appropriately pleaded. These facts relied on by the defendant are that after plaintiff and defendant, in May, 1902, had entered into an agreement between them to purchase the lot involved in the partition for their joint benefit, plaintiff violated the agreement, took title to the whole property in his own name, asserted ownership to the entire lot in himself, and repudiated all claim of the defendant to any interest therein; that in August,

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excess of taxes. For the period after filing the bill, taxes and repairs, and it seems insurance, were allowed in reduction of rents, or perhaps of rental value.

Compensation disallowed.

On the other hand, some of the cases deny compensation to a disseisor.

Thus, it was held in Rippe v. Badger, 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642, that a disseisor will not on partition be compensated for his improvements.

But where a disseisor, a purchaser at a former partition, in good faith put improvements on the land, and some of these were inexpensive buildings which he was allowed to remove, and the rest exceeded the rental value of the land, it was held that the cotenant had no cause of complaint. Parkhill v. Doggett, 142 Iowa, 534, 119 N. W. 689.

—fraud.

In Smith v. Mount, 149 Mo. App. 668, 129 S. W. 723, it was held that one tenant in common in possession wrongfully and fraudulently claiming the whole estate is not entitled to be compensated for his improvements, set off on partition to his cotenant, as he did not make them in good faith.

So, it was held in an action for accounting of rents and profits, that compensation for improvements would not be allowed to a cotenant who was a disseisor wrongfully holding possession and attempting to cheat and defraud his co-owners by omitting to pay the taxes so that he could acquire a tax title, thus denying and attempting to destroy their title. Austin v. Barrett, 44 Iowa, 488.

Where a man, to deprive his wife of her interest in his real estate, fraudulently conveys the land to his son, and after the death of the father the conveyance is set aside in a partition suit, improvements made before the father's death belong to all the owners. McKelvey v. McKelvey, 83 Kan. 246, 111 Pac. 180 (where charges against the son for rents and credits to him for taxes paid were not objected to).

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A grantee for value, but with knowledge that his grantor has by a fraud in law deprived his cotenants of their property, cannot on the judicial reinstatement of such cotenants as to their interest be allowed his improvements. Dormitzer v. German Sav. & L. Soc. 23 Wash. 132, 62 Pac. 862, affirmed in 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221, as construed in German Sav. & L. Soc. v. Tull, 69 C. C. A. 1, 136 Fed. 1, certiorari denied in 200 U. S. 621, 50 L. ed. 624, 26 Sup. Ct. Rep. 757, where it was held on partition of the same property that the point was *res judicata* and properly decided. In the Tull Case it seems to have been also held, however, that the said grantee should account as to certain receipts and disbursements received and paid out with interest on both sides, probably rents and expenses, etc., but the case is not fully reported in this respect.

3. New York cases.

In view of the somewhat varying nature of the New York cases, they are considered together.

In Jackson ex dem. Van Denberg v. Bradt, 2 Caines, 303, it was held that one who makes improvements as tenant of a claimant of the whole cannot, in ejectment, have compensation for them from those who as cotenants of his lessor recover a portion of the premises, as good faith does not require indemnity for improvements made in defiance of and adversely to the claims of everybody else, and the statute does not relate to this.

And in Putnam v. Ritchie, 6 Paige, 390, it was held that a tenant in common of a leasehold estate who made improvements supposing he owned the entire leasehold cannot enjoin an action of ejectment, to prevent his cotenant of the leasehold from taking the benefit of such improvements without compensation.

But in Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246, it was held *obiter* that one who in good faith makes improvements believing he owns the whole will be entitled

1903, defendant brought an action to establish his title as joint owner with plaintiff in said property, which plaintiff resisted, claiming that he was the sole owner thereof, and that defendant had no interest therein; that such litigation continued until January 10, 1910, when a judgment establishing the title of defendant to one half of said lot as tenant in common with plaintiff was entered; and that in establishing his title to said property he was compelled to expend in counsel fees and costs a large sum of money. This action in partition and for an accounting was commenced by plaintiff March 30, 1910, a few months after the final judgment in favor of defendant just referred to was entered. Under these facts as found, the position of defendant is that the court should have further found that all the items of expenditure made by the plaintiff up to two years prior to the bringing by him of this action in partition, as far as it involved an accounting between the parties, were barred by the statute of limitations which defendant pleaded, but on which the court found against him.

We are satisfied that this contention of appellant based on the statute of limitations is well taken. That statute operates between tenants in common as to causes of action existing between them and growing out of the cotenancy relation, to the same extent that it operates upon causes of action between parties not within that relation. While there is some difference in the authorities as to when it begins to run

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on partition to have the improvements set off to him.

So, a tenant in common who improves believing in good faith that he owns exclusively will have the land on which his improvements are located set off to him in partition, and mortgages given by him will be restricted to the land allotted to him. St. Felix v. Rankin, 3 Edw. Ch. 323.

And it was held in Conklin v. Conklin, 3 Sandf. Ch. 64, that a tenant in common who improves in good faith supposing he owns exclusively will be compensated in partition to the extent to which the improvements enhance the present value of the premises.

And the general rule of the modern cases seems reached in Jones v. Duerk, 25 App. Div. 551, 49 N. Y. Supp. 987, where it was held that a tenant in common making improvements supposing in good faith that he owns exclusively will on partition be compensated therefor. And the court of appeals seems to take the same view in Satterlee v. Kobbe, 173 N. Y. 91, 65 N. E. 952, an action for partition, where it did not appear whether there were improvements or not, and where the court said: "In a partition action the court will always adjust equities between tenants in common arising out of expenditures and improvements made by one of them as against the other (Ford v. Knapp, 102 N. Y. 135, 55 Am. Rep. 782, 6 N. E. 283), and if it may adjust such equities in an action of partition, no good reason is apparent why it should not adjust similar equities in behalf of a person setting up an adverse possession, and having made improvements upon a part of the property in reliance upon his having a good title, although such title may be in fact defective." In Ford v. Knapp, there was no assumption of sole ownership.

There seems no particular reason why the doctrine should be restricted to "mills, houses, and the like," as in the ancient writ de reparatione facienda. But in Clapp v. Nichols, 31 App. Div. 531, 52 N. Y. Supp. 128, the court, following Jones v. Duerk, supra, and holding also that the improvements should be reduced by the rental value, and referring to Cosgriff v. Foss, 152 N. Y. L.R.A.1915B. 104, 36 L.R.A. 753, 57 Am. St. Rep. 500, 46 N. E. 307 (a case without the scope of this note as the improving tenant was also lessee of his cotenant), said: "It is true Judge Vann there says that when actual partition cannot be had, contribution is not required for improvements as distinguished from repairs, even by courts of equity in this state, 'except in the case of mills, houses, and the like, under circumstances of special necessity.' We think, however, that the present case falls within this exception, as did Jones v. Duerk, supra."

It would seem that the above more recent cases overrule the theory of the earlier decision next referred to. In Stephenson v. Cotter, 23 N. Y. S. R. 74, 5 N. Y. Supp. 749, where a tenant in common holding adversely to her cotenants, claiming chiefly under a deed held void for the incompetency of the grantor, erected a new house, the court in actual partition charged her with rental value, and directed that the commissioners might set off to her in her share the land on which it stood, but would not allow her the sum laid out in building the house, and said: "She excepts to the refusal of the referee to find that she is entitled to the sum laid out by her in building a new house as permanent improvements. There is nothing in the case that would make such a finding proper. The facts are that Mrs. Cotter thought she had become the sole owner of the premises, and she built a new house upon it for her own convenience, without any reference to the other owners whose rights she disputed. This new house was not necessary for the protection or preservation of the property, but only that she might the better enjoy it. There is no equity in this state of facts to warrant allowing Mrs. Cotter to improve her cotenants out of their property. But, as there must be an actual partition, the judgment may direct the commissioners to set off to Mrs. Cotter in her two fifths of the land the part in which the new house now stands."

Where a mortgagee forecloses and buys in the property, he is, as to owners of the equity not served in the suit, a tenant in

as to actions arising from the cotenancy, there is a uniform agreement in them that, when there is a repudiation of the relation of cotenancy, from that date the statute begins to run, both as to the right of possession and the right to an accounting. Here the plaintiff, from the time that it was claimed by defendant that such cotenancy existed, denied any such relation, took the conveyance of the property in his own name, asserted absolute right to an assumed exclusive possession of the cotenancy property, and through a litigation of years, excluded the defendant from her rights as a cotenant with him, and repudiated the existence of any such cotenancy. Under such circumstances the parties became adversaries, and as to any right or cause of action growing out of the cotenancy relationship, which might be asserted by either against the other, the statute of limitations immediately began to run. As an incident to cotenancy relationship, either cotenant has a right to demand of the other an accounting as to rents and profits of the cotenancy, which, of course, involves the right of one cotenant to have refunded to him by the other his proportion of any expenditures made for the benefit of the common property. The right to this accounting as to rents and profits inures to either cotenant as soon as the other has collected them, and the right to demand a proportionate share and maintain an action therefor on refusal to pay it then arises. So, also, as to the right of contribution.

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common, and upon ejectment by such owners he may counterclaim for a foreclosure, and for money paid for improvements, taxes, and assessments under the erroneous belief that he owned the entire premises, at least to the amount of the plaintiffs' claim for damages, etc. Kelly v. Struth, 164 App. Div. 705, 150 N. Y. Supp. 391.

4. The question of notice.

See also cases supra, II. c, 1, and II. c, 2.

There is comparatively little discussion in the cases on the effect of actual or constructive notice to the improving tenant of his cotenant's claim.

Some of the cases affirmatively hold that it is immaterial whether the improver knew of his cotenant's claim or not (Alleman v. Hawley, 117 Ind. 532, 20 N. E. 441, supra, II. c, 1); or whether the improvements were made in belief of sole ownership, so long as they were made in good faith (Sarbach v. Newell, 30 Kan. 102, 1 Pac. 30, supra, II. c, 1). This seems to be the view of Respass v. Breckenridge, 2 A. K. Marsh. 581, supra, II. c, 1.

So, there was notice of the title in Robinson v. McDonald, 11 Tex. 385, 62 Am. Dec. 480, supra, II. c, 1, as there was in cases of setting off improvements. Hart v. Hawkins, 3 Bibb, 510, 6 Am. Dec. 666, supra, II. b; Biehn v. Biehn, 18 Grant, Ch. (U. C.) 498; and Hovey v. Ferguson, 18 Grant, Ch. (U. C.) 498, infra.

So, there was constructive notice of the title in Eighmey v. Thayer, 135 Mich. 682, 98 N. W. 734, supra, II. c, 1, and in Vermillion v. Nickell, — Ky. — , 114 S. W. 270, supra, II. c, 1, and possibly in Noble v. Tipton, 219 Ill. 182, 3 L.R.A.(N.S.) 645, 76 N. E. 151, supra, II. c, 1, and in Sanders v. Robertson, 57 Ala. 465, supra, II. c, 1, "Compensation for improvements limited to offsets."

In Hall v. Piddock, 21 N. J. Eq. 311, it was held that improvements made by the predecessors of one claiming the whole, where he alleged that he and they supposed themselves to have good title to the whole, would be compensated for on partition by actual partition or sale. The court held it was not necessary to decide whether the improvers and their successors supposed they had good title to the whole, and said: "The rule that a tenant in common who has made improvements on the land held in common is entitled to an equitable partition is well established, and is hardly disputed by counsel. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his cotenants, or encumbering their estate, or hindering partition. And the fact that the tenant making such improvements knows that an undivided share in the land is held by another is no bar to equitable partition. No other want of good faith is alleged or contended for by the defendants in this cause."

It was held in Biehn v. Biehn, 18 Grant, Ch. (U. C.) 497, and in Hovey v. Ferguson, 18 Grant, Ch. (U. C.) 498, that where a father put one of his sons in possession of certain land, announcing his intention of giving it to him by way of advancement, and the son made improvements thereon, on the intestacy of his father, if not entitled to the land absolutely, at least he could on partition be allotted the land, if its present value without improvements did not exceed his share of the lands to be divided.

In a suit to remove a cloud on title, it was held that a tenant in common ignorant of the true state of the title, believing he owned the whole, but chargeable with notice of the true state of the title (a deed from his grantor to a third party being in the record), who asks for improvements, must share rents and profits, and the court here found the two equalized each other. Eighmey v. Thayer, 135 Mich. 682, 98 N. W. 734.

On the other hand, some cases take the view that compensation will not be allowed for improvements made with notice of the cotenant's interest. See Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 410, 19 Mor. Min. Rep. 19, supra, II. c, 1, "Compensation for

The right of the cotenant making the payment in excess of his proportion, to recover payment from the other cotenant of his share thereof, arises at the date when any such expenditure is made.

Here the plaintiff had repudiated the existence of any cotenancy before any expenditures for which he claims contribution had been made, and was still repudiating it when all of them were made. This ouster of the defendant as a cotenant set the statute of limitations in motion for all purposes, not only as to the title and right of possession of the common property, but equally as to the right to demand an accounting for rents and profits, or contribution, as incidents to its existence. If the defendant, after notice of such repudiation, and more than two years after the receipt of rents and profits of the cotenancy property by plaintiff, if such had been received, or more than two years after defendant himself had made expenditures for the common benefit, had brought an action against plaintiff for an accounting or contribution, there can be no question but what plaintiff could have successfully pleaded the statute of limitations. It had been set in motion by him through his repudiation of any cotenancy between them, and effectually barred any right which might have accrued to the defendant more than two years before an action brought by him. Now, as the defendant would be barred from asserting any rights against the plaintiff growing out of the cotenancy by the running of

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improvements limited to offsets." And in Burford v. Aldridge, 165 Mo. 419, 63 S. W. 109, 65 S. W. 720, supra, II. c, 2, it was for improvements before notice of the cotenant's claim that allowance was to be made.

Possibly it was on account of notice that the court disallowed compensation in the briefly reported case of Glass v. Glass, 7 Ky. L. Rep. 437, supra, II. c, 1, but this is not stated.

Compensation for improvements made after the beginning of the partition suit has been refused McClaskey v. Barr, 62 Fed. 209 (Ohio) (as that gave information of other claimants); McLaughlin v. Barnum, 31 Md. 425.

"We think the proposition is fundamental that there can be no bona fide improvements made under such circumstances." Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42 (tenant denying plaintiff's claim).

So, where the improvements were made pending an appeal from the decree of the lower court against one denying claim of his cotenant, a claim for them was not allowed, even as against rents. Anderson v. Northrop, 44 Fla. 472, 33 So. 419.

But where tenants in common, after a partition but before a final decree, make improvements respectively, and many years afterwards the case is proceeded with and the earlier partition set aside, they should be allowed compensation respectively for such improvements, so far as they add to present values. Chinn v. Murray, 4 Gratt. 348.

It has been declared in South Carolina that improvements are not allowed where the improver is aware of his cotenant's interest.

Thus, in Scaife v. Thomson, 15 S. C. 337, supra, II. c, 1, the court said: "It is undoubtedly true, as said by Wardlaw, Ch., in Corbett v. Laurens, 5 Rich. Eq. 315 (citing the cases), 'that our cases have settled the question against the right of an improving tenant in common to the exclusive benefit of his improvements,' and with this rule we are entirely satisfied, where the tenant who makes the improvements is aware, at the time, that other persons are entitled to interests in the property so improved. But where one has expended his money in the improvement of property under the honest conviction of exclusive ownership in himself, it seems to us that there is manifest equity in allowing him the benefit of such improvements, as far as the same can be done without injury to the other cotenants."

Possibly the same idea was in the mind of the court in the obscure case of McGee v. Hall, 28 S. C. 562, 6 S. E. 566.

But it is not clear that the South Carolina cases are so ruled. It was considered in Dellet v. Whitner, Cheves, Eq. 213, that the circumstances might be such as to admit of some allowance for improvements made after notice of the cotenant's interest. And the general view taken in Johnson v. Pelot, infra, would indicate a more liberal policy than that suggested in Scaife v. Thomson, supra.

In Johnson v. Pelot, 24 S. C. 255, 58 Am. Rep. 253, the court stated that where cotenants are known and easy of access, improvements made by one without consultation with the others will not as matter of right be allowed him in the partition, and said: "Where, however, improvements are made by one cotenant under the belief that he has in severalty a fee simple title to the premises, or where said improvements have been erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of their benefit, the disposition of the court of equity has always been to give him the benefit thereof if practicable, and as far as consistent with the equity of the cotenants, especially as against the claim of one who subsequently thereto establishes his right as cotenant. 1 Story, Eq. § 655." The court stated further that under this principle certain South Carolina cases were decided, modifying the general rule above by allowing the improving tenant not the original cost of his improvements, but the increased value of the premises imparted in consequence of said improvements, this benefit being secured to him either by assigning the improved portion of the premises to him without charging the improve-

the statute as well as to all claims accruing more than two years before action brought by him, the benefit of the statute must be equally available to the defendant as to claims asserted against him by plaintiff accruing more than two years prior to the commencement of this action. The statute of limitations, having commenced to run by the repudiation of the existence of the cotenancy by plaintiff, affected the right of either party to the action equally. Under this view the trial court in this action should have found that the right of plaintiff to recover contribution from defendant for his proportion of items of expenditures stated in the account, and which were made more than two years prior to the bringing of this action, was barred by the statute of limitations invoked by defendant. As it is unquestioned that the amount of expenditures made by plaintiff during this period and allowed against defendant amounted to $371, the court should have disallowed them, and erred in not doing so.

The rest of the payments made by plaintiff and allowed by the court were made within two years of the bringing of this action by plaintiff, and are not affected by the statute. As to these, however, defendant contends that plaintiff should not be allowed them, because they were made by him in his own behalf while repudiating any interest of defendant as a cotenant in the property, and asserting exclusive title in himself. While undoubtedly this was the attitude of plaintiff towards defendant, we

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ments, or by sale of the premises, the increased purchase money in consequence of the improvements being allowed him in the distribution of the proceeds of said sale.

III. Taxes.

A tenant in common claiming the whole premises, who is charged rents or rental value, may offset taxes paid. Mahoney v. Mahoney, 65 Ill. 406; Davis v. Chapman, 36 Fed. 42 (Ind.) (one claiming adversely, but not in bad faith); German v. Heath, 139 Iowa, 52, 116 N. W. 1051; McGill v. Cromwell, 5 Ky. L. Rep. 246, supra, II. b (rents less taxes paid on the property as it was before he improved it); Sharp v. Zeller, 114 La. 549, 38 So. 449; Sunter v. Sunter, supra, II. c, 2; Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384; Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149, cited in WILLMON v. KOYER; Smith v. Mount, 149 Mo. App. 668, 129 S. W. 723 (in effect); Davidson v. Thompson, 22 N. J. Eq. 83; Armijo v. Neher, 11 N. M. 645, 72 Pac. 12; Scaife v. Thomson, 15 S. C. 337; Adams v. Bristol, infra; Johnson v. Pelot, 24 S. C. 255, 58 Am. Rep. 253.

The same seems to be understood in Willes v. Loomis, 94 App. Div. 67, 87 N. Y. Supp. 1086, but the case went back for a new trial.

The same is true as to an ousting tenant, Scantlin v. Allison, 32 Kan. 376, 4 Pac. 618.

A tenant in common who believed he owned exclusively, but made no claim against his cotenants till about the time they brought partition, on accounting for rents received, will be allowed for repairs and taxes paid during the time the premises were rented or vacant. Adams v. Bristol, 196 N. Y. 510, 89 N. E. 1095, affirming 126 App. Div. 660, 111 N. Y. Supp. 231, where the court said: "While under the circumstances it is at least doubtful if Bristol is not entitled to be credited also with the taxes paid and the amount spent for necessary repairs while he himself was in possession, . . . nevertheless I think, if this [*i. e.*, the above] conclusion be adopted, substantial justice will be done to all the parties." The court was also of the opinion that rents and profits were not limited to six years.

A tenant in common in possession, though fraudulently claiming the whole, who has already in a former suit been charged with rents, may have contribution for the taxes paid. Smith v. Mount, 149 Mo. App. 668, 129 S. W. 723, where the court said: "If one tenant in common pays the taxes on the common estate, he is entitled to contribution from his cotenant for an aliquot part. This is true, too, notwithstanding the fact that the tenant who pays the tax is a wrongdoer, or is asserting a title adverse; for, though otherwise a wrongdoer, by paying the taxes, he removes the lien and protects the interests of the cotenant as well as his own." The court observed that the wrongdoer had already in a former suit been charged with rents, and it was just he should be recompensed for the taxes.

Where heirs of the wife sued the husband for recognition as joint owners of the community property, and for partition, he claiming the whole, it was held that, on being ordered to account for rents, he was not estopped to claim disbursements for taxes, insurance, and necessary repairs, for, admitting that he was a possessor in bad faith as to the interests of the plaintiffs, he was entitled to necessary expenses for the preservation of the property. Sharp v. Zeller, 114 La. 549, 38 So. 449.

In Victoria Copper Min. Co. v. Rich, 113 C. C. A. 238, 193 Fed. 314 (Mich.), a case where improvements were set off against waste, it was held that one tenant in common paying taxes on belief that he owned the whole property may not have contribution if his possession is such as to be legally adverse to his cotenant, as in that case he is presumed to have received benefits equal to the maintenance; but he may have contribution for taxes paid in such belief where his possession was not legally adverse to his cotenant, and his grantee may set off such taxes and interest against the amount of the money judgment awarded against him in ejectment in lieu of the land.

do not think that this affords sufficient cause for denying him contribution. The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as a matter of right to have his cotenant, who has received the benefit of it, refund to him his proportionate share of the amount paid. As a matter of fact this property was joint property when these taxes and other charges against it were paid by plaintiff. In proportion to their interests all tenants in common are in duty bound to pay taxes, which in this state are a lien upon real property, and their nonpayment subjects the land to sale in satisfaction of them. Either of the cotenants may pay the taxes assessed against the whole estate, and such payment discharges the lien imposed upon the common interest, and no matter whether one tenant paying it intended the payment to be for his own benefit or not, such payment in fact and in law essentially inures to the benefit of the other cotenants. It discharges the lien against the common estate for the common benefit, independent of any intention of the cotenant paying it, and as all other cotenants are entitled to the benefit of such payment, it is only right that they should refund to the one making it their proportion of the amount he has paid. Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149. This rule equally applies to expenditures other than taxes made for the common benefit.

The court allowed the plaintiff interest on

It may be noted that where all the tenants in common had conceded the sole ownership of the possessor, and later recovered against him in partition an award paid to him by the municipality, and interest thereon, he should be allowed interest on the taxes he paid. Spencer v. Spencer, 148 App. Div. 888, 133 N. Y. Supp. 7.

The cases are not agreed whether there can be contribution for taxes paid by a tenant in common in possession claiming exclusively, otherwise than as a set-off to rents, etc.

In McClaskey v. Barr, 62 Fed. 209 (Ohio), supra, II. c, 1, it was held that a tenant in common claiming the whole, and resisting partition, and thus having had exclusive possession, would have no allowance for taxes or assessments except to offset rents, which were allowed for six years.

In O'Hara v. Quinn, 20 R. I. 176, 38 Atl. 7, it was held in partition that a cotenant paying taxes, supposing himself to be the sole owner, could not have contribution therefor. The court said: "The taxes paid by the respondent Quinn were assessed upon the whole land in suit, and against him alone, both he and the assessors supposing him to be the sole owner. No portion of the taxes were assessed against his cotenants or against their interest in the land, and, so far as appears, no notice of the assessment was given to them. The payment therefore by Quinn did not inure to the benefit of his cotenants. So far as they are concerned, the payments were for moneys which they were under no obligation to pay."

A tenant in common in exclusive possession, ignoring the title of his cotenant and excluding him from any participation in the management and control of the property will not be allowed in partition contribution for taxes and assessments paid. Wistar's Appeal, 125 Pa. 526, 11 Am. St. Rep. 917, 17 Atl. 460. But the court states also that the cotenant purchased his own share after the claims paid had ceased to be liens and without any notice of such claims so far as appeared.

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See also in a case of fraud, Sunter v. Sunter, supra, II. c, 2.

On the other hand, it was held in Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, that a tenant who has ousted his cotenants may on partition be allowed for taxes paid, even although no claim is made against him for use and occupation.

The same was held where there was a repudiation of the cotenancy. WILLMON v. KOYER.

And where heirs deny the insufficient deed of their ancestor to his co-owner, they will not be allowed to set up the statute of limitations against the grantee in such deed, who in good faith has paid the taxes on unproductive land for many years. Thus, where one partner sold to the other by an insufficient instrument, his interest in unproductive land, and the buyer for many years paid the taxes and assessments supposing the whole was his, the heirs of the seller will not in partition be allowed to set up the statute of limitations as to any part of the amount of such taxes so paid. Wiegel v. Mogk, 46 App. Div. 190, 61 N. Y. Supp. 528.

It has been held in Texas that a cotenant of the remainder would be allowed taxes paid during the life tenancy, though he was not charged with rents for that period. Thus, in Mateer v. Jones, — Tex. Civ. App. — , 102 S. W. 734, it was held on partition, where the defendant apparently denied the cotenancy, that, besides being allowed taxes and the permanent value of his improvements, and being charged rents, he should be allowed taxes paid during the life of the life tenant, but should not be charged with rents of that period, the court considering that the entire estate was benefited and saved to its owners by such payment.

IV. Repairs, expenses, and services.

It is usual to allow repairs to a tenant in common in possession claiming the whole, as against rents, etc. Davis v. Chapman,

all the expenditures from the date of payment of each by plaintiff. As we hold that part of these expenditures are barred by the statute of limitations, the question of interest only applies to those which we conclude were properly allowed. But as to those we are satisfied no interest should have been allowed. As a general rule in cotenancy accounting, a tenant making payments is only entitled to interest after a demand on his cotenant for contribution. Here, of course, if the defendant had offered payment, plaintiff would have refused it, because the acceptance would have been in derogation of his claim of nonexistence of the cotenancy. On the other hand, he could not consistently have made demand while repudiating the cotenancy, and in fact he made no demand until this action was brought. Under these circumstances plaintiff was not entitled to interest prior to the entry of judgment determining the liability of defendant for contribution.

On the claim that the court should not have charged the portion of the property assigned to defendant on partition with the lien for the payment of the amount found to be due plaintiff from defendant; there is no merit in this claim. It was an appropriate judgment to enter under the pleadings. In fact, it is always appropriate to do so in partition, as the only effectual way to secure a cotenant making advances and obtaining judgment therefor.

The judgment and order appealed from are reversed.

We concur: **Henshaw, J.; Melvin, J.**

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36 Fed. 42 (Ind.); Anderson v. Northrop, 44 Fla. 472, 33 So. 419; Adams v. Bristol, 196 N. Y. 510, 89 N. E. 1095, affirming 126 App. Div. 660, 111 N. Y. Supp. 231, supra, III.; Scaife v. Thomson, 15 S. C. 337 (such repairs as were necessary to preserve the property); Davidson v. Thompson, 22 N. J. Eq. 83; McLaughlin v. Barnum, 31 Md. 425 (rental value less such repairs as were necessary to keep the premises in their former condition).

But in Armijo v. Neher, 11 N. M. 645, 72 Pac. 12, it was held on partition that, while a tenant in common deeming himself the exclusive owner may setoff taxes paid against rents, he may not be allowed repairs where their necessity is not shown.

Insurance.

There are few cases on the subject of contribution for expense of insurance paid by a tenant in common claiming exclusive ownership.

In Sharp v. Zeller, 114 La. 549, 38 So. 449, supra, III. it was held that expenses of insurance might be credited against rents. See also Sunter v. Sunter, supra, II. c, 2.

On the other hand in Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384, credit for insurance was refused, as it was not shown that the insurance benefited the co-owner. So, in Gilroy v. Richards, 26 Tex. Civ. App. 355, 63 S. W. 664, it was held that "a joint owner who does not represent his co-owner, but holds the property adversely to him, cannot legally insure the entire property from loss by fire, and charge any part of the insurance to his co-owner against his consent."

Expenses.

In Foster v. Weaver, 118 Pa. 42, 4 Am. St. Rep. 573, 12 Atl. 313, 15 Mor. Min. Rep. 551, where one tenant in common of an oil lease fraudulently secured a transfer of his cotenant's interest, on such transfer being set aside it was held that the transferee must account for the full value of the oil produced while the transfer was in effect, L.R.A.1915B. without any deduction for the expense of producing it. Compare Williamson v. Jones, supra, II. c, 1, "Compensation for improvements limited to offsets," and Ruffner v. Lewis, supra, II. c, 2.

Services.

A tenant in common who wrongfully denies his cotenants' right may not have compensation for his services in managing the property which are thus forced upon his cotenants. Anderson v. Northrop, 44 Fla. 472, 33 So. 419; Sharp v. Zeller, 114 La. 549, 38 So. 449 (the court observed that the possessor had the rents without interest); Hattersley v. Bissett, 52 N. J. Eq. 693, 30 Atl. 86; Murphy v. Murphy, — La. —, 66 So. 382.

But allowance has been made for services of a tenant in common holding adversely, but believing in good faith that he owned exclusively.

Thus, where one considered as a tenant in common holding adversely had developed a salt well on the land, he was in equity held entitled to compensation for his improvements and services, including the expense of abortive attempts to find salt, and was to be charged rents and profits. Ruffner v. Lewis, 7 Leigh, 720, 30 Am. Dec. 513.

And in Sailer v. Sailer, 41 N. J. Eq. 398, 5 Atl. 319, it was held that a tenant in common occupying the whole, part as residence and part by his lessee, under a belief of right in good faith, but on whom no demand was made, will be on partition compensated for his improvements and for his services for taking care of the property (10 per cent on rents collected), and charged rents; but as to so much of the premises as he occupied as a residence, he will not be charged for use and occupation, nor credited in respect to taxes and ordinary repairs.

V. Encumbrances, etc.

It is familiar law that a tenant in common cannot have the benefit of the payment of an encumbrance by his cotenant

without reimbursing him *pro tanto*. There seems to be no reason why this rule should not fully apply to the payment of an encumbrance by a tenant in common claiming to be the exclusive owner. No effort has been made to collect the cases on this point, but a few of them are here cited.

Of course, in a particular case compensation might be refused for the expense of the purchase of a tax title, on the ground that a tenant in possession ought to pay the taxes.

A tenant in common who is a disseisor will on partition be allowed compensation for a lien on the property paid off by him. Rippe v. Badger, 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642, where, however, it does not seem clear that he was a disseisor at the time he paid off the lien.

So, in partition a tenant in common who has repudiated the cotenancy will be allowed payment of encumbrances. Duke v. Reed, 64 Tex. 705.

A tenant who has ousted his cotenants will on partition be allowed "court costs incurred in the defense and protection of the common title, if the proceedings were necessary, and operated to the benefit of the estate in which the parties are jointly interested." Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347.

See also WILLMON v. KOYER.

So, on ejectment against the possessor by his cotenant, the costs of ejectment by such possessor against strangers should be allowed. Gregg v. Patterson, 9 Watts & S. 197.

Where a purchaser in partition did not get a perfect title, owing to an outstanding part owner who was not a party, it was held in a subsequent partition between them that such outstanding party should be charged with his proportion of a judgment paid off with the proceeds of the sale in the first partition suit. Parkhill v. Doggett, 142 Iowa, 534, 119 N. W. 689.

In Hanrick v. Gurley, supra, the court said: "The objection urged is simply that, by his ouster of his cotenants, he has precluded himself from claiming contribution from them. We think this contention cannot be maintained. The court, in determining the rights of the parties, will adjust them upon the proper basis. It will deny to the ousting cotenant his claim to the exclusive ownership of the property, but will enforce his true rights with respect to it; and, if he has discharged burdens which rested alike on the whole estate, it will require his cotenants, when they seek partition and settlement with him, to bear their just proportion of such burdens, requiring him, at the same time, to account for any benefits in excess of his just share, which he has received from the estate. Many of the reported cases in which this principle of contribution has been applied grew out of the efforts of an heir to acquire a title himself adverse to that of his coheirs, and, by force of it, to exclude them. Such efforts have uniformly met with defeat, but at the same time the cotenants seeking to share in the estate have as uniformly been required to reimburse him so far as he had borne for their benefit more than his portion of the burdens."

See also Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886, infra, VI.

VI. Cases arising under statutes.

Betterment acts.

The reader will understand that no attempt is made here to deal with the general question of the relation of the betterment acts to improvements by tenants in common, but simply to refer to those cases where the court discusses the effect of such acts upon an improver holding adversely, or supposing that he had a good title.

If a tenant in common has improved the land in good faith, under the belief that he was the sole owner, he is, when sued in ejectment, entitled to the benefit of the betterment act, and constructive notice of title, such as is implied from the registry of the plaintiff's deed, will not preclude the occupant from such benefit. Shepherd v. Jernigan, 51 Ark. 275, 14 Am. St. Rep. 50, 10 S. W. 765.

In Jacobs v. Bush, 17 S. C. 594, supra, II. c, 1, the court, in following the rule of Scaife v. Thomson, supra, II. c, 1, observed that the case was also within the betterment act; but it was stated in the obscure case of McGee v. Hall, 28 S. C. 562, 6 S. E. 566, that the betterment act did not apply to a tenant in common who claimed to own all under an incorrect construction of a will.

A tenant in common believing in good faith that he owns the whole should, under the statute, on actual partition, be compensated for his improvements,—to be setoff to him if possible,—and should be charged use and occupation exclusive of the improvements. Thompson v. Jones, 77 Tex. 626, 14 S. W. 222, where the court said: "The equity of a defendant who improves real estate believing he owns the whole, when he owns only an undivided interest, is certainly as great as that of one who thinks he owns the whole when in fact he has no title whatever."

The betterment statute gives a tenant in common, after a recovery against him by his cotenant of an undivided interest, the right to compensation for valuable improvements made in good faith upon the common estate. Phœnix Lead Min. & Smelting Co. v. Sydnor, 39 Wis. 600 (*obiter*).

Probably it was on this theory that it was held in Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886, that a tenant in common in possession in good faith, supposing he owns the whole, will be, on ejectment by his cotenant, reimbursed for his share of the payment of a mortgage, and of taxes with interest, and for his share of the value of repairs or improvements, less his share of the rental value.

See also in this connection, Sunter v. Sunter, supra, II. c, 2.

Probably the court was referring to the betterment act in Curtis v. Fowler, 66 Mich. 696, 33 N. W. 804, where it was held that a tenant in common of the remainder, who was also grantee of the tenant for life, would not be allowed compensation for improvements made by him during the life of the tenant for life, the statute as to improvements not applying to such a case.

See also in this connection, Jackson ex dem. Van Denberg v. Bradt, 2 Caines, 303, supra, II. c, 3.

Other statutes.

In some cases the statutes provide that in partition the value of improvements shall be taken into consideration and assignments made in conformity thereto. See Allen v. Hall, 50 Me. 253.

It seems to be suggested in Marshall v. Crehore, 13 Met. 462, that a tenant in common who entered under a title supposed to be good as to the entire premises might not on partition have the benefit of his improvements, but a note to the case states that by statute of 1850, the respondent in partition shall be entitled to compensation for the value of any improvements. In Chandler v. Simmons, 105 Mass. 412, it was held that the statute as to rents and damages, and also as to improvements, in partition, did not apply when the respondent did not deny the right and title of the petitioner to any part of the premises claimed by him, the statute providing for improvements and rents, etc., where "it appears by the pleadings that the defendant or respondent denies the right and title of the plaintiff or petitioner to any part of the premises, and claims the same as his own estate in fee, and it is proved that the defendant or respondent held the same under a title which he believed to be good." Followed in Aldrich v. Husband, 131 Mass. 480, — the court observing that it did not decide whether a bill in equity would afford relief.

VII. Limitations.

Ordinarily, where rents and profits are set up against improvements, made by one claiming exclusively, the improver may not interpose the statute of limitations.

Thus, where in partition a tenant in common who has held adversely, and had resisted ejectment commenced before the improvements were made, asks compensation for betterments and improvements made during the entire period, he cannot interpose the statute of limitations against rental value during any of such period. Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

So, in Vaughan v. Langford, 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 Ann. Cas. 91, supra, II. c, 1, while the point was not involved in the decision, the court considered that the statute of limitations would not apply in charging rents against betterments, as betterments were considered as paid *pro tanto* by the rents as they accrue.

So, in Tongue v. Nutwell, 31 Md. 302, the plaintiff, who had already recovered in ejectment a moiety of the premises, sued for trespass and mesne profits, and it is suggested by the report that the defendant occupied in belief that he owned the whole. The court, while holding that the statute did not permit a recovery for mesne profits for more than three years, held that the defendant, having claimed an allowance for an improvement against the rents and profits, must allow in reduction of it the mesne profits during his occupation, including a period of more than three years.

In Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, it was held that, in partition, claims by one who had ousted his cotenants, for court costs incurred in defense of the title and for taxes, would be allowed without reference to the statute of limitations. "His right is to have the property so divided or sold as to make the others, while sharing equally in the benefits of the estate, share equally in the necessary expenses incident to it. To such a claim, when thus asserted, the statute of limitations has, in our opinion, no application, because it is an incident to partition, and to an action for partition the statute does not apply." There was here no claim for use and occupation.

It will be observed that the contrary is held in WILLMON v. KOYER. While it may be argued that a disseisor's claim for taxes should be subject to the statute of limitations, the claims for payment of assessments and for expenses of defending the title against a third person are not far removed in nature from a claim for the discharge of a mortgage on the common property, and there seems to be no reason why the statute of limitations should bar the reimbursement of a tenant in common for the payment of such a mortgage.

It was held in Starks v. Kirhgraber, 134 Mo. App. 211, 113 S. W. 1149, cited in WILLMON v. KOYER, upon an action by one cotenant against another who had ousted him, for an accounting of rents and profits, that the defendant may setoff the taxes, and each party may plead the statute of limitations as to items barred by it.

VIII. Miscellaneous.

Where an agent was attempting to get all the land for himself, his principals, if they recover the part of it owned by them on the theory that he was their agent, must allow him on partition his improvements either by allotting them to his share or otherwise. Drennen v. Walker, 21 Ark. 539.

In Baker v. Whiting, 3 Sumn. 475, Fed. Cas. No. 787, a tenant in common, who was also an agent of his cotenants, buying in a tax title and claiming under it, was ordered to convey to his cotenants according to their interest after being satisfied of all

his just claims for taxes, for purchase money at the tax sale, for expenditures and improvements on the land, and also for his services as agent, deducting his receipts for stumpage or otherwise.

It may be noted that in Tyner v. Fenner, 4 Lea, 469, it does not appear that there was any actual or constructive denial of the claims of the other tenants, or that the successor supposed he owned the whole.

It may be noted that in Texas it is held that where tenants in common have not acquired the property "by the same instrument or act of the parties or of the law," one tenant may acquire a good title to the whole by the purchase of an outstanding title to the whole (Niday v. Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027) or by purchase at foreclosure of an encumbrance against the whole (Fielding v. White, — Tex. Civ. App. —, 32 S. W. 1054, citing Texas authorities). In Niday v. Cochran, supra, the court said: "In this state the general rule is subject to a fundamental modification, which, though apparently against the weight of outside authority, seems, nevertheless, to be firmly established. It is in regard to the facts out of which this mutual obligation may grow. It is the rule in this state that the mutual obligation arises only where the parties have acquired the property by the same instrument or act of the parties or of the law. Fielding v. White, supra, and authorities cited. Or else when there in fact exists between the cotenants the relation of mutual trust and confidence."

B. B. B.

WASHINGTON SUPREME COURT.
(Department No. 2.)

STATE OF WASHINGTON EX REL. H. O. FISHBACK, Insurance Commissioner, Respt.,

v.

GLOBE CASKET & UNDERTAKING COMPANY, Appt.

(— Wash. —, 143 Pac. 878.)

Insurance — burial certificates.

1. The business of selling certificates guarantying burial to the holders is insurance, and one attempting to transact it must comply with the insurance laws.

Statute — contemporaneous construction.

2. The assumption for two years by the insurance commissioner, that the business of issuing certificates guarantying burial is not within the insurance laws of the state, will not, if the statute is plain, prevent the stopping of the business for failure to comply with the insurance laws, on the theory of contemporaneous construction.

Estoppel — of state — act of officers.

3. An insurance commissioner cannot, by deciding that the business of issuing certificates guarantying burial is not insurance, estop the state from enforcing the insurance laws against one attempting to issue them.

Corporation — dissolution — legitimate objects.

4. That a corporation which has been issuing certificates guarantying burial also has authority to transact other legitimate business will not prevent the courts requiring its liquidation, if it has not attempted to transact such business, and has no authority to issue such certificates, and the liquidation of the burial certificates is necessary to protect holders.

Corporation — forfeiture of charter — illegal business.

5. The charter of a corporation which has undertaken illegally to issue certificates guarantying burial may be forfeited, although it has authority to transact legitimate business, since the transaction of the illegal business may result in injury to the public.

(October 20, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to enjoin defendant from further prosecution of its business, to have its corporate affairs wound up, and its corporate charter forfeited. Affirmed.

The facts are stated in the opinion.

Mr. **John Mills Day** for appellant.

Mr. **L. L. Thompson**, with Messrs. **W. V. Tanner**, Attorney General, and **John M. Wilson**, Assistant Attorney General, for respondent:

Defendant is doing an insurance business.

State ex rel. Coleman v. Wichita Mut. Burial Asso. 73 Kan. 179, 84 Pac. 757; State v. Willett, 171 Ind. 296, 23 L.R.A. (N.S.) 197, 86 N. E. 68; Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; Physicians' Defense Co. v. Cooper, 188 Fed. 832, 47 L.R.A. (N.S.) 290, 118 C. C. A. 50, 199 Fed. 576; State v. Hogan, 8 N. D. 301, 45 L.R.A. 166, 73 Am. St. Rep. 759, 78 N. W. 1051; Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Shakman v. United States Credit System Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

The state is not estopped from maintaining the action.

State ex rel. Tanner v. Northwestern Invest. Co. 70 Wash. 381, 126 Pac. 895; Em-

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Note. — As to what constitutes insurance, see note to Physicians' Defense Co. v. Cooper, 47 L.R.A.(N.S.) 290, and later case King v. Atlantic Coast Line R. Co. 48 L.R.A. (N.S.) 450.

ployers' Liability Assur. Co. v. Commissioner of Insurance, 64 Mich. 614, 31 N. W. 542; Travelers' Ins. Co. v. Fricke, 94 Wis. 258, 68 N. W. 958; State ex rel. Fidelity & C. Co. v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

A corporation may incur a forfeiture of its franchises by the doing of an illegal act.

Morawetz, Priv. Corp. 2d ed. § 1024; 5 Thomp. Corp. 2d ed. § 6524.

Fullerton, J., delivered the opinion of the court:

This is an action brought on the relation of the state insurance commissioner against the appellant, to enjoin it from the further prosecution of the business conducted by it, to have its corporate affairs wound up, and its corporate charter forfeited. The complaint of the commissioner is based on the ground that the business of the appellant, as conducted, is in violation of the insurance laws of the state. To the complaint the appellant made answer, whereupon the commissioner moved for judgment on the pleadings. This motion the trial court granted, rendering judgment in accordance with the prayer of the complaint.

The record discloses the following facts: The appellant is a corporation organized under the laws of this state, having its offices and principal place of business at the city of Tacoma. It objects and purposes, as set forth in its articles of incorporation, are the following: "The object and purpose of this corporation shall be the manufacturing, selling, and disposing of burial caskets, doing a general undertaking business, or contracting for doing the same, purchasing, selling, and disposing of all articles, materials, and everything necessary for embalming and preparing the dead for burial; owning, controlling, leasing hacks, hearses, and all other necessary vehicles for the proper transporting of the dead, and conducting funerals, in any city, town, or state in the United States; to own, purchase, sell, trade for, and control or lease cemeteries, burying grounds, tombs, mausoleums, lots, or tracts of ground for burying the dead; to issue, sell, and dispose of by barter, trade, or transfer, certificates guarantying to the holder thereof a decent and respectable burial, interment, or cremation, at the time of his death; to sell and transfer said certificates, and exchange the same for stocks, bonds, or any valuable consideration, of not less than the benefits guaranteed therein; to purchase, lease, trade for, and sell lands, factory sites, and locations for the purpose of erecting and maintaining factories, offices, agencies, and places of business, for the purpose of manufacturing of all and every article known to the undertaking business and disposing of the same; to employ agents, establish agencies for the purpose of disposing of any and all goods, articles, and things manufactured by this company, and to dispose of and sell its certificates of funeral benefits; to do any and all things necessary to perpetuate, carry out, and fulfil the objects and purpose of this corporation; and to issue its bonds or notes in payment for any property purchased, and redeem the same at the will of the corporation."

The appellant has not, in so far as the pleadings disclose, engaged in the general undertaking business, nor has it engaged in the manufacture or sale of general burial supplies, or acquired any of the named facilities therefor. Its business is confined solely to the sale of the certificates named in its articles, and the performance, through the agency of others, of the obligations assumed thereby. These certificates are in two forms. In the one the corporation agrees, on the death of the holder, "to take charge of the burial of said holder, and provide the necessary furnishing and materials therefor to the value of one hundred ($100) dollars, as follows: One black broadcloth, white or colored plush casket; one outside box for casket; one hearse two carriages; one burial robe; necessary embalming; necessary accessories; and services of funeral director." The other is similar in form, with the exception that it does not name the value of the furnishings, and provides that the corporation will take charge of the funeral of the holder "on the surrender of this receipt," and will furnish the hearse and two carriages in places only where they are obtainable. Sales of the certificates are made through the agency of solicitors on the instalment plan. An applicant is required to sign a written application according to a form provided by the corporation. In this form is given a somewhat minute description of the applicant, his age, date and cause of his last illness, and his present condition of health, which the applicant warrants and declares to be true. His application is subject to the approval of the corporation. If approved, and the first instalment is paid, the applicant is given a "contract . . . as binding on the company as the certificate, provided payments are made according to contract." When the instalments are fully paid, the contract is taken up, and one or the other of the certificates before mentioned is issued him. The cost of a certificate is not shown, although it is alleged that the sum collected in each case is a certain fixed sum. It further appears that, on the organization of the corporation, the president thereof consulted with the then insurance com-

missioner concerning the business in which the corporation intended to engage, and was advised by him that its business would not be in violation of the state insurance laws; and that the corporation did not then comply, and has not since complied, with such laws.

The appellant, in support of its appeal, makes two principal contentions: First, that the business in which it is engaged is not an insurance business; and, second, if it be so found, the state is estopped, by the acts of its former insurance commissioner, from now questioning the appellant's right to engage in the business.

As to the first contention, we think the business is clearly insurance. The contract evidenced by the certificate has all of the elements of a life insurance contract. It is an agreement to perform a service which can become obligatory only on the death of the certificate holder. While no beneficiary of the promise is named, in reality one exists, and may be ascertained with as much certainty as if directly and specifically named. It is the person who would otherwise be obligated to pay the expenses of the burial. This may be the heir of estate of the decedent, his relatives, or the state; but, whoever such person may be, he is relieved of his obligation to the extent of the value of the service agreed to be performed by the terms of the certificate. There is therefore a promise by one person to perform a valuable service on the death of another, a valuable consideration paid for the promise, and a person to whom the benefit of the promise will inure. Had the ordinary insurance nomenclature been used to designate the person making the promise, the person to whom the promise is made, the person who will receive the benefit of the promise, and the consideration paid for the promise, no one would question that it was an insurance contract. But a contract is to be determined from its nature and effect, not by the terminology used to characterize it. Here there is an "insurer," an "insured," a "premium," and a "beneficiary," and we think the contract nothing else than a plain, ordinary insurance contract.

Again, the contract is not one that the courts will strain the laws to uphold. It is freighted with the greatest possibilities for fraud. Since the corporation was organized under the general incorporation laws, it could enter upon its business when its capital stock was all subscribed. It is not required to have or keep any paid-up capital. Its duration is limited to fifty years. The officers of the corporation may handle and dispose of the funds received in payment of the certificates in any manner they please. It is certain that many of these certificates will not be ripe for redemption for a number of years, and it is reasonably certain that some of them will survive the life of the corporation itself. If, therefore, the company were permitted to continue the business, and all or any considerable proportion of these certificates were ever redeemed, it will be a consummation unique in human experience.

That contracts of the nature of the contract here in question are insurance contracts, and subject to control under the insurance statutes, is the general trend of authority. In State ex rel. Coleman v. Wichita Mut. Burial Asso. 73 Kan. 179, 84 Pac. 757, the organization in question was one ostensibly to secure to the members thereof a decent burial. The expenses were defrayed by assessments levied upon the members. Two classes of certificates were issued, one entitling members to a funeral worth $100, and the other a funeral worth $50, accordingly as they paid the greater or lesser assessment. It was organized by an undertaker, through whom alone burials could be had. The court held the association an insurance company and subject to the insurance laws of the state. Passing upon the question. the court said: "We conclude from the foregoing facts that the business designed to be transacted under the plan of the Wichita Mutual Burial Association is plain, ordinary insurance. Membership in this association insures to each member above ten years of age that which is equivalent to $100 cash, payable at the death of such member to whomsoever would otherwise defray the burial expenses of such decedent. If the certificate of membership issued by this burial association be designated a 'policy,' the assessment a 'premium,' and those who are relieved from paying the funeral expenses of the deceased member 'beneficiaries,' this association, both in general plan and phraseology, would be a substantial duplicate of the ordinary mutual insurance company. The fact that no beneficiary is specifically named deserves little consideration, since in reality one exists, and may be ascertained with as much certainty as if directly and specifically mentioned. Whoever would otherwise pay the burial expenses of the deceased member is, by being relieved of that burden, as directly benefited to the amount of such expenses as if the cash were paid immediately to such person. If the deceased member leave an estate, the whole thereof, undiminished by the burial expenses, which would otherwise be paid therefrom, will be received by his heirs. If he leave no estate, then his immediate relatives and friends, who would otherwise have to furnish the

expenses of his burial, will be benefited by being relieved of that burden."

To the same effect is the case of State v. Willett, 171 Ind. 296, 23 L.R.A.(N.S.) 197, 86 N. E. 68, in which the court used the following language: "The contract was issued by an association whose declared object was to secure or make certain, by a system of mutual contribution, to each member of the association, at death, the specific benefit of $75 for application to his burial service. This was indemnity or security, that, at the cessation of the life of the member, a certain sum of money would be payable by the association for his burial, whether the deceased had paid one assessment or a thousand. The controlling elements of the contract, as interpreted by the by-laws, are in all material respects similar to those of an ordinary mutual life insurance company. . . . It is simply a business enterprise in which the contract holder is promised a definite thing in consideration of his performance of a definite undertaking on his part. The contract is determinable by the cessation of a human life, and belongs to that extended class of agreements dependent upon such contingency, and commonly known as life insurance."

For cases analogous to the general principle, see Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; Physicians' Defense Co. v. Cooper, 47 L.R.A. (N.S.) 290, 118 C. C. A. 50, 199 Fed. 576; State v. Hogan, 8 N. D. 301, 45 L.R.A. 166, 73 Am. St. Rep. 759, 78 N. W. 1051; Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293; Shakman v. United States Credit System Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

The appellant cites the case of Com. ex rel. Hensel v. Provident Bicycle Asso. 178 Pa. 636, 36 L.R.A. 589, 36 Atl. 197, as sustaining the contention that the business in which it is engaged is not an insurance business. In that case the defendant was a corporation organized "for the purpose of the accumulation of a fund by assessments for the protection of its members from loss by reason of injury to or the losing of bicycles." Each member of the association was required to pay a fixed due of $2, and a further sum of $1 on the 1st days of January, April, July, and October of each year. In consideration of the payments, the corporation agreed with its several members to: "(1) Clean your bicycle twice during the year. (2) Repair tire when punctured by accident. (3) Repair bicycle when damaged by accident. (4) Replace bicycle when destroyed by accident. (5) Replace bicycle when stolen, if not recovered in eight weeks, and provide a bicycle during that time."

The corporation was attacked on the ground that it was carrrying on an insurance business without complying with the insurance laws of the commonwealth. The trial court held that it was not, and its judgment was affirmed by the supreme court. In the course of the opinion the court said: "The defendant is a corporation chartered under the 2d section of the act of 1874 as a protective association. The question raised by the quo warranto and the answer is whether the association is carrying on the business of insurance, in violation of the act of 1876. The right challenged is that of the defendant to carry on the business in which it is engaged. A part of this business is clearly not insurance, and a part of it may come within the meaning of that term. This would, however, depend on the manner in which the affairs of the association are conducted. All of its business may be so transacted as to be of a kind that a protective association may properly carry on, and it does not appear that it has not been so transacted. The obligation of the association is to repair and replace, not to pay a fixed amount or an amount covering or proportionate to the loss sustained, and the right of the member is fixed by the fact of membership. The propriety of granting such a charter under the act of 1874 may well be doubted, as there is a probability of its improper use as a cover for a business regulated by the act of 1876, and this case is so near the border line that we have hesitated to affirm it, because it might encourage attempts to establish insurance companies which would not be subject to the wholesome provisions of the insurance laws. These laws are founded on a wise public policy, and any attempt to evade them should be promptly met and defeated."

This case, in our opinion, rather supports than militates against the conclusion we have reached. It is rested, as will be observed, on the ground that all of the business of the corporation could be transacted under its charter as a protective association, and there was no showing that it had not been so transacted. The court, however, plainly intimates that, if it had been shown that the corporation had conducted its business to the full extent permitted by its charter, a different conclusion would have been justified. The case, therefore, we repeat, does not sustain, but rather militates against, the proposition to which it is cited.

The second contention of the appellant is also without merit. It is the general rule undoubtedly that when a statute is of doubtful meaning, and the officers in charge of its

execution give it a construction which is afterwards so long continued in as to amount to a general acquiescence, the courts will hesitate to declare transactions illegal which are performed in pursuance of such construction. But no such condition is presented here. The insurance acts are not of doubtful construction, and there can be no reasonable doubt, at least to our minds, that the appellant's business as conducted is in violation of such statutes.

Nor can it be said that the construction put upon the statute by the former commissioner has been so long continued in as to show general acquiescence. But two years have elapsed since that time, and, so far as it appears, no other person or combination of persons have adopted that construction or engaged in the same business.

Nor is the act of the former commissioner in any sense an estoppel. An officer of the state can, under certain circumstances, condone past offenses against the law, but he cannot grant indulgences to commit new or continuing offenses. State ex rel. Tanner v. Northwestern Invest. Co. 70 Wash. 381, 126 Pac. 895.

It is further objected that the judgment entered is not warranted by the facts disclosed by the record. It is argued that at most the judgment entered should go no farther than to prohibit the issuance of the illegal contracts in future, leaving the corporation free to prosecute the business it is legitimately entitled to prosecute under its articles of incorporation. But it is a sufficient answer to this to say that the company has engaged in but one form of business, and that an illegal business; that it has outstanding contracts requiring liquidation; and that the court has power to provide for such liquidation in that form which in its judgment will best meet the justice and equity of the case, and that we find no abuse of discretion in the method adopted.

Finally it is said there should be no forfeiture of the appellant's corporate charter. But as was said by Mr. Morawetz in his work on Corporations, 2d ed. § 1024: "A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize the corporation to perform, is unlawful; and, if the doing of such act is an injury to the public, it may be sufficient ground for declaring a forfeiture of the corporate franchises."

Here the business engaged in by the corporation is not only illegal, but it is of such a nature that it can result in an injury to the public. There is therefore no question as to the right of the court to declare a forfeiture, and we think this the better way to prevent the further continuance of the illegal business.

The judgment is affirmed.

Crow, Ch. J., and **Parker**, **Mount**, and **Morris**, JJ., concur.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

HENRY W. MUNROE, Plff. in Err.,
v.
UNITED STATES OF AMERICA.

(— C. C. A. —, 216 Fed. 107.)

Witness — contempt — failure to produce papers from foreign country.

One is not punishable for contempt in failing to produce, in response to a subpœna duces tecum, papers which are in possession of his partners at the firm's place of business in a foreign country, and which relate to such business.

(July 9, 1914.)

ERROR to the District Court of the United States for the District of Massachusetts to review a judgment adjudging defendant guilty of contempt. Reversed.

The facts are stated in the opinion.

Argued before Putnam, Dodge, and Bingham, Circuit Judges.

Note. — Duty to produce books or papers, pursuant to subpœna duces tecum or order of court as affected by their location or control, or by considerations of convenience or inconvenience.

This note is confined to cases where the refusal of the witness or party to produce books or papers at the trial, or before an examining body such as a grand jury or commissioner to take depositions, is based upon the ground that they are in such a location, or under such control, or of such size or number, that he is not obliged to produce them. Cases of refusal based upon the privilege of the witness are excluded; also cases in which the applicant is merely fishing for evidence, or in which the refusal to produce is based upon the ground that the books and papers contain incriminating matter. Cases relating purely to discovery are also not within the scope of the note.

For refusal to produce books or papers in response to subpœna upon ground that they contain private matter, see note in 29 L.R.A.(N.S.) 716.

As to requiring attorney to produce papers or documents belonging to client as

Messrs. **Boyd B. Jones** and **Henry R. Stern**, for plaintiff in error:

Defendant was not guilty of criminal contempt for not producing the checks, because they were in the possession of his partners in Paris, France, subject to the French laws, and defendant was not of right, as against his partners, entitled to have the checks sent to him at New York.

American Lithographic Co. v. Werckmeister, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676; Amey v. Long, 9 East, 473, 1 Campb. 16, 180, 6 Esp. 116, 9 Revised Rep. 589; Atty. Gen. v. Wilson, 9 Sim. 526, 8 L. J. Ch. N. S. 119; Bessette v. W. B. Conkey Co. 194 U. S. 324, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Crowther v. Appleby, L. R. 9 C. P. 23, 43 L. J. C. P. N. S. 7, 29 L. T. N. S. 580, 22 Week. Rep. 265; Eccles v. Louisville & N. R. Co. [1912] 1 K. B. 135, 81 L. J. K. B. N. S. 445, 28 Times L. R. 67, 56 Sol. Jo. 107; Greatrex v. Greatrex, 1 DeG. & S. 692, 11 Jur. 1052; Re Sykes, 10 Ben. 162, Fed. Cas. No. 13,707; Kearsley v. Philips, L. R. 10 Q. B. Div. 465, 52 L. J. Q. B. N. S. 269, 48 L. T. N. S. 468, 31 Week. Rep. 467; Martineau v. Cox, 2 Younge & C. Exch. 638, 7 L. J. Exch. in Eq. N. S. 18, 1 Jur. 818; Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; Murray v. Walter, Craig & Ph. 114, 3 Jur. 719; Parrot v. Mexican C. R. Co. 207 Mass. 184, 34 L.R.A.(N.S.) 261, 93 N. E. 590; Reid v. Langlois, 1 Macn. & G. 627, 2 Hall & Tw.

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violation of privilege, see 48 L.R.A.(N.S.) 334, and note.

As to right of corporation, corporate officer, or other person having custody of its books and papers, to refuse to produce them on the ground that they may tend to incriminate, see note in 47 L.R.A.(N.S.) 1175.

As to particularity required in description of documents in subpœna duces tecum, which includes "fishing" cases, see 31 L.R.A. (N.S.) 835, and note.

Partners.

A witness who has been subpœnaed to produce books cannot refuse to do so on the mere ground that they are in the hands of a partnership of which he is a member only, especially in the absence of proof that the other members refused to allow him to produce them. United States v. Collins, 145 Fed. 709.

So, in Forbes v. Samuel, 82 L. J. K. B. N. S. 1135, [1913] 3 K. B. 709, 109 L. T. N. S. 599, 29 Times L. R. 544, where a number of copies of a partnership deed were executed, and each partner signed every copy and each partner had one, it was held that a partner could be compelled by subpœna duces tecum to produce the copy which he had in action against him.

But it has been held that a partner may not be compelled by subpœna duces tecum to produce books and documents belonging to the partnership, where his copartner objects to their production. Atty. Gen. v. Wilson, 9 Sim. 526, 82 L. J. Ch. N. S. 119.

Corporation or association.

The better rule is that the officer of a corporation having charge or custody of its books and papers may be required to produce them by subpœna duces tecum or order.

In Nelson v. United States, 201 U. S. 92, 50 L. ed. 673, 26 Sup. Ct. Rep. 358, it was held that the refusal of corporate officers to obey orders of a Federal circuit court requiring them to produce certain documentary evidence on their examination before a special examiner could not be justified on the theory that such evidence was not in their possession or under their control, and that their possession was not personal, but was that of the corporation. The court said that the plaintiffs in error contended that the documentary evidence called for was not shown to be in the possession or under the control of the witnesses, and further stated: "This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were officers. Granting this to be so, and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books, and were summoned from necessity, as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail, the books of a corporation can be withdrawn from the reach of compulsory process. It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them—not the intangible being they represent and act for—that the law directs its process of subpœna and must procure its evidence."

See also Dancel v. Goodyear Shoe Machinery Co. 128 Fed. 753, and Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 716, infra.

And in Lorenz v. Lehigh Nav. Co. 5 Legal Gaz. 174, in which the court declined, under the circumstances, to punish an officer of a corporation having actual custody of the books and papers, the corporation being a party to the suit, for refusal to obey a subpœna duces tecum, the court remarked that in a proper case the subpœna duces tecum would be enforced against an officer of a corporation having actual custody of its books and papers, regardless of any orders he might have received relative thereto.

Prior to the New York statute (Code

59, 19 L. J. Ch. N. S. 337, 14 Jur. 467; Taylor v. Rundell, Craig & Ph. 104, 11 Sim. 391, 4 Jur. 426; United States v. Babcock, 3 Dill. 566, Fed. Cas. No. 14,484; United States v. Collins, 145 Fed. 709; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

Under the laws of France the title to the checks was in Dolan; the Paris house could not lawfully send them to the defendant at New York without her consent, and therefore the defendant was not guilty of the contempt charged.

Burton v. Payne, 2 Car. & P. 520, 31 Revised Rep. 692; Partridge v. Coates, Ryan & M. 153, 1 Car. & P. 534; 1 Morse, Banks & Bkg. 4th ed. § 460; Com. v. Webster, 5 Cush. 295, 52 Am. Dec. 711.

Assuming that a citizen subpœnaed duces tecum is in contempt for an unreasonable failure to make an attempt to obtain papers in a foreign jurisdiction in the possession of and belonging to a foreign partnership of which he is a member, nevertheless, defendant was not guilty of the criminal contempt charged, because such finding was not warranted by the law and evidence.

Re Savin, 131 U. S. 267, 33 L. ed. 150, 9 Sup. Ct. Rep. 699; Jones v. United States, 126 C. C. A. 407, 209 Fed. 585; United States v. Mason, 218 U. S. 517, 54 L. ed. 1133, 31 Sup. Ct. Rep. 28.

Mr. **Asa P. French**, for the United States:

Defendant was bound reasonably to use, when duly served with a valid precept of the district court requiring him to produce be-

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Civ. Proc. § 868) which provides that the production of books or papers belonging to a corporation may be compelled by a subpœna duces tecum directed to the president or other head of the corporation, or to the officer thereof in whose custody the books or papers are, it was held in Bank of Utica v. Hillard, 5 Cow. 153, that a mere clerk in a bank could not be compelled upon subpœna duces tecum to produce books which were in the possession and under the control of the cashier at the trial of an action in which the bank was a party. And upon a new trial of the same case it was held that the cashier could not be compelled by subpœna duces tecum to produce the books of the corporation, as his possession was only temporary and the books were not his property, and that the office of a subpœna duces tecum was to coerce a witness to produce books and papers that were his property, or at least did not belong exclusively to the adverse party. 5 Cow. 419.

And so in La Farge v. La Farge F. Ins. Co. 14 How. Pr. 26, it was held that the president of a corporation which was a party could not be compelled to produce at the trial books and papers belonging to the corporation, under a subpœna duces tecum issued by the adverse party, as he had no right to remove them from the office.

And in Morgan v. Morgan, 16 Abb. Pr. N. S. 291, it was held that, as to books of a corporation not a party to the action, no power of enforcing an examination or production of them on a trial between other parties was afforded, and that its agents or officers in their individual capacities could not be compelled to discover or produce the books of a corporation over which they did not have the right of disposition at their own will and discretion.

In Boorman v. Atlantic & P. R. Co. 78 N. Y. 599, it was held that directors of a corporation defendant, who were not shown to be in control of its books and papers, could not, in a proceeding against them, be required to produce such books and papers for inspection of the plaintiff before trial, under a provision of the Code authorizing the court to compel such production by "a party to the action."

In Crowther v. Appleby, 43 L. J. C. P. N. S. 7, L. R. 9 C. P. 23, 29 L. T. N. S. 580, 22 Week. Rep. 265, it was held that a witness who was secretary and attorney for a corporation which was not party to the suit could not be compelled by subpœna duces tecum to produce books and papers belonging to the corporation, which the directors refused to allow him to take.

And in Penney v. Goode, 1 Drew. 474, 17 Jur. 82, 22 L. J. Ch. N. S. 371, 1 Week. Rep. 120, it was held that where only part of the board of directors of a corporation was before the court, they could not be compelled without the consent of the other directors to produce documents which were at the office of the company and in the custody of the directors as a body.

Inconvenience.

In Wertheim v. Continental R. & Trust Co. 21 Blatchf. 246, 15 Fed. 716, it was held that the officers of a corporation which was not a party to a suit could be compelled by subpœna duces tecum to produce books of the corporation which were necessary in evidence, regardless of considerations of inconvenience. The court said: "It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardied, and the administration of justice thwarted." The court further said: "Why should not the officers of a corporation be required to produce the books of the corporation as witnesses when the books are necessary evidence? A corporation can only act through its officers. The suggestion that the books are in the

fore it such checks, the influence which he possessed with his partners to bring about the production of such checks.

United States v. Collins, 145 Fed. 709.

Putnam, Circuit Judge, delivered the opinion of the court:

This is a writ of error to the district court of the United States for the district of Massachusetts to review a judgment against Henry W. Munroe for contempt. The facts of the case are mainly stated for our purposes in the opinion of the district court.

Munroe was found guilty of criminal contempt, and sentenced to pay a fine of $250 and be confined in jail for ten days. The contempt charged was the alleged refusal or failure of Munroe to produce certain checks before the grand jury after service on him of a subpœna duces tecum. Munroe failed to produce the checks as ordered by the subpœna. Munroe is a citizen of the United States, residing, at the time of the service of the subpœna upon him, in the city of New York. He is the senior partner of the firm of Munroe & Company, whose principal place of business was and is in Paris, France, where the checks in question were, and always have been, and still are, and where the business transactions out of which the checks arose occurred; none of the transactions, so far as Mr. Munroe's partnership is concerned, having been in the United States.

There was no specfic finding of facts; but this writ of error has proceeded before us on the opinion filed in the district court

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legal custody of the corporations, and not of its officers, may be theoretically correct. If technically true, it is not an objection to compelling the officers to produce them."

And in Beeber v. Parker, 17 W. N. C. 399, it was held that the receiver of an insurance company, plaintiff in an action against members of the company upon a policy of insurance issued by the corporation, could be compelled to produce books and papers in his possession which were material to defendant's cause, although they were about one hundred in number, of large size, cumbrous and weighty, and many of them were in daily use by the receiver and his clerks, and the taking of them from his custody would inconvenience him.

But in Lowenstein v. Carey, 12 Fed. 811, it was held that where great inconvenience would result from the production of books in daily use, and a copy of the entries from the books was given or proposed to be given, a very strong case of the necessity of the production of the books themselves should be made to compel their production.

And in Thompson v. Taylor, 9 W. N. C. 169, it was held that a plantiff, a resident of New York, would not be compelled to produce his books of account in an action on a claim in the courts of Pennsylvania, where the books were in constant daily use and the production thereof would entail a loss exceeding the amount of his claim, especially where the object of the demand could be accomplished by copies.

And in Ervin v. Oregon R. & Nav. Co. 22 Hun, 566, it was held that a corporation having its principal office and place of business in the state of Oregon could not be required to produce before a referee in the state of New York such books as were probably in daily and frequent use in such state, where compliance would cause great and unnecessary embarrassment and injury to it; but that copies were sufficient.

In National Exch. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944, it was held that a motion for a writ of subpœna duces tecum made after the plaintiff bank had closed its case was properly denied in an action on a note, where the production of the books in question, which were in daily use, would have greatly inconvenienced the plaintiff, and the defendant could, by order of court before trial, have obtained the information desired, so as to have procured copies of entries, and it did not appear that the books, if produced, would have furnished material evidence, and it appeared that the evidence of the president of the bank, who was present in court during the trial, was available.

In United States v. American Tobacco Co. 146 Fed. 557, it was held that a corporation could be compelled to produce before a Federal grand jury its minute books from the time of its incorporation "to the present day," a period of three years, and its copy letter books covering a period of four months and a half.

And in Stone v. Mansfield, 27 Misc. 560, 58 N. Y. Supp. 339, it was held in an action by an employer against an employee for the excess of advances over earnings, in which the employee claimed that he had not been properly credited with commissions on orders, that the mere fact that the orders were very voluminous, and would involve much time and labor in their examination, was not ground for refusal to produce them.

But in Dancel v. Goodyear Shoe Machinery Co. 128 Fed. 753, it was held that the mere allegation in a motion for a subpœna duces tecum that the evidence desired was material and necessary in the suit, without preliminary proof that the documents desired were in the possession of the witness, and were prima facie competent and were material evidence, was insufficient to warrant the issuance of a subpœna duces tecum for the production of a great number of books and papers belonging to a corporation, as such a procedure would be an oppressive, if not an unconstitutional, use of the power of the court, and an abuse of its process.

In McDonald v. Ideal Mfg. Co. 143 Mich. 17, 106 N. W. 279, it was held that where the books of the defendant which he was summoned to produce by subpœna duces

as though it had been a formal finding of facts, the same having been incorporated in the record. It is necessary, therefore, with reference to certain requests for rulings, to refer to what appears in that record. The district attorney had observed, as appears by the record, that he understood that certain requests were for facts, and not requests for rulings; and he said he was not quite clear whether the court refused to give them or declined to pass upon them as being immaterial. Thereupon the following came from the court: "I regard them as immaterial, but I also refused them because the evidence produced before me did not sustain them."

Then Munroe excepted to the refusals of the court to find the facts as stated in certain other requests, some of which we will call to specific attention. Under the circumstances, we might reverse for the want of formal findings of fact, but we deem it suitable to proceed on the same line on which the parties have proceeded, namely, to hold the matters stated in the opinion of the district court as facts found, and to pass upon the rulings made, and those requested and refused, in the light of what appears in the record before us. Proceeding thus, the facts found by the court covered the following: "I find the material facts to be as follows: The defendant is a member of a partnership (Munroe & Company) which consists of five partners, and has been in existence at least ten years. It is organized under the laws of France and is engaged in the business of banking and foreign exchange. The defendant has been a member of the firm since its organization, and is now the senior partner, and has the largest individual interest; he is a citizen of the United States. The principal place of business of the firm is in Paris, where three of the partners are resident, of whom one is a French citizen, and another is a brother of the defendant. It has also had, for ten years at least, a place of business in New York, in or near which city the defendant and one other partner reside. This place of business is carried on under the name of John Munroe & Company. Although the partnership is, as stated, organized under the French law, the rights of the partners *inter sese* do not appear, as to the papers and matters concerned in these proceedings, to be different from what they would be under the law of this district. At times the defendant went to Paris and participated in the business there, and one of the Paris partners came to New York and participated in the business there.

"In May, 1913, the United States officers

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tecum were twenty-one in number, containing about seven hundred pages each, and were not all necessary in order to enable the plaintiff to make out his case, the defendant would not be required to produce them, but that plaintiff should at least determine what books he needed by an examination of the books where they were kept.

Other country, state, county, or town.

In Martineau v. Cox, 2 Younge & C. Exch. 638, 7 L. J. Exch. in Eq. N. S. 18, 1 Jur. 818, the court remarked that a member of a partnership, and defendant in a suit in England, could not be compelled to produce documents of the partnership in the hands of other members in a foreign country, if such members refused to give them up.

And in MUNROE v. UNITED STATES it was held that a witness could not be compelled to produce papers which were in possession of his partners in a foreign country.

It has been held that where a railroad company had its head office in one state, and maintained a branch office in a foreign state, from which books in current use, when filled, were sent to the head office to the secretary, who was charged by the by-laws with the possession thereof, books which had been so sent to the head office were not "in the custody" of the branch officer, within the meaning of the New York statute, so as to be subject to production under subpœna duces tecum by such officer. Re Sykes, 10 Ben. 162, Fed. Cas. No. 13,707.

And in Bank of Commerce v. Newberry, 71 Wash. 422, 128 Pac. 1064, it was held that a bank doing busines in a foreign state should not be required to bring books daily used from such state. The court said: "We may assume that the books are essential to the everyday business of a waygoing bank, and that the depositors and patrons have an interest therein. There is a way to get such evidence either by deposition or by stipulating the accuracy of an account showing the entries. In the event of a retrial, the court will not compel the physical production of the books."

And in Bacon v. Mutual Ben. L. Ins. Co. 6 Ky. L. Rep. 222, it was held that the administratrix of an insured could not be compelled to produce the policy where it was in possession of one residing in another state, to whom the insured had pledged it in his lifetime, and the plaintiff had been unable to obtain it, although she had endeavored so to do, the party having possession of the policy being before the court only by warning order.

It has also been held in Louisiana that under a statute authorizing the court, upon motion of one of the parties, to require the adverse party to produce books, papers, and documents in his possession, a party who is in possession of commercial books, and resides out of the parish (which corresponds to county in other states) in which the court is held, cannot be required to produce them. Murison v. Butler, 18 La. Ann. 296; Cain v. Pullen, 34 La. Ann.

had reason to believe that one Mary A. Dolan, of Brookline, Massachusetts, might have been guilty of offenses against the criminal laws of the United States by smuggling merchandise imported by her from Paris, France, into the district of Massachusetts, and her conduct in relation thereto was under investigation by the grand jury for this district at the times herein referred to. She had had a deposit with Munroe & Company at its Paris establishment, against which she had drawn checks which had been delivered to various persons in Paris in payment of accounts due them. These checks had been paid by Munroe & Company at their Paris branch, and the paid checks were retained there. . . .

"On September 19, 1913, the defendant and the other New York partner of Munroe & Company were duly served with a subpœna duces tecum of this court, commanding them to appear before the United States grand jury in Boston, and to produce certain papers and documents therein specified, among which were certain paid checks drawn by Mary A. Dolan upon Munroe & Company at their Paris house. Other papers were called for by the subpœna, the production of which is not now insisted upon, and as to which the defendant was informed by the United States officers that they need not be produced. A correct copy of said subpœna and returns of service thereon is annexed to the presentment of the grand jury for contempt. No question has at any time been raised by the defendant that the subpœna required the production of an unreasonable number of documents, or insufficiently described the documents which were required. The checks called for by it were material and important evidence upon the matters which the grand jury were investigating. At the time of the service of this subpœna, said checks were, and they still are, in Paris, in the possession of the firm of Munroe & Company, of which the defendant, as has been stated, was and is a member. In other words, the possession of the checks was in the defendant and his four partners as joint tenants.

"This subpœna the defendant, under advice of counsel, entirely disregarded in so far as it required the production of papers or documents. He did not communicate to his partners in Paris the fact that the subpœna had been served upon him. He made no request upon the Paris house to forward the papers called for by it, and made no effort whatever to obtain any of the papers specified in it. He appeared before the grand jury October 22d and testified that he had not the papers called for;

515; Cooper v. Polk, 2 La. Ann. 158; Ludeling v. Frellsen, 4 La. Ann. 534.

It has also been held that the production of commercial books of a party, which are located in another town or city, will not be required where the removal thereof will be prejudicial to business, but that the applicant will be limited to an inspection at the place of location. Davies, S. Mill & Land Co. v. Buchanan, 10 B. C. 175.

Tender of costs.

In Northern P. R. Co. v. Keyes, 91 Fed. 47, it was held that a railroad company could not be compelled to prepare and produce a paper showing freight shipments over a period of four years, which would necessitate great expense and a long time in its preparation, and would require the services of a large number of clerks, unless the expense thereof was first tendered.

Miscellaneous.

And in Campbell v. Dalhousie, L. R. 1 H. L. Sc. App. Cas. 462, 22 L. T. N. S. 879, it was held that witnesses, trustees of the former owner of a castle, could not be compelled by subpœna duces tecum to produce documents which were locked up in the castle, where there was a dispute between them and the owner of the castle as to the right of possession thereof, although they had a key to the room in which the documents were kept.

The case of Amey v. Long, 9 East, 473, 1 Campb. 16, 180, 6 Esp. 116, 9 Revised

Rep. 589, involving the refusal of a sheriff's bailiff to produce upon subpœna duces tecum a warrant under which he acted in a former suit, is sufficiently discussed in the principal case.

In People ex rel. Germania F. Ins Co. v. Circuit Judge, 41 Mich. 258, it was held to be no objection to an order requiring plaintiff in an action on a bond to produce certain contracts with other companies, to enable defendants to prepare their defense, that such other companies were interested in the contract, they being parties to the bond and privies to the dealings to which the bond relates.

And in National Fertilizer Co. v. Holland, 107 Ala. 412, 54 Am. St. Rep. 101, 18 So. 170, it was held that in an action on a note given by the members of a secret order, in which it was claimed that the books of the order would show authority for the giving of the note, only those members who had the custody or control of the books could be required to produce them, and be subjected to attachment for failure to do so.

And in Rex v. Daye, [1908] 2 K. B. 333, 3 B. R. C. 211, 77 L. J. K. B. N. S. 659, 72 P. P. 269, 99 L. T. N. S. 165, it was held that a bank with which was deposited a document under an arrangement that it should not be delivered up by the bank without the consent of the two parties who deposited it was obliged under subpœna duces tecum to produce such document in a criminal proceeding involving one of the depositors.

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that he had made no effort whatever to obtain them since the service of the subpœna, and that he was under no obligation to make any effort to obtain said papers or checks. The other New York partner was excused from appearing before the grand jury, and no proceedings are pending against him.

"Thereupon the defendant was presented by the grand jury for contempt, and these proceedings were instituted. The statements of fact in the presentment of the grand jury are true.

"A hearing was had before me upon said presentment on October 29th, at which the defendant was present with counsel, and such evidence was taken as either party desired to offer. At said hearing the facts appeared to be as above stated, and at the conclusion of the hearing I said:

" 'I think, when the government required evidence for use in prosecutions, that as a citizen of the country he was bound to make a reasonable and honest and diligent effort, not to pass into unreasonable bounds (and plainly to procure a few checks was nothing unreasonable to ask of a man), to get the evidence requested when he was a joint owner of it. I do not think it is particularly important that the papers in this case are in Paris. They might be in Chicago; they might be in San Francisco. The fact is that a joint owner of documents called for by a subpœna duces tecum, without making any effort whatever to procure them, comes into court and says, "I am not bound to make any effort." I think he is. I haven't any doubt that upon the facts here the defendant is in contempt.' "

Other matters appearing in the opinion of the district court are not essential to the case presented here. They were connected with a praiseworthy attempt on the part of the court to adjust the matter amicably. In the eyes of the law they are only personal matters, and cannot affect this writ of error.

Various errors were assigned that were too general according to technical rules. The grounds upon which we rest our conclusion, however, are of so fundamental a character that we have a right to refuse to be committed to any result contrary thereto; and they may be said to be covered by the general assignments of error to which we refer, and also by the following assigned error: "3. Said district court erred in refusing to make the sixth ruling requested by the defendant, namely: 'The evidence does not warrant a finding that at or since the date of the service of the subpœna upon the defendant the checks or drafts therein referred to were not in Paris, France, in the actual possession of the partners of the defendant under a partnership agreement whereby such partners were under no obligation to send the same to the defendant at New York, and whereby the defendant had no right, without the consent of all the partners, to have the checks sent to him at New York.' "

As to this refusal the request was correct, because, the right being a joint right, and the papers referred to, as well as the partners referred to, being in a foreign country, where the business to which the papers related was transacted, it was plain that the partners who resided there, and had the papers in their possession, had the privilege of objecting to their being forwarded to a foreign country, if they desired so to do. This is plain law, as was stated by Vice Chancellor Shadwell in Atty. Gen. v. Wilson, 9 Sim. pages 526 and 530, 8 L. J. Ch. N. S. 119. It may be added that this proposition is so clear that there is no necessity of citing any authorities in reference thereto. It is true that the court observed that if Munroe had been insistent upon a request for the papers, they would have been forwarded to this country; but there is no evidence to that effect. We know of no proofs upon that point except of a mixed character; indeed, so far as that is concerned, the case is exactly like Atty. Gen. v. Wilson, supra, except that in Atty. Gen. v. Wilson the party proceeded against made a statement that his copartners would not give their consent to the delivery of the books, papers, etc., asked for by the subpœna. In neither case was there any direct evidence that such a consent had been in fact refused.

Two other errors assigned were as follows: "(8) Said district court erred in ruling that the question of whether the defendant was of right entitled to have said checks or drafts sent to him at New York by his partners for the purposes of said subpœna was immaterial. (9) Said district court erred in refusing to make the eleventh ruling requested by the defendant, namely: 'If the defendant at the date of the service of said subpœna was not, and has not since been, entitled as of right to have said checks or drafts sent to him at New York for the purposes of said subpœna, then he cannot be found guilty of criminal contempt for not having obtained them, even if the court should find that his partners by way of favor would have sent them to him at New York if he had requested it.' "

In proceeding on a matter of contempt involving a fine and imprisonment, Munroe was entitled to have his rights positively determined, and there should have been a positive ruling of the court upon these propositions; and that ruling would necessarily

have been against the United States, and would have positively precluded any proceeding against Munroe growing out of the answer thus given. In the line of the request per the above alleged errors 8 and 9, was also the following leading up to them, although it was practically covered by what we have from the opinion of the learned judge of the district court: "(13) The district court erred in refusing to make, without any qualification, the findings of fact asked for in the defendant's first request for finding, namely: 'At the time of the service of the subpœna referred to in the above-entitled petition, the defendant was in New York city, and the checks therein set forth were not in the physical possession of the defendant, but were in Paris, France, in the possession of the banking copartnership of Munroe & Company, of which the defendant was then a partner.'"

No observation, however, is required with reference to assigned error 13; it only leads up to assigned errors 8 and 9, and the whole together would have necessarily resulted that the court could not compel Munroe to do what he could not do in his own right, nor punish him for contempt in neglect in reference thereto. The fundamental question involved is not one of morals or etiquette, nor one whether the court could punish Munroe for not doing what he could accomplish only with the aid of favors from other persons; it could only punish him for what was in his power or legal right to do, and this, too, leads directly to what is the leading case on this topic.

We refer to the opinion of Lord Ellenborough in Amey v. Long, 9 East, 473, relating to subpœna duces tecum, announced in 1808, and of the highest authority in reference thereto. He was speaking the unanimous opinion of the court of King's bench. Some things have since been broadened out in practice, but there is nothing to show that what we now quote from this opinion, at pages 482 and 483, has ever been modified in practice or questioned in theory, namely: "As to the first of these objections, and which applies to both counts of the declaration equally, it appears to us that the allegation 'that the defendant could and might in obedience to the said subpœna have produced and shown forth at the time and place aforesaid, at the said trial of the said issue, the said warrant mentioned and referred to in the writ of subpœna,' in the plain, natural, and obvious sense of these words, imports an immediate physical ability to do the thing required to be done on the part of the defendant; *i. e.*, that the defendant was able, by having the warrant in his own possession, to have produced it, and not that, by application to others who had the custody of it, he could and might have acquired the means, and indirectly have become the instrument, of producing it. The latter sense of the words is indeed so remote from the ordinary understanding of mankind on such a subject, and has so little reference to the duty sought to be enforced, *viz.*, the production of that by the witness which the witness could, in obedience to the subpœna, personally produce, that, after verdict, it is not to be intended that the judge at the trial received proof of the words in this strained and unnatural sense of them. And when it is afterwards said in the count that the defendant did not, nor would, at the time and place of trial, produce the warrant, although solemnly called upon by the court for that purpose, 'and, although he had no lawful or reasonable excuse or impediment to the contrary,' it certainly excludes the case of the warrant being in the possession of another, and on that account attainable only through the means or by the delivery of such other person, inasmuch as the existence of such circumstances, if they had in fact existed, would have afforded 'a lawful and reasonable excuse and impediment to the contrary,' and of course have falsified the allegation upon which the blame of nonproduction is rested; no man being obliged, according to any sense of the effect of such a subpœna, to sue and labor in order to obtain the possession of any instrument from another, for the purpose of its production afterwards by himself, in obedience to the subpœna."

We lay emphasis here upon the words, "could and might have produced," "imports an immediate physical ability to do a thing required," "by having the warrant in his own possession," "and not that by application to others who had the custody of it," "which the witness could, in obedience to the subpœna, personally produce," "excludes the case of the warrant being in the possession of another," "and no man being obliged to sue and labor," etc. Of course, this is not to be taken too literally, but it certainly applies to the case of this plaintiff in error. He could not lawfully be called upon under a writ of subpœna duces tecum. to sue and labor to the extent of superintending shipment of papers from France to the United States, to have the care and responsibility of them upon arrival, or of being obliged to await the necessities of Atlantic navigation, and to assume all the other incidents of an importation of this character, including the chance of the time of the arrival of the documents and the travel to and from in connection therewith, merely for the *per diem* of a witness of perhaps only one day attending court,

and the mileage from his place of residence to the place of trial.

We make these observations because the amount of responsibility and attention required from the position of the United States, with reference to importing documents from a foreign country, is too great to be lawfully demanded as the result of a subpœna duces tecum upon an ordinary witness; and in doing this we stop short of considering whether, in any event, the service of a subpœna can compel a witness to go outside of the district of his own residence for the purpose of obtaining documents, or for any purpose except traveling to the place of judicial session, for which he is compensated, and especially whether a subpœna duces tecum can compel the holder of documents which in many cases may be of very great value, to transport them from one foreign country to a domestic country, and especially across the high seas, with all the perils attaching thereto. No case can be found which justifies a proposition of that character. The caution which the common law took in regard to transportation of documents of value across the high seas is illustrated by what is said in Bacon's Abridgment under Error (D) II. While, with reference to a writ of error from Parliament to the King's bench, the chief justice was required to attend with the original record, though the same was immediately restored to the King's bench, yet, on a writ of error to a judgment in the King's bench in Ireland, only a transcript of the record was sent across the channel by reason of the dangers of the seas. This practice was commented on by Lord Mansfield in Vicars v. Haydon, Cowp. pt. 2, pp. 841 and 843.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with law.

Petition for rehearing denied August 11, 1914.

MONTANA SUPREME COURT.

EX PARTE MITCHELL McDONALD et al.

RE DAN GILLIS.

(49 Mont. 454, 143 Pac. 947.)

Courts — control over governor — suppression of insurrection.

1. The court has no supervisory control over the exercise by the governor of his constitutional power to call out the military forces to suppress an insurrection.

Governor — suppression of insurrection — opinion of local authorities.

2. The local authorities have no power to question the necessity of the exercise by the governor of his constitutional power to call out the militia to suppress an insurrection.

Insurrection — suppression — arrest — power of militia.

3. Under the constitutional power of the governor to call out the militia to suppress an insurrection, the military officers may arrest leaders of the insurrection and hold them in custody until it is safe to turn them over to the courts for trial.

Martial law — power to establish.

4. Constitutional power to the governor to call out the militia to suppress insurrections does not include power to establish martial law, which will authorize the conviction of a civilian for crime without trial by jury.

Statute — rejection by referendum — effect.

5. A statute rejected by the people on referendum after passage by the legislature has no force even to repeal prior statutes.

Habeas corpus — sentence by court-martial — refusal to release.

6. One sentenced to imprisonment by a court-martial will not be released on habeas corpus if he is charged with aiding an insurrection, but will be remanded to be dealt with according to law, although the sentence is invalid.

(October 8, 1914.)

PETITIONS for writs of habeas corpus to secure petitioners' release from al-

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Note. — The constitutional questions raised by the arrest and detention by military authorities, of persons charged with participation in civil disorders which such authorities are employed in suppressing, have been discussed in a note to Re Moyer, 12 L.R.A.(N.S.) 979, on "Power of governor, in exercise of power to suppress insurrection, to authorize arrest and detention of persons without turning them over to the civil authorities," and a note to State ex rel. Mays v. Brown, 45 L.R.A.(N.S.) 996, on "Continuance of constitutional guaranties during war or insurrection." It will be noted that the Montana supreme court, while affirming the right of the military authorities to arrest and detain participants in an insurrection until they may safely be turned over to the civil courts for trial,—a position heretofore taken by other courts, notably the Colorado supreme court in Re Moyer, supra, and the United States Supreme Court in Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235, declines to accede to the doctrine of the West Virginia supreme court in State ex rel. Mays v. Brown, supra and Ex parte Jones, 45 L.R.A.(N.S.) 1030, that the constitutional guaranties of the right to have the validity of such detention reviewed by habeas corpus and the right of trial by jury are suspended in a district in which martial law has been declared. E. S. O.

leged unlawful detention and restraint by the military authorities. Writ denied.

PETITION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for assaulting and resisting an officer. Petitioner remanded for trial.

The facts are stated in the opinion.

Messrs. **I. G. Denny** and **Maury Templeman & Davies**, for petitioners.

Messrs. **D. M. Kelly** and **Jesse B. Roote**, for respondents:

The governor, as the chief executive officer of the state, had the authority under the Constitution and statutes of the state, to issue the proclamation referred to, and to order the state troops into the district described therein.

United States v. Diekelman, 92 U. S. 520, 23 L. ed. 742; Luther v. Borden, 7 How. 45, 12 L. ed. 600; Com. ex rel. Wadsworth v. Shortall, 206 Pa. 165, 65 L.R.A. 193, 98 Am. St. Rep. 759, 55 Atl. 952; Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235, 148 Fed. 870; Re Moyer, 35 Colo. 159, 12 L.R.A.(N.S.) 979, 117 Am. St. Rep. 189, 85 Pac. 190; Re Moyer, 12 Idaho, 250, 12 L.R.A.(N.S.) 227, 118 Am. St. Rep. 214, 85 Pac. 897; Ex parte Bright, 1 Utah, 145; Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761; Re Charge to Grand Jury, 4 Inters. Com. Rep. 781, 62 Fed. 829; State ex rel. Mays v. Brown, 71 W. Va. 519, 45 L.R.A.(N.S.) 996, 77 S. E. 243, Ann. Cas. 1914C, 1; Re Jones, 71 W. Va. 567, 45 L.R.A.(N.S.) 1030, 77 S. E. 1029, Ann. Cas. 1914C, 31; Ex parte Milligan, 4 Wall. 2, 141, 18 L. ed. 281, 302.

Mr. **W. H. Poorman** also for respondents.

Sanner, J., delivered the opinion of the court:

On September 1, 1914, Honorable S. V. Stewart, governor of this state, issued his executive proclamation, as follows:

Proclamation.

Whereas, it has become apparent that conditions of lawlessness and defiance of authority prevail in the county of Silver Bow, state of Montana, and that combinations to resist the execution of process exist in said Silver Bow county, and that the power of the county has been exerted and has not been sufficient to enable the officers having process to execute it; and

Whereas, it has been represented to me by properly constituted authorities that the peace officers of said county are unable to secure service of process and compliance with the law; and

Whereas, it is made sufficiently to appear to me that peace and quiet cannot be reestablished in said county of Silver Bow without the aid of some force other than the present constituted authority of said county:

Now, therefore, I, S. V. Stewart, as governor of the state of Montana, under and by virtue of the authority vested in me by the Constitution and the statutes of said state, do hereby proclaim the said county of Silver Bow, state of Montana, to be in a state of insurrection, and do hereby declare that said Silver Bow county, state of Montana, be and is hereby under martial law, and under the jurisdiction of the military authorities of said state of Montana; and such military forces as may be ordered into service to enforce the provisions of this proclamation shall be under the command of Major Dan J. Donohue. This proclamation to continue until the same shall be revoked or modified.

And I do hereby call upon all citizens of said county, and demand of them that they refrain from any and all acts that may in any way contribute to a continuance of disorder. They should desist from participating in gatherings upon the streets or in public places, mindful always of the danger that attends the assembling of large crowds of the idle and curious, and of the fact that the innocent bystander is always in peril in the event of a clash between the lawless and the forces of law and order. And I appeal to the sober-minded, peace-loving citizens of said county for co-operation with the proper authorities in any manner that will tend to a restoration of peace and quiet in that community.

The forces of the state have been sent into said county upon the urgent demands of those who are entitled to be heard in an appeal for protection of life and property, and for the adjustment of conditions that have become intolerable and a stigma upon the fair name of our state. In the pursuit of this end, these forces shall know neither organization nor faction, their sole aim being the re-establishment of peace in the county of Silver Bow. In the accomplishment of this purpose they should have the moral support of every person who values the stability of government and the safety of life and property.

In witness whereof I have hereunto set my hand and caused the great seal of the state to be affixed.

Done at Helena, the capital, this the first day of September, in the year of Our Lord one thousand nine hundred and fourteen,

and of the independence of the United States the one hundred thirty-ninth.

(Signed) S. V. Stewart.

(The Great Seal of the State of Montana.)

By the Governor:

A. M. Alderson, Secretary of State.

In accordance with the above proclamation, military forces of the state under the command of Major Dan J. Donohue arrived in Silver Bow county, took military possession thereof, and such military possession has since continued and still continues. On the 12th day of September, Mitchell McDonald, Owen Smith, Joseph Bradley, E. W. Malone, Ed Ross, and James Chapman filed in this court their petitions for writs of habeas corpus, alleging, in substance, that they were being unlawfully detained and restrained of their liberty by the governor and by Major Donohue and certain other military officers of the state, who were named as respondents, in that the petitioners had been arrested without warrant and were being held without bail, to be tried without a jury before an alleged court or tribunal set up by the military authorities, upon charges to the petitioners unknown, and this notwithstanding they had infringed no law and were not members of the organized militia of the state. To these petitions respondents made return, setting forth their official character, the proclamation of the governor, and also a proclamation made by Major Donohue upon his arrival in Silver Bow county with the military forces, and alleging that said county was then in a state of insurrection; that the emergencies of the situation demanded the arrest and detention of the petitioners for the successful accomplishment of the purpose for which said military authorities had been sent into Silver Bow county by the governor, "such detention for the present being necessary to prevent the petitioners from committing overt acts in defiance of the military authority of said military forces;" that the said petitioners were leaders of those engaged in insurrection, and had been, and if discharged from arrest would be, active participants in fomenting and keeping alive the condition of insurrection existing in Silver Bow county; and that it is the purpose of the respondents to release and discharge petitioners from military arrest as soon as that can safely be done with reference to the suppression of the existing state of insurrection, and then surrender them to the civil authorities, to be dealt with in the ordinary course of justice after such insurrection is suppressed. Upon the return and the evidence taken at the hearing, this court made an order denying the release of petitioners, with leave to repetition after thirty days, if at that time they had not been delivered to the civil authorities, and the courts were then open and able to execute their process. The reasons for that order will be set forth in the course of this opinion.

Thereafter, and on September 24, 1914, Dan Gillis filed his petition for a writ of habeas corpus, alleging unlawful detention and restraint by the same respondents, and that such detention and restraint are had and claimed by virtue of a commitment issued on September 21, 1914, by Jesse B. Roote, as major and judge of a certain summary court set up by the military authorities in Silver Bow county, after an alleged trial before said Jesse B. Roote without a jury, upon a charge of assaulting and resisting an officer, and in which said proceeding said Jesse B. Roote assumed to adjudge the petitioner guilty and to render judgment that he be imprisoned in the county jail in Silver Bow county, or any prison in said county, for the term of eleven months and pay a fine of $500, and all this notwithstanding all of the district courts of said Silver Bow county were during the period covered by said proceeding, and since have been, open and actively attending to business, including the trial of causes. The effect of the return to this petition is to admit the detention of the petitioner under the commitment above mentioned, and such detention is sought to be defended upon the following grounds: That by the proclamation of the governor martial law became established in Silver Bow county; that by the proclamation of Major Donohue the summary court above referred to was created, "and it was ordered that all acts which would constitute an offense or offenses under the penal laws of Montana or the ordinances of the city of Butte, as well as any act which would hinder or tend to hinder, delay, or obstruct the work of the military forces in restoring order, should be punishable as offenses under the martial law, and that such punishments should be inflicted as in the judgment of said officer constituting said summary court in cases of minor offenses should be suitable." It is also respectfully claimed "that the supreme court of Montana is without jurisdiction in the premises to discharge said Dan Gillis from arrest and imprisonment by reason of the facts and things hereinbefore recited."

It will be readily noted that the position taken by the respondents in the Gillis Case is much broader than that presented by the returns in the causes first presented. The respondents now maintain: "That the

governor, as the chief executive officer of the state, has and had the authority, under the Constitution and statutes of the state, to issue the proclamation referred to, and to order the state troops into the district described therein, and that when the proclamation, as is the case here, declares absolute martial law, that of itself has the effect of suspending all governmental civil tribunals, and that the supreme authority and responsibility of government is thereby vested in the military forces, . . . and such military forces, in the discharge of the duties resting upon them, may establish courts for the trial of offenders who violate military orders or who violate the laws of the state within the troubled zone."

The questions thus involved are extremely grave and far-reaching in effect.

A. That the governor had the authority to proclaim a state of insurrection to exist in the county of Silver Bow, and to detail the organized militia of this state to suppress such insurrection, is settled by the express language of our Constitution: "The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed. The governor shall be commander in chief of the militia forces of the state, . . . and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion." Const. art. 7, §§ 5, 6.

Nor is there the slightest doubt that, as he must determine, so he alone can determine, when a state of insurrection exists, and when the conditions require the interposition of military aid. Neither this court nor the local authorities can be the arbiter in such a matter. Not this court, for it exercises judicial functions alone; and not the local authorities, for, although the enforcement of the law is primarily with them, public opinion and official attitude may be dominated by the forces who would take the law into their own hands. In every age and in every country there has come a time when portions of the people, roused to passion by some real or fancied cause, have sought by violence to enforce what they conceived to be their rights. When such an emergency arises it calls for prompt and effective action, for this is a government of law, and no permanent redress of grievances is possible through the wanton destruction of life or property. In such a situation the governor is not to be thwarted and his hands are not to be tied by the judgment of local authorities who may be overconfident or who may be acquiescent. "It is said that this power . . . is dangerous to liberty, and may be abused. All power may be abused, if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual." Luther v. Borden, 7 How, 1, 12, 12 L. ed. 581, 586.

In a case of insurrection it is not merely the local law that is set at naught. It is the law of the state. Our Constitution places the responsibility for the maintenance of that law exactly where it belongs; our statutes recognize the fact in the provision that the governor may (but need not) put the militia in charge of the local authorities (Rev. Codes, § 8967), and it is the duty of this court to refrain from interference or question so long as the governor remains within the limits established by the Constitution. So much being true, the recitals in the proclamation that a state of insurrection existed in the county of Silver Bow cannot be controverted, but must be taken as final and conclusive. Martin v. Mott, 12 Wheat, 19, 6 L. ed. 537; Luther v. Borden, supra; Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235; Moyer v. Peabody (C. C.) 148 Fed. 870; Franks v. Smith, 142 Ky. 232, L.R.A. 1915A, 1141, 134 S. W. 484, Ann. Cas. 1912D, 319; Re Moyer, 35 Colo. 159, 12 L.R.A.(N.S.) 980, 117 Am. St. Rep. 189, 85 Pac. 190; Barcelon v. Baker et al. 5 Philippine, 87; Re Boyle, 6 Idaho, 609, 45 L.R.A. 832, 96 Am. St. Rep. 286, 57 Pac. 706; Ex parte Moore, 64 N. C. 807. For reasons equally cogent, we must presume the conditions, thus proclaimed, to continue until by executive order or proclamation it shall be otherwise declared. Barcelon v. Baker, 5 Philippine, 87.

Premising, then, that Silver Bow county was and is in a state of insurrection, and that the presence of the organized militia was and is necessary to the permanent restoration of order, what has that to do with the arrest and detention of McDonald and his copetitioners? We think it has much to do under any and every theory that may possibly be entertained touching the power of the governor and the militia in cases of insurrection. It was distinctly asserted in the returns, and established to our satisfaction by the evidence taken upon the hearing, that McDonald and his copetitioners had not been arrested, and were not being held for trial before any court-martial or other military tribunal, but that they had been arrested as leaders and inciters of the insurrection, and were being held as necessary measures for its suppression, to be turned over to the civil authorities for trial as soon as that could safely be done. After a consideration of

all that was said in argument, and of practically all the accessible literature on the subject, we are convinced that the theory which accords the least power to the governor and to the militia in cases of insurrection is that he acts as a civil officer of the state, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest and detention, under the circumstances stated, can be justified, and must be upheld.

The return to the writs issued on behalf of the McDonald and his copetitioners is in exactly the same terms as that presented in the Moyer Case, cited above, and touching its efficacy the supreme court of Colorado said: "Are the arrest and detention of petitioner under the facts narrated illegal? When an express power is conferred, all necessary means may be employed to exercise it, which are not expressly or impliedly prohibited. 1 Story, Const. § 434. Laws must be given a reasonable construction, which, so far as possible, will enable the end thereby sought to be attained. So with the Constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights. In suppressing an insurrection, it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. Without such authority, the presence of the military in a district under the control of the insurrectionists would be a mere idle parade, unable to accomplish anything in the way of restoring order or suppressing riotous conduct. If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city or the sheriff of a county aided by his deputies or *posse comitatus* in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed. . . . If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters, or engage in aiding and abetting their action, and, if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that, on the arrest of a rioter by the military, he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence, and until order is restored, would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress."

After his release, Moyer brought a civil action in the circuit court of the United States for the district of Colorado, to secure damages for his arrest and imprisonment, and that court, in sustaining a demurrer to the complaint, remarked: "The state Constitution enjoined the governor, as such officer, to put down the insurrection. The situation must have been more or less desperate, and required prompt action, effective of the purpose. Measures are sometimes necessary under the police power that are severe, such as the summary destruction of property used for an unlawful purpose (Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499), such as treating property used in an unlawful traffic as a nuisance (Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6), such as the summary destruction of property to stay conflagration

(Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980); such as the summary destruction of obscene books and diseased cattle (Sentell v. New Orleans & C. R. Co. 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, 1 Am. Neg. Rep. 773); such as the restraint of personal liberty in passing either into or out of an infected district, for the extermination of contagion (Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; and the prohibitions found in the 14th Amendment have never been construed to be an encroachment on such a proper exercise of that power; neither is it believed that said prohibitions can be so construed as an encroachment upon the exercise of the military power within the lines here indicated,—invoked to protect the very life of the social body. In both cases we find their right and justification in the maxim, *Salus populi, supreme lex.*" Moyer v. Peabody, 148 Fed. 876.

The cause last mentioned was appealed to the Supreme Court of the United States, and was affirmed; Mr. Justice Holmes speaking as follows: "Of course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes, and executive decisions for exclusion from the country. Den. ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644. What, then, are the circumstances of this case? . . . The facts that we are to assume are that a state of insurrection existed, and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him. . . . In such a situation we must assume that he had a right under the state Constitution and laws to call out troops, as was held by the supreme court of the state. The Constitution is supplemented by an act providing that 'when an invasion of or insurrection in the state is made or threatened, the governor shall order the National Guard to repel or suppress the same.' Colo. Laws 1897, chap. 63, art. 7, § 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." Moyer v. Peabody, 212 U. S. 84, 53 L. ed. 416, 29 Sup. Ct. Rep. 236.

The reasoning of these cases, properly understood and strictly confined to its proper sphere, we take to be unanswerable, and to be entirely applicable to the right and duty of the governor and the militia under our Constitution and laws. The release of McDonald and his copetitioners was therefore denied; but since the justification is necessity, and since it cannot obtain beyond the period of such necessity, we granted leave to reapply, having in mind that the course of events might or might not demonstrate the detention of these petitioners beyond the time indicated to be unnecessary.

B. Does it follow, then, that the governor can suspend the writ of habeas corpus, declare martial law, and authorize the creation of military tribunals to try citizens for violations of the laws of the state? It should be said in justice to the governor that he has not attempted to suspend the writ of habeas corpus, and we should not refer to the subject but for the claim urged upon the return in Gillis's Case, that this court is without jurisdiction to order a release. This claim can, of course, have no basis save upon the theory that the governor, having declared martial law, *ipso facto* suspended the writ of habeas corpus. Certain decisions were presented which sustain this view. (Ex parte Moore, 64 N. C. 807; State ex rel. Mays v. Brown, 71 W. Va. 519, 45 L.R.A.(N.S.) 996, 77 S. E. 243, Ann. Cas. 1914C, 1; Re Jones, 71 W. Va. 567, 45 L.R.A.(N.S.) 1030, 77 S. E. 1029, Ann. Cas. 1914C, 31; Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761); but we do not care to discuss them, for it has been the settled law of this country ever since 1807 that the suspension of the writ of habeas corpus is a legislative, and not an executive, function (Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Ex parte Benedict, Fed. Cas. No. 1,292; McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; Re Kemp, 16 Wis. 360; Ex parte Moore, 64 N. C. 807). If, therefore, the power to suspend that writ must stand or fall with the power to establish absolute martial law, the inference is inevitable that no such *régime* can be established by the executive.

We prefer, however, to rest our conclusion upon other grounds. Absolute martial law, the character of rule which respondents claim to have been established in Silver Bow county, means nothing more

nor less than the will of the military commander in the field. It "confers power of arrest, of summary trial, and of prompt execution; and when it has been proclaimed the land becomes a camp, and the law of the camp is the law of the land." Webster, in Luther v. Borden, 5 Works, 240. Such is the understanding of it as entertained by counsel for respondents, who in oral argument asserted that it meant the abrogation, for the time being, of all the constitutional guaranties and of all the statutes of the state, and in whose brief we find authorities to similar effect. Re Ezeta (D. C.) 62 Fed. 1002; Re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303; Com. ex rel. Wadsworth v. Shortall, 206 Pa. 165, 65 L.R.A. 193, 98 Am. St. Rep. 759, 55 Atl. 952. Some logical difficulty might be met in conceiving how a constitutional officer can constitutionally suspend the Constitution, or how any tribunal can try men for the violation of laws whose force and effect are for the time being in abeyance. But we pass these and state the question to be this: Is it possible for the executive by proclamation or otherwise to constitutionally establish in this state any form of martial law which will authorize the conviction of a civilian for crime, without trial by jury?

The answer may be found in almost every page of Anglo-Saxon history since 1628. Prior to that time the Crown had on various occasions attempted to extend the operation of martial law, either by applying it in time of peace, or to nonmilitary persons, or to nonmilitary offenses. Finally, the issuance by James I. and Charles I. of commissions to proceed under martial law for the purpose, not only of maintaining the discipline of the army, but also for bringing to more speedy punishment any crimes of whatsoever nature committed by civilians of a certain class, led to the historic Petition of Right in the year above mentioned. In the debate which occurred in the House of Commons on that occasion, the right to proclaim martial law was thoroughly discussed, and the views of such high authorities as Rolle and Coke were stated by the former as follows: "Martial law is merely for necessity, when the common law cannot take place. . . . If an enemy come into any part where the common law cannot be executed, there may martial law be executed. If a subject be taken in rebellion, if he be not slain at the time of his rebellion, he is to be tried afterwards and by the common law."

Fifty years later, Sir Matthew Hale, insisted that "martial law is not a law, but something indulged rather than allowed as a law. The necessity of government, order, and discipline in an army is that only which can give it countenance. . . . Secondly, this indulged law is only to extend to members of the army and to those of the opposite army, and never may be so much indulged as to be exercised or executed upon others. Thirdly, the exercise of martial law may not be permitted in times of peace when the King's courts are open." History of the Common Law, chap. XI.

These words are echoed, with illustrations, by Blackstone, from whom we may always learn the state of the common law at the time our Constitution was adopted. 1 Hammond's Blackstone, 695. Nor has any other view ever prevailed among the jurists and publicists of England. In Grant v. Gould, 2 H. Bl. 98, Lord Loughborough said: "Martial law, such as is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all."

And it is a notable fact that martial law has not been proclaimed in England since 1689,—neither in the Jacobite risings, nor in the Gordon riots in the eighteenth century, nor in the disturbances which occurred at various times in the nineteenth century. It is quite true that in Ireland in 1798, and in the different British colonies since then, martial law has been proclaimed on several occasions, and the right to do so has been the subject of much parliamentary discussion. The prevalent view in these discussions seems to have been the one expressed by Lord Cardwell on the Jamaica troubles of 1867. He said that "while there was properly no such thing as martial law, there was no doubt a law of necessity which required that certain acts should be done for the suppression of the rebellion, but not for the punishment of persons concerned in it. . . . The law of necessity to which he had referred was strictly limited in time, and operated only for repression, and not for punishment."

The views above expressed were strongly enforced in 1867 by Justice Blackburn in Reg. v. Eyre, L. R. 3 Q. B. 487, 37 L. J. Mag. Cas. N. S. 159, 18 L. T. N. S. 511, 16 Week. Rep. 754, 9 Best & S. 329, and by Chief Justice Cockburn in Reg. v. Nelson.

The sort of martial law for which respondents now contend is regarded in England as a strictly continental institution. It is applied by declaring the affected locality in "the state of siege," wherein "the constitutional guaranties are suspended." Professor Dicey comments upon it as follows: "This kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a riot, as they may resist an invasion; they may fight rebels, just as they might fight foreign enemies; but they have no right under the law to in-

flict punishment for riot or rebellion." Dicey, Law of the Constitution, 300.

If they cannot inflict punishment for riot or rebellion, they cannot inflict it for any other offense against the municipal law.

Turning to our own country, we note that when the Constitution was adopted the common law on the subject was as stated by Justice Blackstone. We may also recall that there was a very keen appreciation and jealousy of their personal rights on the part of our forefathers,—a jealousy which had been in part directed to this very subject of martial law by the acts of General Gage in New England and of Governor Dunmore in Virginia. It is also well known that, when the national Constitution was submitted to the people, over one third of the vote was against it, and many of the favorable votes it received were cast with much misgiving, due to the fact that it did not put in positive terms those safeguards to which the people "had been long accustomed to have interposed between them and the magistrate who exercises sovereign power." Madison, Annals First Congress, 450. It was explained that the Constitution was to be a grant of power, and therefore powers not expressly granted were reserved to the people; but "this explanation satisfied not one state." Bancroft, History of Formation of Constitution, pp. 383 et seq. The general attitude was expressed by Jefferson, who, after extolling the merits of the new plan, added: "I will now tell what I do not like: First, the omission of a bill of rights, providing clearly and without aid of sophism for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trial by jury in all matters of fact triable by the laws of the land, and not by the law of nations." 2 Jefferson's Works, 329.

Eight states coupled their assent with a demand for such a bill of rights. Thus clearly was it insisted that trial by jury should be guaranteed in every case then triable by jury at the common law: and as the common law did not then authorize violations of the laws of the land to be tried by military commission, it follows that the guaranty of trial by the jury as contained in Amendment 6 must be taken in this sense.

And such we find to be the result of the adjudicated cases arising under the national Constitution. It would extend this opinion to inordinate length to review them all, and we shall therefore content ourselves with a brief reference to a few whose meaning cannot be doubted:

Smith v. Shaw, 12 Johns. 257, arose out of an arrest for trial by court-martial during the War of 1812, and the supreme court of New York, in disposing of an attempted plea of justification under the martial law, said: "It is a general rule that, where such a court has neither jurisdiction of the subject-matter nor of the person, everything done is absolutely void. . . . None of the offenses charged against Shaw were cognizable by a court-martial, except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy. There was therefore a want of jurisdiction, either of the person or of the subject-matter, as to all the offenses alleged against the plaintiff."

To the same effect is McConnell v. Hampton, 12 Johns. 234.

Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675, arose out of the declaration by General Jackson of martial law in the city of New Orleans, and the supreme court of Louisiana, touching that matter, declared: "If it be said that the laws of war, being the laws of the United States, authorize the proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power."

The next war fought upon our own soil was the great Rebellion, and, as might have been expected, it gave rise to much controversy and discordance of opinion touching the scope and power of martial law. All this, however, was set at rest by the great decision of the Supreme Court of the United States in the Milligan Case, wherein all that is now asserted by respondents was urged upon the court, and from which decision we quote: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. . . . Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them, because the Constitution expressly vests it 'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate

of the President, because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction. . . . Why was he not delivered to the circuit court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it, because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. . . . If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended. Another guaranty of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution, and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army or navy or militia in actual service. . . . All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. . . . It is claimed that marital law covers with its broad mantle the proceedings of this military commission. The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will, and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power,'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable, and, in the conflict, one or the other must perish."

As pointed out by an eminent military authority, there is nothing in Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312, or in any subsequent decision of the Supreme Court, to break the force of the Milligan decision. Union College Lectures, Clous on Military and Martial Law.

We are quite aware that, as indicated by Chief Justice Marshall in Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672, the guaranties contained in the 5th and 6th Amendments to the national Constitution are limitations upon the power of the United States, and not upon the power of the states; but the interpretation of them serves to show how they were understoood in that behalf, and to furnish a guide to the proper understanding of like guaranties contained in article 3 of our state Constitution. Ex parte Moore, 64 N. C. 807; Franks v. Smith, 142 Ky. 232, L.R.A.1915A, 1141, 134 S. W. 484, Ann. Cas. 1912D, 319; Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; Sheean v. Jones, 44 Ill. 167; Carver v. Jones, 45 Ill. 334; Re Kemp, 16 Wis. 360.

It is insisted, however, that under all the decisions the executive can establish martial law in time of war when the ordinary tribunals are not open; that an insurrection is war, and that the proof at bar shows the civil tribunals of Silver Bow county to have been closed. When in do-

mestic territory the laws of the land have become suspended, not by executive proclamation, but by the existence of war, the executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms.

The term "war" is used in the books, not in its popular, but in its legal, sense, and only the national Congress can declare or recognize the existence of war. There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the great Rebellion; but it does not become so in the legal sense until the rebellious party assumes political form. This was pointed out by the Supreme Court of the United States in the Prize Cases, 2 Black, 635, 673, 17 L. ed. 459, 478. "In organizing this rebellion, they have acted as states claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. . . . It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is claimed, and held in possession by an organized, hostile, and belligerent power."

In internal wars the object is to coerce the power opposed to the sovereign, and because such power exercises jurisdiction and control *de facto*, and claims it *de jure* over the territory under its sway, it is competent for the sovereign to exercise powers belonging to belligerents at international law. Miller v. United States (Page v. United States), 11 Wall. 268, 20 L. ed. 135; Rose v. Himely, 4 Cranch, 241, 272, 2 L. ed. 608, 618; The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; Taylor, International Public Law, §§ 449, 450.

How inapplicable all this is to a formless insurrection, and how impossible to characterize such a movement as a state of war, with all its powers and immunities, is pointed out by Mr. Justice Nelson in the Prize Cases cited: "It has been argued that the authority conferred on the President by the act of 1795 invests him with the war power. But the obvious answer is that it proceeds from a different clause in the Constitution, and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquility of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war, with all the rights of war, and all the penal consequences attending it, every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. . . . The truth is this idea of the existence of any necessity for clothing the President with the war power, under the act of 1795, is simply a monstrous exaggeration."

It was also the general belief, when the 6th Amendment to the national Constitution was under consideration, that trial by jury could not be denied on account of any mere local disturbance. This is evidence by the fact that in the first draft of that Amendment as presented by Madison, in the second draft as presented by the congressional committee of 11, and in the third draft as reported by the special committee of 3, provision was specifically made for trials by jury out of the vicinage, when the vicinage should be in a state of insurrection. 2 Thorpe, U. S. Const. History, pp. 199 et seq.

So far as the right to trial by jury in case of insurrection is concerned, it does not seem to us vitally important whether the courts are or are not open when the military appear. It may be granted that courts which are prevented by insurrection from executing their process are not open in contemplation of the law. To open them is a part of the duty devolving upon the military. It was conceded at bar that some of the courts of Silver Bow county are in operation, though it was insisted to be only such as are permitted by the military authorities; the others being closed by their order. No such cloture can be recognized.

We have somewhere met with the argument that, because the insurrection may be prolonged, the summary trial of offenders is preferable to their indefinite detention. This is not even an argument from necessity, but from convenience only. We know of but one court of last resort which gives it any countenance, and that court we do not choose to follow. Nor are we impressed with the suggestion that military trials are necessary in Silver Bow county, because the state of public feeling would render

trials by jury ineffective,—that the guilty will not be punished. We are loath to believe that the courts and citizenship of that county are so weak as this; but, if they are, ample relief is afforded the state by the statutory provisions for change of venue.

Martial law, however, is of all gradations, and although the governor cannot, by proclamation or otherwise, establish martial law of the character above discussed, he is not barred from declaring it in any form. We must therefore assume that, in using that phrase in his proclamation, he meant only such degree or form of martial rule as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection, and to direct their movements, without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities; but neither he nor the military under him can lawfully punish for insurrection or for other violations of the law. The courts cannot be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the Constitution.

A very brief notice will suffice for the contention that in consequence of the passage of the Donohue bill by the legislature, which was subsequently defeated on referendum, we have no organized militia in this state, and therefore all that has been done was illegal. There is nothing in this. The militia of this state consists of all its able-bodied citizens between the ages of eighteen and forty-five years, with certain exceptions. Const. art. 14, § 1. The governor was authorized to call any or all of them to quell the insurrection, without regard to whether they belonged to the National Guard or not. But we have an organized militia. The passage of the Donohue bill by the legislature was not final, and never became effective by virtue of the referendum. It required the approval of the people before becoming a law, and this it never had. If it did not become a law for constructive purposes, it could not be one for repealing purposes. State ex rel. Hay v. Alderson, 49 Mont. 387, 142 Pac. 210.

The trial and commitment of petitioner Gillis were void, and his detention thereunder cannot be upheld. But he is not entitled to his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the state. He must therefore be remanded to the custody of respondents, to be dealt with according to law. Re Jones, 46 Mont. 122, 126 Pac. 929.

It is so ordered.

Brantly, Ch. J., and **Holloway**, J., concur.

Rehearing denied November 5, 1914.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

DURAND & COMPANY et al.
v.
HOWARD & COMPANY.

JULIE PARSONS REDMOND et al., Exrs., etc., of Henry S. Redmond, Deceased, et al., Appts.

NATHANIEL S. CORWIN et al., Receivers of Howard & Company, Respts.

(— C. C. A. —, 216 Fed. 585.)

Receiver — permission to sue — absence of right.

1. A court which has appointed a receiver for the property of lessees will not permit a suit to be brought against him by the landlord in another court to recover possession of the leasehold if from the facts stated it is apparent that the landlord has no right to such possession.

Landlord and tenant—covenant against assignment — receivership.

2. A covenant against assignment of a lease is not broken by the appointment of a receiver for the property of the lessee.

Same — waiver of forfeiture — compelling election by receiver.

3. A lessor waives the right to declare a forfeiture of the lease because the rent is in arrear, by asking the court to require a receiver of the property of the tenant to elect whether he will adopt or reject the lease.

(Hand, District Judge, dissents.)

(July 30, 1914.)

Note. — Right of lessor, as against receiver or assignee for creditors of lessee, to declare forfeiture for breach of conditions or covenants prior to appointment.

As to liability for rent of premises occupied by receiver or assignee for creditors, see the extensive note to Link Belt Mach. Co. v. Hughes, 59 L.R.A. 673.

Right to forfeit.

The rule seems to be that a lessor is, as against the receiver or assignee for creditors of a lessee, entitled to forfeit the lease for breach of conditions or covenants prior to

APPEAL by the lessors from an order of the United States District Court for the Southern District of New York in favor of the receivers of the lessee in a suit to recover possession of a leasehold. Affirmed.

Statement by **Rogers**, Circuit Judge:

The complainants, citizens and residents of the state of New Jersey, filed a bill in the district court for the southern district of New York against the defendant, a corporation organized and existing under the laws of the state of New York.

The bill alleged that the defendant was engaged in business in New York city and that its assets were largely in excess of $100,000; that it owed approximately $140,000 to more than 150 creditors; that it did not have sufficient money to meet its obligations as they fell due, and was not able to borrow the money necessary for such purpose; that it was indebted to complainants in certain specified amounts; that unless a receiver was appointed certain creditors would obtain a preference over other creditors; and that the assets, consisting of jewelry and silver, would be sacrificed at half their value and great injury result to creditors. It therefore asked for the appointment of a receiver. The defendant filed an answer admitting the truth of the allegations contained in the bill and joined in the prayers thereof.

On January 6, 1914, the cause came on to be heard upon the bill and answer, and the court appointed Samuel Strasbourger and

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the appointment of the receiver or assignee, where he has not waived the breach. However, it has been held that there is no such right to forfeit the lease for nonpayment of overdue rent where the receiver or assignee is willing and able to assume the lease and pay such overdue rent.

Thus, that a lessor may summarily dispossess a voluntary assignee for the benefit of creditors who has accepted a lease held by his assignor, but which was subject to forfeiture because of breach by the assignor of a covenant to pay rent, see Hasbrouck v. Stokes, 13 N. Y. Supp. 333, as set out, quoted, and discussed in DURAND & CO. v. HOWARD & CO.

So, in Walton v. Stafford, 162 N. Y. 558, 57 N. E. 92, affirming 14 App. Div. 310, 43 N. Y. Supp. 1049, 4 N. Y. Anno. Cas. 114, it was said, in holding that an assignee for the benefit of creditors who cannot be held liable for rent under a lease because no rent fell due while he was in possession, cannot be held liable for use and occupation of the premises, that the lessor might have at once removed both assignor and assignee from the premises by reason of the assignor's failure to pay rent previously due.

And the right of a lessor to declare a forfeiture of a lease and to recover possession of the leased premises from a receiver in bankruptcy of the lessee, for a default in payment of rent in arrear at the time of the adjudication in bankruptcy, was recognized in Re Chambers, 2 N. B. N. Rep. 388, 98 Fed. 865; but the remedy was declared to be in the bankruptcy court, and not by ejectment in the state court. In this case the Federal court had taken into its custody and control the entire estate of the bankrupt, including the leased property, and a receiver was appointed and authorized to carry on the bankrupt's business, and he entered upon such leased premises and did carry on such business. The lessor brought ejectment in the state court against the bankrupt and the receiver to recover possession of the demised property for default in payment of rent in arrear at the date of the adjudication, and the receiver and trustee petitioned the bankruptcy court to enjoin the action of ejectment in the state court. This petition was granted, the court saying that in such a case, whatever may be the right of the landlord, the remedy must be sought in the Federal court, which in the exercise of its equitable powers will direct the surrender of possession by the receiver at the expiration of such time as may be reasonably necessary for the execution of his trust, and award the landlord suitable compensation for their occupation in the meantime.

And the decision in Farmers' Loan & T. Co. v. Northern P. R. Co. 58 Fed. 257, supports the theory that the landlord may declare, as against the tenant's receiver, a forfeiture for default of the tenant. In this case, however, the demand was for payment of rentals of railroad lines forming a part of a railroad system, which accrued prior to the receivership of the system, and that the receivers be directed to apply for leave to adopt the lease, and, failing such election, the lessors be declared entitled to resume possession of the demised lines, and in accordance with the request of the receivers and against the objection of one of the railroads which formed a part of the system, the court decreed delivery of possession to the lessors.

So, in New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. 58 Fed. 268, Lurton, Circuit Judge, said that the lessors of a part of a railroad system had a clear right to declare a forfeiture and recover possession from the receivers for nonpayment of rent accruing before the receivership.

And see DURAND & CO. v. HOWARD & CO., and especially the dissenting opinion of Hand, District Judge.

But it has been held that a landlord cannot as against the receiver of a lessee forfeit the lease for default in payment of rent accruing prior to the appointment of the receiver, unless it appears that the receiver is unwilling or unable to assume the lease and pay the overdue rent. Fleming v. Fleming Hotel Co. 69 N. J. Eq. 715, 61 Atl. 157.

National S. Corwin temporary receivers. The receivers were authorized to take possession of all the property, business, assets, and effects of the defendant, "and to run, manage, and operate the said property in such manner as will in their judgment produce most satisfactory results, and to preserve the same in proper condition, and to protect the title and possession and to secure and develop the business of the same." They were also authorized to pay the necessary expenses of operating the property. All persons were "enjoined and restrained from selling, transferring, disposing of, or in any manner interfering with, any of the property of the defendant company, or from taking possession of or in any way interfering with any part thereof, or from in any manner obstructing or interfering with the possession or management of any part of the said property."

On January 30, 1914, the appointment of the receivers was made permanent, and all creditors were required to file their claims with the receivers on or before February 16, 1914, "or they may be excluded from the benefit of these proceedings."

On January 30, 1914, the landlords asked the court to fix a time within which the receivers should decide whether they would adopt or renounce the lease held by the defendants. On February 9, 1914, the receivers were required, on the application of the landlord, to elect on or before March 4, 1914, whether they would assume and adopt on behalf of the estate of the defendant the lease of the premises 624 Fifth avenue in the city of New York and dated January 18, 1911, between the executrix and executor of Henry S. Redmond, deceased, and Equitable Trust Company as trustee under the will, as lessors, and the defendant, as lessees, or whether they would renounce the same. And on March 3, 1914, the court, acting upon the recommendation of a committee appointed by the creditors and upon the facts as set forth by them, authorized the receivers "to affirm the lease," and an

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Waiver of right to forfeit.

It is not the purpose of the annotator to treat the general question of what acts upon the part of a lessor will constitute a waiver of the right to declare a forfeiture for breach by a tenant of conditions or covenants in his lease, the present note being confined to those cases wherein is presented the additional element that the forfeiture is sought to be declared against a receiver or assignee for creditors of the tenant. Upon the general question of delay of landlord in enforcing forfeiture as waiver of breach, see note to O'Connor v. Timmermann, 24 L.R.A.(N.S.) 1063. And generally as to acceptance of rent accruing after cause for forfeiture, with knowledge of such cause, as waiver of forfeiture, see note to Kenny v. Seu Si Lun, 11 L.R.A.(N.S.) 831.

A number of cases have presented the question as to what acts will constitute a waiver of a breach by the lessee of conditions or covenants in a lease such as will prevent a declaration of a forfeiture as against a receiver or assignee for creditors of the lessee.

Thus, in Chase v. Knickerbocker Phosphate Co. 32 App. Div. 400, 53 N. Y. Supp. 220, it was held that a suit to enforce a forfeiture of a lease for nonpayment of rent, which default occurred before the appointment of a receiver for the lessee, would be enjoined at the suit of the receiver where the lessor affirmed the possession of the receiver, and waived his right to re-enter by maintaining distress for rent so unpaid, and by receipt from the receivers, after the commencement of the suit, of a large sum on account of the rent, there being no default in payment of any balance found to be due.

And in Blank v. Independent Ice Co. 153 Iowa, 241, 43 L.R.A.(N.S.) 115, 133 N. W. 344, it was held that a landlord, by attempting to enforce a lien for past-due rent notwithstanding he knew that the lessee's property subsequent to the default in payment of rent had gone into the hands of a receiver, and by accepting current rent from the receiver, waived his right to forfeit the lease for the nonpayment of rent and recover possession from the receiver.

And that a lessor waives the right to declare a forfeiture of the lease because of rent in arrear before the appointment of a receiver of the property of the lessee, by asking the receiver to elect whether he will adopt or reject the lease, see DURAND & Co. v. HOWARD & Co. But in connection with this case, see Farmers' Loan & T. Co. v. Northern P. R. Co. as set out supra.

And the question of waiver was involved in the case of Re V. D. L. Co. 175 Fed. 635, wherein it was held that a trustee of a bankrupt lessee could adopt the lease and sell same as the assets of the estate notwithstanding default in payment of rents accruing before the petition which entitled the lessor to declare the lease forfeited and to take possession of the premises, where the lessor made no demand that the lease be surrendered at the time of the default, and subsequently accepted payment of rents, he thereby having waived his right to forfeiture of the lease, even though he did at one time state that the lessee could not longer hold under the lease, such statement having been in the nature of a threat to compel payment of the rents due.

On the other hand, it has been held that payment of rent by a receiver of the lessee, and the acceptance thereof by the lessor for the period the leased premises are occupied by the receiver, does not, standing alone, constitute a waiver of the lessor's right of re-entry for default in payments of rent due prior to the receivership. Fleming v. Fleming Hotel Co. supra. G. J. C.

order was entered declaring that the receivers "be and they hereby are authorized to assume and adopt on behalf of the estate of the defendant and as such receivers the lease of the premises" describing them. And on March 4, 1914, the attorney for the receivers notified the attorneys for the landlord that they assumed and adopted the lease, and that "the adoption of the lease is made pursuant to the request of the creditors' committee and upon the authority of the court in the above action upon application of the aforesaid creditors' committee."

The other material facts are stated in the opinion of the court.

Argued before Coxe and Rogers, Circuit Judges, and Hand, District Judge.

Messrs. **Cadwalader, Wickersham, & Taft** for appellants.

Mr. **Edmund L. Durkin**, with Mr. **Philip W. Russell**, for respondents.

The recceivers are not liable for rent accruing before the receivership. The very fact that a receiver has the right to adopt or renounce an executory contract shows that a new situation is created by the adoption. The relation between the debtor and creditor is not affected, but a new and additional relation created between the creditor and the receiver, and the distinction between a chancery receiver and a statutory receiver or an assignee must be borne in mind.

Cook, Corp. 6th ed. § 874; Stokes v. Hoffman House, 167 N. Y. 554, 53 L.R.A. 870, 60 N. E. 667; Prince v. Schlesinger, 116 App. Div. 500, 101 N. Y. Supp. 1031, affirmed without opinion in 190 N. Y. 546, 83 N. E. 1130; Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 97, 36 L. ed. 632, 637, 12 Sup. Ct. Rep. 787; Smith, Receiverships, p. 220, ¶ 121; Moore v. Higgins, 2 Silv. Sup. Ct. 298, 5 N. Y. Supp. 895.

The Redmond estate waived the right to eject the receivers from possession of the premises by reason of the default in rent of the corporation before receivership, by entering into the agreement of December 16, 1913, with its lessee, Howard & Company, as well as by the acceptance of rent, as rent, from the receivers on January 31, 1914, and should not now be granted leave to commence dispossess proceedings.

Bispham, Eq. ¶ 181; Wanamaker v. McCaully, 11 W. N. C. 450; Steiner v. Marks, 172 Pa. 400, 33 Atl. 695, 18 Mor. Min. Rep. 320; Ireland v. Nichols, 46 N. Y. 413; Croft v. Lumley, 4 El. & Bl. 608, 24 L. J. Q. B. N. S. 78, 1 Jur. N. S. 424, 3 Week. Rep. 234; Clarke v. Cummings, 5 Barb. 339; Murray v. Harway, 56 N. Y. 337; Bleecker v. Smith, 13 Wend. 530; Collins v. Hasbrouck, 56 N. Y. 157, 15 Am. Rep. 407; Stuyvesant v. Davis, 9 Paige, 427; Conger v. Duryee, 90 N. Y. 594; Taylor, Land. & T. ¶ 497; Tolk v. Cohen, 62 Misc. 230, 114 N. Y. Supp. 771; Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151.

The landlord by electing to file his claim on February 13, 1914, for rent in arrear as a general creditor, has waived his right to claim a forfeiture thereafter for the nonpayment of that rent.

Taylor, Land. & T. ¶ 499; Conger v. Duryee, 90 N. Y. 594; Stuyvesant v. Davis, 9 Paige, 427; Moller v. Tuska, 87 N. Y. 166; Washburn v. Rainier, 149 App. Div. 800, 134 N. Y. Supp. 301; Conrow v. Little, 115 N. Y. 387, 5 L.R.A. 693, 22 N. E. 346; Re Kenyon, 156 Fed. 863; Steinbach v. Relief F. Ins. Co. 77 N. Y. 498, 33 Am. Rep. 655; Re Garver, 176 N. Y. 386, 68 N. E. 667; Standard Varnish Works v. Haydock, 74 C. C. A. 456, 143 Fed. 318.

The court should on equitable principles, and because of the absence of good faith on the part of the landlord in dealing with the receivers as well as the other creditors, refuse to grant leave to the landlord to proceed elsewhere against its officers, the receivers.

J. I. Case Plow Works v. Finks, 26 C. C. A. 46, 52 U. S. App. 253, 81 Fed. 529; Alderson, Receivers, p. 734, ¶ 529; Re Herbst, 63 Hun, 247, 17 N. Y. Supp. 760; Porter v. Kingman, 126 Mass. 141; High, Receivers, 4th ed. p. 299, ¶ 254, B; Mechanics' Nat. Bank v. Landauer, 68 Wis. 44, 31 N. W. 160; Stephens v. Augusta Teleph. & Electric Co. 120 Ga. 1082, 48 S. E. 433; Meeker v. Sprague, 5 Wash. 242, 31 Pac. 628.

Rogers, Circuit Judge, delivered the opinion of the court:

The question which this cause presents is as to the right of a landlord to proceed against chancery receivers for the forfeiture of a lease because of default made by the lessee in the payment of rent, which lease has been adopted by the receivers appointed over the estate of the lessee. After the receivers notified the landlords, on March 4, 1914, that upon the authority of the court they had adopted the lease, they received a communication, also dated March 4, 1914, which read as follows: "On behalf of the lessors, we hereby return this notice on the ground that it is void and of no effect, and on the further ground that there is now due and unpaid the rent due from July 12, 1913, to January 6, 1914, with accrued interest, and that there is also due and unpaid the rent which accrued for the month of February, with interest from the 12th day of February, 1914, to date, and

that there could be no such ratification nor adoption until said defaults are made good, on the further ground that even admitting that such notice, adoption, or assumption were valid, that then and in that event the said receivers are now in default under the terms of said lease."

On March 6, 1914, the landlords petitioned the court for an order directing the receivers to remove from and vacate the premises or pay the petitioners all past-due rent, amounting to $8,694.37, with interest, and in the event of the failure to pay the same that the petitioners be authorized "to take such steps as may be proper, including proceedings instituted in the municipal court of the city of New York, or any other court, to compel said receivers to remove from, vacate, and give up said premises, and to dispossess them therefrom." As a matter of fact the rent due from the receivers during the time they have had possession of the property has been paid and all arrears of rent are such as are owing from the lessees, Howard & Company.

The petition was heard on March 25, 1914, and was denied. It was denied on three grounds: (1) That a landlord is not entitled, as a matter of right, to back rent as a condition of the affirmance by receivers in equity of a lease; (2) that if the landlords have such a right, they had waived it in this case; (3) that so far as the application is one addressed to the discretion of the court, that discretion should not be exercised in the landlords' favor.

The power of a court of equity to appoint a receiver has long been recognized as one of as great utility as any which belongs to the court. It is exercised to prevent fraud, or to save the subject of litigation from material injury, or to rescue it from inevitable destruction. A receiver is appointed when it appears necessary to do so to preserve the property and give adequate protection to the rights of the parties interested in it. This was the purpose of the court in the appointment of the receivers in this cause. The intention was to prevent injury to creditors by a slaughter of the assets through forced sales, and also to prevent a preference among creditors. This may well be kept in mind in passing upon the question which is presented. The receivers have not been appointed for the benefit of any particular party, but upon a principle of justice and for the benefit of all parties interested. These receivers are the representatives of the court and of all the parties in interest. They have been put into the possession of this property because the interests of justice can in this way be best secured. The receivers are but the arm and the hand of the court,—a part of the machinery of the court to work out the ends of justice. The property of which they have the possession is *in custodia legis*. It is elementary that the receivers have only such power and authority as are given them by the court, and that they cannot be sued touching the property in their charge without the court's consent.

It being conceded that where property is in the hands of receivers no action can be brought against the receivers without the consent of the court appointing them, it is said it is not usual for the court to refuse leave unless it is perfectly clear that there is no foundation for the demand. Ordinarily this is true, and if the question is whether the property which a receiver has taken into his possession as being the property of A is the property of A, or in reality belongs to B, who is claiming it, there may be no sufficient reason why the court should not allow that question to be determined in a suit against the receiver, unless the court can see upon the facts stated that B's claim is clearly without merit. But that is not the question in this case. There is no dispute here as to whether the lessees, Howard & Company, got a good title under their lease. The question is whether, having obtained a concededly good title under the lease, the lessors will be permitted by a court of chancery to forfeit the lease, after it has been adopted by the receivers, for a default which is not the default of the receivers, but of the lessees, who failed to pay all the rent due before the receivers took possession. The lessees insist that unless the receivers pay the arrears of rent they must surrender the premises. They insist that receivers have no right to assume a lease unless all arrears of rent are paid. If that be the law, then the court must authorize a preference in favor of the lessor creditors or else surrender the lease; and whichever course the court adopts would work to the prejudice of the body of the creditors, and nullify in some degree the purpose of the court in the appointment of the receivers. Either the court must give a preference to the lessors by compelling the payment of the entire amount of their claim, or else it must deprive the other creditors of the benefit which will accrue to all by allowing the receivers to continue carrying on the business in the old and accustomed place. If this is a matter which rests within the discretion of the court appointing the receivers, we cannot say that that discretion has been improperly exercised in this case.

It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to

be litigated elsewhere. In Porter v. Sabin, 149 U. S. 473, 479, 37 L. ed. 815, 818, 13 Sup. Ct. Rep. 1008, 1010 (1893), the Supreme Court, speaking through Mr. Justice Gray, said: "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65, 14 L. ed. 322, 328; Peale v. Phipps, 14 How. 368, 374, 14 L. ed. 459, 461; Booth v. Clark, 17 How. 322, 331, 15 L. ed. 164, 167; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. Rep. 1013; Thompson v. Phenix Ins. Co. 136 U. S. 287, 297, 34 L. ed. 408, 413, 10 Sup. Ct. Rep. 1019. It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Texas & P. R. Co. v. Cox, 145 U. S. 593, 601, 36 L. ed. 829, 832, 12 Sup. Ct. Rep. 905."

See also Werner v. Murphy (C. C.) 60 Fed. 769; Kennedy v. Indianapolis, C. & L. R. Co. (C. C.) 2 Flipp. 704, 3 Fed. 97; Klein v. Jewett, 26 N. J. Eq. 474, 5 Am. Neg. Cas. 1; Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870; Stephens v. Augusta Teleph. & Electric Co. 120 Ga. 1082, 48 S. E. 433; Reed v. Axtell, 84 Va. 231, 4 S. E. 587, 10 Am. Neg. Cas. 346.

In refusing its consent to allow a suit to be brought in the state courts the court had all the facts before it, and it came to the conclusion that the right which the landlords seek to enforce against the receivers did not exist. When a court can see from the facts stated that the so-called right is not a right, it is not even called upon to exercise its discretion and determine whether or not it will permit a suit to be brought in another court against its receivers, thereby exposing them to the costs of a needless and fruitless litigation at the expense of the creditors.

Was the court in error in holding that a landlord is not entitled as a matter of right to back rent as a condition of the affirmance by chancery receivers of a lease? Counsel called attention to a paragraph in the lease which reads as follows: "That the said tenant will not assign, transfer, or make over this lease, or any of the covenants, terms, or conditions thereof, or any part thereof, to any person or persons, corporation or corporations, without the consent in writing of the said landlords, first had and obtained, under penalty of forfeiture and damages."

It is said that the landlords have not consented, in writing or otherwise, to any assignments of the lease to the receivers. But they themselves came into court and asked to have a time fixed when the receivers would determine whether they would accept or renounce the lease. And we do not regard the covenant against assignment as at all material for two reasons. The first is that such a covenant is not broken when the assignment is not voluntary, but is done by operation of law. Taylor, Land & T. § 408. In this case there has been no voluntary assignment of the lease by the lessors. The second is that there has been no assignment whatever, either voluntary or involuntary, of the lease. The chancery receivers are not assignees of the lease. By their appointment they acquired no title. They only obtained a right to the possession of the property as the officers of the court. Keeney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60; Stokes v. Hoffman House, 167 N. Y. 554, 559, 53 L.R.A. 870, 60 N. E. 667.

Then attention is called to the fact that the lease provides that if default is made in the payment of the rent, or any part thereof, it shall be lawful for the landlords to re-enter the demised premises and repossess and enjoy the same as in their first and former estate. The common pleas court of New York in Hasbrouck v. Stokes, 13 N. Y. Supp. 333 (1891), decided that when a voluntary assignee for the benefit of creditors accepted a lease held by the assignor, which had become subject to forfeiture by such assignor's breach of the covenant to pay rent, the lessor could maintain summary dispossessory proceedings against the assignee. In that case Judge Pryor said: "It is said, however, that the assignee, not being liable for the rent, cannot be dispossessed for the default of his assignor. But the inference is a *non sequitur*. By express provision of the Code (§ 2231) an undertenant may be summarily removed, and yet an undertenant is not

liable for rent to the landlord. By virtue of the statute, if not by express provision in the lease, it was a condition of the original demise that a breach of the covenant for rent should expose the term to forfeiture at the option of the landlord. If for default in payment of rent the assignee may not be dispossessed, then he is in a better position than his assignor; and, furthermore, he holds by a tenure to which the lessor has never assented. The assignee was under no obligation to accept the lease, but, having accepted it, he takes it *cum onere—i. e.*, with liability to forfeiture for arrears of rent. True, that since his liability for rent is only because of privity of estate, that liability is only for payment of rent accruing while his estate subsists; but it does not follow that the landlord may not recover the land of him for condition broken by his assignor. . . . Upon default in payment of rent, the statute plainly gives the landlord a right to reclaim his land from the lessee, or whoever holds under him. Indeed, the words of the statute are, 'the lessee or his assigns,' and 'assigns,' is the equivalent of 'assignees.'"

If the principle adopted in the foregoing case is correct as applied to the facts existing in that case, and as to that it is not necessary to express any opinion, it does not follow that it governs the case at bar. An assignee for the benefit of creditors differs in important respects from a receiver appointed by an equity court. He holds the title to the property and derives it directly from his assignor, and not from the court. His possession is not always the possession of the court, and the property he holds is not necessarily *in custodia legis*. He is not an officer of the court, and does not derive his powers from the court, but from the deed of his assignor and the statute law of the state. See Adler v. Ecker (C. C.) 1 McCrary, 256, 2 Fed. 126 (1880); Lehman v. Rosengarten (C. C.) 23 Fed. 642 (1885); Lapp v. Van Norman (C. C.) 19 Fed. 406 (1884). Such is his status except where the statute law of a particular state has changed it. The rules which govern an assignee are not necessarily applicable to a chancery receiver, who holds no title, is an officer of the court, and derives his powers from the court, and is simply holding possession for the court pending a settlement of the estate.

An assignee for the benefit of creditors, if he elects to accept a lease belonging to his assignor, becomes by such election an assignee of the lease, holds the title, and becomes personally liable on the covenant to pay rent. But it is not so in the case of a chancery receiver. A chancery receiver takes no title to the leasehold estate, but has mere possession as an officer of the court. This has been expressly decided by the New York court of appeals in Stokes v. Hoffman House, 167 N. Y. 554, 53 L.R.A. 870, 60 N. E. 667 (1901). In that case the court also held that no privity of estate could be created between a chancery receiver and the lessor by which the receiver could become liable as assignee of the term upon a covenant to pay rent. The acceptance of the lease imposed, according to that decision, no legal liability upon the part of the receiver to pay rent, but gave to the lessor merely an equitable claim to have the rent paid as a part of the reasonable expenses of the receiver in carrying on the business.

Now it is perfectly evident that the mere appointment of a chancery receiver does not affect title, and it is equally evident that acceptance of a lease by a receiver acting under the authority of a court in accepting it does not and cannot invest the receiver with title. Equity acts only *in personam*. A decree in equity never devests a title at law, except in pursuance of a statute expressly conferring the authority. But it is not necessary for us to inquire whether, after a receiver has been appointed and a court of equity has taken possession of the property pending a settlement of an insolvent estate, a landlord has a right to forfeit the lease as against the receivers. If we assume that the right exists, and we are not to be understood as intimating that we doubt its existence, we think the facts of this case are such that the landlords are not at this time entitled to come into court to assert it.

Where a right of re-entry is reserved in a lease in case of failure of the lessee to perform a covenant on his part, an acceptance by the lessor of rent accruing after a breach of the covenant, with knowledge on his part of such breach, is a waiver of the forfeiture and an affirmance of the lease. Conger v. Duryee, 90 N. Y. 594 (1882). So if a landlord, after a forfeiture has been incurred, proceeds to make a distress for rent previously due, the right to re-enter is waived because by distraining he recognizes the relation of landlord and tenant and the lease as still existing. Zouch v. Willingale, 1 H. Bl. 311, 2 Revised Rep. 770; Jackson ex dem. Blanchard v. Allen, 3 Cow. 220.

As we understand the law, it is that the landlord is unable to assert his right of re-entry or his right of forfeiture if, with knowledge of the tenant's default, he thereafter does any act which recognizes the tenancy as still subsisting or the lease as still in force. When the landlords came into court on January 30, 1914, and asked the court to fix a time within which the receiv-

ers should decide whether they would adopt or renounce the lease, and when they again appeared on February 9th for the same purpose, they recognized the lease as still in full force, as much so as though they had distrained at that time for the rent. For if the lease was not then in full force and effect, and if there was not an existing tenancy, there could be no lease for the receivers to adopt. By that act the receivers waived their right to insist upon the forfeiture. The default in the payment of rent for which they now seek to forfeit the lease occurred prior to January 6, 1914. There has been no default since that time. Moreover, the acceptance by the lessors of the rent called for by the terms of the lease, and which has been paid in full ever since the receivers assumed possession, must also be regarded as a recognition of the continued existence of the lease. The money paid each month is the exact amount of rent the lease called for. In view of all the facts, we must then conclude that after the last default occurred the landlords recognized the lease as still in existence, and having done so they are not now at liberty to set it aside for the prior default.

The decree is affirmed.

Hand, District Judge, dissenting:

The majority of the court in this case does not, as I understand it, question the proposition, though they do not decide it, that, if a receiver in insolvency proceedings accepts a lease on which back rent is due, he takes subject to existing defaults upon conditions subsequent in the term. I should be sorry if any doubt were thrown upon that, and there is no intention, if I am right, to do so. The gravamen of the decision is this: By asking the court to compel the receivers to make their election the landlords recognized the lease as still in existence, and that recognition was a waiver of their right of forfeiture. A landlord may by his conduct waive a breach of condition either for failure to pay rent or for anything else. Thus a distress even for rent accruing before the default will waive the breach and toll the re-entry, because distress is a remedy which lies only against a tenant and presupposes that the term still endures. Stuyvesant v. Davis, 9 Paige, 427; Jackson ex dem. Norton v. Sheldon, 5 Cow. 448. So also suit to recover for a subsequent instalment, or even the receipt of such an instalment is enough, because there can be no subsequent rent, unless it arise from the term. In all these cases, if a landlord be later allowed to reenter as of a default earlier than the time of the distress or the period for which the rent is due, he will have got a right or a remedy which depended upon the existence of the term at one period which by his subsequent action he wishes to declare nonexistent during that period. Such I think are all the cases. I have not been referred to a case which holds a landlord to be estopped, because he spoke of a "lease," or acknowledged that the termor had some existing rights as of course he has.

What the landlords did here in order to compel the election appears in the recitals of the order of February 9, 1914, and the affidavit of Charlton verified the same day. No petition was made; the whole thing was done orally, except for the affidavit. It appears from this that on January 30th, the landlords' attorney told the court that they wished to have a time fixed within which the receivers should decide "what was their intention concerning said lease." After an adjournment and a subsequent appearance for the same purpose the court fixed a time, within which the receivers took the lease. Had the landlords asked that the receivers should within a fixed time declare their intention "concerning their option to accept the defendant's rights in the forfeited lease," there would have been no waiver, as I understand it. Because without condition they called it a "lease," their recognition of it constituted a waiver. I cannot really see why, if this be so, we must not also say that it is a waiver to demand unconditionally of a termor rent already due under his "lease" or under "the lease under which you now hold." A landlord must be careful not to speak of the lease as such, without adding that he reserves all his rights.

I can find no authority for such a ruling, and it seems to me an interpretation of the conduct and language of the parties which violates their intention and the universal practice of all landlords and tenants. When the landlords asked the receivers to declare their option regarding the "lease," no one would, I think, have supposed that they intended to waive any existing conditions, and we ought to interpret language when we can as it is meant. The lease remains yet a lease, though the landlords may forfeit it if the lessee continued in default. Until then it is a lease, and may never be anything else. Why should he not call it what it still remains, without adding a complete statement of his rights regarding it? To require him, every time he mentions it, to attach a reminder that he makes no waiver, appears to me to substitute a purely factitious requirement to a perfectly plain transaction.

The other alleged waivers it is necessary to take up, if one disagrees upon the point I have just discussed. They are three:

(1) The agreement of December 16, 1913; (2) the payment by the receivers during their occupation; and (3) the filing of the claim in the receivership proceedings. The first is not a waiver, in my judgment, for two reasons: First, because the sum received does not even amount to one month's rent, and there are three due. The landlord would have the right to allocate the payment on the first month's rent, leaving the subsequent rents unpaid. Now it is a well-settled principle that the receipt of rent waives forfeitures only for the period antedating that upon which the rent is applied, and the subsequent unpaid rents, with their several forfeitures, remained sufficient ground of forfeiture. However, the landlord specifically reserved all his existing rights, notwithstanding the security which he took, as he had the right to do, and this is a complete answer. Second, the acceptance of money from the receivers was not a payment of rent under the lease. It is well settled that the receivers or trustees in bankruptcy do not take over the term until they voluntarily accept it or remain mute an unreasonable time. Re Frazin, 33 L.R.A. (N.S.) 745, 105 C. C. A. 320, 183 Fed. 28. Until then everything they receive is by way of payment for occupation. This was in fact the case of the January payment. The receivers had not accepted the lease and could not pay the rent. The use of the word "rent" in the receipt was intended by neither side to constitute an acceptance of the lease or a payment of rent under it; but, if it had been, it was without the authority of the landlord, whose agent had not the right to bind him.

Finally, there is the question of proving the claim in bankruptcy. On January 30th the final decree was entered directing all persons to file claims on or before February 16th. On the earlier day the landlords appeared and asked the court to fix a time within which the receivers must elect to accept the lease. That matter was adjourned until the 9th of February, when formal application was made and the court fixed the 4th day of March; the claim was not filed until February 13th. Thus it appears that the receivers were not called on by the court to decide before the time expired within which the landlords must file claims. If they did not file, they lost their dividends; and if the receivers later repudiated the lease, they could never recover anything for those months. It seems to me, in view of this, that the filing of the claim should not be taken as a recognition of the lease, inconsistent with the right of re-entry, but that it should be taken as a provision against repudiation by the receivers.

I dissent, and vote to reverse the order, and allow the landlords to sue in ejectment upon the breach of condition subsequent. I do not mean that in any event this court should forbid landlords recourse to the state court under such circumstances; but I have considered the merits, since the decision has been upon the merits. In any event it would seem to me that the proper place to decide all such matters was in an action of ejectment in some court of competent jurisdiction.

ARKANSAS SUPREME COURT.

PARAGOULD ABSTRACT & REAL ESTATE COMPANY et al., Appts.,
v.
M. R. COFFMAN.

(100 Ark. 582, 140 S. W. 730.)

Adverse possession — unregistered deed — payment of taxes.

An unrecorded deed to vacant, unimproved property constitutes color of title so that payment of taxes thereunder for the statutory period will give an adverse title against a subsequent grantee from the common grantor, who promptly recorded his deed, but made no adverse entry upon the property.

(November 6, 1911.)

Note. — Adverse possession: unrecorded deed as color of title.

I. Introductory, 1006.
II. In general, 1007.
III. Statutes requiring registration, 1010.
IV. Extent of color, 1011.
V. Validity of deeds, 1011.

I. Introductory.

The cases treated in the note are confined to those in which color of title is held or assumed to be necessary to the acquisition of a title by adverse possession. The question of the necessity of color of title is not discussed. The necessity of color of title when not made a statutory condition of title by adverse possession has been treated in the note to Jasperson v. Scharnikow, 15 L.R.A.(N.S.) 1178.

The necessity of registry of partition proceedings in office of register of deeds not considered.

Nor is the right to tack the possession of various owners considered. This question has arisen frequently where there was a failure to record a deed in the chain of title for some time, it being objected that the delay prevented tacking. Some cases in which the question has arisen are: Dunn v. Taylor, — Tex. Civ. App. —, 143 S. W. 311; De La Vega v. Butler, 47 Tex. 529; Gillum v. Fuqua, — Tex. Civ. App. —, 61 S. W. 938; Jack v. Dillon, 6 Tex. Civ. App.

APPEAL by the Abstract and Trust Companies from a decree of the Chancery Court for Greene County quieting defendant's title as against appellants, and dismissing, for want of equity, the complaint of the Trust Company against him for the foreclosure of a mortgage on the land. Affirmed.

Statement by **Kirby**, J.:

This was a suit by the Paragould Trust Company against the Paragould Abstract & Real Estate Company to foreclose a mortgage upon certain lands, and against M. R. Coffman, alleging that he claimed some kind of an interest in the lands, of the exact nature of which plaintiff was not informed. Coffman filed an answer and cross complaint, claiming ownership of the land, deraigning title from the government to W. T. Sharp, and a conveyance by him on August 23, 1898, alleged the lands to be wild, uninclosed, and unimproved, and that he had continuously for more than seven years paid the taxes on said lands, and pleaded his color of title and payment of taxes in bar to plaintiff's right, and prayed for the cancelation of the mortgage as a cloud upon his title.

The Trust Company answered, denying the ownership of Coffman, alleging that the Abstract Company was the owner of the land at the time of the execution of the mortgage to it, and deraigning title thereto from the government to W. T. Sharp, and from Sharp to the Abstract Company,

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192, 25 S. W. 645; Snow v. Letcher, — Tex. Civ. App. —, 154 S. W. 355.

Where entry was had under registered deeds, and thereafter, upon a conveyance to another person, the continuity of such registration was broken by the failure of the grantee to register his deed, title by adverse possession under the five-year statute of limitations was held not to run, in Sorley v. Matlock, 79 Tex. 304, 15 S. W. 261.

Nor is the effect of a deed illegally recorded, as color of title, considered.

It is assumed that the adverse possession of the property is in other ways sufficient, the question being merely whether an unrecorded deed is color of title.

As to the effect of an invalid tax deed as color of title, within general statutes of limitation, see note to Bradbury v. Dumond, 11 L.R.A.(N.S.) 772.

For discussion of quitclaim deed as color of title, see note to Waterman Hall v. Waterman, 4 L.R.A.(N.S.) 776.

For discussion of the question as to whether or not a void tax deed set in motion special statutes of limitations governing actions to recover lands sold for taxes, see note to Mathews v. Blake, 27 L.R.A.(N.S.) 339; especially subdivision VIII.; and see also note to Gage v. Hampton, 2 L.R.A. 512; especially the discussion on page 515, on when statute of limitations begins to run.

II. In general.

The purpose of color of title is to show the character or extent of the possession of the one claiming by adverse possession. It is the actual possession, or, in some cases of wild and unoccupied lands, the payment of taxes, for the period required by the statute of limitations, founded upon such color of title, that perfects the title.

In the absence of a statute requiring color of title to consist of recorded instruments, an unrecorded deed is color of title. Dorlan v. Westervitch, 140 Ala. 283, 103 Am. St. Rep. 35, 37 So. 382; Packard v. Moss, 68 Cal 123, 8 Pac. 818 (*dictum*); Johnson v. Rhodes, 62 Fla. 220, 56 So. 439; Rawson v. Fox, 65 Ill. 200; Holbrook v. Forsythe, 112 Ill. 306 (*dictum*); Bernstine v. Leeper, 118 La. 1098, 43 So. 889; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Minot v. Brooks, 16 N. H. 374; Newmarket Mfg. Co. v. Pendergast, 24 N. H. 54; Bellows v. Jewell, 60 N. H. 420; Doe ex dem. Hardin v. Barrett, 51 N. C. (6 Jones L.) 159; Davis v. Higgins, 91 N. C. 382 (*dictum*); Hunter v. Kelly, 92 N. C. 285; Avent v. Arrington, 105 N. C. 377, 10 S. E. 991; Turner v. Williams, 108 N. C. 210, 12 S. E. 989; Lewis v. Roper Lumber Co. 109 N. C. 19, 13 S. E. 701; Smith v. Allen, 112 N. C. 223, 16 S. E. 932; Jones v. Perry, 10 Yerg, 59, 30 Am. Dec. 430; Cohen v. Woollard, 2 Tenn. Ch. 686; Hornsby v. Davis, — Tenn. Ch. App. —, 36 S. W. 159; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Nowlin v. Reynolds, 25 Gratt. 137; Lea v. Polk County Copper Co. 21 How. 493, 16 L. ed. 203; PARAGOULD ABSTRACT & REAL ESTATE CO. v. COFFMAN.

It has been stated that the evidence of title furnished by adverse possession for twenty years is founded on a presumption of some grant or agreement, which the law raises for the quieting of possessions and titles; but this presumption of grant does not arise from the fact that the party in possession has any title of record. It exists in full force where nothing exists on the record as to the extent of the actual occupation. The color of title only extends the limits of that occupation constructively. But it is the occupation itself that furnishes the notice, and, as we said before, the registry is not provided to give limits to it. Minot v. Brooks, 16 N. H. 374.

An unrecorded deed is color of title under a statute providing that where any person shall have had seven years' possession of any land which had been granted by the state, holding or claiming the same by virtue of the deed of conveyance or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity, effectually prosecuted, shall have been set up or made to said land within the aforesaid time, then and in that case the person or persons shall be entitled to keep and hold possession of such quantity of land as shall be specified and described

and alleged that Coffman's deed from Sharp had not been placed of record at the time of the execution of the mortgage by the Abstract Company to it, and that it was an innocent purchaser from the said Abstract Company without any notice of Coffman's right or claim. To this answer Coffman replied, alleging that at the time the mortgage was executed by the Abstract Company to the Trust Company that he was paying taxes on the lands, that he had continued the payments up to the time the suit was brought, that he had paid the taxes thereon for seven years, and that more than seven years had elapsed since the first payment, and pleaded the limitation in bar.

The testimony shows that all the parties deraigned title from the same grantor, W. T. Sharp, and his deed to Coffman was executed August 23, 1898, but not filed for record until September 28, 1907. The date of the deed from Sharp to the Abstract Company was January 16, 1905, and the mortgage from the Abstract Company to the Trust Company bears date of January 25, 1906. It appears that the Abstract Company first became aware of the claim by Coffman, and he of the claim of said company, in the summer of 1905, after Sharp's conveyance of the land to said company on January 18th of that year, and that about two years afterward Coffman's deed was placed of record, and about six months after the Abstract Company had notice of his claim an abstract of title

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in the deed. Lea v. Polk County Copper Co. 21 How. 493, 16 L. ed. 203.

An unrecorded deed is sufficient color of title to enable the grantee therein to complete a prescriptive period begun by his predecessor in title under a recorded deed. Roberson v. Downing Co. 120 Ga. 833, 102 Am. St. Rep. 128, 48 S. E. 429, 1 Ann. Cas. 757.

Nothing is said as to color of title in Jaques v. Lester, 118 Ill. 246, 8 N. E. 795, but it is there held that one who goes into possession under an unrecorded deed, and occupies the land adversely for more than the period of prescription, has a title superior to one who receives a deed from a devisee of the original grantor.

It is stated in Bracy v. Buck, 11 La. Ann. 100, that an unregistered title is a good basis for prescriptive title, but it does not clearly appear that the instrument was not registered, but only that the certificate of the parish recorder was not offered in evidence.

An unrecorded sheriff's deed, made in pursuance of the sale publicly had by the sheriff after the publication of the requisite notice, constitutes color of title. Tarplee v. Sonn, 109 App. Div. 241, 17 N. Y. Anno. Cas. 366, 96 N. Y. Supp. 6.

A deed which had been altered after record, with the consent and knowledge of the grantor, need not be recorded again to constitute color of title, since an unregistered deed will make color of title. Doe ex dem. Campbell v. McArthur, 9 N. C. (2 Hawks) 33, 11 Am. Dec. 738. See Shingler v. Bailey, 135 Ga. 666, 70 S. E. 563, infra, IV.

Under a statute providing that no deed or contract for the sale of land shall be valid to pass any property against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof, an unregistered deed of one purchaser is not color of title as between parties claiming from the same grantor. Austin v. Staten, 126 N. C. 783, 36 S. E. 338; Collins v. Davis, 132 N. C. 106, 43 S. E. 579; Moore v. Johnson, 162 N. C. 266, 78 S. E. 158.
L.R.A.1915B.

But where the parties do not claim from a common grantor, the unrecorded deed is color of title even under this statute. Utley v. Wilmington & W. R. Co. 119 N. C. 720, 25 S. E. 1021; Janney v. Robbins, 141 N. C. 400, 53 S. E. 863; Brown v. Hutchinson, 155 N. C. 205, 71 S. E. 302; Gore v. McPherson, 161 N. C. 638, 77 S. E. 835.

Adverse possession under the Texas ten-year statute of limitations was based upon an unrecorded deed in Hodges v. Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565, but, on rehearing, the evidence was held insufficient to show title to the land by limitation.

The Missouri doctrine requires notoriety of extent and nature of claimant's claim. In Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 S. W. 957, it was urged that a patent could not be regarded as giving color of title to the claimant because it did not affirmatively appear to have been recorded in the local office for the registry of conveyances in the county where the land lay. In answer to this contention it is stated that color of title need not necessarily consist of recorded instruments, that facts and circumstances showing sufficient notoriety of claim and of its nature and extent may sometimes impart to an unrecorded document the effect of color, and that, as the agreed statement conceded that the claimant's possession was adverse and notorious, and that it rested upon a patent from the state, the want of any showing that it was recorded in the county could not impair the force of the patent as such color.

A similar holding appears in Fields v. Bollinger, 234 Mo. 190, 136 S. W. 293.

The court was of the same opinion in Plaster v. Grabeel, 160 Mo. 669, 61 S. W. 589; but in that case there was a recorded deed upon which the adverse claimant could rely, and the decision is based largely on the recorded deed.

It becomes important under this doctrine to know what facts and circumstances are a sufficient showing of notoriety. In Plaster v. Grabeel, supra, the fact that the land was openly known as the land of the one in possession, and that the other claimant

to the property was prepared and the loan procured from the Trust Company upon the execution of the mortgage to it. The abstract showed a clear title from the government to the Abstract Company, and no indication of any claim on the part of Coffman, and the loan was made. After the Abstract Company had information of Coffman's title, they again searched the records of the county for his deed, but were not able to find it; it not being recorded until September, 1907. It had the lands assessed upon the tax books in its name, and Coffman, discovering it, had the assessor to erase the name of the company and assess the land in his name, and complained to the Abstract Company, desiring to know why they were attempting to assess his land. This was the first that either knew of the claim of the other to the land, and occurred six or seven months after the date of the Sharp deed to the Abstract Company. Thereafter the loan was applied for and made by the Abstract Company, upon an abstract of title furnished by its abstractor, who knew of the claim of title of Coffman, but who had not in fact notified the president of the Trust Company of the claim, and it was stipulated that the president of said Trust Company, who made the loan, was not advised and had no information of any claim of title by Coffman at the time the mortgage was taken. It further appeared that the lands were assessed for taxes, and the tax books and the records of tax receipts for Greene county shows that

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lived in the neighborhood, and saw and knew the condition, was held sufficient. That the possessor's claim was adverse and notorious was held sufficient in Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 S. W. 957; also Fields v. Bollinger, 234 Mo. 190, 136 S. W. 293.

An unrecorded land contract to uninclosed woodland, wild and mountainous, not suitable for cultivation, but valuable chiefly for timber, constitutes color of title for the purpose of showing the character and extent of the possession asserted, and the intent with which such possession is taken. Woods v. Montevallo Coal & Transp. Co. 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. 475.

Under a statute, an unrecorded contract of sale is stated to be void as to third parties, in Prevost v. Ellis, 11 Rob. (La.) 56. The same was held with reference to an act of sale not recorded in the parish in which the land was situated, in Duplessis v. Boute, 11 La. 342.

Under a statute requiring a tax deed to be recorded in order to complete the vesting in the grantee of the right, title, and interest of the former owner to the land conveyed, a tax deed is not color of title until it is recorded, within the meaning of a statute providing that every person in the actual possession of lands or tenements under claim and color of title, made in good faith, who shall, for seven consecutive years, continue in such possession, and pay taxes during such time, or any person having color of title, made in good faith, to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven consecutive years, shall be deemed and adjudged to be the legal owner of such land to the extent and according to the purport of his or her paper title. Sayre v. Sage, 47 Colo. 559, 108 Pac. 160.

This statute was again involved in Hughes v. Webster, 52 Colo. 475, 122 Pac. 789, where it was held, following the earlier case, that a tax deed does not constitute color of title so as to set in motion the statute of limitations until filed for record. These decisions were approved and followed in Carnahan v. Hughes, 53 Colo. 318, 125 Pac. 116, and Wostenburg v. Karme, 53 Colo. 258, 125 Pac. 118; Marks v. Morris, 54 Colo. 186, 129 Pac. 828 (*dictum*); Scott v. Conrad, 24 Colo. App. 452, 135 Pac. 135.

An unrecorded deed which is not delivered, and which is destroyed with the consent of the grantee, is not color of title. Chastien v. Philips, 33 N. C. (11 Ired. L.) 255.

In certain cases it is held simply that possession under an unrecorded deed is adverse, and, if maintained a sufficiently long time, will give good title, without any indication as to the necessity of color of title.

In Poage v. Chinn, 4 Dana, 50, the adverse possession of one who held under a contract which did not appear to have been recorded for the statutory period was a held to give good title as against the heirs of the prior patentee. In the course of the opinion the court states that it has never been held or understood that, to make out the bar of the statute, the whole derivation of title from the commonwealth to the individual in possession must be evidenced by acts of record. A title from the commonwealth—which must be of record—being shown, its subsequent transmission to the person claiming a legal or equitable interest under it may be proved as in other cases by such evidence as applies to the nature of the conveyance or of the right set up.

Similar holdings appear in Dolton v. Cain, 14 Wall. 472, 20 L. ed. 830; Collins v. Smith, 18 Ill. 160.

In Ring v. Gray, 6 B. Mon. 368, possession of one under an unrecorded deed was held adverse against the grantor, but, by virtue of the statute, it was not adverse at law as against creditors.

In Krauth v. Hahn, 139 Ky. 607, 65 S. W. 18, it is stated that one who occupies land adversely for fifteen years obtains title, whether he has a title of record or not.

It is stated in Winston v. Prevost, 6 La. Ann. 164, that it is not necessary that a private act under which land has been held the requisite number of years should have been recorded in the parish where the land is situated in order to enable the claimants to regulate their possession by it; that

it was assessed for taxes for the years 1898 to 1907, inclusive, and that M. R. Coffman, the appellee, paid the taxes thereon within the time required by law for all of those years. It is also conceded that the land was wild, unimproved, and uninclosed at the time of the purchase of Coffman from Sharp, and still remains so.

A decree was rendered dismissing plaintiff's complaint as to Coffman for want of equity, and quieting his title to the land as against both the Abstract Company, mortgagor, and the Trust Company, and from this decree both of said companies have appealed.

Messrs. **W. S. Luna, R. P. Taylor,** and **M. P. Huddleston,** for appellants:

Payment of taxes does not operate as constructive notice of claim of ownership.

Jerome v. Carbonate Nat. Bank, 22 Colo. 37, 43 Pac. 215; Ely v. Wilcox, 20 Wis. 524, 91 Am. Dec. 436; Sheldon v. Powell, 31 Mont. 249, 107 Am. St. Rep. 429, 78 Pac. 491; Towson v. Denson, 74 Ark. 302, 86 S. W. 661; Penrose v. Doherty, 70 Ark. 256, 67 S. W. 398.

He who intentionally or through negligence permits the record title to his land to remain in another, concealing his deed from the world, will not be permitted to

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the claimant's possession of a portion of the land is sufficient to put others on inquiry as to the extent and nature of such possession.

In Joyce v. Dyer, 189 Mass. 64, 109 Am. St. Rep. 603, 75 N. E. 81, one who entered under an unrecorded deed from a tenant in common, purporting to convey the entire fee, and occupied adversely to the knowledge of the other tenants, was held to acquire title by adverse possession.

The acquisition by one in possession of land without any claim of right or color of title of a deed from another was held to make his possession adverse, although not recorded, in De St. Laurent v. Gescheidt, 18 App. Div. 121, 45 N. Y. Supp. 730.

In Stewart v. Harris, 2 Swan, 656, it is held that the limitation act did not require the deed to be registered, and that, if the tenant holds, under such a deed, for the requisite period, he becomes invested with a perfect legal title which rests not upon the registry laws, but upon the deed and adverse possession.

The unrecorded deed was not considered in Gardiner v. Hinton, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779, upon the question of color of title, it being held merely that the fact that the deed was not recorded until within less than ten years of the institution of the suit did not prevent adverse possession running against an opposing claimant.

An unrecorded deed cannot be given in evidence as color of title without proof of its execution (Highwater v. Williams, 38 Ga. 597; Hardin v. Barrett, 51 N. C. [6 Jones, L.] 159; Hunter v. Kelly, 92 N. C. 285), unless it is an ancient document (Davis v. Higgins, 91 N. C. 382).

A deed conveying a tract of land in two countries, properly registered in one, may be admitted in the other without proof of execution, as color of title. Lewis v. Roper Lumber Co. 109 N. C. 19, 13 S. E. 701.

The present note, however, does not purport to deal exhaustively with questions of evidence.

III. Statutes requiring registration.

Statutes may require registration in order to form the basis of adverse possession. Snider v. Brown, — Tenn. —, 48 S. W. 377; L.R.A.1915B.

Smith v. Cross, 125 Tenn. 159, 140 S. W. 1060. The unrecorded deed is not, under such statutes, color of title.

A statute required registration in Byrd v. Phillips, 120 Tenn. 14, 111 S. W. 1109, and Breckenridge Cannel Coal Co. v. Scott, 121 Tenn. 88, 114 S. W. 930, but in those cases the deeds had been illegally recorded, —a class of cases not included in the present note.

Likewise, under some special short-term statutes of limitation registration is required to form the basis of adverse possession. Consequently where the deed is not registered, it cannot form a basis upon which to found a title by adverse possession. This is true under the Texas five-year statute of limitations. Porter v. Chronister, 58 Tex. 53; Medlin v. Wilkins, 60 Tex. 418; Van Sickle v. Catlett, 75 Tex. 404, 13 S. W. 31; McCurdy v. Locker, 2 Tex. Civ. App. 220, 20 S. W. 1109 (*dictum*); Wille v. Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; Hodges v. Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565; Watts v. Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

The deed under which those in possession claim must be recorded, it not being sufficient that some deed in the chain of title or purported chain of title is duly registered. Porter v. Chronister, 58 Tex. 53; Medlin v. Wilkins, 60 Tex. 418; Cook v. Dennis, 61 Tex. 246; Harvey v. Cummings, 68 Tex. 600, 5 S. W. 513; Cobb v. Robertson, 99 Tex. 138, 122 Am. St. Rep. 609, 86 S. W. 746, 87 S. W. 1148; Allen v. Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200.

And the registration must have been for five successive years before suit is brought. Adkins v. Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; William Cameron & Co. v. Collier, — Tex. Civ. App. —, 153 S. W. 1178.

So, where the claimant's deed had been duly registered, but he had not paid taxes, so that it was necessary for him to rely on an unregistered deed of his grantor to make out the five-year period, title by adverse possession under this statute will not accrue. Tarlton v. Kirkpatrick, 1 Tex. Civ. App. 107, 21 S. W. 405.

Under this statute a deed recorded in a county other than that in which the land lies cannot form a basis for adverse posses-

assert his title as against subsequent grantees of the record title, who purchased without any notice of a prior deed.

Breeze v. Brooks, 97 Cal. 72, 22 L.R.A. 256, 31 Pac. 742.

Messrs. **Block & Kirsch**, for appellee:

Appellee's title was perfected as against all the world.

Towson v. Denson, 74 Ark. 304, 86 S. W. 661; Cottonwood Lumber Co. v. Hardin, 78 Ark. 95, 92 S. W. 1118; Hardie v. Bissell, 80 Ark. 75, 94 S. W. 611; Earle Improv. Co. v. Chatfield, 81 Ark. 296, 99 S. W. 84; Updegraff v. Marked Tree Lumber Co. 83 Ark. 154, 103 S. W. 606; Wyse v. Johnston, 83 Ark. 522, 104 S. W. 204; Price v. Greer, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009; Sibly v. England, 90 Ark. 420, 119 S. W. 820; Greer v. Vaughan, 96 Ark. 524, 132 S. W. 456.

Kirby, J., delivered the opinion of the court:

The question for decision in this case is whether appellee, M. R. Coffman, acquired title to the land in controversy by limitation upon the payment of taxes for seven years under § 5057 of Kirby's Digest, having color of title thereto. The seven payments of taxes had been made and the

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sion, although it was recorded in the other county under a mistake, at a time when the land was supposed to lie therein, and taxes were by such county levied and collected. Adams v. Hayden, 60 Tex. 223.

IV. Extent of color.

As stated above, the purpose of color of title is to show the character or extent of the possession of the one claiming title by adverse possession. This being true, the possession of the claimant is extended to the limits of the tract, as fixed in the color of title, although the claimant is in actual possession of only a part.

Roberson v. Downing Co. 120 Ga. 833, 102 Am. St. Rep. 128, 48 S. E. 429, 1 Ann. Cas. 757; O'Brien v. Fletcher, 123 Ga. 427, 51 S. E. 405; Floyd v. Ricketson, 129 Ga. 668, 59 S. E. 909; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Minot v. Brooks, 16 N. H. 374; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; applied in Brown v. Johnson, 1 Humph. 267, in case of an unrecorded title bond.

Thus, although the lot of land is divided by a stream or swamp, and actual possession is maintained of only the portion on one side of the stream, constructive possession extends over the entire tract under an unrecorded deed. Dodge v. Cowart, 131 Ga. 549, 62 S. E. 987. In this case, actual possession of 50 acres was held to extend constructive possession to 202½ acres.

An unrecorded deed of certain independently described tracts of land is color of title to the entire tract of which the grantee is in possession of a part, but not as to the other tracts described in the deed, under a Code provision that where a person having paper title to a tract of land is in possession of only part thereof, his possession shall be construed to extend to the boundary of the tract. Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904.

A deed of land described as "situated on the Pinkham road and designated as lot No. 6 on the westerly of Peabody river to run 160 rods each side of the road where it now runs and wide enough to contain 100 acres" is not constructive possession of land on the east side of the river, although, in point of fact, the average distance of the Peabody river easterly from the Pinkham road is only 42 rods. Bellows v. Jewell, 60 N. H. 420.

A charge of the trial court to the effect that, in order for actual possession of one tract embraced in a deed to extend constructively to other tracts embraced therein, so as to ripen into a prescriptive title, the deed must have been on record "during the time that the prescription ripens," was excepted to in Shingler v. Bailey, 135 Ga. 667, 70 S. E. 563, on the ground that relatively to a deed executed prior to the adoption of the Code of 1895, it was not necessary that it be recorded in order for it to operate as color of title. The court states that the charge was open to this criticism, but it is not clear that it is intended to hold more than that an unrecorded deed prior to the Code did operate as color of title.

A Texas statute requires a registered conveyance in order to extend boundaries beyond 160 acres. Hodges v. Robbins, 23 Tex. Civ. App. 57, 56 S. W. 565; Watts v. Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258.

It was accordingly held, under this statute, in Doom v. Taylor, 35 Tex. Civ. App. 251, 79 S. W. 1086, that one claiming title to land by adverse possession under an unregistered deed could only claim the land actually occupied, unless that occupied was less than 160 acres, in which event it might be extended to include 160 acres.

Title acquired to an irrigation ditch by adverse possession under an unrecorded deed extends only to the amount of ground necessary for the use of the ditch, and is not measured by the calls of the deed. Swank v. Sweetwater Irrig. & Power Co. 15 Idaho, 353, 98 Pac. 297.

The Missouri doctrine is that an unrecorded deed must be coupled with facts and circumstances showing the nature and extent of the claimant's claim, with some notoriety, in order to constitute color of title for parts other than those actually in possession. Ozark Plateau Land Co. v. Hays, 105 Mo. 143, 16 S. W. 957; Plaster v. Grabeel, 160 Mo. 669, 61 S. W. 589. See discussion of Missouri doctrine, supra.

V. Validity of deeds.

The deed need not be perfect, in fact, it need not be such as would be entitled to

seven years had expired after the purchase of said lands by said Coffman from W. T. Sharp, and their conveyance to him on August 23, 1898, and before the filing of the suit herein on September 22, 1908.

The land was wild, unimproved, and uninclosed, and his first payment of taxes thereon under his said deed was made April 10, 1899, for the taxes of 1898. The Abstract Company purchased the same lands from said W. T. Sharp, appellee's grantor, on January 16, 1905, without any actual notice of said Sharp's deed to Coffman, which had not been recorded at that time, and filed its deed for record on January 18, 1905, long before said Coffman's deed was recorded, and claims that his said deed was invalidated on account thereof under § 763 of Kirby's Digest. That section provides: "No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; . . . shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated." And it may be conceded that it invalidates the deed of Sharp to said Coffman, not recorded until after the record of the deed from said Sharp to the said Abstract Company, but even so, said deed, nevertheless, constituted color of title within the meaning of the said statute of limitations. And it is undisputed that the grantee therein paid the taxes upon the lands in controversy for seven years after their conveyance to him by said deed and before the bringing of this suit also that there was no adverse entry by appellants during said time, and the lands remained wild, unimproved, and uninclosed during the whole period.

In Updegraff v. Marked Tree Lumber Co. 83 Ark. 159, 103 S. W. 608, this court said: "It will be observed that the act merely declares that the person who pays the taxes on unimproved and uninclosed lands shall be deemed to be in possession thereof if he have color of title. The statute does not undertake to fix the period of limitation, but merely declares the continuous payment of taxes under color of title to be possession, and leaves the general statute of limitations applicable thereto. The only proviso or condition in the act is that the person who pays the taxes, before he can claim the benefits thereof, must have paid at least seven years in succession, three of which must have been since the passage of the statute. It follows from this that where lands continue to be unimproved and uninclosed, and seven successive payments of taxes are made, the possession continues and becomes complete, unless the possession be broken by adverse entry or by commencement of an action before expiration of the seven-year period from the date of the first payment."

By such payment of taxes under color of title, appellee acquired a valid title thereto as against appellants and all others, as has often been held by this court. Towson v. Denson, 74 Ark. 304, 86 S. W. 661; Updegraff v. Marked Tree Lumber Co. 83 Ark. 159, 103 S. W. 608; Wyse v. Johnston, 83 Ark. 522, 104 S. W. 204; Price v. Greer, 89 Ark. 300, 116 S. W. 676, 118 S. W. 1009; Sibly v. England, 90 Ark. 420, 119 S. W. 820; Greer v. Vaughan, 96 Ark. 524, 132 S. W. 456.

Appellant and its mortgagee knew the law and that title could be so acquired, and they also knew that they were not paying the taxes upon the said land, and that necessarily they were being paid by someone else. Slight diligence upon their part would have discovered the condition existing long before appellee's title was perfected under the statutes of limitations, and an entry into possession, or the bringing of the suit, would have stopped the running of the statute in his favor. Having waited until his title by limitation ripened, they cannot complain that they are now barred by the statute.

This view of the case makes it unnecessary to decide whether or not the fact that notice had been given to the Trust Company's abstractor, who passed upon and approved the title and knew of Coffman's claim to the land before the loan was made, was actual notice thereof to the said Trust Company,—a corporation that can act only through its agents, within the meaning of said § 763. Appellee, having color of title,

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record. Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904.

A guardian's deed, executed without authority, is sufficient. Plaster v. Grabeel, supra.

Even a void deed may be color of title. Minot v. Brooks, 16 N. H. 374.

So, an unrecorded deed, void because made from a wife to a husband without such sale having been allowed by an order of the superior court, may operate as color of title. L.R.A.1915B.

Floyd v. Ricketson, 129 Ga. 668, 59 S. E. 909.

In Nye v. Alfter, 127 Mo. 529, 30 S. W. 186, a void tax deed was held not to be color of title until delivered to the recorder for record. This case, however, is interpreted in Plaster v. Grabeel, supra, as authority only for the proposition that when one claims under color of title, the nature and extent of his claim, as well as his possession, must be made known. W. A. E.

and having paid the taxes upon the said land thereunder for seven successive years, three of said payments having been made after the passage of said statute, and the whole of said seven years having expired before adverse entry by appellants or the bringing of this suit, perfected his title by limitation. Greer v. Vaughan, supra.

It follows that the decree of the Chancery Court, quieting his title as against appellants, and dismissing the complaint of the Trust Company against him for foreclosure of the mortgage of the land for want of equity, was correct, and it is affirmed.

ARKANSAS SUPREME COURT.

BOB MITCHELL et al., Appts.,
v.
GILLUM HOPPER.

(— Ark. —, 170 S. W. 231.)

Inspection — cattle — injury to animal — liability.

Public cattle inspectors engaged in the work of eradicating disease among cattle of the state are not liable for injury to an animal during inspection, in the absence of carelessness or negligence on their part.

(October 26, 1914.)

APPEAL by defendants from a judgment of the Circuit Court for Boone County in plaintiffs' favor in an action brought to recover damages for the value of a steer alleged to have been killed by defendants' negligence. Reversed.

Statement by **Kirby, J.**:

This suit was brought by appellee for damages for the value of a steer alleged to have been carelessly killed by appellants while roping him. They answered denying any negligence, but admitting that the steer broke his leg after he had been lassoed or roped, while they were attempting, in the exercise of proper care, to inspect the herd of cattle as officials of the state engaged in the work of tick eradication in Boone county; that the occurrence was an accident for which they were not responsible; that they immediately reported it to the plaintiff, who requested them to sell the steer to the meat market at Harrison, which they did, for

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Note. — Officers: liability of live stock inspectors.

This note does not include cases of the seizing and impounding of animals running at large or trespassing, nor cases where the only question was as to the owner's right of replevin from the officers without discussing the element of damages. Nor does it include the liability of officers of societies for the prevention of cruelty to animals.

The scope of this note does not include cases where the only question discussed is whether the law under which the inspectors acted was valid, as in Hawkins v. Hoye, — Miss. —, 66 So. 741 (prohibition of sale of milk from cows found to be tuberculous). As to validity and construction of statutory regulations concerning infected animals, see notes to Grimes v. Eddy, 26 L.R.A. 638, and Adams v. Milwaukee, 43 L.R.A. (N.S.) 1066.

As to the general subject of the liability of officers, see Index to L.R.A. Notes, §§ 38, 40.

Unconstitutional statute.

An officer destroying a horse under an unconstitutional statute is liable for its value. Loesch v. Koehler, 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, 43 N. E. 129; Waud v. Crawford, 160 Iowa, 432, 141 N. W. 1041.

Officer not proceeding according to the statute.

A health officer who destroys an animal as infected, without the warrant or authority the law prescribes for such cases, is liable for such destruction. Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54, 30 So. 36.

Replevin, with damages for detention, will lie by an owner against the sheriff, who took and quarantined the plaintiff's cattle upon a paper insufficient as the complaint specified in the statute, and continued to hold them under an order of the live stock commission not reciting the essential fact that the cattle were "capable of communicating or liable to impart" the disease mentioned in the statute. Asbell v. Edwards, 63 Kan. 610, 66 Pac. 641.

Where the statute provided that, on notice by the sheriff to a justice, the latter should appoint inspectors who should examine cattle and report to the justice, who might thereupon order the sheriff to take the cattle, it was held that the owner of the cattle had an action of trover on account of the taking of his cattle by the sheriff under an order from the justice,—assuming that the statute was valid, that the cattle were not the kind against which the statute was designed to guard, or that the proceedings thereunder were so irregular as to be void. The court considered that the proceedings of the justice were void as they all took place outside his township. It does not appear whether or not the defendants other than the sheriff were the inspectors and the justice. Wilcox v. Johnson, 34 Kan. 655, 9 Pac. 610.

Disease as a prerequisite for the acts of officer.

An officer is liable to the owner for cattle

$18.40, and offered to pay this amount to the plaintiff, but he declined to accept it, and they tendered it in the justice's court. From the judgment for double damages in appellee's favor, the appellants appealed to the circuit court. It appears from the testimony that the appellants were inspectors engaged in the work of tick eradication in Boone county; that it was necessary to catch the cattle and examine them closely in order to make the proper inspection; that one of them threw a rope or lasso on this steer as he started away from the herd, and his horse braced himself, and when the steer came to the end of the rope, the slack, he slipped on a rock or fell and broke his leg. He was skilled in roping cattle, and both the inspectors testified that it was properly done without any carelessness. They immediately reported the occurrence to the owner, and he said that he would expect pay for his steer, and that they should sell the animal to the butcher. They replied that they wanted to do what was right about it and went immediately to town, but were not able to get more than $18.40 for the injured animal. There is some question about whether that sum was tendered appellee before suit was brought, and the tender was not made good by bringing the money into the circuit court. The court instructed the jury that if they found from the evidence that appellants, during the inspection, injured any of plaintiff's stock, they would be liable for whatever damages he sustained by reason of the injury, and declined to give appellants' requested instruction No. 2 as follows: "Before you would be authorized to find for the plaintiff, you must find from a prepon-

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killed through the officer's mistaken conclusion of the presence of disease, where the statute declares that diseased live stock may be destroyed or otherwise dealt with by the officer, but provides for no compensation to the owner for mistakes of the officer. Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100. See also Wilcox v. Johnson, supra.

Thus, the selectmen and board of health are liable in tort for killing the plaintiff's horse on an order of the commissioners adjudging that the horse had the contagious disease known as the glanders or farcy, when in fact he was not afflicted therewith or with any contagious disease, the statute providing that, "in all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof." Miller v. Horton, supra.

So, live stock commissioners and their servants are liable for killing horses as affected with an infectious and contagious disease, or as having been exposed to it, if the jury find the horses did not have such a disease or had not been exposed to it, where the only authority given by the statute to kill and destroy domestic animals existed in cases of contagious or infectious disease, and was the power to order the slaughter of "diseased animals" and the power "to order the appraisement and slaughter of all such animals as have been exposed to such contagion," the statute making no provision for animals killed by mistake, or for those not affected with a contagious or infectious disease or exposed thereto; and the good faith of the officers is no justification, nor is the fact that there was reasonable cause for them to think that the horses had the disease supposed. Pearson v. Zehr, supra.

Similarly it was the opinion of the court in Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697, that a statute making horses affected by contagious and infectious disease common nuisances, and authorizing their destruction if, in the judgment of the assistants of the board of health, the disease was not likely to yield to any remedial treatment and was likely to spread, would not protect the officers unless the disease creating the nuisance actually existed; but as the plaintiff demurred to the plea of justification, instead of taking issue on the facts, the defendants had judgment on the demurrer.

It may be noted that in Houston v. State, 98 Wis. 481, 42 L.R.A. 39, 74 N. W. 111, where it was held that an action would not lie against the state for an injury resulting from the negligence or tortious acts of its officers or agents, in a case where the state veterinarian destroyed cows as tuberculous which were alleged to be sound, the court observed: "The statute only authorized the destruction of animals in case they were affected with some 'contagious or infectious disease of malignant or very fatal nature.' . . . Unless the animals were so diseased in fact, their slaughter was without authority of law, and hence tortious. Pearson v. Zehr, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100."

Reference may be made in this connection to Lowe v. Conroy, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 Ann. Cas. 341, where, although the health officer's orders related to both living and dead cattle, the damages were, it seems, confined to the dead. It was there held that, although the health officer's acts were quasi judicial in nature, he was liable for destroying the hide and beef of a steer which he supposed had died of anthrax, when the animal had not been affected with any dangerous or infectious disease, and the law contained no provision for payment for property destroyed by mistake of health officers.

derance of the testimony that the defendants carelessly or negligently roped the steer belonging to the plaintiff, and in so doing broke, or caused to be broken, its leg, and if you fail to so find from a preponderance of the testimony, then your verdict will be for the defendants."

From the verdict and judgment for appellee, appellants have appealed.

Mr. **Troy Pace**, for appellants:

There can be no liability for purely accidental injuries arising from the doing of a lawful act in a proper manner.

38 Cyc. 423; 1 Thomp. Neg. 2d ed. § 14; Tinsman v. Belvidere R. Co. 26 N. J. L. 148, 69 Am. Dec. 565; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Nitroglycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206; Bizzell v. Booker, 16 Ark. 308; Cameron v. Vandergriff, 53 Ark. 386, 13 S. W. 1092; Manning v. Jones, 95 Ark. 362, 129 S. W. 791.

Mr. **Gillum Hopper** *in propria persona*.

Kirby, J., delivered the opinion of the court:

Appellants' instruction No. 2 correctly states the law, and should have been given. Appellants were officers and engaged in the performance of their duties in inspecting the cattle at the time they undertook to do so. The act being lawful, they were only liable for injuries resulting from carelessness or negligence, and could not be held liable for damages for injury resulting by accident or casualty while they were in the exercise of proper care, or such care as an ordinarily prudent man would have exercised under the circumstances. Bizzell v.

—exemplary damages.

In Pearson v. Zehr, supra, it was also held that the court would not disturb a verdict for more than the actual damages shown, where it was not contrary to the evidence for the jury to find that the defendants committed the trespass wilfully or recklessly or oppressively, or in wanton disregard of the plaintiff's rights.

Miscellaneous.

It has been held that a sheep inspector acts with such discretionary powers as are in their nature judicial in choosing the place of quarantine for diseased sheep, under a statute providing that when sheep are found to be diseased, the state sheep inspector or his deputy shall at once make regulations for their quarantine, and shall define the place and limits within which such sheep must be held until pronounced cured from disease by him or his deputy. Consequently, he is not liable for mere negligence in selecting a place where there is a plant injurious or fatal to sheep. Garff v. Smith, 31 Utah, 102, 120 Am. St. Rep. 924, 86 Pac. 772, where the court said: "The law does not prescribe nor define the time nor mode of the performance of the act with such certainty that nothing remains for judgment or discretion. The kind of regulations to be made, and the defining of the place and limits of quarantine, are wholly left to the judgment and discretion of the officer, to be determined by him, not from fixed and designated facts, but from the facts and circumstances of the particular case." The court said also: "All the authorities agree that a public officer acting judicially, or in a quasi judicial capacity, cannot be made personally liable in a civil action, unless the act complained of be wilful, corrupt, or malicious, or without the jurisdiction of the officer. But if the duties of the officer are merely ministerial, he is liable in a civil action, when, in the performance of them, he acts negligently."

But on the other hand it has been held that a deputy sheep inspector acts ministerially in dipping sheep when ordered so to do by the proclamation of the governor under the statute, and he is liable in damages to the owner of bucks for which he caused to be used an injurious dip, said proclamation requiring that bucks should be "dipped under the supervision of the state veterinarian through the deputy sheep inspector of the county into which the sheep are to remain, and said sheep shall be dipped in some recognized and reliable dip known to be efficient in the cure of scab." Bair v. Struck, 29 Mont. 45, 63 L.R.A. 481, 74 Pac. 69.

In Moore v. Wilson, 84 Kan. 745, 115 Pac. 548, where the statute gave no authority to the live stock commissioner to appoint a deputy, but he assumed to appoint one, who with little, if any, inspection erroneously decided that the plaintiff's cattle were infected with mange, and placed a quarantine upon them, it was held in an action against the commissioner and such appointed deputy, that the person appointed deputy was not a deputy and had no authority as such to establish a quarantine or to restrain the plaintiff's stock. (Verdict for the defendants was reversed on the ground that the court charged the jury that the commissioner was warranted in appointing a deputy.)

It may be noted that it was held in Stanbury v. Exeter Corp. [1905] 2 K. B. 838, 22 Times L. R. 3, 75 L. J. K. B. N. S. 28, 70 J. P. 11, 54 Week. Rep. 247, 93 L. T. N. S. 795, 4 L. G. R. 57, where a general board of agriculture, under the authority of a statute, made an order that inspectors should detain sheep suspected of sheep scab, and the statute gave to local authorities the appointment of inspectors, that the local authority is not liable to the owner of sheep negligently detained by an inspector appointed by such local authority.

It will be noted that in MITCHELL v. HOPPER there was no negligence on the part of the officers.

B. B. B.

L.R.A.1915B.

Booker, 16 Ark. 308; Manning v. Jones, 95 Ark. 359, 129 S. W. 791; 38 Cyc. 423; 1 Thomp. Neg. § 14; Tinsman v. Belvidere R. Co. 26 N. J. L. 148, 69 Am. Dec. 565; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; Nitro-glycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206.

The court's instructions declared the law incorrectly, and were erroneous also in directing, in effect, a verdict against appellants for the value of the injured animal. They, of course, were liable in any event, as one of their requested instructions told the jury, for the payment of the $18.40 realized from the sale of the injured steer, which amount they claim to have been willing at all times to pay.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

IDAHO SUPREME COURT.

JOHN DERN, Appt.,
v.
NAT OLSEN et al., Respts.

(18 Idaho, 358, 110 Pac. 164.)

Limitation of action — acknowledgment — statutory provision.

1. Under the provisions of § 4078 of the Revised Codes no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the operation of the statute of limitations, unless the same is contained in some writing signed by the party to be charged thereby.

Same — promise to pay — necessity for.

2. Under the provisions of § 4078 of the Revised Codes, a clear and definite acknowledgment of the existence of a contract and liability which has not at the time been barred by the statute of limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt and fixes a new date from which the statute begins to run.

Same — acknowledgment.

3. Where O. was owing D. a note and mortgage which was overdue but not yet barred by the statute of limitations, and O. wrote D., telling him of a prospective sale of mining property he had in view, and saying, "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property," such letter constitutes an "acknowledgment" of a "continuing contract" within the meaning of § 4078, Rev. Codes, and sets a new date from which the statute of limitations begins to run.

Same — negativing implied promise to pay.

4. Held, further, that the words, "If I can make this deal, will try and get enough money down to liquidate the mortgage," constitute a condition that the debtor pro-

Headnotes by AILSHIE, J.

Note. — Waiver or tolling of the statute of limitations or nonclaim by personal representative as to an indebtedness of the estate.

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posed to place upon the sale of the property and demand from the purchaser, rather than a condition as to the payment of the debt to his creditor, and did not negative an implied promise to pay at some time even if the sale should not be made.

Same — authority of administrator to waive bar.

5. Under the provisions of §§ 5469, 5471, 5461, and 5463 of the Revised Codes, an administrator of the estate of a deceased person has no power or authority to waive the bar of the statute of limitations so as to set a new date for the statute to begin to run.

Same — power of administrator to acknowledge debt.

6. Under the provisions of § 4078, Rev. Codes, an administrator cannot "acknowledge or promise" to pay "a new or continuing contract" so as to remove the same from the operation of the statute of limitations and bind the estate, for the reason that the debt is the obligation of the estate represented by the administrator, and would not be the debt of the party making the acknowledgment or promise and "to be charged thereby."

(June 25, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Ada County in defendants' favor in an action brought to foreclose a mortgage on certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. **Richards & Haga**, for appellant:

There was such an acknowledgment of an existing liability as the law requires, as an unqualified admission is sufficient. Southern P. Co. v. Prosser, 122 Cal. 413, 55 Pac. 145; Kuhn v. Mount, 13 Utah, 108, 44 Pac. 1037; Foster v. Bowles, 138 Cal. 449, 71 Pac. 495; Concannon v. Smith, 134 Cal. 14, 66 Pac. 40; Tuggle v. Minor, 76 Cal. 101, 18 Pac. 131; Cowan v. Magauran, Wall. Sr. 66, Fed. Cas. 3,292; Kirk v. Williams, 24 Fed. 448; Green v. Coos Bay Wagon Road Co. 10 Sawy. 625, 23 Fed. 70; Clark v. King, 54 Kan. 222, 38 Pac. 281; 19 Am. & Eng. Enc. Law, 295; 25 Cyc. 1335-1337.

If any doubt as to whether or not the language used by the defendants amounted to an acknowledgment of an existing liability, the benefit should be given the plaintiff.

Kelly v. Leachman, 3 Idaho, 639, 33 Pac. 44.

Several letters of a series can be construed together to determine whether there was an acknowledgment.

Morris v. Carr, 77 Ark. 228, 91 S. W. 187.

The letters were a sufficient acknowledgment.

Sears v. Howe, 80 Conn. 418, 68 Atl. 983, 12 Ann. Cas. 414; Cleland v. Hostetter, 13 N. M. 43, 79 Pac. 801; Willis v. Wile-

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I. Introduction.

As to whether the statute of limitations is suspended during the period allowed an administrator to bring an action, see Morse v. Hayes, 13 L.R.A.(N.S.) 1200, and note appended thereto.

It is the purpose of the present note not only to present the adjudications upon the question of the right of an executor or administrator to toll or waive the statute of limitations as to an indebtedness of the testator or intestate, but to treat the cases which determine what constitutes a toll or waiver of the statute, as well as the decisions as to the effect, upon the various interested parties, of a tolling or waiver of the statute. The general questions are treated not only with respect to the general statute of limitations, but also as arising in connection with the so-called short, special, administrative, or nonclaim statute of limitations.

For the guidance of the investigator it may be well to state that to avoid confusion the term "waiver" throughout the note is used only when the debt was fully barred, and the term "toll" is used only where the statutory bar was not complete. In many cases, however, it is impossible to determine from the reports the exact time when the bar became complete, but where possible, such time has been stated, usually parenthetically.

With reference to the right of an executor or administrator to "toll" or suspend the general statute of limitations, the great weight of authority is to the effect that the personal representative can toll the statute when the debt is not fully barred at the time of the alleged tolling. In fact the courts of but three jurisdictions (Mississippi, Idaho and West Virginia) seem to have definitely denied this privilege to the personal representative, and in two of these (Idaho and West Virginia) the decisions are controlled, in part at least, by statutes. For the Mississippi cases upon this point, see infra, II. a, 1 (b); for the Idaho case

man, 53 Misc. 465, 102 N. Y. Supp. 1004; Milwee v. Jay, 47 S. C. 430, 25 S. E. 298; Kuhn v. Mount, 13 Utah, 108, 44 Pac. 1037; Rumsey v. Settler, 120 Mich. 372, 79 N. W. 579; Walker v. Freeman, 209 Ill. 17, 70 N. E. 595; Concannon v. Smith, 134 Cal. 14, 66 Pac. 40; Hill v. Hill, 51 S. C. 134, 28 S. E. 309; Barlow v. Barner, 1 Dill. 418, Fed. Cas. No. 998; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; 3 Wigmore Ev. § 2120.

The letters are a sufficient acknowledgment to fully meet the requirements of the statute.

Miller v. Kinsel, 20 Colo. App. 346, 78 Pac. 1075; Reymond v. Newcomb, 10 N. M. 151, 61 Pac. 205; Cleland v. Hostetter, 13 N. M. 43, 79 Pac. 801; Wise v. Adair, 50 Iowa, 104; Bayliss v. Street, 51 Iowa, 627, 2 N. W. 437; Senninger v. Rowley, 138 Iowa, 617, 18 L.R.A.(N.S.) 223, 116 N. W. 695; Pracht v. McNee, 40 Kan. 1, 18 Pac. 925; Elder v. Dyer, 26 Kan. 609, 40 Am. Rep. 320; Walsh v. Mayer, 111 U. S. 31, 28 L. ed. 338, 4 Sup. Ct. Rep. 260; Barnard v. Bartholomew, 22 Pick. 291; Custy v. Donlan, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360; King v. Davis, 168 Mass. 133, 46 N. E. 418; Chidsey v. Powell, 91 Mo. 625, 60 Am. Rep. 267, 4 S. W. 446; Devereaux v. Henry, 16 Neb. 55, 19 N. W. 697; Harms v. Freytag, 59 Neb. 359, 80 N. W. 1039; Rumsey v. Settle, 120 Mich. 372, 79 N. W. 579; De Forest v. Hunt, 8 Conn. 180; Norton v. Shepard, 48 Conn. 141, 40 Am. Rep. 157; Wood, Limitations,

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see DERN V. OLSEN, and for the West Virginia case see Findley v. Cunningham, 53 W. Va. 1, 44 S. E. 472, as set out infra, II. a, 2 (a).

But with respect to the right of a personal representative to "waive" the general statute of limitations as to a barred indebtedness of the estate, there is a decided conflict of authority. But taking the decisions as a whole, there seem to be several well-defined rules. One line of cases announces a rule which allows the personal representative in his discretion, and without reference to when the debt became barred, to waive the statute of limitations. See infra, II. a, 1 (a). Another line of cases, in equally general terms, denies any right in the representative to waive the statute as to a fully barred debt, irrespective of when the bar became complete. See infra, II. a, 1 (b). In another class of cases the personal representative is not allowed to waive the statute as to debts which were fully barred at the time of the death of the debtor, but permits him to waive the statute as to debts which became barred subsequent to the death of the debtor but before the representative did the acts which are alleged to have worked the waiver. See infra, II. a, 1 (c). And still another line of cases lays down the rule that a personal representative cannot waive the statute of limitations as to a fully barred claim, and specifically holds that the rule applies both to claims barred before and after the death of the debtor, but does allow the representative to toll the statute as to debts not fully barred. See infra, II. a, 1 (d). The cases falling under these general rules have been classified under such rules rather than according to the facts of each individual case, in order that the rule in each jurisdiction, so far as it has been determined, may show on the face of the note. For a more detailed statement of the conflicting and overlapping phases of these rules, see the various subdivisions wherein the rules are treated.

But in a considerable number of jurisdictions the question of the right of a personal representative to waive the statute is now controlled, in whole or in part, by statutory provisions. Some of these statutes deny to the representative the right to waive the statute, while others authorize him to waive it. See infra, II. a, 2.

Of course the executor or administrator should not be allowed to waive the statute of limitations so as to bind the estate for an unjust, false, or fictitious claim which is barred by the statute. See infra, II. b

Upon the question of the right of an executor or administrator to waive or toll the statute of limitations as to his individual claims against the estate, there is a decided conflict of authority, with a marked tendency towards a limitation of the rule allowing him to waive the statute as to general creditors. See infra, II. c.

And there is a conflict of authority as to whether one or more less than all of the executors or administrators of a deceased person may waive the statute of limitations so as to bind the corepresentatives and the estate. The decided weight of authority, however, is, as is shown infra, II. d, to the effect that one executor or administrator may act for all.

With respect to an executor *de son tort* it may be said generally that he cannot waive the general statute of limitations as to debts of the decedent, so as to bind either the rightful executor or the estate, except perhaps as to assets which are rightfully in his hands. See infra, II. e.

The general rule as to the right of an executor or administrator to waive a short or nonclaim statute of limitations, which question is fairly distinctive from that of the right to waive the general statute of limitations, is that such statute cannot be waived by the personal representative. For the authorities upon this question and the reasons for the holdings, see infra, III.

As to what constitutes a waiver of the general statute of limitations, but little can be said in a general way except that in those jurisdictions which permit a personal representative to waive or toll such statutes, an express acknowledgment and promise to pay, a payment, a part payment, a failure to plead the statute, a statement

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191; Banning, Limitations, 228; Suhre v. Benton, — Tex. Civ. App. —, 25 S. W. 822; Brown v. Anderson, 13 Mass. 201; Emerson v. Thompson, 16 Mass. 429; Preston v. Cutter, 64 N. H. 467, 13 Atl. 874; Brewster v. Brewster, 52 N. H. 52; Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25.

An administrator may acknowledge a decedent's debt which was not barred at decedent's death, and start the statute running anew.

Woerner, Am. Law of Administration, § 401.

The administrator can toll the statute by an acknowledgment of the debt, by part payment or by a promise to pay.

Suhre v. Benton, — Tex. Civ. App. —, 25 S. W. 822; Emerson v. Thompson, 16 Mass. 429; Townes v. Ferguson, 20 Ala. 147; Ricketts v. Ricketts, 4 Lea, 163; Johnson v. Beardslee, 15 Johns. 3; Jones v. Mitchell, 9 Ky. L. Rep. 858; Northcut v. Wilkinson, 12 B. Mon. 408; Jordan v. Brown, 72 Ga. 495; Marietta Sav. Bank v. Janes, 66 Ga. 286; Foster v. Starkey, 12 Cush. 325; Pole v. Simmons, 49 Md. 20; Daniel v. Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421; Preston v. Cutter, 64 N. H. 461, 13 Atl. 874.

Messrs. **Wyman & Wyman**, for respondents:

Each acknowledgment must be sufficient in itself, unaided by others.

Simrell v. Miller, 169 Pa. 326, 32 Atl. 548; Patterson v. Neuer, 165 Pa. 66, 30 Atl. 748; 25 Cyc. 1339.

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of account, an agreement, or confession of judgment, will in the majority of cases remove the bar of the statute. See infra, IV. a, subdivisions 1–6.

To summarize the decisions in the cases in which the question has been presented as to the effect of a waiver or tolling of the statute, the weight of authority seems to be to the effect that a waiver or tolling of the statute is binding upon the successors of the representative, the joint obligors of the debtor, the bona fide purchasers of the property, the general creditors, and the heirs and devisees of the debtor to the extent of the personal assets, but not as to the real estate; and that the personal representative is not personally liable upon his acknowledgment or promise, etc., unless he exceeded or abused his authority in making the same. This question is treated infra, V., subdivisions a–g.

II. General statute of limitations.

a. In general.

1. In absence of statute.

(a) Rule allowing waiver.

In a number of jurisdictions the courts have established the broad rule that an executor or administrator may waive the statute of limitations as to debts that are fully barred, without reference to when the debts became so barred. And of course this rule carries with it the lesser one extending to personal representatives the right to toll the statute as to claims not fully barred.

Thus in the following cases it was held that an executor or administrator may waive the statute of limitations as to a debt barred by it, or, as the case may be, toll the statute as to claims not fully barred: West v. Smith, 8 How. 402, 12 L. ed. 1130 (holding that such is the law of Virginia, especially if the court, by not striking out the item, impliedly sanctioned the waiver); Fairfax v. Fairfax, 2 Cranch, C. C. 25, Fed. Cas. No. 4,613 (holding that an executor or administrator may pay a debt barred by the statute of limitations); Newhouse v. Redwood, 7 Ala. 598 (debt barred); Hall v. Darrington, 9 Ala. 502 (debt barred); Pitts v. Wooten, 24 Ala. 474 (*dictum*); Pollard v. Scears, 28 Ala. 484, 65 Am. Dec. 364 (holding such to be the rule where the personal assets are sufficient to pay the debts of the estate); Teague v. Corbitt, 57 Ala. 529 (holding same as next preceding case—debt barred); Scott v. Ware, 64 Ala. 174 (statute may be waived if debt barred, and tolled if not barred—valid to extent of personal assets); Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15 (waiver valid to extent of personal assets); Martin v. Ellerbe, 70 Ala. 326 (debt barred; waiver valid to extent of personal assets); Trimble v. Fariss, 78 Ala. 260 (debt barred; waiver valid to extent of personal assets); McDonald v. Carnes, 90 Ala. 147, 7 So. 919 (waiver valid if barred debts are paid from personal assets); Conway v. Reyburn, 22 Ark. 290 (debt barred; but see Rogers v. Wilson, 13 Ark. 512, and Rector v. Conway, 20 Ark. 83, as set out infra, II. a, 1 (c)); Scott v. Penn, 68 Ark. 492, 60 S. W. 235 (holding such to be the rule under "ordinary circumstances"—see this case as set out infra, II. a. 1 (c)); Bennington v. Parkin, 1 Harr. (Del.) 128, affirmed in 1 Harr. (Del.) 209 (holding that since 1829 a personal representative may revive a barred debt—see infra, II. a, 2); Latimer v. Peterson, 2 Harr. (Del.) 366 (holding that an executor could keep alive by acknowledgment and new promise the lien of a judgment against the decedent's real estate which was not barred at the time of the alleged waiver of the statute); Chambers v. Fennemore, 4 Harr. (Del.) 368 (it does not appear in this case whether the claim was completely barred as the death of the intestate, but the court clearly extends the right of waiver to the personal representative in all cases where a sound discretion would warrant satisfaction of the claim); Trimble v. Marshall, 66 Iowa, 233, 23 N. W. 645 (holding that an executor or administrator is not in duty bound to plead the statute of limitations

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An acknowledgment may be made either before or after the statute has run and with the same effect.

Wood, Limitations, § 81; Carlton v. Coffin, 27 Vt. 498; Austin v. Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Syllabus in Malone v. Searight, 8 Lea, 91; Opp v. Wack, 52 Ark. 288, 5 L.R.A. 743, 12 S. W. 565; Wilcox v. Williams, 5 Nev. 206; Reed v. Smith, 1 Idaho, 535.

The new promise or acknowledgment must be either (1) an unconditional promise to pay the debt; (2) an acknowledgment of the debt from which a promise to pay is to be implied; or (3) a conditional promise to pay the debt accompanied by a sufficient showing that the condition upon which the promise is made to depend has been performed.

25 Cyc. 1325, 1326.

While the acknowledgment need not be in any particular form, it must be a direct, distinct, unqualified, and unconditional admission of the debt the party is liable and willing to pay; or, if it is qualified and made conditional, then the qualification and condition must be shown to have been performed.

Pierce v. Merrill, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Biddel v. Brizzolora, 56 Cal. 374; Finn v. Seegmiller, 134 Iowa, 15, 111 N. W. 314; Visher v. Wilbur, 5 Cal. App. 562, 90 Pac. 1065,

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against a debt of the decedent when he believes the debt to be just and unpaid, even though such a plea might defeat the claim); Re Baumhover, 151 Iowa, 146, 130 N. W. 817 (administrator in good faith paid just claim; court assumed that statute of limitations could have been successfully pleaded); Thomas v. Daniels, 7 Ky. L. Rep. 98 (holding that an executor may waive a barred debt or toll the statute where the debt is not completely barred); Jones v. Mitchell, 9 Ky. L. Rep. 858 (waiver valid except as against heirs and devisees); Hord v. Lee, 2 T. B. Mon. 131, on subsequent appeal in 4 T. B. Mon. 36; Head v. Manner, 5 J. J. Marsh. 255 (debt barred); Northcut v. Wilkinson, 12 B. Mon. 408; Payne v. Pusey, 8 Bush, 564 (debt barred); Hamilton v. Wright, 27 Ky. L. Rep. 1144, 87 S. W. 1093; Withers v. Withers, 30 Ky. L. Rep. 1099, 100 S. W. 253 (debt not barred; tolling of statute good as against personalty but not as against heirs and devisees); McCoy v. McCoy, — Ky. —, 125 S. W. 177; Forbes v. Perrie, 1 Harr. & J. 109 (promise binding "if there are assets"); Chapman v. Dixon, 4 Harr. & J. 527; Kent v. Wilkinson, 5 Gill & J. 497 (semble); Quynn v. Carroll, 10 Md. 197; Semmes v. Magruder, 10 Md. 242; Ecker v. First Nat. Bank, 59 Md. 291 (debt barred); Houck v. Houck, 112 Md. 122, 76 Atl. 581 (waiver of statute as to barred debts valid to extent of personal assets only); Fledderman v. Fledderman, 112 Md. 226, 76 Atl. 85 (*dictum*); Baxter v. Penniman, 8 Mass. 133 (holding that a promise made after the expiration of statutory period is sufficient); Brown v. Anderson, 13 Mass. 201 (*dictum*); Emerson v. Thompson, 16 Mass. 429 (holding that an executor may not only waive the statute of limitations as to a debt completely barred, by a new promise, but may omit or refuse to plead the statute in bar of such a debt which is justly due); Foster v. Starkey, 12 Cush. 324; Lamson v. Schutt, 4 Allen, 360 (*dictum*); Fisher v. Metcalf, 7 Allen, 209; Slattery v. Doyle, 180 Mass. 27, 61 N. E. 264 (in connection with the foregoing Massachusetts cases see Haskell v. Manson, 200 Mass. 599, 128 Am. St. Rep. 452, 86 N. E. 937, as set out infra, II. a, 1 (c)); L.R.A.1915B. Hodgdon v. White, 11 N. H. 208 (holding that a personal representative may waive the statute as to a just debt barred during the lifetime of the debtor, so as to charge both the personalty and realty, provided only that the claim was not so stale that, aside from the statute of limitations, a strong presumption arose against its validity); Brewster v. Brewster, 52 N. H. 52 (*dictum*); Preston v. Cutter, 64 N. H. 461, 13 Atl. 874 (debt not barred at time of promise); Pursel v. Pursel, 14 N. J. Eq. 514 (account barred); First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Wheedon v. Nichols, 72 N. J. Eq. 366, 65 Atl. 445 (claim barred); Shreve v. Joyce, 36 N. J. L. 44, 13 Am. Rep. 417; Everett. Prosecutor, v. Williams, 45 N. J. L. 140 (*dictum*); Hewes v. Hurff, 69 N. J. L. 263, 55 Atl. 275; Cobham v. Administrators, 3 N. C. (2 Hayw.) 6, 2 Am. Dec. 612 (debt barred); Wilkings v. Murphy, 3 N. C. (2 Hayw.) 282; Williams v. Maitland, 36 N. C. (1 Ired. Eq.) 92 (debt barred); Bevers v. Park, 88 N. C. 456 (holding that a personal representative cannot bind the realty as against the heirs); Halliburton v. Carson, 100 N. C. 99, 6 Am. St. Rep. 565, 5 S. E. 912 (debt barred); Woodlief v. Bragg, 108 N. C. 571, 13 S. E. 211 (claim not barred); Justice v. Gallert, 131 N. C. 393, 42 S. E. 850; Smith v. Porter, 1 Binn. 209 (*dictum* as to barred debt); Jones v. Moore, 5 Binn. 573, 6 Am. Dec. 428; Anderson's Appeal, 3 Walk. (Pa.) 497 (debt barred); Kennedy's Appeal, 4 Pa. 149 (debt barred); Ritter's Appeal, 23 Pa. 95 (holding such to be the rule provided legatees, distributees, or creditors whose claims may be diminished by the allowance of the barred claim make no objection); Woods v. Irwin, 141 Pa. 278, 23 Am. St. Rep. 282, 21 Atl. 603 (holding that an administrator when sued is not bound to plead the statute of limitations, and that a confession of judgment, if in good faith, is good as against the estate, although the dividends of the creditors will be reduced thereby); Re Claghorn, 181 Pa. 600, 59 Am. St. Rep. 680, 37 Atl. 918 (holding same as next preceding case); Re Claghorn, 181 Pa. 608, 37 Atl. 921 (seemingly holding the same in ef-

91 Pac. 412; Reed v. Interstate Oil Co. 41 Colo. 463, 92 Pac. 911; 25 Cyc. 1337–1339.

The letters were not sufficient to constitute an acknowledgment under the statute.

Hanson v. Towle, 19 Kan. 273; Bullion & Exch. Bank v. Hegler, 93 Fed. 890; Biddel v. Brizzolara, 56 Cal. 374; Lambert v. Doyle, 117 Ga. 81, 43 S. E. 416; Lawson v. McCartney, 104 Pa. 356; George W. Helm Co. v. Griffin, 112 N. C. 356, 16 S. E. 1023; Chambers v. Rubey, 47 Mo. 99, 4 Am. Rep. 318; Wood v. Merrietta, 66 Kan. 748, 71 Pac. 579; Warren v. Cleveland, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910; Rodgers v. Robson, 147 Mich. 656, 111 N. W. 193; Haythorn v. Cooper, 65 Kan. 338, 69 Pac. 333; Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280; Weston v. Hodgkins, 136 Mass. 326; Shepherd v. Thompson, 122 U. S. 231, 30 L. ed. 1156, 7 Sup. Ct. Rep. 1229.

An administrator cannot waive the bar of the statute of limitations.

Grotenkemper v. Bryson, 79 Ky. 353; Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926; Fullerton v. Bailey, 17 Utah, 85, 53 Pac. 1020; Huntington v. Bobbitt, 46 Miss. 528; Moore v. Hardison, 10 Tex. 467; Peck v. Botsford, 7 Conn. 172, 18 Am. Dec. 92; Seig v. Acord, 21 Gratt. 365, 8 Am. Rep. 605; Fitzgerald v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813; Milwee v. Jay, 47 S. C. 430, 25 S. E. 298; Thompson v. Peter, 12 Wheat, 565, 6 L. ed. 730; Steele

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fect as Woods v. Irwin, supra)—(in connection with the foregoing Pennsylvania cases see other Pennsylvania cases as set out infra this subdivision): Brown v. Porter, 7 Humph. 373 (holding generally that executors are not bound at their peril to plead the statute of limitations); Batson v. Murrell, 10 Humph. 300, 51 Am. Dec. 707 (debt fully barred before administration; see case as quoted infra this subdivision); Lampman v. Davis, 1 U. C. Q. B. 179 (*dictum*); Read v. Price [1909] 1 K. B. 577, 78 L. J. K. B. N. S. 504, 100 L. T. N. S. 457, 25 Times L. R. 283, 17 Ann. Cas. 171 (*dictum* that executor may keep an indebtedness of the estate alive by an acknowledgment in writing); Midgley v. Midgley [1893] 3 Ch. 282, 62 L. J. Ch. N. S. 905, 69 L. T. N. S. 241, 2 Reports, 561, 41 Week. Rep. 659 (*dictum* that personal representative may waive statute as to barred debts); Re Rownson, L. R. 29 Ch. Div. 358, 49 J. P. 759, 54 L. J. Ch. N. S. 950, 52 L. T. N. S. 825, 33 Week. Rep. 604, 9 Eng. Rul. Cas. 342 (same as next preceding case); Hunter v. Baxter, 3 Giff. 214, 31 L. J. Ch. N. S. 432, 5 L. T. N. S. 46; Norton v. Frecker, 1 Atk. 526 (debt barred); Briggs v. Wilson, 5 De G. M. & G. 12, 2 Eq. Rep. 153, 17 Beav. 330 (holding that an executor cannot bind the realty); Moodie v. Bannister, 4 Drew, 432, 28 L. J. Ch. N. S. 881, 5 Jur. N. S. 402, 7 Week. Rep. 278 (debt barred); Fordham v. Wallis, 10 Hare, 217, 22 L. J. Ch. N. S. 548, 17 Jur. 228, 1 Week. Rep. 118 (holding that an executor may bind the personalty, but not the realty, by payment of interest on a barred debt); Hill v. Walker, 4 Kay & J. 166 (debt barred); Putnam v. Bates, 3 Russ. 188 (acknowledgment not binding as to realty); Tullock v. Dunn, Ryan & M. 416, 27 Revised Rep. 765 (*dictum*); Smith v. Poole, 12 Sim. 17, 10 L. J. Ch. N. S. 192; Stahlschmidt v. Lett, 1 Smale & G. 415 (debt barred); Ex parte Dewdney, 15 Ves. Jr. 479, 2 Rose, 59, note (*dictum*); Williamson v. Naylor, 3 Younge & C. Exch. 210, note (a) (holding that an executor may pay barred debt); Castleton v. Fanshaw, 1 Eq. Cas. Abr. 305 (holding that an executor may refuse to plead the statute of limitations as to barred claims against the estate, even as against the devisees)—(in connection with the foregoing English cases see the *dictum* of Bayley, J., in the early case of M'Culloch v. Dawes, 9 Dowl. & R. 40, 5 L. J. K. B. 56, 30 Revised Rep. 515, wherein a contrary conclusion was announced which is often cited, but which has been expressly disapproved in several cases); Clinton v. Brophy, Ir. L. R. 10, Eq. 139 (debts barred). In Batson v. Murrell, supra, the court discussed the right of a personal representative to waive the statute of limitations as to barred claims of general creditors against the estate as follows: "An executor or administrator is not bound to plead the statute of limitations, to an action commenced against him by a creditor of the estate, for he may know that the debt is a just one, and that it ought *in foro conscientiæ* to be paid, though it be barred by the statute; and representing the estate in place of the deceased, being bound morally and legally for its proper protection, and having no interest in the debt sued for, there can be no reasonable supposition that he will collude with the creditor to defraud it, and therefore it is considered perfectly safe to let him rely upon the statute of limitations or not, at his own discretion, as the deceased himself could have done had he been alive."

This rule that a personal representative may waive the statute of limitations has, in some cases, been stated in another form, namely, that it is discretionary with such a representative whether or not he will plead the statute as to claims against his decedent. It was stated in this form in the following cases: West v. Smith, 8 How. 402, 12 L. ed. 1130, intimating that such is the rule in Virginia as to barred debts, especially if the court impliedly sanctioned a waiver of the statute by failing to strike out the item; Re Huger, 100 Fed. 805 (*dictum*); Ex parte Perryman, 25 Ala. 79, 60 Am. Dec. 494, holding that where the administrators refuse to plead the statute of limitations, the distributees of the estate cannot be allowed to appear and plead it; Miller v. Dorsey, 9 Md. 317, wherein the court said that the personal representative

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v. Steele, 64 Ala. 439, 38 Am. Rep. 15; Oates v. Lilly, 84 N. C. 643; Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977; Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Cape Girardeau County use of Road & Canal Fund v. Harbison, 58 Mo. 90; Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643; Rector v. Conway, 20 Ark. 79; Hanson v. Towle, 19 Kan. 273.

Allshie, J., delivered the opinion of the court:

This action was instituted for the foreclosure of a mortgage. The note and mortgage were dated at Salt Lake City, December 18, 1901, and became due and payable July 1, 1902, at McCornick & Company's bank at Salt Lake City. Certain letters from each of the defendants, Olsen and Browne, were pleaded by the plaintiff for the purpose of showing that each of the defendants had acknowledged the debt, so as to relieve the cause of action from the plea of the bar of the statute of limitations. To this complaint the defendants demurred, alleging as ground for the demurrer that the complaint on its face showed that it was barred by the statute of limitations. The court sustained the demurrer and the action was dismissed. This appeal is from the judgment.

The note and mortgage sued upon were signed by Nat Olsen and John Lynch. Lynch subsequently died, and Robert B. Browne, one of the defendants here, was appointed as administrator of his estate. The

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was, in the first instance, the only judge whether a claim should be paid or not, and that "to his discretion and conscience alone is confided the propriety and justice of the interposition of the plea of the statute of limitations;" Williams v. Maitland, 36 N. C. (1 Ired. Eq.) 92 (barred claim); Leigh v. Smith, 38 N. C. (3 Ired. Eq.) 442, 42 Am. Dec. 182, holding that an executor cannot be compelled to plead the statute of limitations as to barred claim; Person v. Montgomery, 120 N. C. 111, 26 S. E. 645 (barred claims); Re Smith, 1 Ashm. (Pa.) 352, holding that an executor is not bound to plead the statute of limitations; Fritz v. Thomas, 1 Whart. 66, 29 Am. Dec. 39 (see case as quoted infra this subdivision); Steel v. Steel, 12 Pa. 64; Ritter's Appeal, 23 Pa. 95; Batson v. Murrell, 10 Humph. 300, 51 Am. Dec. 707 (see case as quoted supra this subdivision); King v. Rogers, 31 Ont. Rep. 573 (debt barred during lifetime of debtor); Lowis v. Rumney, L. R. 4 Eq. 451, holding that an executor could waive the statute of limitations as to a barred debt, even where the personal assets were insufficient to pay same and the debt would be a charge upon the real estate. In Re Huger, supra, it was said: "This [the pleading of the statute of limitations by an executor] is a matter wholly within his discretion; that is to say, if he considers it a just debt he can acknowledge and pay it, notwithstanding it would be barred by the statute. If he does not so consider it, he can plead the statute."

And for statutory provisions under which a personal representative has been held to have the right to waive the statute of limitations, see infra, II. a, 2 (b).

But an executor or administrator must not be guilty of negligence, or act in bad faith or in collusion, where there is doubt of the justice of the claim. Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15. As to right of personal representative to discriminate between meritorious claims in an action to marshal assets, see Jordan v. Brown, 72 Ga. 495, as set out infra, II. a, 1 (c).

An even in some jurisdictions which generally allow an executor or administrator to waive the statute of limitations as to debts barred thereby where the personal assets are sufficient to pay same, it has been held, as above indicated, that the personal representative cannot waive the bar of the statute so as to bind the real estate, where resort thereto would be necessary because of the insufficiency of the personal assets. Pollard v. Scears, 28 Ala. 484, 65 Am. Dec. 364; Teague v. Corbitt, 57 Ala. 529; Scott v. Ware, 64 Ala. 174; Steele v. Steele, supra; Lee v. Downey, 68 Ala. 98; Grimball v. Mastin, 77 Ala. 553; Trimble v. Fariss, 78 Ala. 260; McDonald v. Carnes, 90 Ala. 147, 7 So. 919; Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26, 34 So. 905; Jones v. Mitchell, 9 Ky. L. Rep. 858; Withers v. Withers, 30 Ky. L. Rep. 1099, 100 S. W. 253; Houck v. Houck, 112 Md. 122, 76 Atl. 581; Bebers v. Park, 88 N. C. 456. And see Bond v. Smith, 2 Ala. 660, wherein it was held that upon an application of the executor to sell realty to pay debts, the heir could set up the statute of limitations as against the debt, the court saying that in such case the executor could not dictate the defense to his petition. And see also the Pennsylvania cases set out infra this subdivision. In Teague v. Corbitt, supra, the court discussed this element of the general rule allowing waiver as follows: "Between an administrator or executor and the heir or devisee no relation of privity exists, and the real assets cannot be bound by any admission or acknowledgment made by the personal representative. Hence, though the executor or administrator is not bound to plead the statute of limitations, and by omitting to plead it, or by an express promise in writing, may revive a demand the statute bars, and thereby charge the personal assets, no such charge can be created on the real assets. . . . He is the owner of the personal assets as trustee; but the lands descend, if not devised, to the heir, or, if devised, pass *eo instanti* the death of the testator to the devisee; and as to the heir or devisee his admissions or acknowledgments are *res inter alios*." But the Alabama rule that an executor or administra-

question to be decided is whether or not the letters pleaded are sufficient to constitute an acknowledgment of the original contract within the purview and meaning of § 4078 of the Revised Codes to take the case out of the operation of the statute of limitations. The defendants, by the demurrer, relied on § 4052 of the Revised Codes as constituting a bar to an action. That section provides that within five years: "An action [must be commenced] upon any contract, obligation, or liability founded upon an instrument in writing." This action was instituted on the 22d day of May, 1908, or nearly six years after the maturity of the debt.

The letters written by Olsen and pleaded by plaintiff and on which he relies are as follows: On November 24, 1902, he wrote among other things, "I was in hopes I would make enough out of this run to pay off the mortgage, but am sorry to say I did not. The ore did not mill as much as I expected, besides the cost of handling ore up here is high. . . . If I should be able to get a party to take hold and buy, and, if I did, the first money of course would be paid to you. I don't know what to do now when you foreclose mortgage. I won't have the money to pay, and won't be able to get another party interested. I was in hopes you would give me time." This letter, it will be observed, was written more than five years prior to the commencement of this action. The plaintiff must, therefore, rely on the other letters. On June 21, 1903, Olsen wrote the plaintiff in which he discussed his mining

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tor may waive the bar of the statute of limitations when he has sufficient personal assets in his hands, but not when a resort to real estate is necessary, was somewhat broadened in its application by the holding in McDonald v. Carnes, 90 Ala. 147, 7 So. 919, that although an executor or administrator cannot use money derived from a sale of real estate to pay a debt or demand barred by the statute of limitations yet he may use money derived from the sale of personalty for that purpose, though the personalty is not sufficient to pay all the debts of the estate, and use money derived from real estate to pay debts and demands not barred. This ruling allows the representative to exhaust all the personal assets by the payment of barred debts, and to charge debts not barred against the realty.

But the contrary has been held in England,—see Lowis v. Rumney, L. R. 4 Eq. 451, as set out supra this subdivision and as quoted infra, V. e. But conflicting with this are the earlier English cases of Briggs v. Wilson, 5 DeG. M. & G. 12, 2 Eq. Rep. 153, 17 Beav. 330, wherein it was held that an executor cannot waive the statute of limitations as to barred debts so as to make them a charge on the realty; Fordham v. Wallis, 10 Hare, 217, 22 L. J. Ch. N. S. 548, 17 Jur. 228, 1 Week. Rep. 118, holding the same as Briggs v. Wilson; and Putnam v. Bates, 3 Russ. 188, holding that an acknowledgment by the personal representative is not binding upon the devisee as to lands in his possession, in an action to subject the same to payment of the debt.

And see also infra, V. e, upon the question of the right of a personal representative to bind the real estate by a waiver of the statute of limitations.

The general rule of waiver is modified in Pennsylvania by the holding that an acknowledgment by a personal representative of a debt of the decedent is not binding upon such representative so as to preclude him from pleading the statute of limitations to a count on the original cause of action. Fritz v. Thomas, 1 Whart. 66, 29 Am. Dec. 39; Clark v. Maguire, 35 Pa. 259. And the same has been held where the bar of the statute was not yet complete at the time of the acknowledgment or new promise. Forney v. Benedict, 5 Pa. 225; Steel v. Steel, 12 Pa. 64. In Fritz v. Thomas, supra, the court said: "The concession that the plaintiff's claim is just, and the promise to see what could be done for him, would doubtless be sufficient to maintain an action, if the consideration were the defendant's own debt. But can any acknowledgment by an executor or administrator preclude him from pleading the statute of limitations to a count on the original cause of action? . . . Had the judges, when they determined that a promise to the representative of a decedent must be declared on as such, also determined that it must be declared on as such when made by him, they would have restored the law to its primitive symmetry, and suggested a principle that would have entirely extinguished the notion of revival, which, for want of it, seems to have lingered in its embers through the succeeding cases; for the forms of the law are the indices and conservatories of its principles. It would not only have indicated the necessity of a special consideration, to support the promise of a representative, but it would have disclosed a bar to an action against two or more, on a promise by one. And as he cannot charge himself personally without a new consideration, he cannot charge the estate, on the foundation of the old one, to the prejudice of the creditors, whose fund might be materially lessened by it. He is not bound to plead the statute, because he may know the debt to be a just one; and for that reason only, the matter is left to his discretion; but it follows not that he may tie up his hands from using it, when the time comes, by a mistaken concession or an engagement which has no consideration to bind him personally or officially. Besides, it would be hazardous to expose the estate to the consequences of his inexperience or ignorance of the demands made upon him. We know how perilous a thing it is for the debtor himself, though armed with knowledge and vigilant to guard against surprise, to converse about a debt barred by the statute; but the peril would

operations and a prospective sale, and said: "I suppose that if I do not make a deal of the mine will have to go to work and take out ore and pay off mortgage." On October 26, 1903, he again wrote to the plaintiff, speaking of the mines and a sale he had in view, and said: "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property." On June 13, 1906, he wrote plaintiff, further discussing the property and its probable value, and said: "The first payment on Baltimore mine is due about the middle of October, when I hope to pay you."

The question now arises as to whether any one of these letters, commencing with the one of date June 21, 1903, is sufficient to waive the bar of the statute of limitations and set a new date for the statute to begin running. There is a great diversity of opinion among the courts as to the nature of a writing which is sufficient to take a given case out of the operation of the statute. We shall therefore confine our consideration of the matter as closely as possible to the specific terms of our statute.

Section 4078 of the Revised Codes of this state provides as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Some difference of opinion has existed

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be overwhelming if the estate were to be jeoparded by the mistakes of one who is bound to parley, and has not only everything to learn, but to learn it from those whose interest it is to mislead him. . . . To be consistent we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise lies not against an executor or administrator in his official character." And in Re Kittera, 17 Pa. 416, the court limited the rule that a personal representative may waive the statute of limitations by holding that such rule applies only where the personal representative is intrusted with the management of the estate, and that "it has no place in a proceeding before the orphans' court, where the parties beneficially entitled to the fund are recognized as having a standing in court, and must, as a consequence of that condition, be permitted to protect their respective interests in their own way." This holding was in effect approved in Re Claghorn, 181 Pa. 600, 59 Am. St. Rep. 680, 37 Atl. 918, wherein it was said: "That the personal representative is not answerable for a cause of action not created by the decedent; that if by a new promise he revive a debt already barred, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable. And, although he is not bound to plead the statute where he believes the debt unpaid, yet in the distribution of a fund creditors whose interests are affected can plead it. Where, however, a suit is brought against him in his representative capacity on a debt barred by the statute, and he waives his right to plead it, the judgment is *de bonis testatoris*, and cannot be questioned thereafter on distribution of the estate." And see Wood v. Irwin, as set out supra this subdivision. To summarize the decisions in the various Pennsylvania cases: It seems that the rule is that a personal representative when sued upon a claim against the estate may, in his discretion, waive the defense of the statute of limitations, in which case, in the absence of fraud, the judgment would be binding; and that he may pay a barred claim and be allowed therefor, provided the distributees (not including minors—Hemphill v. Pry, 183 Pa. 593, 38 Atl. 1020), having notice, raise no objection; but that an acknowledgment or new promise made by the personal representative is not binding upon him as such, or upon the legatees, devisees, or creditors whose distributive shares would be diminished by enforcement thereof; and that in case of claims for allowances for sums paid upon debts so acknowledged by the representative, no credit would be given, as the interested parties may set up the statute; the only effect, if any, of the acknowledgment, being to render the representative personally liable.

And in England it has been held that an executor cannot exercise any discretion as to the pleading of the statute of limitations in bar of claims as to which it has fully run, after an administration decree, but that in such case he must plead the statute. Phillips v. Beal, 32 Beav. 26.

In the North Carolina cases of Oates v. Lilly, 84 N. C. 643, Flemming v. Flemming, 85 N. C. 127, statements to the effect that a personal representative cannot waive the statute of limitations so as to bind the estate seem to be in conflict with both the earlier and later North Carolina decisions cited supra this subdivision. This is not material at present, however, because it is now left by statute to the discretion of the personal representative whether or not to plead the statute of limitations against a barred claim against the estate. See infra, II. a, 2(b).

(b) Rule denying right to waive.

The direct converse of the broad rule laid down in the preceding subdivision has been adopted by several jurisdictions, it being held, without drawing any distinction as to when the bar became complete, that the statute of limitations cannot be waived as to debts of the estate which are fully barred thereby. And in some, but not many, instances, the courts have gone so far as to hold that a personal representative cannot

among the courts as to whether a statute like the foregoing requires the acknowledgment of the debt to be coupled with a promise to pay the same. Some courts have held that "the acknowledgment which is now requisite as evidence of a new or continuing contract must not only be in writing, . . . but it must be an unconditional promise to pay the debt." George W. Helm Co. v. Griffin, 112 N. C. 356, 16 S. E. 1023; Warren v. Cleveland, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910. Other courts have taken the position that it is not necessary that the acknowledgment be coupled with a promise to pay, but that it is sufficient if the party to be charged unqualifiedly admits a present and subsisting liability to pay the debt. Elder v. Dyer, 26 Kan. 604, 40 Am. Rep. 320; Clark v. King, 54 Kan. 222, 38 Pac. 281; Cleland v. Hostetter, 13 N. M. 43, 79 Pac. 801, and cases cited; Chidsey v. Powell, 91 Mo. 626, 60 Am. Rep. 267, 4 S. W. 446. There are still other cases which, while in legal effect they seem to us to be in accord with the line of authorities last cited, yet attempt to hold to a somewhat middle ground between these two extremes. They hold that "to take a debt out of the statute of limitations by reason of an acknowledgment or new promise, it is necessary that there should be an unqualified acknowledgment, not only that the debt was just originally, but that it continues due at the time of the acknowledgment, so that a promise to pay can fairly be implied; either an express

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even toll the statute of limitations as to claims not fully barred.

Thus the following cases deny in general terms the right of a personal representative to waive, and, as noted, to toll the statute of limitations: Thompson v. Peter, 12 Wheat. 1265, 6 L. ed. 730 (the language used seemingly indicates that the court was of the opinion that this was the rule, but there is some doubt as to whether the personal representative made an acknowledgment sufficient in itself to have waived the bar of the statute under any rule, and other courts have often doubted whether the decision fully supports the above rule, for which it is generally cited); Wilkings v. Murphey, Brunner, Col. Cas. 21, Fed Cas. No. 17,663 (debt barred during lifetime of debtor); Peck v. Botsford, 7 Conn. 172, 18 Am. Dec. 92; Ensign v. Batterson, 68 Conn. 298, 36 Atl. 51; House v. Peacock, 84 Conn. 54, 78 Atl. 723; Hanson v. Towle, 19 Kan. 273; Clawson v. McCune, 20 Kan. 337; McGee v. McDonald, 66 Mich. 628, 33 N. W. 737 (claim fully barred); McHugh v. Dowd, 86 Mich. 412, 49 N. W. 216, citing the next preceding case as holding that "an administrator cannot waive the statute of limitations, and thus charge the estate for a claim which the law presumes to have been paid;" Draper v. Brown, 153 Mich. 120, 117 N. W. 213, holding that the policy of the law in Michigan as declared by the statutes and by the supreme court is to refuse allowance of demands barred by statute, and to confine the administrator to the payment of demands duly allowed; Henderson v. Ilsley, 11 Smedes & M. 9, 49 Am. Dec. 41, holding that a personal representative cannot revive a debt barred by the statute of limitations during the debtor's lifetime, and that the rule is probably the same as to a claim as to which the bar was not complete, or where the statute had not commenced to run, at the death of the debtor—see case as quoted infra this subdivision; Sanders v. Robertson, 23 Miss. 389; Bingaman v. Robertson, 25 Miss. 501 (debt fully barred; court also said that the law had not been established in Mississippi as to claims not fully barred at the time of the promise); Waul v. Kirkman, 25 Miss. 609 (full rule as laid down in Henderson v. Ilsley, supra, approved); Trotter v. Trotter, 40 Miss. 704 (claim fully barred); Huntington v. Bobbitt, 46 Miss. 528, holding that an administrator has no authority to prevent the bar of the statute of limitations from attaching to a debt of his intestate not barred at the death of the testator—see case as quoted infra this paragraph; (in connection with the above Mississippi cases see Byrd v. Wells, 40 Miss. 711, wherein it was held that executors and administrators will be allowed credit for money paid on debts of the estate which were barred at the time of payment but not at the time of the appointment of the personal representative. The reasoning in this case, however, was expressly criticized in the later case of Huntington v. Bobbitt, which is set out supra and quoted infra this paragraph); Moore v. Hardison, 10 Tex. 467 (debt fully barred); Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118 (debt fully barred); Howard v. Johnson, 69 Tex. 655, 7 S. W. 522 (*obiter* as to fully barred debts); Park v. Prendergast, 4 Tex. Civ. App. 566, 23 S. W. 535 (in this case it was said that it does not necessarily follow that because an executor may not revive a debt already barred he may not suspend the operation of the statute before the bar is complete, especially where the executor is the sole legatee); Daniel v. Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421, holding that an independent executrix may, by an acknowledgment, suspend the statute of limitations as to a debt not fully barred; Vinson v. Whitfield, — Tex. Civ. App. —, 133 S. W. 1095, holding that, as it is the duty of the executor to plead the statute of limitations as to debts fully barred, he cannot waive the statute by an acknowledgment; Jackson v. Stone, — Tex. Civ. App. —, 155 S. W. 960 (claims barred); Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926 (*dictum* as to barred claims); Bishop v. Harrison, 2 Leigh, 532, holding that a personal representative may toll the statute as to claims not yet barred; Tunstall v. Pol-

promise to pay the debt or a conditional promise the condition of which has been performed." Weston v. Hodgkins, 136 Mass. 326; Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280; Reed v. Interstate Oil Co. 41 Colo. 463, 92 Pac. 911; Rumsey v. Settle, 120 Mich. 372, 79 N. W. 579; 25 Cyc. 1323.

Our statute is identical with § 360 of the Code of Civil Procedure of California, and the supreme court of that state in Southern P. Co. v. Prosser, 122 Cal. 413, 52 Pac. 836, 55 Pac. 145, has indicated the view that this statute only requires an "acknowledgment" where the acknowledgment was made prior to the running of the statute and while the debt was yet a subsisting "continuing contract." There a distinction was made between the acknowledgment of an indebtedness made before it was barred by the statute and the acknowledgment and promise to pay an indebtedness already barred. The court in that case quotes with approval from McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170, as follows: "There are two ultimate facts that may be proved in the mode prescribed,—a continuing contract and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and, when made after the bar of the statute, a new contract is created."

Chief Justice Beatty, commenting on the McCormick Case, said: "On principle this distinction must exist. When a debtor makes a new promise before an action is barred upon the original contract, he does

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lard, 11 Leigh, 1 (barred debt); Braxton v. Harrison, 11 Gratt. 30, holding that a personal representative may toll the statute as to a debt not barred; Seig v. Acord, 21 Gratt. 365, 8 Am. Rep. 605 (strong *dictum* to the effect that the personal representative cannot revive a debt barred in the lifetime of the debtor); Smith v. Pattie, 81 Va. 654 (debt barred in debtor's lifetime); Switzer v. Noffsinger, 82 Va. 518 (*dicta* as to both barred and unbarred claims); Bell v. Wood, 94 Va. 677, 27 S. E. 504, holding that a personal representative may toll the statute as to debts not barred; Woodyard v. Polsley, 14 W. Va. 211 (barred debt); Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26, holding that a personal representative cannot waive the statute of limitations as to barred debts, and that he cannot toll the statute as to debts not yet barred, by a verbal promise; Stiles v. Laurel Fork Oil & Coal Co. 47 W. Va. 838, 35 S. E. 986 (barred debt); Findley v. Cunningham, 53 W. Va. 1, 44 S. E. 472, holding that a personal representative not only cannot revive a barred debt, but that he cannot toll the statute as to a debt not yet barred by it—see case as set out infra, II. a, 2 (a); Re Bedson, 19 Manitoba L. Rep. 664 (barred debt). In Henderson v. Ilsley, 11 Smedes. & M. 9, 49 Am. Dec. 41 (set out supra), the supreme court of Mississippi discussed that phase of the rule which denies to a personal representative the power to waive the statute of limitations as to debts fully barred, as follows: "An executor or administrator can only discharge existing legal obligations against the estate. He is the trustee or agent appointed by law, for the benefit and protection of creditors and distributees, who stand upon their strict legal rights, which cannot be prejudiced by the voluntary and unauthorized acts of the administrator. His duty is prescribed by law, and that is the limit of his power. The law determines the extent of the estate's liability, and he cannot enlarge it. He can make no contract, except such as may be necessary in the course of his administration. If he can make no new contract, how is he to make an admission which shall operate to revive an obligation which is extinct? To admit that he has such power would be to place the estate entirely at his arbitrary discretion. Old debts might be revived without limit, and the whole estate swept away in their liquidation. It is no answer to say that the deceased might have done this. The law makes the administrator the agent to do what the deceased was bound to do in reference to his debts; but it does not clothe him with the discretion which the deceased had a right to exercise. . . .

"In regard to claims barred at the time of the death of the original debtor, we can have no hesitancy in holding, both on reason and authority, that they are not revived by the subsequent promise of the executor or administrator, assuming that nothing more than ordinary powers are conferred by the will, in the case of an executor." And in the later case of Huntington v. Bobbitt, 46 Miss. 528 (set out supra), the same court, after referring to that phase of the rule treated in the foregoing quotation, discussed the application of its doctrine to debts not fully barred as follows: "The only question presented by this case for solution is, Does the same doctrine apply where the bar is not complete at the death of the intestate? The distinction between these cases cannot be made without putting a new clog on a statute, the utility of which has been greatly lessened and litigation increased by engrafting on it, by construction, an exception which is at war with its letter and spirit. The safest rule seems to be to hold that no promise by an administrator shall take a case out of the statute of limitations. This principle commends itself to our adoption by its certainty and uniformity, and as best calculated to promote the ends of justice in the administration of estates of decedents. An administrator can only discharge existing legal obligations against the estate. He is the trustee or agent appointed by law, for the benefit and protection of the interests of the creditors and distributees, who stand upon their strict legal rights, which cannot be permitted to be prejudiced

not make himself liable a second time for the same debt, and the old promise is not merged in the new; he merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end by reason of the lapse of the full period of limitation or of a discharge in bankruptcy, a new promise creates a new obligation and is itself the basis of the action. A clear recognition of this distinction reconciles all seeming conflict in the decisions of this court, and demonstrates the essential difference between this case and the case of Wells v. Harter, 56 Cal. 342, in which it appears that the action on the principal obligation had been barred before the new promise was made."

Now, it seems to us that the authorities may be reconciled on the subject of a promise to pay when it is remembered that the acknowledgment of an existing indebtedness, in the absence of a specific refusal to ever pay the debt, necessarily carries with it the implied promise to pay it at some time in the future. This, it seems to us, is just as true in a case of this kind as it is where A purchases goods from B without saying anything about ever paying for the goods. The presumption is that A is an honest man, and that when he secures the goods he means to pay for them, and the law raises an implied promise; so when A says to B "I owe the mortgage you hold against

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by the voluntary and unauthorized acts of the administrator. His duty is prescribed by law, and that is the limit of his power. The law determines the extent of the estate's liability, and he cannot enlarge it. He can make no contract except such as may be necessary in the course of his administration. If he can make no new contract, how can he make a promise which shall operate to prevent the bar of the statute of limitations from attaching to a claim against the estate? To admit that he has such power would be to place the estate entirely at his arbitrary discretion."

And it has been held that the fact that the executor was the sole heir does not alter the rule that a personal representative cannot waive the statute of limitations as to barred debts of the testator. House v. Peacock, 84 Conn. 54, 78 Atl. 723; Smith v. Pattie, 81 Va. 654. But in Texas the opposite conclusion was reached in Suhre v. Benton, — Tex. Civ. App. —, 25 S. W. 822, where, in holding that an executrix who was the sole devisee and legatee could waive the statute as to a fully barred debt, the court said: "Defendant [testatrix] occupied no trust relation to another in respect to the property. She owned it herself; to the extent thereof had become liable for all subsisting debts of her testator. This debt could have been recovered of her but for the statute. The same moral obligation that rested on her testator to pay the barred debt rested on her under these circumstances; and we hold that an acknowledgment sufficient to take the debt out of the statute, if made by the testator, would have the same effect if made by her." And that an executor who is the sole legatee may toll the statute of limitations by an acknowledgment made before the bar became complete, see Park v. Prendergast, 4 Tex. Civ. App. 566, 23 S. W. 535.

But in Texas it has been held that, while it is the general duty of a personal representative to plead the statute of limitations, the rule is by no means inflexible, and that the courts should not allow an administrator to make such a defense where its manifest operation would be to cut off the rights

of the estate against third parties. King v. Cassidy, 36 Tex. 531.

For statutes under which it has been held that a personal representative cannot waive the statute of limitations, see infra, II. a, 2 (a).

And for statutes under which it has been held that a personal representative cannot start the statute of limitations running anew, even before the debt is barred, see Findley v. Cunningham, 53 W. Va. 1, 44 S. E. 472, as set out infra, II. a, 2 (a); and DERN v. OLSEN.

And for other jurisdictions which deny to the personal representative the right to waive the statute of limitations where the debt is fully barred, but in which a point has been made as to when the bar became complete, see infra, subdivisions II. a, 1 (c) and (d).

(c) Rule restricting denial of right to waive to debts barred at death of debtor.

A third rule which is a limitation of that treated in the second preceding subdivision (II. a, 1(a)), and an adoption of a part of that laid down by some of the cases in the next preceding subdivision (II. a, 1(b)), results from the various decisions rendered in a few of the states.

This rule is that an executor or administrator cannot waive the statute of limitations as to a debt completely barred during the life of the debtor, but that he may waive the statute where the statutory bar of the claim was not complete at such time; and of course the latter part of the rule carries with it the right to toll the statute where the bar is not complete. The jurisdictions in which the following cases arose seemingly adhere to this rule: Patterson v. Cobb, 4 Fla. 481 (debt barred during the lifetime of the debtor); Sanderson v. Sanderson, 17 Fla. 820 (debt not barred during the lifetime of the debtor, but the court discusses and announces both phases of the rule); Deans v. Wilcoxon, 25 Fla. 980, 7 So. 163 (debt not barred at time of waiver); Griffin v. Inferior Ct.

me," the presumption is that he is an honest man, and means at some time in the future to pay the mortgage. The law, therefore, raises an implied promise to pay. It follows, therefore, from this line of reasoning that a clear and definite acknowledgment of the existence of the contract and liability, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay, and this in a large measure reconciles the cases which hold that there must be a promise to pay with those which hold that it is sufficient to have an unqualified acknowledgment of the existing liability. It has been said by some of the courts, however, and particularly by Justice Brewer in Elder v. Dyer, 26 Kan. 604, 20 Am. Rep. 320, that the acknowledgment is sufficient if it be unqualified and certain, even though it be coupled with the express declaration that the party will never pay the debt. Now, it is not necessary to go to that extent to meet the facts of this case, and we therefore specifically withhold any expression of opinion as to the law under a state of facts where the debtor might acknowledge the debt and yet specifically refuse to pay it. We are satisfied, however, to hold that a definite acknowledgment of the debt, although nothing is said whatever about ever paying the same, is clearly sufficient under our statute, where it is not coupled with any refusal to pay or declaration that the party will not pay or never intends to pay. It should be remembered that under the stat-

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Justices, 17 Ga. 96 (debt not barred before acknowledgment, but the language used by the court implies the full rule); Castellaw v. Guilmartin, 54 Ga. 299 (debt not barred, and the court points out that the Georgia statute [Code 1873, § 2542] permits waiver of the bar of the statute of limitations where the bar was not completed during the lifetime of the debtor); DuBignon v. Backer, 61 Ga. 206; Smith v. Hudspeth, 63 Ga. 212; McBride v. Hunter, 64 Ga. 655; Marietta Sav. Bank v. Janes, 66 Ga. 286 (debt not barred during lifetime of debtor; full rule stated); Jordan v. Brown, 72 Ga. 495 (debt not fully barred); Crabtree v. Graham, 81 Ga. 290, 6 S. E. 426 (holding that while an administrator may revive a debt against his intestate which became barred after the death of the latter, he cannot, after the court has declared a debt barred, which holding has not been reversed or set aside, do anything which will revive the claim against the estate); Ray v. Strickland, 89 Ga. 840, 16 S. E. 90 (debt not barred during lifetime of decedent); Walter v. Radcliffe, 2 Desauss. Eq. 577 (holding that a personal representative may toll the statute by an acknowledgment and promise made previous to the note being barred); Knox v. M'Call, 1 Brev. 531 (holding that there can be no waiver where the debt is completely barred); Fisher v. Tucker, 1 M'Cord, Eq. 169 (holding that there can be no waiver of the bar of the statute as to a debt completely barred before the death of the debtor); Pearce v. Zimmerman, Harp. L. 305 (holding that an executor may waive the statute of limitations as to a debt which was not barred at the death of the debtor, but which was barred at the time of the acknowledgment—see case as quoted infra this subdivision); Reigne v. Desportes, Dud. L. 118 (holding that a personal representative may waive the statute of limitations as to a debt barred intermediate the death of the debtor and the alleged waiver—see case as quoted infra this subdivision); Lomax v. Spierin, Dud. L. 365 (holding that the statute may be tolled as to a debt not completely barred); Sumter v. Morse, 2 Hill, Eq. 87 (holding that an executor, especially where he is the sole distributee of the estate, can waive the statute of limitations); Wilson v. Wilson, McMull. Eq. 329 (holding that a debt barred at the death of the debtor cannot be revived by the personal representative); Clarke v. Jenkins, 3 Rich. Eq. 318 (holding that the representative cannot waive the statute as to a debt barred before the death of the debtor); Johnson v. Ballard, 11 Rich. L. 178 (holding that the statute may be tolled as to a debt not barred); Bolt v. Dawkins, 16 S. C. 198 (lays down the rule treated infra, II. a, 1 (d)—see case as set out in that subdivision and as discussed infra this subdivision); Gibson v. Lowndes, 28 S. C. 285, 5 S. E. 727 (holding that a personal representative cannot toll the statute of limitations so as to bind the realty in the hands of the heirs and devisees); Milwee v. Jay, 47 S. C. 430, 25 S. E. 298 (seemingly holding to the same effect as Bolt v. Dawkins, supra—see case as set out infra, II. a, 1 (d) and as treated infra this subdivision); Hunter v. Hunter, 63 S. C. 78, 90 Am. St. Rep. 663, 41 S. E. 33 (holding that an executor may toll the statute of limitations, and in some cases pay a debt after it is fully barred, provided it became barred after the death of the testator); Divine v. Miller, 70 S. C. 225, 106 Am. St. Rep. 743, 49 S. E. 479 (holding that an administrator may toll the statute of limitations as against the personalty, but not as against the realty). And see Haskell v. Manson, 200 Mass. 599, 128 Am. St. Rep. 452, 86 N. E. 937, wherein it was said by way of argument that while the rule in that commonwealth is that an executor or administrator is not bound to plead the statute of limitations, and that while no distinction had been established between the effect of a payment and acknowledgment by a personal representative of a debt which was not fully barred, and the payment of a debt that was barred in the lifetime of the debtor, it was "a significant fact that in every case that we have found in Massachusetts in which a payment or acknowledgment by an executor or administrator was held to have extended the time, the debt was not barred in the lifetime of the debtor." In Reigne v. Desportes,

ute and the holding of the court in this state (Chemung Min. Co. v. Hanley, 9 Idaho, 794, 77 Pac. 226; Kelly v. Leachman, 3 Idaho, 629, 33 Pac. 44; McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529) the running of the statute of limitations against the cause of action does not cancel the contract or pay the debt. It merely renders it optional with the debtor to thereafter exercise a personal privilege given him by law to plead the limitation and thereby cut off the remedy which the law affords the creditor. It is merely a statute of repose; it does not presume, as has been held in some states, that the debt has been paid. Nothwithstanding the fact that the bar of the statute might appear on the face of the complaint, still the same facts would support a valid judgment unless the bar of the statute is pleaded. Our statute (§ 4078) provides a method of waiving the right to plead the bar of limitation. This statute recognizes two methods, one an acknowledgment and the other a promise. It also recognizes two kinds of "contract," one a "new" contract and the other a "continuing" contract. This statute would be complete for the purposes of the present action by reading it as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this title, unless the same is contained in some writing," etc. A debt that has not yet been barred by the statute of limita-

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supra, the court said: "The general rule is, if a debt is not barred at the death of the testator or intestate, the promise of the executor or administrator to pay it will prevent the operation of the statute of limitations. The reason of this rule appears to be that if the debt was not barred at the death of the testator or intestate, the plaintiff had a good cause of action against the executor or administrator, which would be a sufficient consideration to support his subsequent promise, made after the statute had run out. If, however, the statute had barred the debt in his testator's or intestate's lifetime, then the new promise of the executor or administrator, if made as such, would not be binding; but where the debt is not barred at the testator's death, the promise of the executor or administrator, to be binding, must be an express promise to pay, or that which is equivalent to it, and will be sufficient to raise an implied promise. If the promise is conditional, the condition must be shown to have happened."

And in Pearce v. Zimmerman, Harp. L. 305 (set out supra), the South Carolina supreme court again said: "And I can perceive no good reason for the distinction between a promise before and one made after the debt has been barred; providing the debt was a subsisting one, and not barred at the death of the testator. If it was due at that time, the executor is the proper judge whether it has been since paid. The lapse of time raises no more than a presumption of payment by virtue of the statute, which presumption is as well rebutted by the promise made after the lapse of the four years as if it had been made before. In both instances the object is to discover whether the presumption still remains, *i. e.*, whether the payment has been made or not. And the acknowledgment discovers the truth equally in both instances. The mistake evidently arises from considering the statute an absolute bar to the recovery of the debt; whereas by the settled construction it merely raises a presumption of payment, arising from the lapse of time, which may be rebutted in various ways."

And in Arkansas it has been held that an executor or administrator cannot waive the statute of limitations as to debts which became barred during the life of the debtor. Rogers v. Wilson, 13 Ark. 507; Rector v. Conway, 20 Ark. 79. In Rogers v. Wilson, supra, the court said that "the administrator is the legal representative of the intestate, and it is certainly his duty to see that the statutes testing the validity of claims presented against an estate should be complied with, and to interpose every legal defense which the intestate might have interposed. And although there are decisions which go to the extent that an administrator is not bound to plead the statute bar of limitations as a general rule, it is clearly their duty to do so where the claim was barred by limitation before the death of the intestate, or is so stale as to raise the presumption of payment from lapse of time, or where the statutory prerequisites to its presentation or allowance have not been complied with." And that the rule that it is the duty of an executor or administrator to plead the statute of limitations where the debt was barred before the death of the debtor might be extended in Arkansas so as to impose on the representative the duty of pleading the statute where the demand was barred at the time of presentation, see Rector v. Conway, 20 Ark. 79. But in connection with Rogers v. Wilson, and Rector v. Conway, supra, see Conway v. Reyburn, 22 Ark. 290 (wherein the court discredited the earlier cases, and in terms laid down the broad rule that an executor or administrator can waive the statute by failing to plead it against a well-founded demand, saying: "It is an obligation resting upon no man to discharge an honest, subsisting debt by the plea of limitation. What would be infamous to be done by a man when alive cannot be commendable or legally binding to be done for him by his representative when he is dead. . . . Nothing is more inconsistent with what we know of Conway [the debtor] as disclosed in his long and various dealing with Reyburn [the claimant] than to suppose that he would himself have pleaded the statute to a just demand of Reyburn. And what

tions is undoubtedly a "continuing" contract within the meaning of this statute. An acknowledgment in writing of the existence of such a contract is the acknowledgment of a "continuing contract" within the meaning of this statute, and simply fixes a new date from which the statute of limitations begins to run. It in no respect changes, alters, or modifies the original contract; it is simply a waiver of that portion of the statute of limitations which may have run prior to the "acknowledgment." Now, as suggested by Chief Justice Beatty in Southern P. Co. v. Prosser, supra, a somewhat different principle may be involved where the statute of limitations has already run against the debt prior to the acknowledgment or promise to pay.

Turning, now, to the facts of the particular case in hand, we find that on October 26, 1903, the defendant Olsen, in writing plaintiff, in speaking of a prospective sale of some of his mines, says: "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property." The debt at this time was not barred by the statute, and the plaintiff could then have maintained an action. In fact, it was nearly three years thereafter until the cause of action was barred. This was a clear and unqualified acknowledgment that the plaintiff held a mortgage "against the property" owned by Olsen. The apparent condition contained within this statement is not a condition on which the debt was eventually to have been

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his executrix knew he would not have done, she was not bound to do to protect his estate"); and Scott v. Penn, 68 Ark. 492, 60 S. W. 235, wherein the court said that "An administrator is not bound to plead the statute of limitations under ordinary circumstances," but held that in the present case there were "extraordinary circumstances" in that twelve years had elapsed during which no effort had been made to collect the alleged debt, that the evidence (notes) of the debt had been lost, and that no attempt had been made to get new ones.

But while the general rule in Georgia is that an executor or administrator may waive the statute of limitations as to debts not fully barred during the lifetime of the decedent, where he has filed a bill to marshal assets, and has brought the creditors with their claims before the court, it has been held that he cannot arbitrarily relieve certain claims of the bar of the statute and plead it as to others, but must apply the same rule to all who have equally meritorious claims. Jordan v. Brown, 72 Ga. 495.

As above indicated, there is a conflict of authority in South Carolina as to whether or not a personal representative may waive the statute of limitations as to an indebtedness of the estate, where the bar became complete after the death of the debtor, but previous to the alleged waiver. On one side are the cases of Pearce v. Zimmerman and Reigne v. Desportes, both of which are set out and quoted supra this subdivision. In the Pearce Case it was expressly stated that there was no good reason for distinguishing between a promise made before and one made after the debt became barred, provided the debt was a subsisting one, and not barred at the death of the debtor, thus making the status of the debt at the time of the debtor's death the criterion. And in the Reigne Case the court pointed out that if the debt was not barred at the death of the testator or intestate the creditor had a good cause of action against the personal representative, which would be a sufficient consideration to support his subsequent promise, made after the statute had run out. L.R.A.1915B.

Some support is afforded these cases by Hunter v. Hunter, set out supra this subdivision. But directly opposed to the conclusion reached in the Pearce and Reigne Cases is a decision in Bolt v. Dawkins, 16 S. C. 198 (referred to supra this subdivision and set out infra, II. a, 1 (d)), wherein it was held, seemingly upon the ground that an executor or administrator cannot create a new debt against the estate of the decedent, that the representative cannot waive the statute as to a fully barred claim, and in this case the debt became barred after the death of the intestate but before the making of the acknowledgment by the administrator. However, no reference is made to either Pearce v. Zimmerman or Reigne v. Desportes, or the arguments advanced in those cases. In fact, no notice was taken of the fact that the debt was a subsisting and enforceable obligation long after the death of the debtor, the court merely observing that the bar became complete some five years after the death of the debtor and about two years before the making of the alleged waiver. And lending support to the Bolt Case is the argument advanced in Milwee v. Jay, 47 S. C. 430, 25 S. E. 298 (referred to supra and set out infra, II. a, 1 (d)), wherein it was said that, since an executor has no power to create a debt against the estate of his testator, he cannot bind that estate by a new promise or payment made after the bar of the statute becomes complete.

For statutes under which the rule treated in this subdivision was held to obtain, see infra, II. a, 2, (a) and (b).

(d) Rule allowing tolling only.

In still other jurisdictions, having regard to the decisions as a whole, the rule seems to be that, while an executor or administrator cannot waive the statute of limitations as to claims against the estate which were fully barred either before or after the death of the decedent, the statute may be tolled as to claims not fully barred at the time the act is done which works the toll.

It will be noted that this rule differs from

paid, but it was rather a condition Olsen proposed to place upon the prospective sale of his property. He says: "If I can make this deal, will try and get enough money down to liquidate the mortgage." This condition was one that he proposed to make upon the purchaser of the property, and in no way negative the presumption that he would raise the money in some other manner in case he failed with this sale. If he succeeded in his sale, and in imposing the condition thus suggested upon the purchaser, he proposed to thereupon pay Dern the mortgage held against the property. On the other hand, he does not propose that a failure of this condition should be a refusal to pay the debt, nor does he pretend to say or intimate that he will not pay the debt unless he can make this sale in the manner suggested. This is not a conditional acknowledgment of the debt, nor is it a conditional promise. It is an unqualified acknowledgment of the debt with the suggestion of a condition under which he hopes to immediately receive the money with which to pay the debt. We think this acknowledgment sufficient to meet the requirements of the statute. Of course, this would be open to the admission of oral evidence on the part of the defendant to show that the mortgage here referred to was not the mortgage sued upon. Evidence to this effect is admissible under all the authorities. Kelly v. Leachman, 3 Idaho, 629, 33 Pac. 44.

The next question presented in this case is the power and authority of the adminis-

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any of those hereinbefore treated in that (1) it denies the right of waiver of barred claims allowed by the general rule set out supra, II. a, 1 (a); (2) it is more specific than that treated supra, II. a, 1, (b) inasmuch as the decisions specifically reject the qualifications of that rule with respect to waiver as affected by the question of when the bar became complete, adopted by the courts adhering to the rule set out in II. a, 1 (c), whereas the cases set out in II. a, 1, (b), do not do so, and, moreover, uniformly allows the personal representative to toll the statute where the bar is not complete; and (3), as is just shown, is narrower than the rule laid down in II. a, 1, (c), in that it does not allow waiver of claims barred intermediate the death of the debtor and the commission of the alleged waiver.

This rule is deducible from the following cases: McCoy v. Morrow, 18 Ill. 519, 68 Am. Dec. 578, cited to the same effect in Langworthy v. Baker, 23 Ill. 484 (barred claim); Marshall v. Coleman, 187 Ill. 556, 58 N. E. 628; Bromwell v. Schubert, 40 Ill. App. 330, affirmed in 139 Ill. 424, 28 N. E. 1057 (barred claim); Edwards v. Harness, 87 Ill. App. 471 (*semble* as to right to toll statute); Ott v. Flinspach, 143 Ill. App. 61 (part payment by the executor held to toll the statute); Holmes v. Bartlett, 160 Ill. App. 443 (part payment and acknowledgment held to have kept debt alive); Egan's Succession, Manning, Unrep. Cas. (La.) 399 (action barred but full rule stated in headnotes); Lafon v. His Executors, 3 Mart. N. S. 707 (action barred); Dejean's Succession, 8 La. Ann. 505 (claim not barred); Beatty v. Tete, 9 La. Ann. 131 (claim not barred); McAlpin's Succession, 14 La. Ann. 617; Sevier v. Gordon, 21 La. Ann. 373 (acknowledgment held to interrupt statute as to debt not barred, but to be of no import as to debts fully barred); Warren v. Childress, 23 La. Ann. 184 (claim not barred); Flanner v. Lecompte, 23 La. Ann. 193 (claim barred); Walker v. Cruikshank, 23 La. Ann. 252 (claim not barred); Dickson v. Compton, 24 La. Ann. 83 (claim barred); Miltenberger v. Witherow, 24 La. Ann. 183 (claim barred); Villere v. Villere, 26 La. Ann. 380 (claimed barred); Romero's Succession, 29 La. Ann. 493 (claim not barred); Renshaw v. Stafford, 30 La. Ann. 853 (claim not barred); Patrick's Succession, 30 La. Ann. 1071 (claim not barred); Berens v. Boutte, 31 La. Ann. 112 (claim not barred); Maraist v. Guilbeau, 31 La. Ann. 713 (claim not barred); Romero's Succession, 31 La. Ann. 721 (claim barred); Porter v. Hornsby, 32 La. Ann. 337 (claim not barred); Cloutier v. Lemee, 33 La. Ann. 305 (claim not barred); Mansion's Succession, 34 La. Ann. 1247 (claim not barred); Re Romero, 38 La. Ann. 947 (claim barred); Morris v. Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418 (claim not barred); Willis's Succession, 109 La. 281, 33 So. 314 (claim not barred); Driscoll's Succession, 125 La. 287, 51 So. 200 (claim barred, but court stated the full rule); Cape Girardeau County use of Road & Canal Fund v. Harbison, 58 Mo. 90, criticizing a *dictum* to the contrary contained in Wiggins v. Greene, 9 Mo. 262 (debt barred); Vernon County use of School Fund v. Stewart, 64 Mo. 408, 27 Am. Rep. 250 (debt not barred); Bambrick v. Bambrick, 157 Mo. 423, 58 S. W. 8 (debt barred); Zervis v. Unnerstall, 29 Mo. App. 474 (debt not barred); Re Hill, 2 Connoly, 25, 7 N. Y. Supp. 328 (holding that an executor or administrator cannot waive the statute of limitations by a payment upon a debt as to any part thereof which is barred at the time of the payment); Willson v. Willson, 2 Dem. 462 (holding same as next preceding case); Re Dunn, 5 Dem. 124 (see case as quoted infra this paragraph); Broome v. Van Hook, 1 Redf. 444 (debt not barred at time of the making of the new promise); Freeman v. Freeman, 2 Redf. 137 (claim, if any, fully barred); Burnett v. Noble, 5 Redf. 69 (claim fully barred); Willcox v. Smith, 26 Barb 316 (payments before bar was complete held to toll the statute); Heath v. Grenell, 61 Barb. 190 (claim not barred at time of payment); Bucklin v. Chapin, 1 Lans. 443 (claim barred); Re Robins, 7 Misc. 264, 27 N. Y. Supp. 1009 (holding that part payment of a claim not fully barred at the time of the payment

trator to waive the bar of the statute of limitations as against the estate represented by him. This claim had never been presented to the administrator by the plaintiff, but, in conformity with the provisions of § 5470 of the Revised Codes, he expressly waived all recourse against any other property of the estate except that covered by the mortgage. It appears that prior to the time of the running of the statute of limitations, the debtor, Lynch, died, and Browne was appointed administrator of his estate. Prior to the running of the statute Browne wrote to the plaintiff, making reference to this mortgage and the debt secured thereby. It is now claimed by the plaintiff that this was a waiver of the bar of the statute, and that the administrator has the power and authority to waive the statute of limitations where the claim is not barred prior to the death of the debtor.

Section 5469 of the Revised Codes provides as follows: "No claim must be allowed by the executor or administrator, or by the probate judge, which was barred by the statute of limitations at the time of the death of the decedent. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the applicant and others, on oath, and hear any other legal evidence touching the validity of the claim."

Section 5471 of the Revised Codes provides that "the time during which there shall be a vacancy in the administration

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tolls the statute); Re O'Rourke, 12 Misc. 248, 34 N. Y. Supp. 45 (*dicta* to the effect that an executor or administrator cannot waive, as against the heirs and devisees, the statute of limitations, and that a payment of a claim that is outlawed within the knowledge of the personal representative cannot be said to have been made in good faith); Re Oosterhoudt, 15 Misc. 566, 38 N. Y. Supp. 179 (claim barred); Balz v. Underhill, 19 Misc. 215, 44 N. Y. Supp. 419 (claim barred); Re Bradley, 25 Misc. 261, 2 Gibbons, Sur. Rep. 597, 54 N. Y. Supp. 555, affirmed on other grounds in Re Sargent, 42 App. Div. 301, 59 N. Y. Supp. 105 (holding that while an executor or administrator cannot revive a claim barred by the statute of limitations he can keep a claim not fully barred outside the statute by making payments thereon); Re Knab, 38 Misc. 717, 78 N. Y. Supp. 292 (court laid down both phases of the rule); Re Van Voorhees, 55 Misc. 185, 106 N. Y. Supp. 354 (claim barred); Spicer v. Raplee, 4 App. Div. 471, 38 N. Y. Supp. 806 (claim barred); Yates v. Wing, 42 App. Div. 356, 59 N. Y. Supp. 78 (*dictum* as to barred claim); Hamlin v. Smith, 72 App. Div. 601, 76 N. Y. Supp. 258 (debt not barred); Re Goss, 98 App. Div. 489, 90 N. Y. Supp. 769 (part of claim barred); Mooers v. White, 6 Johns. Ch. 360 (holding that the personal representative cannot bind the real estate by an acknowledgment of a barred debt); Stiles v. Burch, 5 Paige, 132 (holding that a personal representative cannot acknowledge or pay a debt barred by the statute of limitations after the decree of the surrogate ordering distribution, so as to affect the interests of those citing him to account); Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716 (debt barred); Bloodgood v. Bruen, 8 N. Y. 362 (debt barred); McLaren v. McMartin, 36 N. Y. 88, 3 Abb. Pr. N. S. 345, 33 How. Pr. 449 (see case as quoted infra this paragraph); Gilbert v. Comstock, 93 N. Y. 484 (holding that an executor could toll the statute of limitations as to so much of an indebtedness as was not barred during the lifetime of the deceased, but that she could not revive the fully barred part of the indebtedness); Re Kendrick, 107 N. Y. 104, 13 N. E. 762 (debt barred at time of alleged waiver); Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643 (debt barred); Schutz v. Morette, 146 N. Y. 137, 40 N. E. 780, reversing 81 Hun, 518, 31 N. Y. Supp. 39 (debt barred); Adams v. Fassett, 149 N. Y. 61, 43 N. E. 408 (debt barred); Holly v. Gibbons, 176 N. Y. 520, 98 Am. St. Rep. 694, 68 N. E. 889, modified on another point on rehearing in 177 N. Y. 401, 69 N. E. 731 (debt not barred); (Johnson v. Beardslee, 15 Johns. 3, which seemingly holds that an executor can revive a barred debt by an acknowledgment and an express promise to pay—if it so holds it is clearly not good law in New York); Drouilliard v. Wilson, 1 Ohio Dec. Reprint, 555 (debt barred); Baen v. Weller, 12 Ohio Dec. 128 (debt barred); Crouse v. Frybarger, 22 Ohio C. C. 315, 12 Ohio C. D. 254 (holding that the statute of limitations was tolled as to a debt of a deceased person by a payment made thereon by the personal representative before the statutory period had expired); Bolt v. Dawkins, 16 S. C. 198 (holding, apparently upon the ground that a personal representative cannot create a new debt against the estate, that he cannot waive the statute of limitations as to a debt barred at the time of the promise or acknowledgment, but which was not barred at the death of the debtor; but see contra Pearce v. Zimmerman, Harp. L. 305, and Reigne v. Desportes, Dud. L. 118, as set out and compared with Bolt v. Dawkins, supra, II. a, 1, (c)); Milwee v. Jay, 47 S. C. 430, 25 S. E. 298 (contains argument supporting Bolt v. Dawkins, supra).

This rule is perhaps nowhere better stated than in Re Dunn, 5 Dem. 124, supra, wherein, in discussing the effect upon the running of the statute of limitations of payments by an executor upon a note by his testator, the court said: "I think the effect of these payments is determined by the answer to the question whether at the time of making them the note was a subsisting obligation against the estate; for while an executor may, by making payments on claims which are at that time valid, create a legitimate inference of an acknowledg-

must not be included in any limitations herein prescribed."

It is also provided by § 5460 of the Revised Codes that every executor or administrator must immediately after his appointment give a notice by publishing the same in some newspaper in the county, requiring all persons having claims against the estate to present the same, in the manner prescribed by law.

Section 5461 provides that the time that shall be expressed in this notice must be ten months after its first publication, when the estate exceeds in value the sum of $1,500, and four months when it does not exceed that sum.

Section 5463 provides that all claims not presented within the time prescribed by the notice shall be "barred forever."

These provisions of the statute indicate to our minds that it was the intention of the lawmakers to prohibit the administrator in any manner extending the bar of the statute of limitations, or to interrupt its running against the debt or claim held against the estate he represents. It is claimed, however, by appellant that the insertion of the words, "which was barred by the statute of limitations at the time of the death of the decedent," expresses an intent on the part of the lawmakers to prohibit the administrator from renewing or reviving a debt already barred, but did not intend to prohibit him extending the time that the statute may run against a debt

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ment of the claim and promise of payment, so as to keep it out of the statute, he cannot, however, by so doing revive a demand which has once expired, or create a liability where at the time of making the payments none existed." In McLaren v. McMartin, supra, the New York court of appeals in this connection said: "Payment by the debtor personally, or by his direction and authority, is evidence now, as heretofore, from which an acknowledgment of the residue of the debt may be implied. It does not, however, even in that case, constitute an express promise, nor amount *per se* to a renewal; but it is evidence from which an intention to renew the original promise may be inferred. . . . So in the case of a demand subsisting at the death of the intestate, and which the administrator is bound to pay, it would be legitimate to infer from a subsequent partial payment an acknowledgment of his continuing obligation. But in respect to demands barred at the death of the intestate the administrator is under no such obligation. The immunity of the estate is absolute. His position is purely fiduciary. It is his right and his duty to apply the funds in his hands to the satisfaction of all legal demands; but he has no retrospective authority to contract debts in the name of the intestate, or to revive those which were extinguished by law in his lifetime. There is a moral obligation on the debtor to pay demands which he knows have never been satisfied; but there is none on his executor or administrator to pay claims which the statute has barred. He is not at liberty to misapply assets which the law awards to the creditors and next of kin." And in Holly v. Gibbons, 176 N. Y. 520, 98 Am. St. Rep. 694, 68 N. E. 889 (set out supra), the court pointed out the distinction between cases where the debt is barred and where it is still alive, in the following language: "The appellant argues that the executor could not, by the acknowledgment of the debt, prevent the statute of limitations from running. He argues, in effect, that the principle of the rule, which prevents an executor from reviving a debt against the estate of his testator which is barred by the statute, applies equally to his right to keep a debt alive. I perceive no force in such an argument; nor am I aware of any authority in reported cases which would support it. The demand of the plaintiff was upon an obligation of the testator, subsisting at the time of his death, and for which his estate was concededly liable. It was the right and it was the duty of the executor to discharge the indebtedness upon the obligation, either from the personal estate, or, if that was insufficient, by the exercise of the power of sale given to him by the will. There is a plain distinction between the right of an executor to revive an indebtedness against his testator's estate, which had been extinguished by law, and his right to acknowledge and to keep in force a subsisting obligation, by making payments from time to time upon the principal of the debt, or by way of keeping down the interest. . . . In the one case he in effect creates an indebtedness; while in the other he is performing a moral obligation, and is executing a duty recognized by law."

But this rule has been modified in New York where the personal representative is the sole distributee of the estate, it having been held that in such case he may waive the statute of limitations by the making of a part payment upon the only claim against the estate, even though such debt was barred by the statute at the time of such payment. Re Miles, 33 Misc. 147, 68 N. Y. Supp. 368, affirmed in 170 N. Y. 75, 62 N. E. 1084, which reversed 61 App. Div. 562, 71 N. Y. Supp. 71, which had reversed the surrogate's decree upon a jurisdictional question.

For statutes which provide that the bar of a debt of a decedent cannot be avoided after it is complete, see infra, II. a, 2, (a).

2. Under statute.

(a) Statutes denying right to waive.

In California by express statutory provision an executor or administrator is prohibited from waiving the statute of limita-

which was not barred at the time of the death of the decedent. This statute, standing alone, is subject to the construction claimed for it by appellant, but when read in connection with the other provisions of the statute it seems to us that the phrase, "at the time of the death of the decedent," must have been added to prevent any confusion arising on account of the provisions of § 5471, whereby the time during which there is a vacancy in the administration is to be excluded and eliminated from the running of the statute. That time could not run prior to the death of the debtor, but necessarily runs subsequent to his death, and while the obligation on its face might show that the statute had run against the claim, still, as a matter of fact, which is subject to proof, there may have been a long period of time intervening during which there was no administrator or executor to whom the claim could be presented.

This view of the statute is reinforced by the provisions of § 4078, which we have heretofore considered in this opinion. That statute provides that an acknowledgment cannot take the case out of the operation of the statute "unless the same is contained in some writing signed by the party to be charged thereby." Now, "the party to be charged" is the debtor, and not his legal representative. Hanson v. Towle, 19 Kan. 282. There is no personal liability against the administrator or executor for the debts of the decedent. The administrator or executor is only liable in a representative

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tions as to debts of a decedent. See McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466, citing Code Civ. Proc. § 1499; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473, which announces the rule but makes no reference to any statute; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470, which merely states that "the administrator is prohibited from allowing or paying any claim which is barred;" Barclay v. Blackinton, 127 Cal. 189, 59 Pac. 834, citing Code Civ. Proc. § 1499; Etchas v. Orena, 127 Cal. 588, 60 Pac. 45, citing same section of Code; and Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977, which also cites said § 1499.

And by the express provisions of Montana probate practice act, § 156, an administrator or executor cannot allow a claim which is barred by the statute of limitations. See Re Mouillerat, 14 Mont. 245, 36 Pac. 185, holding that an administrator could not waive the statute of limitations as to a barred debt of his intestate.

And in Delaware, § 5 of the act of 1792 (2 Del. Laws, 1031) prohibited an executor or administrator from paying any claims or demands against the estate of a deceased person, of any longer standing than three years next before the death of the decedent. Under this statute it was held that an executor or administrator could not revive a debt barred during the lifetime of the debtor. Parkin v. Bennington, 1 Harr. (Del.) 209, affirming 1 Harr. (Del.) 128; Gailey v. Washington, 2 Harr. (Del.) 204; Chambers v. Fennemore, 4 Harr. (Del.) 368. But on the other hand it has been held that the statute did not prohibit a personal representative from keeping alive by a promise or acknowledgment a debt as to which the bar of the statute was not complete at the death of the debtor. Parkin v. Bennington, 1 Harr. (Del.) 209; Chambers v. Fennemore, supra. But that this act remained in effect only until 1829, and that the contrary has since been the law, see Bennington v. Parkin, 1 Harr. (Del.) 128, affirmed in 1 Harr. (Del.) 209; Latimer v. Peterson, 2 Harr. (Del.) 366; and Chambers v. Fennemore, 4 Harr. (Del.) 368, as set out supra, II. a, 1 (a). L.R.A.1915B.

So in Georgia an executor or administrator is prohibited by statute from waiving the statute of limitations as to claims against the decedent completely barred during the lifetime of the debtor. Castellaw v. Guilmartin, 54 Ga. 299, citing Georgia Code 1873, § 2542; DuBignon v. Backer, 61 Ga. 206; Smith v. Hudspeth, 63 Ga. 212; McBride v. Hunter, 64 Ga. 655; Ray v. Strickland, 89 Ga. 840, 16 S. E. 90.

And in Nebraska, where the statutes require claims against the estate to be presented to the probate court for allowance, and provide that "no claim barred by the statute of limitations shall be allowed," it has been held that the administrator cannot, by consenting to the allowance of a barred claim, warrant the court in so allowing it. Re Brusha, 87 Neb. 254, 126 N. W. 1079.

In Nevada, § 113 of the probate act (Compiled Laws, § 2898) expressly provides that no claim against a decedent shall be allowed by an executor or administrator which is barred by the statute of limitations at the time of the death of the debtor. See Jones v. Powning, 25 Nev. 399, 60 Pac. 833, holding that by the mandatory provision of the statutes an administratrix could not waive the statute of limitations as to a debt of her intestate which was barred at the time of his death.

In New York it is provided by statute that a judgment or decree for a sum of money is presumed to be paid and satisfied after twenty years, and that the presumption is conclusive except as against a personal representative, etc., who makes a payment or acknowledges the indebtedness in writing within the statutory period. See Re Kendrick, 15 Abb. N. C. 189, 3 Dem. 301, affirmed in 107 N. Y. 104, 13 N. E. 762, holding that a personal representative could not waive the statute as to a demand that was completely barred at the time of the act which was alleged to constitute the waiver.

In Virginia it is provided by statute that if a personal representative pay any debt, recovery of which, to his knowledge, could have been prevented by reason of lapse

capacity, and in that capacity only to the extent of the assets of the estate. The acknowledgment of a debt or liability under this provision of the statute so as to take it out of the operation of the statute of limitations appeals to the conscience and sense of fair dealing of the debtor. After he is dead, his legal representative is purely and solely a legal representative of the estate and not of the person of the deceased. He is purely a business representative, and in no way can represent the conscience or sense of equity and justice of the deceased debtor. When the debtor dies the power and authority to waive the bar of the statute of limitations dies with him, and the conscience and sense of fair dealing to which this statute appeals thereupon loses the medium of expression and action to take the obligation out of the operation of the statute of limitations. A number of authorities have been cited on this question, and we are aware that a great many courts have held that the administrator may waive the bar of the statute of limitations. That seems to be the general rule in England. These cases, however, rest upon statutes very different from ours. We do not find such a holding from any court where they have statutes the same as or similar to those above quoted. See 2 Woerner, Am. Law of Administration, § 401; Hanson v. Towle, supra; Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Claghorn's Estate, 181 Pa. 600, 59 Am. St. Rep. 680, 37 Atl. 918. In the case last cited, the

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of time, no credit shall be allowed him therefor; and a similar provision prohibits the making of acknowledgments or promises. See Smith v. Pattie, 81 Va. 654, holding that an executor cannot waive the statute of limitations as to a claim barred during the testator's lifetime.

And West Virginia has a statute similar to that in Virginia. See Woodyard v. Polsley, 14 W. Va. 211, holding that a personal representative cannot waive the statute of limitations as to barred claims; and Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26, the holding in which is to the same effect. And in West Virginia it is the rule that a personal representative cannot even toll the statute of limitations as to debts not yet barred. This rule was laid down in Findley v. Cunningham, 53 W. Va. 1, 44 S. E. 472 (set out supra, II. a, 1, (b)), and is the result of the construction of the West Virginia statutes, and can best be understood by examination of the pertinent language used by the court. Among other things it said: "As to the question whether an executor or administrator can, before a debt against the estate has been barred by the statute of limitation, by a written promise debar the estate from the benefit of the statute. Section 9, chap. 104, Code, reads: 'No acknowledgment or promise by any personal representative of the decedent . . . shall charge the estate of such decedent . . . in any case in which, but for such acknowledgment or promise, the decedent's estate . . . could have been protected under the 6th section of this chapter.' This is literally the same as § 8, chap. 149, Virginia Code of 1849. How was the law before 1849? The great current of authority said that an administrator could not revive a debt already barred. . . . But the law in Virginia as elsewhere generally was that an executor could, by a promise to pay, give a new term to a debt not barred. . . . To restrain this power to a limited extent, that is, as to realty of a decedent, in 1841 the Virginia legislature passed an act containing the provision, 'No debt shall be protected against the operation of the statute of limitations by this act, nor by any assumpsit of the executor or administrator, so as to charge the real estate in the possession of the heirs or devisees with the payment thereof.' Here we have the broad enactment that no promise by an executor or administrator shall give the debt a prolonged force against realty. There is no hint that his promise should be void as to a barred debt, but good as to one not barred. The act makes no such distinction. Can we suppose that it was the purpose of § 8, chapter 149, Code 1849, to narrow the law of 1841, and to charge real estate by the promise of an executor, whereas it would not by the act of 1841? It would be a violent assumption to say so. That it was not so intended is clearly shown by the note of the revisers who reported the Code of 1849 to the legislature for its action. That note says that § 8 would 'accomplish the object of the latter part of the act of 1841-2,' that is, attain the object, afford the same protection to realty as did the act of 1841. Revisers' Report, 744. No other section was inserted to retain the act of 1841, as there was no need of another section. Now, the Code of 1849 for the first time made real estate of a decedent assets for payment of general debts, the same as personalty, and we cannot suppose that it was intended to make an executor's promise charge the personalty, and not the realty. Of course, that idea cannot be for a moment entertained. It was the design in 1849 to protect both against an executor's promise in the only case in which they needed protection, that is, where the promise was to pay a debt not yet barred. The law already protected both personalty and realty against an executor's promise to pay a barred debt. The act of 1841 went a step farther, and protected realty against a debt not yet barred; and when in 1849 both personalty and realty were made alike liable to all debts, the same protection was meant for both. There was no longer reason to make the difference between personalty and realty made by the act of 1841. The

supreme court of Pennsylvania, after reviewing the authorities, said: "It will be seen from these most explicit decisions that the personal representative is not answerable for a cause of action not created by the decedent; that if by a new promise he revive a debt already barred, or prolongs the life of one not yet barred, the contract is his own, and he is personally answerable." Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 728, 14 Ann. Cas. 926. To the contrary effect, see Preston v. Cutter, 64 N. H. 467, 13 Atl. 878; Brown v. Anderson, 13 Mass. 201; Suhre v. Benton, — Tex. Civ. App. —, 25 S. W. 822. See note to Schlicker v. Hemenway, 52 Am. St. Rep. 123.

We therefore conclude that the plaintiff stated a good cause of action against the defendant Olsen, and that as against the administrator and the interveners the complaint was open to the demurrer on the ground that the cause of action was barred by the statute of limitations. The judgment must therefore be reversed, and the cause remanded for further proceedings, in accordance with the views herein expressed. Costs awarded against the appellant and in favor of the administrator and the interveners, who are heirs of the deceased and creditors of the estate of deceased, and the appellant will be awarded such costs against the respondent Olsen as have necessarily been incurred in prosecuting the appeal against Olsen alone.

Sullivan, Ch. J., concurs.

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law already denied effect to an executor's promise to pay a barred debt, and we must say that the Code of 1849 meant some change, and that was to protect both alike, to deny any power in an executor or administrator to add to the burden of the estate to make it liable where without his act it would be exempt. In construing a statute we look at the evil to be remedied, and that was the power of an executor to promise payment of a live debt, not his power to revive a dead one, as he had no such power. The probability arising from the state of the law up to 1849, and the making of both personalty and realty assets for debts, and the adoption of § 8, seems likely and strong; but that probability does not rest on those influences alone, but it becomes a certainty when we look at the report of the revisers. . . . 'The section will accomplish this purpose, and at the same time attain the object of the latter part of the 2d section of the act of 1841-2, p. 55, chapter 98, which provides that no debt shall be protected against the statute of limitations by any assumpsit of the executor or administrator, so as to charge the real estate in the possession of the heir or devisee with the payment thereof.' The legislature passed § 8 with that explanation of its aim and legal effect before it, and may we not therefore say that it intended to utterly deny in all cases power in an executor or administrator to make any promise having any effect to prevent the bar of the statute? And why should this power not be denied? The man is dead; the administrator takes the estate as he finds it, simply to gather in assets, pay debts, and distribute."

And that under the Idaho statutes a personal representative can neither waive the statute of limitations as to barred claims nor toll it as to claims not fully barred, see DERN v. OLSEN.

And in Wisconsin a personal representative cannot, by failing to plead the statute of limitations against a barred debt, be deemed to have waived same, because it is expressly provided by statute that no claim barred by the statute of limitations shall be allowed against a decedent's estate. See Murtha v. Donohoo, 149 Wis. 481, 41 L.R.A. (N.S.) 246, 134 N. W. 406, 136 N. W. 158.

And that the Wyoming statutory provision that "no claim shall be allowed by the executor or administrator which is debarred by the statute of limitations" would operate to prevent a personal representative from waiving the statute of limitations, see O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525.

(b) Statutes allowing waiver.

In Maryland it is provided by statute that no administrator shall be obliged to discharge any proven claim, and that he may reject and at law dispute the same in case he believes decedent had a claim in bar. See Pole v. Simmons, 49 Md. 14, construing Code Public General Laws, art. 93. And by a later statute (Code 1904, art. 93, § 97) it was expressly provided that "it shall not be considered as the duty of an administrator to avail himself of the statute of limitations to bar what he supposes a just claim, but the same shall be left to his honesty and discretion." See Dunnigan v. Cummins, 115 Md. 289, 80 Atl. 922, holding that the facts in the case did not warrant removal of the administrator because of his failure to plead the statute of limitations in bar of certain claims.

And in North Carolina the statutes now leave the pleading of the statute of limitations as to barred claims against a decedent's estate to the discretion of the personal representative. See Person v. Montgomery, 120 N. C. 111, 26 S. E. 645.

(c) Suspension statutes.

In Louisiana by statute the acknowledgment by an administrator or executor of a succession debt suspends the prescription of it as long as the property of the succession remains in the hands of the executor or administrator under administration. Johnson v. Waters, 111 U. S. 640, 28 L. ed. 547, 4 Sup. Ct. Rep. 619; Mayfield v.

Richards, 115 U. S. 334, 29 L. ed. 334, 5 Sup. Ct. Rep. 1187 (*dictum*).

And see the Delaware cases of Parkin v. Bennington, and Chambers v. Fennemore, as set out supra, II. a, 2, (a).

b. Unjust claims.

Of course, where a claim against an estate is unjustly due, or otherwise not well founded for especial reasons, the personal representative should not be allowed to waive the statute of limitations. See Marshall v. Coleman, 187 Ill. 586, 58 N. E. 628; and Hodgson v. White, 11 N. H. 208, holding that a personal representative waives the bar of the statute by payment of a barred claim, at the peril of being able to establish its justness.

And in Re Rownson, L. R. 29 Ch. Div. 358, 49 J. P. 759, 54 L. J. Ch. N. S. 950, 52 L. T. N. S. 825, 33 Week. Rep. 604, 9 Eng. Rul. Cas. 342, it was said that the rule that an executor or administrator may waive the bar of the statute of limitations cannot be applied in case of debts as to which there is a valid defense other than the statute of limitations.

c. Individual claims of executor or administrator.

1. In general.

There is, perhaps, a greater tendency to apply a strict rule with respect to the right of a personal representative to waive the statute of limitations as to his individual claims which are barred by the statute of limitations, than to the claims of general creditors which are barred. This is evidenced by the fact that the courts of several jurisdictions, although adhering to the rule allowing the personal representative to waive the statute as to barred claims of general creditors, have refused to apply the rule to individual claims of the representative, while apparently but one court has applied a stricter rule to the claims of general creditors than to the individual claims of the individual representative, and that case has been questioned in later decisions in the same jurisdiction.

As to the rights of personal representatives as to individual claims as affected by the statute of nonclaim, see infra, III.

2. Rule denying right to waive.

In some instances, as before noted, the courts lay down a stricter rule as to waiver of the statute of limitations as to barred individual claims of a personal representative than they do as to the claims of general creditors.

Thus in Tennessee it has been held that while a personal representative may waive the statute of limitations as to a barred claim of a general creditor, he cannot do so as to his individual claim against the estate. Batson v. Murrell, 10 Hump. 300, 51 Am. Dec. 707 (claim barred before administration); Wharton v. Marberry, 3 Sneed, 603 (claim not barred before administration, but barred before the intention to retain was made known); Williams v. Williams, 15 Lea, 438 (holding such to be the rule even though the testator in his will gave the executors power "to pay, if they see proper, just debts barred by the statute of limitations"). In Batson v. Murrell, supra, it was said that, although it was safe to let the personal representative use his discretion as to whether he should waive the statute as to barred claims of general creditors, it was very different when he himself seeks to charge the estate with his own claim which is barred by the statute, as his honesty is then antagonistic to the estate, and that the other interested parties should then judge as to the propriety of waiving the statute as to his claim.

And in Pennsylvania, although as to general creditors the personal representative may in some cases waive the statute of limitations, it seems that he cannot do so as to his own claim against the decedent's estate (Re Eckert, 18 Lanc. L. Rev. 58), especially against the objection of a legatee to the allowance of a claim barred in the lifetime of the debtor (Hoch's Appeal, 21 Pa. 280).

So in South Carolina it has been held that a personal representative cannot waive the statute and retain the amount of his own claim against the estate, where the claim was barred at the death of the debtor. Cooper v. Peyton, Rich. Eq. Cas. 259 (in this case the court intimated that, had the claim been that of a general creditor, the representative could have waived the bar of the statute, saying that such rule did not apply to individual claims of the representative; but this opinion as to the right of the representative as to general creditors does not conform to the general South Carolina rule on the subject—see supra, II. a, 1, (c)); Godbold v. Vance, 14 S. C. 458.

In a number of jurisdictions which deny any right to the personal representative to waive the statute of limitations as to barred claims of general creditors, the courts have applied the same rule to individual claims of the personal representative which are fully barred. Thus, in New York it has been held that a personal representative having a claim against his decedent is not in a better situation than other creditors, and therefore that he cannot retain for a debt barred during the lifetime of the debtor (this is an application of the general New York rule—see supra, II. a, 1, (d)). Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716; Burnett v. Noble, 5 Redf. 69. In this connection the court in the latter case said: "There seems to be no doubt as to the duty of a representative of an estate to interpose the defense of the statute of limitations against any claim barred thereby; and the next question for consideration is whether that statute can be invoked in behalf of persons interested in the estate against a claim thus barred in favor of an executor or administrator. There seems to be no good reason for a

different rule in respect to such a claim. Indeed, it would seem to require the enforcement of the immunity of the estate more rigidly than in the case of an ordinary claim, because in the latter the representative of the estate has no personal interest in neglecting its protection, while in the former his interest is adverse to any scrutiny of the claim, or defense thereto." And in Gilbert v. Comstock, 93 N. Y. 484, the court adopted that part of the general New York rule allowing a personal representative to toll the statute of limitations as to debts not completely barred and apply it so as to bar the statute as to the claim of the personal representative.

And in Louisiana the general rule of that state, that an administrator or executor cannot waive the statute of limitations as to a claim completely barred previous to the attempted waiver (see supra, II. a, 1 (d)), has been applied to individual claims of the representative which were so barred. Lafton v. His Executors, 3 Mart. N. S. 707.

And in Connecticut the general rule that an executor or administrator cannot waive the bar of the statute of limitations as to claims of general creditors against the decedent has been applied to individual claims of the representative against the decedent. Ensign v. Batterson, 68 Conn. 298, 36 Atl. 51.

And the Ohio rule seems to be the same as the Connecticut rule. See Re Ward, 21 Ohio C. C. 753, 12 Ohio C. D. 44.

And in Massachusetts it has been held that an executor cannot waive the statute of limitations as to his individual claims against the decedent which were fully barred at the time of the death of the debtor. Re Richmond, 2 Pick. 567; Grinnell v. Baxter, 17 Pick. 383. In the latter case the court said that an administrator having a personal claim "probably" would be within the equity of the exemption of the statute (Stat. 1793, chap. 75, § 3) providing that if suit was not barred at the time of the death of the debtor, or thirty days previous, the creditor should have two years from the time of administration taken to commence his suit, and that, as an administrator cannot sue, it might be that taking administration would be deemed equivalent.

So in Arkansas it has been held that an executor or administrator cannot waive the statute of limitations as to his individual claim which was barred before the debtor's death, notwithstanding the statutory provision (Gould's Dig. chap. 4, § 98) "that an executor or administrator may establish any demand he may have against his testator or intestate." Rector v. Conway, 20 Ark. 79.

3. Rule allowing waiver.

Applying the rule that an executor or administrator may waive the statute of limitations as to debts of the estate, and that he is not bound to insist upon its bar, it has been held that he may retain sufficient assets from the estate to pay a debt due himself, but which was barred during the lifetime of the decedent. Knight v. Godbolt, 7 Ala. 304; Harwood v. Harper, 54 Ala. 659; Trimble v. Fariss, 78 Ala. 260; Payne v. Pusey, 8 Bush. 564 (except in a proceeding to subject the realty to the payment of the claim); Withers v. Withers, 30 Ky. L. Rep. 1099, 100 S. W. 253 (holding same as next preceding case); Semmes v. Magruder, 10 Md. 242; Wheedon v. Nichols, 72 N. J. Eq. 366, 65 Atl. 445; Crooks v. Crooks, 4 Grant, Ch. (U. C.) 615; Emes v. Emes, 11 Grant, Ch. (U. C.) 325; Sharman v. Rudd, 27 L. J. Ch. N. S. 844, 4 Jur. N. S. 527; Hill v. Walker, 4 Kay & J. 166; Stahlschmidt v. Lett, 1 Smale & G. 415; Clinton v. Brophy, Ir. L. R. 10 Eq. 139.

In the New Jersey case of Wheedon v. Nichols, 72 N. J. Eq. 366, 65 Atl. 445, cited supra, the court said: "When the personal representative has a claim against the estate which he is administering, it is impossible for him to enforce the claim by action at law or in equity. In such case it is well settled that he may exercise the right of retainer for the satisfaction of his claim, if the claim be honest. If the indebtedness was originally honest, it is not rendered dishonest by the running of the statute for the prescribed period. As such a representative may, with impunity, decline to interpose the bar of the statute against an honest debt remaining unpaid, I think he may exercise the right of retainer to satisfy his own claim if of that character. . . . If a personal representative cannot be compelled by the exceptant to a claim upon an insolvent estate, to interpose the statute against the claim of a third person, there seems no valid reason why the statute should be held to operate as a bar to an honest claim of the personal representative, which is necessarily tried before the orphans' court. It is true that the admission of the claim notwithstanding the statute has run against it will diminish the dividend to the other creditors; but such would be the result if, in an action at law brought by a claimant under § 105, the personal representative did not interpose the bar of the statute. The creditors have no greater rights than have legatees or distributees of a solvent estate, whose interests are diminished by the failure of the personal representative to set up the statute."

And in New Jersey it has been held that this rule is not abrogated by the fact that the estate is insolvent, although in such case the personal representative cannot retain the whole of his claim, but must come in on an equality with other creditors of the same degree. Ibid.

But the rule was later qualified in Alabama by holding the rule to be that the representative may waive the statute, provided the personal assets are sufficient to pay the debts, but that he cannot charge the real estate therewith. Harwood v. Harper, 54 Ala. 659; Trimble v. Fariss, 78 Ala. 260.

In Georgia, seemingly contrary to the rule as to general creditors (see supra, II. a, 1, (c)), it has been held that an executor or administrator may waive the statute of limitations as to his individual claim against his decedent, even though it was barred at the death of the testator or intestate. Baker v. Bush, 25 Ga. 594, 71 Am. Dec. 193. But in Beckham v. Beckham, 113 Ga. 381, 38 S. E. 817, the court refused to follow the holding in the Baker Case, and, after questioning the soundness thereof, said that, however the law might have been at the time that case was decided, an administrator now has no right to pay himself a debt due to him by his intestate, when the same was barred by the statute of limitations before the debtor's death. And see Willis v. Sutton, 116 Ga. 283, 42 S. E. 526, wherein it was held that "even if an administrator who has permitted a claim which he had against his intestate to become barred pending his administration may waive, in favor of himself, the right to plead the statute of limitations against the claim, and, in pursuance of this waiver, retain the amount due him from the assets of the estate, slight circumstances will be sufficient to overcome the presumption that his return setting up such retainer is correct, and that the claim against the estate was a just one, where there has been no return setting up the exercise of the right of retainer until long after the statutory period of limitations has expired; and especially would this be true where the return exercising the right of retainer is made pending a suit against the administrator for an accounting."

d. Joint executors.

1. In general.

It is the purpose of the annotator to treat in this subdivision the question whether or not one or more, less than all, of joint executors may waive the statute of limitations so as to bind the other executors and the estate. This question, as a distinct question, of course would not arise where all, acting jointly, could not waive the bar of the statute.

There is considerable diversity of opinion upon this point, but the decided weight of authority supports the rule that one executor may waive the statute so as to bind both the other executors and the estate.

2. Rule denying right of one to waive.

It has been held, even in jurisdictions which permit a sole executor to waive the statute of limitations, that a promise by one of several joint executors or administrators will not take a case out of the statute of limitations. Caruthers v. Mardis, 3 Ala. 599; Pitts v. Wooten, 24 Ala. 474, holding such to be the rule even though the one making the promise was the sole acting executor, others having qualified; Conway v. Spicer, 5 Harr. (Del.) 425. And see the L.R.A.1915B. early English cases set out in the following subdivision of this note.

It has been said that this rule is based upon the reason that "one administrator has not the power to bind those connected in the administration so as to make them responsible for a devistavit." Hall v. Darrington, 9 Ala. 502.

And in Pennsylvania, applying the rule that, while an executor may waive the statute of limitations, such a waiver is not binding upon him, it has been held that a waiver by one executor is not binding upon his coexecutors. Re M'Williams, 3 Clark (Pa.) 321; Reynolds v. Hamilton, 7 Watts, 420; Hill v. Boyd, 6 Pa. 267.

But in Alabama a different rule has been held to apply where the associates of the personal representative who made the promise died subsequent to the making of the promise and prior to the bringing of an action thereon. See Hall v. Darrington, 9 Ala. 502, wherein it was said that the reason for not allowing one of several representatives to waive the bar of the statute no longer obtained where the representative who made the promise was the sole survivor.

3. Rule allowing one to waive.

But as stated supra, II. d, 1, the weight of authority is to the effect that one of two or more personal representatives may waive or toll the statute of limitations, and that such a waiver is binding upon all of the representatives as well as the estate. The following cases so hold: Hord v. Lee, 2 T. B. Mon. 131, on subsequent appeal in 4 T. B. Mon. 36; Head v. Manners, 5 J. J. Marsh. 255; Northcut v. Wilkinson, 12 B. Mon. 408; McCann v. Sloan, 25 Md. 575, holding such to be the rule, especially when made before the statute has operated upon the claim, and provided the claim is established by proof *aliunde;* Cole v. Simmons, 49 Md. 14, holding same as next preceding case, and seemingly adding the further proviso that the claim was not barred at the time of the acknowledgment or promise; Emerson v. Thompson, 16 Mass. 429, holding that a new promise by one of the executors was binding; Shreve v. Joyce, 36 N. J. L. 44, 13 Am. Rep. 417, holding that a new promise by one of several executors was sufficient to bind the estate; Heath v. Grenell, 61 Barb. 190, holding that part payment was sufficient to toll the statute as to a debt not barred at the time; Hammon v. Huntley, 4 Cow. 493; Cobham v. Administrators, 3 N. C. (2 Hayw.) 6, 2 Am. Dec. 612; Briggs v. Starke, 2 Mill, Const. (S. C.) 111, 12 Am. Dec. 659; Lomax v. Spierin, Dud. L. 365, holding that one representative may toll the statute of limitations as to debts not barred at the death of the debtor, so as to bind all in an action on a claim against the deceased; Re Macdonald [1897] 2 Ch. 181, 66 L. J. Ch. N. S. 630, 76 L. T. N. S. 713, 45 Week. Rep. 628, holding such to be the rule in England subsequent to the enactment of Lord Tenterden's act; Re Hollingshead,

L. R. 37 Ch. Div. 651, 57 L. J. Ch. N. S. 400, 58 L. T. N. S. 758, 36 Week. Rep. 600 (*dictum*); Sharman v. Rudd, 4 Jur. N. S. 527, 27 L. J. Ch. N. S. 844, wherein one of several executors was allowed to retain for his individual claim, which was barred.

In Hord v. Lee, 4 T. B. Mon. 36, the court discussed this question as follows: "The principles which govern the duties of administrators, when carried out, warrant the decision of the court below. If there be several, yet they represent one man and one fund, and of course, it follows that the act of one must, in most cases, be taken as the act of all. One can pay away the money of the estate in discharge of the debts due, and a dissenting majority cannot recover it back. He may also release a debt due to the estate, and bar a recovery thereof by his coadministrators. For, says Toller [Exrs. & Admrs.] p. 407: 'Of executors, we have seen, the acts of any one in respect to the administration of the effects are deemed by the law to be the acts of all, inasmuch as they have a joint and entire authority over the whole property; but joint administrators have been considered in a different light. Their power arises not from the act of the deceased, but from the ordinary; and administration is in the nature of an office. . . .' So strong is this principle that one of several administrators or executors may bind the others by legal proceedings,—by entering an appearance; and process served on one may be considered as served upon all, and binds them. From these principles, it seems necessarily to result that the promise of one administrator, so far as it can be operative upon the estate represented by him, must bind all who are joined with him in that representation."

But it has been held that one of two or more executors or administrators cannot, by an attempted waiver of the statute of limitations as to a debt of the decedent, bind the estate where one of such personal representatives expressly objects to such a waiver of the statute. Haskell v. Manson, 200 Mass. 599, 128 Am. St. Rep. 452, 86 N. E. 937. So in England it has been held that one of two joints executors cannot, as against the wishes of the other, bind the real estate by an acknowledgment of a barred debt. Astbury v. Astbury [1898] 2 Ch. 111, 67 L. J. Ch. N. S. 471, 78 L. T. N. S. 494, 46 Week. Rep. 536.

And in England it has been held that one of several executors or administrators cannot waive the statute of limitations and pay a barred debt, where it has been judicially declared that the debt is barred by the statute. Midgley v. Midgley [1893] 3 Ch. 282, 62 L. J. Ch. N. S. 905, 69 L. T. N. S. 241, 2 Reports, 561, 41 Week. Rep. 659. In this case the court said that the rule allowing waiver and payment of barred debts must be limited to waiver and payment before decree in an administration suit.

In England, before Lord Tenterden's act (1828), which provided in effect that where there are two or more joint executors or administrators, a sufficient acknowledgment or promise by one shall be binding upon all (see English cases, supra, this subdivision), some cases had laid down the rule that one joint executor could not bind his joint executors. To this effect are the cases of M'Culloch v. Dawes, 9 Dowl. & R. 40, 5 L. J. K. B. 56, 30 Revised Rep. 515 (*dictum* per Bayley, J.); Tullock v. Dunn, Ryan & M. 416, 27 Revised Rep. 765, holding that there must be an express promise by all the representatives; and Scholey v. Walton, 12 Mees. & W. 510, 13 L. J. Exch. N. S. 122, 8 Jur. 319 (per Parke, B.).

e. Executors de son tort.

It has been held that an executor *de son tort* cannot, by a promise to pay, toll the statute of limitations as to a debt of the decedent so as to be binding in a suit subsequently brought against him as the rightful administrator. Gibson v. Lowndes, 28 S. C. 285, 5 S. E. 727; Haselden v. Whitesides, 2 Strobh. L. 353. In this connection the court in the latter case said: "When the promise was made by the defendant he was a tort feasor in contemplation of law, and not the legal representative of the estate of the deceased so far as the interests of that estate were concerned." It was also pointed out that the holding had nothing to do with any question as to the liability in actions against executors *de son tort*, or with the personal liability of such an executor upon his promise.

So, in Ontario it has been held that an executor *de son tort* cannot by a part payment waive the statute of limitations as against the lawful personal representative. Cook v. Dodds, 6 Ont. L. Rep. 608. The court said: "The principle upon which a part payment has been held to give a new starting point for the running of the statute is that it is an acknowledgment from which the law raises the implication of a promise to pay the residue of it, and the rule is therefore quite inapplicable, as it seems to me, to a payment by an executor *de son tort;* such an executor is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased only where they are lawful and such as the true representative was bound to perform in the due course of administration."

And in Bolt v. Dawkins, 16 S. C. 198, it was said that no promise, admission, or part payment by an executor *de son tort* can be allowed to have the effect of creating, reviving, or continuing any legal obligation binding on the estate.

And in Grant v. McDonald, 8 Grant, Ch. (U. C.) 468, in holding that an executor *de son tort* cannot, by submission to arbitration, confession of judgment, part payment, or by any other act, give a new start to the statute of limitations, either as against the rightful administrator or the parties beneficially interested in the estate,

Spragge, V. C., said: "It is contended for the claimant that an executor *de son tort* may do all lawful acts which a rightful executor may do. . . . But the character of a rightful executor and of an executor *de son tort* are essentially different; the one lawfully represents the estate; the other only incurs personal responsibility by intermeddling with the estate; that intermeddling is itself wrongful and cannot confer a right. Such lawful acts as a rightful executor is compellable to do an executor *de son tort* may justify, or, more strictly, perhaps may excuse the doing of by himself, and that only, as it appears to me, as limiting the extent of his liability,—thus, being liable to the extent of assets come to his hands, and no further, he may show their application in payment of debts, or delivery over before action brought, to the rightful administrator; but the absence of all right on his part is apparent from this, that to an action against him by the rightful executor he cannot plead even the payment of just debts, but can only show such payment in mitigation of damages. When a creditor receives from him payment of his debt, or sues him to recover it, the creditor does this, because by intermeddling, the executor *de son tort* has made himself liable to pay, or because he is ostensibly representative of the estate; but when the creditor deals with him as entitled to represent the estate, he is bound, I apprehend, to see that he is so entitled, just as a debtor to the estate would be bound to ascertain it before paying his debt to him; as to that portion of the estate which he does not get into his hands, he is a stranger, he has incurred no responsibility in regard to it, and can have acquired no right to represent it; and if upon being sued by a creditor, he and the creditor agreed to refer the claim to arbitration, or if upon being so sued he chose to admit the debt and to confess judgment, in either case it appears to me his acts could have no effect beyond what he had in his hands to administer."

But it has been held that a part payment by an executor *de son tort* waives the statute of limitations to the extent of the assets of the deceased which have come into such executor's hands, where neither the rights of a lawful representative of the deceased nor those of the persons beneficially entitled to the estate are in question. Cook v. Dodds, 6 Ont. L. Rep. 608.

f. Effect of directions in will.

The general rule is that an executor may waive the statute of limitations as to barred debts under authority conferred in the will, even in those jurisdictions which do not permit such a waiver under ordinary circumstances.

Thus, in Texas it has been held that admitting it to be the rule that an executor or administrator cannot waive the statute of limitations as to barred claims, where the testator expressly directs that the executor pay just debts and disregard the statute of limitations except as to interest upon barred claims, a personal representative is not bound to plead the statute of limitations as to barred debts. Campbell v. Shotwell, 51 Tex. 27.

And in the Illinois case of Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 197, although the general rule in Illinois seems to be to the contrary, it was held that payments, made by a personal representative under express authority conferred by will, upon otherwise barred claims, took such claims out of the statute of limitations.

So, in Pennsylvania it has been held that where there is an express direction in a will to pay a barred debt, the personal representative will be protected in paying it. Re Tillion, 15 Pa. Co. Ct. 8.

And in the Mississippi case of Waul v. Kirkman, 25 Miss. 609, it was held that power may be conferred upon an executor by will which will authorize him to make an acknowledgment of a debt sufficient to take it out of the statute of limitations, and that such was the present case. The Mississippi rule is that under ordinary circumstances a personal representative cannot waive the statute of limitations. See supra, II. a, 1 (b).

And in Glassell v. Glassell, 147 Cal. 510, 82 Pac. 42, it was held that where the testator expressly waived the statute of limitations in his will, and directed his executor to pay all obligations notwithstanding the statute of limitations, the executor may waive such statute and pay barred debts. No reference is made in the report of this case to the California statute (see supra, II. a, 2 (a), which expressly prohibits an executor or administrator from waiving the statute of limitations as to barred debts of the decedent.

But the rule allowing provisions of a will to override the general law does not apply to all cases, and this is especially true if the direction in the will is so general as not to show the intention of the testator as regards any particular debt or debts.

Thus, in Williams v. Williams, 15 Lea, 438, the court adhered to the Tennessee rule that a personal representative cannot waive the statute of limitations as to his individual claim against the estate, even though the testator in his will empowered the executors "to pay, if they saw proper, just debts barred by the statute of limitations." The court said: "The provision can only be held to apply to the claims of third parties against the estate, and not to debts or claims in favor of the executors themselves. This would be to make them judges of their own cases. . . . We could not, in view of these well-settled principles, as well as common justice and propriety, construe this clause as embracing the right of the executors to waive the bar of a statute of limitations in their own favor, without a most definite and unmistakable purpose expressed by the maker of the will. No such purpose is seen in the language quoted."

And a provision in a will for the payment of all just debts has been held not to authorize a personal representative to waive the statute of limitations as to a debt which could not otherwise be revived because completely barred at the death of the debtor. Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716.

As to effect of direction in will as to time for adjustment of claims as affected by the statute of nonclaim, see infra, III.

III. Short or nonclaim statutes.

a. In general.

The great weight of authority is to the effect that an executor or administrator cannot waive the so-called short, special, nonclaim, or administration statute of limitations under which claims must be presented, and in some instances prosecuted, within a given time after administration begins. These rulings are generally based upon the ground either that the statute is mandatory, or that there is a distinction between waiver of the general statute of limitations and a special or nonclaim statute in that the former statutes apply to the remedy, and not to the debt which still exists, whereas the special statutes, enacted for the purpose of making a speedy and final distribution of the assets possible, applies to the right which when once barred is forever barred (for a case which points out and discusses this distinction, see Rhodes v. Cannon, — Ark. —, 164 S. W. 752). But this latter view has not been universally adopted, as is shown by the case of Waughop v. Bartlett, 165 Ill. 124, 46 N. E. 197, wherein it was said that failure to file a claim against the estate of a deceased debtor within the time prescribed by the short statute of limitations did not bar the claim itself, but merely the right to claim a distributive share in the inventoried property.

Of course where there is an express statutory or testamentary power to waive the short statute of limitations conferred upon a personal representative, he may exercise such power.

b. Rule denying right to waive.

The general rule that an executor or administrator cannot, in the absence of express authority, waive the failure of a general creditor to present his claim against the estate within the statutory period, is supported by the following cases: Miner v. Aylesworth, 18 Fed. 199; Grimball v. Mastin, 77 Ala. 553; Rhodes v. Cannon, supra; Hicks v. Hicks, — Ark. —, 167 S. W. 95; Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473; Winchell v. Sanger, 73 Conn. 399, 66 L.R.A. 935, 47 Atl. 706 (*semble*); Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 Atl. 1019; Sanderson v. Sanderson, 17 Fla. 820; Stillman v. Young, 16 Ill. 318, holding that the failure of the administrator to plead the special statute of limitations will not bar or preclude the heirs from pleading it on L.R.A.1915B. settlement of the estate; Littlefield v. Eaton, 74 Me. 516, holding that the statute is "a conclusive bar to, and a practical extinguishment of, claims not prosecuted within the time limit; that an administrator cannot waive it, but is bound to plead it; that no promise on his part can revive a claim thus barred, or prevent its barring an action not commenced within the appointed time;" Scott v. Hancock, 13 Mass. 162, holding in effect that an administrator cannot waive the statute as against the heirs and devisees so as to charge the real estate; Brown v. Anderson, 13 Mass. 201, holding that an administrator cannot waive the statute so as to affect the estate; Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80; Thompson v. Brown, 16 Mass. 172; Emerson v. Thompson, 16 Mass. 429; Heard v. Lodge, 20 Pick. 53, 32 Am. Dec. 197 (*dictum*); Lamson v. Schutt, 4 Allen, 360; Waltham Bank v. Wright, 8 Allen, 121 (*dictum*); Wells v. Child, 12 Allen, 333; Bacon v. Pomeroy, 104 Mass. 577; Stebbins v. Scott, 172 Mass. 356, 52 N. E. 535 (*dictum*); Re Hubbard, 185 Mass. 22, 69 N. E. 349 (*dictum*); Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669; Nagle v. Ball, 71 Miss. 333, 13 So. 929; Cockrell v. Seasongood, — Miss. —, 33 So. 77; Wiggins v. Lovering, 9 Mo. 262; Stiles v. Smith, 55 Mo. 363; Vanderpool v. Vanderpool, 48 Mont. 448, 138 Pac. 772; Fitzgerald v. First Nat. Bank, 64 Neb. 260, 89 N. W. 813; Hodgdon v. White, 11 N. H. 208; Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25, cited with approval on subsequent appeal in 49 N. H. 312, holding that the personal representative cannot bind the estate even by an express acknowledgment and promise; Hall v. Woodman, 49 N. H. 295; Brewster v. Brewster, 52 N. H. 52; Judge of Probate v. Ellis, 63 N. H. 366, holding that a personal representative cannot bind the estate even by an express promise; Preston v. Cutter, 64 N. H. 461, 13 Atl. 874; Lewis v. Champion, 40 N. J. Eq. 59; Flynn v. Diefendorf, 51 Hun, 194, 4 N. Y. Supp. 934; Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. Supp. 678, affirmed without opinion in 185 N. Y. 534, 77 N. E. 1187; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Mann v. Redmon, 23 N. D. 508, 137 N. W. 478, holding that a personal representative cannot waive the bar of the statute of nonclaim even though he be the sole heir; Pollock v. Pollock, 2 Ohio C. C. 140, 1 Ohio C. D. 408; Crouse v. Frybarger, 22 Ohio C. C. 315, 12 Ohio C. D. 254; Miller v. Ewing, 68 Ohio St. 176, 67 N. E. 292; Lynch v. Farnell, 24 R. I. 496, 53 Atl. 869, holding that a part payment by the executor did not affect the operation of the statute; Thompson v. Hoxsie, 25 R. I. 377, 55 Atl. 930, holding that since the statute extinguishes the right, instead of merely affecting the remedy, it is imperative, and cannot be waived by the personal representative; Kenyon v. Probate Ct. 27 R. I. 566, 65 Atl. 267; Carney v. Hawkins, 34 R. I. 297, 83 Atl. 327; Brown v. Porter, 7 Humph. 373; Hamner v. Hamner, 3 Head, 398, holding such to be the rule in the ab-

sence of a provision in the will to the contrary—see case as set out, infra; Byrn v. Fleming, 3 Head, 658; Henderson v. Tipton, 88 Tenn. 255, 14 S. W. 380; Fullerton v. Bailey, 17 Utah, 85, 53 Pac. 1020; Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723, 14 Ann. Cas. 926; Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Fields v. Mundy, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343; O'Keefe v. Foster, 5 Wyo. 343, 40 Pac. 525. In Emerson v. Thompson, 16 Mass. 429 (cited supra), the reason assigned for the holding that an executor or administrator cannot waive the statute of nonclaims is that the statute is not for his benefit alone, but for that of the heirs and devisees also, in order to discharge their estates within a reasonable time from the lien for the debts of the deceased.

And it has been held that an administrator or executor cannot prevent the bar of the statute of nonclaim, after it has commenced running, by absenting himself from the state. Branch Bank v. Donelson, 12 Ala. 741; Lowe v. Jones, 15 Ala. 545. And in New Hampshire it has been held that a temporary absence from the state would not suspend or stop the statute of limitations, but that on the other hand the extended absence from the state whereby the presentment of claims within the statutory period is prevented will extend the time limit by the statute. Walker v. Cheever, 39 N. H. 420, holding that the question is whether or not the absence from the state prevented or defeated the exhibition of the claim, so that by reasonable diligence the claimant could not present it.

In Oregon it is expressly provided by statute that if an executor or administrator is a creditor of the estate and his claim is not presented within a certain time it is barred, and cannot be allowed, retained, or recovered. Under this statute, of course, such a claim must be presented. See Farrow v. Nevin, 44 Or. 496, 75 Pac. 711.

And in Ohio it has been held that a personal representative having a claim against his decedent must bring the action within the period prescribed by the short statute of limitations, the same as any other creditor, or else be forever barred thereby. Re Ward, 21 Ohio C. C. 753, 12 Ohio C. D. 44.

c. Instances where waiver allowed.

In Iowa it has been held that a creditor may recover his debt from the estate under a statute allowing equitable relief where claim was not presented because of peculiar circumstances preventing or excusing presentation, although he did not formally present it within the statutory period, where the failure to file it was caused by reliance upon the promise of the administrator to allow and pay it and his statement that it was unnecessary to file it, together with partial payment by the representative. Burroughs v. McLain, 37 Iowa, 189. But in the Massachusetts case of Wells v. Child, 12 Allen, 333, where the statute allowed an L.R.A.1915B. equitable action where the claim was not presented within the period prescribed by the special statute of limitations, "where justice and equity require" relief and the claimant "is not chargeable with culpable neglect," it was held that the equitable relief would not be granted upon a showing that the executor knew of the claim and admitted it to be a valid one, and expressed a wish and intention to pay it out of expected funds, and assured the creditor that no further legal proceedings were necessary upon her part, in reliance upon which representations the claimant failed to sue within the statutory period. And in Colby v. King, 67 Iowa, 458, 25 N. W. 704, a mere unconditional promise by the personal representative to pay a claim was held not to be a peculiar circumstance preventing or excusing proof of the claim sufficient to warrant equitable relief for a failure to do so, especially where not relied upon by the claimant.

And in Massachusetts and New Hampshire it has been held that an executor having a personal claim against his testator is not bound to present such claim to prevent its being barred, but may merely hold it, and that so doing does not bar it. Brown v. Greene, 181 Mass. 109, 92 Am. St. Rep. 404, 63 N. E. 2; McLaughlin v. Newton, 53 N. H. 531.

So, in Florida, where by statute an executor or administrator is, except in insolvent estates, allowed to retain assets sufficient to satisfy his individual claims against the decedent, it has been held that a personal representative is not bound to file his claim with the court or present it to himself to save the operation of the statute of nonclaim. Sanderson v. Sanderson, 17 Fla. 820.

And in Ohio it has been held that a personal representative may waive the statute of nonclaim, the court in Joyce v. Hart, 27 Ohio L. J. 144, saying that there is no difference in Ohio between the general statute of limitations and the nonclaim statute, and that the representative may waive either. But this decision, at least as to the right to waive the general statute of limitations as to barred debts, is erroneous (see supra, II. a, 1 (d)), and the exact contrary has been held with respect to the right to waive the special statute (see Ohio cases set out supra this subdivision, in one of which—Crouse v. Frybarger, 22 Ohio C. C. 315, 12 Ohio C. D. 254—it was expressly criticized).

In Tennessee by statute the personal representative may suspend the running of the short statute of limitations by a special request for delay for a definite period. See Puckett v. James, 2 Humph. 565; Langham v. Baker, 5 Baxt. 701, holding that general requests for delay from time to time or assurances that a debt is good will not suspend the statute; Ricketts v. Ricketts, 4 Lea, 163, holding same as next preceding case; Bates v. Elrod, 13 Lea, 156; Allen v. Shanks, 90 Tenn. 359, 16 S. W. 715; Prewett v. Goodlett, 98 Tenn. 82, 38 S. W. 434;

and Woods v. Woods, 99 Tenn. 50, 41 S. W. 345, holding that deposit of a note with the executor, and his recognition of it in his annual account as a filed claim, do not suspend the running of the statute.

And in New York under a statutory provision that upon failure to adjust a claim it may be referred, it has been held that although a mere offer to refer by an executor or administrator after an unqualified refusal to pay will not waive the short statute of limitations, an agreement in writing to refer, upon which both parties have acted, although never completely carried out, will avoid the statute. National Bank v. Speight, 47 N. Y. 668.

Where the will expressly provides that an individual claim of the executor is to be adjusted without reference to time, the short statute of limitations is rendered ineffective, and such a claim need not be presented within the statutory period. Hamner v. Hamner, 3 Head, 398.

IV. Acts constituting waiver.

a. Acknowledgment or new promise.

1. In general.

Assuming that an executor or administrator may waive the statute, the question will often arise as to whether or not he has done so. The general question as to the sufficiency or insufficiency of certain acts or promises, *e. g.*, a conditional promise, or a promise or acknowledgment to a third person, to constitute a waiver, is not within the scope of this note, except so far as the result may be affected by the fact that the act or promise relied upon was that of an executor or administrator. Some aspects of the general question considered without reference to the representative character of the person whose act or promise is relied upon have been treated in other notes in this series, which will be referred to under the appropriate headings.

The question as to what acts upon the part of a personal representative will amount to or constitute an acknowledgment or new promise sufficient to waive or toll the statute of limitations is one which, in the absence of statutory provision, cannot be answered except in terms so broad as to be of little value. This is of necessity true because of the fact that the decision in each case is, to a large extent, dependent upon the particular facts of such case when construed and applied according to the rules and general statutes of the jurisdiction in which the case arose.

In some jurisdictions, however, the statutes prescribe the form in which a debt due by a deceased person must be acknowledged by the personal representative. See as illustrative the Louisiana Code of Procedure, articles 985, 986, and the statutes set out infra, IV. a, 5. Upon the question as to whether such statutory averments must be followed, there seems to be but one express decision. This was rendered in the Louisiana case of Troendle v. De Bouchel, 33 La. Ann. 753, it being held that an acknowledgment of a debt by a personal representative could be made in ways other than that prescribed in the statute. In the earlier Louisiana case of McAlpin's Succession, 14 La. Ann. 617, the court raised the question, but did not decide it.

2. Necessity that acknowledgment or new promise be voluntary, distinct, and unambiguous.

There seems to be no question but that an acknowledgment or promise by a personal representative, to be sufficient to waive or toll the statute of limitations, must be voluntary, distinct, and unambiguous.

Thus, it has been held that an acknowledgment, to be binding, must be voluntary. Bloodgood v. Bruen, 8 N. Y. 362, holding that an acknowledgment by a personal representative made while being compelled to testify as a witness was not voluntary, and that no promise to pay could be inferred from such an admission.

So it has been held that a new promise or acknowledgment by an executor or administrator, to be sufficient to work a waiver or interruption of the statute of limitations as to a claim against the decedent, must be express and unambiguous. Manson v. Gardiner, 5 Me. 108.

And the court in King v. Rogers, 31 Ont. Rep. 573, laid down the rule that to revive a barred debt there must be a distinct acknowledgment or promise to pay the debt; it being held that a written statement that the creditor ought to look to another (a joint maker) for payment, as such other is doing well, was insufficient. It was said that, although there was some recognition of the debt, there was not such a recognition as amounted to a promise or undertaking to pay it.

And mere silence of a personal representative upon presentation to him of a claim against his decedent has been held not to amount to an acknowledgment sufficient to work a waiver of the statute of limitations. Flemming v. Flemming, 85 N. C. 127.

So it has been held that acknowledgments of the justness of a claim do not constitute a promise or acknowledgment sufficient to waive or toll the statute of limitations. Head v. Manners, 5 J. J. Marsh. 255; Seig v. Acord, 21 Gratt. 365, 8 Am. Rep. 605.

And in Whitehurst v. Dey, 90 N. C. 542, it was held that admission of the correctness of the claim and a verbal promise to pay same did not arrest the running of the statute of limitations, where such acts did not prevent the claimant from suing, and there was no agreement for indulgence.

Nor is an acknowledgment of an indebtedness, made for a special purpose other than a waiver of the statute of limitations, sufficient to work such a waiver. Thus, applying the rule that an acknowledgment, to avoid the statute, must be unqualified and disconnected with any circumstance indicating an intention not to become liable

upon it, it was held in Deyo v. Jones, 19 Wend. 491, that an admission of an indebtedness for a particular or special purpose does not amount to an acknowledgment sufficient to waive or toll the statute of limitations. In this case the executrix agreed that a note given by her testator which was barred by the statute of limitations might be charged against her distributive share in the estate of the payee of the note, and it was held that such consent did not amount to such an acknowledgment as would defeat the operation of the statute so as to permit recovery of the balance of the note in an action against her as executrix.

And see the next following subdivision (IV. a, 3) of this note.

3. Sufficiency of conditional acknowledgment or new promise.

Generally as to new promise accompanied by request to know if creditor is satisfied, see note to Gray v. Day, 43 L.R.A.(N.S.) 535. And as to effect of promise to pay as soon as the promisor can, see note to Benton v. Benton, 27 L.R.A.(N.S.) 300; and as to whether an expression of hope or expectation will constitute a new promise which will toll the statute of limitations, see note to Coe v. Rosene, 38 L.R.A.(N.S.) 577. Upon the general question whether or not an unaccepted offer of compromise will toll the statute of limitations, see the note to Marcum v. Terry, 37 L.R.A.(N.S.) 885.

The weight of authority is to the effect that a conditional acknowledgment or new promise by a personal representative to pay an indebtedness of the estate is not sufficient to work a waiver or tolling of the statute of limitations.

This was the rule laid down in Newhouse v. Redwood, 7 Ala. 598. And in Alabama it was subsequently expressly provided by statute that an unconditional promise in writing only will remove the bar of the statute as to a debt completely barred. Harwood v. Harper, 54 Ala. 659 (Rev. Codes § 2914); Scott v. Ware, 64 Ala. 174 (Code 1876, § 3240).

And in Lampman v. Davis, 1 U. C. Q. B. 179, it was held that an acknowledgment, coupled with a statement that the claimant could not be paid for want of assets, was insufficient to work a waiver of the statute of limitations.

So it has been held that an acknowledgment by an executor, couched in terms which preclude any promise to pay, is not sufficient to waive the statute of limitations as to a debt barred in the debtor's lifetime. Briggs v. Wilson, 5 De G. M. & G. 12, 2 Eq. Rep. 153, 17 Beav. 330, holding insufficient an acknowledgment by the executor that the claim was just, and that he did not dispute it, but was compelled to refuse payment without a court order, the legatees objecting to the payment thereof.

And in Grady v. Wilson, 115 N. C. 344, 44 Am. St. Rep. 461, 20 S. E. 518, it was held that the reply of an administrator to a claimant that it was not necessary to get a lawyer, and that he "would see the judge and do whatever he said," was not conduct which waived the statute of limitations.

But see Chapman v. Dixon, 4 Harr. & J. 527, wherein it was held that an oral declaration of an administrator to a creditor of the decedent, that she would pay all just claims, and promising to pay if the court would pass the account, was a waiver of the statute of limitations. But see Kent v. Wilkinson, 5 Gill & J. 497, holding that where the promise is a qualified one the debt must be proved before the promise can be relied upon.

And see Justice v. Gallert, 131 N. C. 393, 42 S. E. 850, wherein it was held that evidence that an administrator had said both to a claimant and her executor that when he could get the money he would pay the claim, and again to the latter, that he knew his intestate had the money (alleged to have been deposited with him), but that what had become of it was a mystery, was sufficient to take to the jury the questions whether the administrator had admitted the amount due and had promised to pay it so as to remove the bar of the statute of limitations.

In Egan's Succession, Manning, Unrep. Cas. (La.) 399, it was said that while a written acknowledgment upon a claim upon a paper attached thereto by the personal representative would amount to an acknowledgment sufficient to toll the statute of limitations, merely putting the claim in the hands of the representative's attorney would not amount to such an acknowledgment.

4. Necessity for both acknowledgment and new promise.

It has been held that where the debt was barred before the making of the acknowledgment or new promise, there must be both an acknowledgment of the claim and a promise to pay it. Townes v. Ferguson, 20 Ala. 147, holding sufficient to remove the bar the following statement: "The account is a good one, but I cannot pay it before June, at which time I will be receiving money for the hire of negroes."

And an admission of an indebtedness of the estate by the personal representative, without a promise to pay same, was held insufficient to waive the statute of limitations in Watkins v. Washburn, 2 U. C. Q. B. 291; the court saying that in the case of an acknowledgment or promise made by an executor, unlike that of a debtor himself, a promise to pay cannot be implied from a mere admission, and that an express promise is necessary.

And in Oakes v. Mitchell, 15 Me. 360, it was held that an acknowledgment, even if sufficient to imply a promise, will not work a waiver of the bar of the statute of limitations. In this case the court said that a stronger case must be made where acts of an executor or administrator are relied upon as a waiver of the statute of limita-

tions, than is necessary if the debtor himself had made the declaration of the promise.

And following Oakes v. Mitchell, supra, it was held in Bunker v. Athearn, 35 Me. 364, that an acknowledgment by a personal representative of a debt of the decedent, standing alone, was insufficient to waive the statute of limitations.

But it has been held that either a promise to pay, or such an acknowledgment of the debt as will imply a promise to pay, is sufficient to toll the statute of limitations. See Holmes v. Bartlett, 160 Ill. App. 443; and Head v. Manners, 5 J. J. Marsh. 255, holding that a bare acknowledgment of a debt will not take the case out of the statute unless it is reasonably inferable from the acknowledgment that the promisor intends to pay the debt, and that an implied promise to pay a debt cannot be inferred from an implied acknowledgment of the debt. And see Tazewell v. Whittle, 13 Gratt. 329, wherein it was held that, admitting that a personal representative could revive a barred debt, a request by an executor that he be furnished with a statement of a debt, and the furnishing of the same by the creditor, is not a sufficient acknowledgment, even though the executor made no objection to the debt; the rule being that if an executor can waive a barred debt, he can only do so by an express promise, or by such an acknowledgment as plainly implies a promise to pay.

So, in Delaware it has been held that an unqualified and unconditional acknowledgment of a debt is sufficient to constitute a waiver of the statute as to a subsisting debt, and that an express promise to pay is not necessary, as in such case there is an implied promise to pay. Chambers v. Fennemore, 4 Harr. (Del.) 368; Conoway v. Spicer, 5 Harr. (Del.) 425.

5. Necessity for writing.

In the absence of statute the general rule is that an acknowledgment or new promise need not necessarily be in writing. Thus, in the following cases verbal acknowledgments and promises by personal representatives were held sufficient to waive or toll the statute as the case may be: Townes v. Ferguson, 20 Ala. 147 (changed by statute —see infra this subdivision); Pitts v. Wooten, 24 Ala. 474 (changed by statute —see infra this subdivision); Ecker v. First Nat. Bank, 59 Md. 291 (declaration that the executor was at all times ready and willing to pay; that after certain named events he would pay, etc.; and that the claim was just, etc.); Cobham v. Administrators, 3 N. C. (2 Hayw.) 6, 2 Am. Dec. 612 (admission of the testator's signature, with the addition that all the just debts would be paid, held to be a sufficient new promise to revive a barred debt).

But in a number of jurisdictions the rule is governed by statutory provisions which generally require a written acknowledgment or new promise.

Thus, in New Jersey it is provided by statute that an acknowledgment or promise by an executor or administrator to take a case out of the statute of limitations must be in writing. See Hewes v. Hurff, 69 N. J. L. 263, 55 Atl. 275, holding that the expressions used in certain letters written by an executor to a creditor were sufficient acknowledgments within the meaning of the statute.

And in West Virginia it is expressly provided by statute that "no promise except by writing shall take any case out of the operation" of the statute of limitations. See Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26, holding that a personal representative cannot by a "verbal promise" prolong against the decedent's estate the vitality of a debt not yet barred; and Stiles v. Laurel Fork Oil & Coal Co. 47 W. Va. 838, 35 S. E. 986, holding that under this statute the acknowledgment must be in writing, be clear and definite, plainly import a liability to pay, and must not be conditional or made by way of compromise or attempt at settlement.

So, in Massachusetts by express statute (Rev. Stat. chap. 120, §§ 13 et seq.) an acknowledgment to take the debt out of the statute of limitations must be in writing. See Foster v. Starkey, 12 Cush. 324.

And in New York it is provided by statute that an acknowledgment made by a personal representative within the statutory period, to be sufficient to toll the statute, must be in writing and signed by the party to be charged. See Re Kendrick, 3 Dem. 301, 15 Abb. N. C. 189, affirmed in 107 N. Y. 104, 13 N. E. 762; Bucklin v. Chapin, 1 Lans. 443; and McLaren v. McMartin, 36 N. Y. 88, 3 Abb. Pr. N. S. 345, 33 How. Pr. 449.

And that an acknowledgment must be in writing under the Alabama statutes, see Harwood v. Harper, 54 Ala. 659, construing Rev. Code, § 2914; and Scott v. Ware, 64 Ala. 174, construing Code 1876, § 3240.

And that under the Louisiana statutes an acknowledgment of a debt of a deceased person made by his personal representative must be in writing, see Patrick's Succession, 30 La. Ann. 1071. And see Warren v. Childress, 23 La. Ann. 184, wherein it was held, without reference to the statute, that an acknowledgment by an executor or administrator, to be sufficient to toll the statute of limitations, must be in writing. It was also held in the latter case that the acknowledgment of notes held by a creditor of the succession, while it must be in writing, need not be made on the notes themselves, but may be made on a separate piece of paper. So, the execution of a renewal note by a personal representative has been held to interrupt the prescription as to the debt evidenced by the notes. Mansion's Succession, 34 La. Ann. 1247. In Sevier v. Gordon, 21 La. Ann. 373, an acknowledgment written on the back of a promissory note of the decedent by his executor was held to interrupt the statute of limitations. But for a Louisiana case holding that an acknowl-

edgment or new promise need not be in writing, see Walker v. Cruikshank, 23 La. Ann. 252, wherein it was held that a statement to the effect that if the creditor would throw off the interest, the personal representative would pay the claim, was sufficient to interrupt the prescription.

So, in England an acknowledgment by an executor or administrator must be in writing. See Re Macdonald [1897] 2 Ch. 181, 66 L. J. Ch. N. S. 630, 76 L. T. N. S. 713, 45 Week. Rep. 628.

6. To whom acknowledgment or new promise may be made.

Generally as to the person to whom acknowledgment or new promise must be made to toll the statute or remove the bar, see notes to Doran v. Doran, 25 L.R.A. (N.S.) 805, and Girard Trust Co. v. Owen, 33 L.R.A.(N.S.) 262.

The general rule is that an acknowledgment or new promise made by a personal representative to be binding must be to an interested party.

Thus it has been held that an acknowledgment made to a stranger is not sufficient in New York, the rule being that an acknowledgment, to take the case out of the statute, must be made to the creditor, his agent, or some person representing him. Bloodgood v. Bruen, 8 N. Y. 362; Re Kendrick, 107 N. Y. 104, 13 N. E. 672, affirming 3 Dem. 301, 15 Abb. N. C. 189.

And the same has been held to be the rule in Ontario. See King v. Rogers, 31 Ont. Rep. 573.

And applying the rule that an acknowledgment by a personal representative, to waive the statute of limitations, must be to a creditor or his agent, it has been held in England that an acknowledgment to the court was not sufficient. Re Beavan, 81 L. J. Ch. N. S. 113, [1912] 1 Ch. 196, 105 L. T. N. S. 784, holding that setting out a statute-barred debt in the schedule of debts in the revenue affidavit for probate by an executor was not a sufficient acknowledgment. This case overruled on this point Smith v. Poole, 12 Sim. 17, 10 L. J. Ch. N. S. 192, which held that inclusion of a barred claim in an inventory and account filed in the ecclesiastical court on the citation of a third person was a sufficient acknowledgment of the barred debt. But an acknowledgment to the court has been held sufficient to revive a specialty debt under statutes which merely require that the acknowledgment be made or contained in some writing, there being no mention of any necessity for a promise to the party making the claim. Moodie v. Bannister, 4 Drew. 432, 28 L. J. Ch. N. S. 881, 5 Jur. N. S. 402, 7 Week. Rep. 278, holding that the admission of indebtedness on a bond, contained in the answer of the executor of the obligor made in a suit to which the obligee was not a party, was sufficient to take the debt out of the statute.

And in the Pennsylvania Case of Re Bell, 25 Pa. 92, it was held that the inclusion of his individual claim against a decedent's estate, by the personal representative, in the inventory of the estate, did not amount to an acknowledgment sufficient to take the claim out of the statute of limitations.

And in New Jersey it has been held (Everitt, Prosecutor, v. Williams, 45 N. J. L. 140) that the insertion of a debt not yet barred by the statute of limitations, in a representation of debts made by an administrator to the court for the purpose of procuring an order to sell lands and pay debts, was not such an acknowledgment as took the debt out of the statute of limitations.

So, in Washington Market Co. v. Beckley, 4 Mackey, 163, the court, without deciding whether or not an executor or administrator may waive the statute of limitations, held that retention by the personal representative in his administration account of estate money, with the consent of the court, to pay a claim which had been approved and passed by the court but which was barred by the statute, and verification of the account, did not remove the bar of the statute so as to prevent the administrator pleading it in a subsequent action on the claim.

But in Louisiana the rule seems to be fairly well settled that an acknowledgment made in a document connected with the administration of the estate is sufficient to toll the statute. Thus, in Berens v. Boutte, 31 La. Ann. 112, it was held that executors by classifying a claim against the succession as one of its debts, and praying for a sale of property to pay the claim, thereby acknowledged the debt and interrupted the statute. Troendle v. De Bouchel, 33 La. Ann. 753, is to the same effect. And in Maraist v. Guilbeau, 31 La. Ann. 713, it was held that placing a debt on his account by an administrator, and asking for authority to pay it, was an acknowledgment interrupting prescription. Morris v. Cain, 39 La. Ann. 712, 1 So. 797, 2 So. 418, is to the same effect. And in Willis's Succession, 109 La. 281, 33 So. 314, the placing of a debt on his account by an administrator, and the granting of an order to pay it, was held to suspend the operation of the statute. And in Porter v. Hornsby, 32 La. Ann. 337, it was held that the mere filing by an executor of a statement of debts was an acknowledgment which suspended prescription as to such debts.

In McMillan v. Toombs, 74 Ga. 535, it was held that bringing a creditor into an action by cross bill, and alleging that he had an account against the estate, was a sufficient acknowledgment under the Georgia Code to take the debt out of the statute of limitations.

b. Payment.

Generally as to effect of payments upon condition to take a debt out of the bar of the statute of limitations, see note to Gillingham v. Brown, 55 L.R.A. 320.

There seems to be no question but that payment of a debt amounts to a waiver of the statute of limitations, where the executor or administrator, as the case may be, has a right to waive or toll the statute. This is the effect of the decisions in the following cases: Fairfax v. Fairfax, 2 Cranch, C. C. 25, Fed. Cas. No. 4,613; Scott v. Ware, 64 Ala. 174; Payne v. Pusey, 8 Bush, 564; Ducker's Succession, 10 La. Ann. 758; Anderson's Appeal 3 Walk. (Pa.) 497; Kennedy's Appeal, 4 Pa. 149; Lowis v. Rumney, L. R. 4 Eq. 451.

c. Part payment.

Part payment by a personal representative having general authority to pay debts has been held sufficient to waive or toll the statute of limitations where such a representative has authority to so relieve from the statutory bar. Ott v. Flinspach, 143 Ill. App. 61; Holmes v. Bartlett, 160 Ill. App. 443; Quynn v. Carroll, 10 Md. 197 (provided the representative had full knowledge of the account); Semmes v. Magruder, 10 Md. 242; Foster v. Starkey, 12 Cush. 325 (noting that while by express statutory provision an acknowledgment to avoid the statute of limitations must be in writing, the common-law effect of a payment of principle or interest is expressly preserved by Rev. Stat. chap. 120, § 17); Fisher v. Metcalf, 7 Allen, 209 (holding that part payment of a debt made by an administrator of a debtor takes the debt out of the general statute of limitations although no promise is made to pay the balance); Slattery v. Doyle, 180 Mass. 27, 61 N. E. 264, holding same as next preceding case; Heath v. Grenell, 61 Barb. 190; Re Robbins, 7 Misc. 264, 27 N. Y. Supp. 1009; Re Bradley, 25 Misc. 261, 54 N. Y. Supp. 555, affirmed on other grounds in 42 App. Div. 301, 59 N. Y. Supp. 105; Holly v. Gibbons, 176 N. Y. 520, 98 Am. St. Rep. 694, 68 N. E. 889, modified on another point on rehearing in 177 N. Y. 401, 69 N. E. 731.

And in Alabama, prior to the enactment of the Code, partial payment would toll the statute if made before the bar was perfect, or remove the bar if complete. Harwood v. Harper, 54 Ala. 659. And even under the statute a partial payment made before the bar of the statute is complete will prevent the operation of the statute, the part of the debt not paid being withdrawn from the operation thereof. Scott v. Ware, 64 Ala. 174, construing Code 1876, § 3240; Grimball v. Mastin, 77 Ala. 553, construing the same provision. But by the express terms of the Alabama statutes a partial payment will not remove the bar of the statutes where the bar was complete at the time of the part payment. Harwood v. Harper, supra, construing Rev. Code, § 2914; Scott v. Ware, 64 Ala. 174, construing Code 1876, § 3240; Grimball v. Mastin, supra, construing Code 1876, § 3240. And the giving of a bill of exchange for the entire amount of a debt cannot operate as a partial payment of the debt so as to prevent or remove the bar of the statute under the rule allowing the statute to be tolled by a part payment made before the bar was complete. Scott v. Ware, supra.

And it has been held that evidence of a payment need not be in writing in order to toll the statute of limitations. Ott v. Flinspach, 143 Ill. App. 61.

But an unauthorized part payment will not amount to an acknowledgment sufficient to toll the statute of limitations. Cox v. Phelps, 65 Ark. 1, 45 S. W. 990 (statute provided that no claim against the estate could be paid unless probated, and the claim in question had not been approved by the court).

And it has been held that a surrogate's decree establishing an indebtedness and ordering a *pro rata* payment out of the assets of the decedent's estate is not in law a promise on the part of the personal representative to pay the balance so as to toll the statute of limitations. Arnold v. Downing, 11 Barb. 554.

But the giving by an executor of a receipt for a stated amount "on account of services rendered" the decedent "in his lifetime," which amount was a part only of that alleged to be due for such and similar services, has been held to be a part payment sufficient to work a waiver of the statute of limitations. Quynn v. Carroll, 10 Md. 197; Semmes v. Magruder, 10 Md. 242.

d. Failure to plead statute.

The failure or refusal of an executor or administrator to plead the statute of limitations against a debt of the estate has been held to constitute a waiver of a defense offered by it, he having the right to waive the statute. West v. Smith, 8 How. 402, 12 L. ed. 1130, holding such to be the rule under the law of Virginia; Ex parte Perryman, 25 Ala. 79, 60 Am. Dec. 494; Lee v. Colston, 5 T. B. Mon. 238; Payne v. Pusey, 8 Bush, 564; Emerson v. Thompson, 16 Mass. 429; Pursel v. Pursel, 14 N. J. Eq. 514 (so holding in effect); First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Leigh v. Smith, 38 N. C. (3 Ired. Eq.) 442, 42 Am. Dec. 182; Alston v. Trollope, L. R. 2 Eq. 205, 35 Beav. 466, 35 L. J. Ch. N. S. 846, 14 L. T. N. S. 451, 14 Week. Rep. 722; Ex parte Dewdney, 15 Ves. Jr. 479, 2 Rose, 59 note (*dictum*); Castleton v. Fanshaw, 1 Eq. Cas. Abr. 305.

e. Statement of account.

It has been held that the statement of an account by an executor, of an indebtedness of his testator which never before had been ascertained or determined, was sufficient to toll the statute of limitations even though no express promise to pay was made. Watkins v. Washburn, 2 U. C. Q. B. 291.

f. Agreement.

Generally as to effect on running of statute of limitations of agreement not to plead the statute, see notes to Chesapeake & N. R. Co. v. Speakman, 63 L.R.A. 193, and Brown v. Atlantic Coast Line R. Co. 16 L.R.A.(N.S.) 645.

In Lade v. Trill, 11 L. J. Ch. N. S. 102, 6 Jur. 272, it was held that an agreement between the respective executors of two deceased persons, that all accounts between such persons should be settled without reference to the statute of limitations, was valid and enforceable so as to prevent the pleading of the statute against barred items in the accounts.

g. Confession of judgment.

In England it has been held that confession of judgment by a personal representative, in a suit on a barred claim, is a waiver of the statute binding against the estate. Hunter v. Baxter, 3 Giff. 214, 31 L. J. Ch. N. S. 432, 5 L. T. N. S. 46.

And in Woods v. Irwin, 141 Pa. 278, 23 Am. St. Rep. 282, 21 Atl. 603, it was held that an administrator when sued is not bound to plead the statute of limitations, and that a confession of judgment by him if done in good faith is good as against the estate although the dividends of the creditors would be reduced thereby. Re Claghorn, 181 Pa. 600, 59 Am. St. Rep. 680, 37 Atl. 918, is to the same effect.

And in Louisiana confession of judgment by a personal representative on a claim not completely barred by the statute of limitations was held in Mansion's Succession, 34 La. Ann. 1247, to constitute an acknowledgment sufficient to interrupt the running of the statute.

But that an executor *de son tort* cannot waive the statute of limitations by confession of judgment, see Grant v. McDonald, 8 Grant, Ch. (U. C.) 468, as set out and quoted supra, II. e.

V. Effect of waiver.

a. Successor or other executor or administrator.

Where it is held that an executor or administrator may toll or waive the cause of action barred by the statute of limitations, and he does so, his subsequent death does not extinguish the cause of action, as his promise is binding upon his successor. Townes v. Ferguson, 20 Ala. 149; Martin v. Ellerbe, 70 Ala. 326.

So an acknowledgment, new promise, or part payment by an executor sufficient to waive or toll the statute of limitations has been held to be good as against the administrator *de bonis non*. Quynn v. Carroll, 10 Md. 197; Semmes v. Magruder, 10 Md. 242; Emerson v. Thompson, 16 Mass. 429; Braxton v. Harrison, 11 Gratt. 30; Bishop v. Harrison, 2 Leigh, 532.

As to whether a waiver by one of two or more executors or administrators is binding upon those other than the one working the waiver, see supra, II. d, and its several subdivisions.

b. Joint obligors.

It has been held that a partial payment or acknowledgment by an executor or administrator of one of the joint makers of a note, made before the statute has fully run, is not binding upon his surviving promisors. Hathaway v. Haskell, 9 Pick. 42; Holcomb v. Sloan, 39 Mich. 173, holding such to be the rule notwithstanding the surviving promisor advised the exhibition of the note against the estate, upon which exhibition the partial payment had been made; Chrisman v. Irwin, 37 Mo. 169, 90 Am. Dec. 375; Read v. Price [1909] 1 K. B. 577, 78 L. J. K. B. N. S. 504, 100 L. T. N. S. 457, 25 Times L. R. 283 affirmed in [1909] 2 K. B. 724, 78 L. J. K. B. N. S. 1137, 100 L. T. N. S. 60, 25 Times L. R. 701, 17 Ann. Cas. 171.

But in Vernon County use of School Fund v. Stewart, 64 Mo. 408, 27 Am. Rep. 250, it was held that a part payment on a bond, made by the administrator of one of the joint makers before the bar of the statute was complete, prevented the operation of the statute in favor of the other makers. To the same effect is Zervis v. Unnerstall, 29 Mo. App. 474.

c. Bona fide purchasers.

It has been held that the fact that an executor or administrator failed to set up the statute of limitations to a claim against the estate, in consequence of which land of the decedent was sold to pay debts, cannot affect the title of a bona fide purchaser of the land. Friedman v. Shamblin, 117 Ala. 454, 23 So. 821.

d. General creditors.

It would seem that giving to the personal representative the right to waive or toll the statute of limitations necessarily imports that the waiver or toll shall be of binding effect upon the general creditors. The question has been expressly raised, however. Thus it has been held that where a personal representative has the power to waive the statute of limitations, and does so by failing to plead it, such waiver is good against a creditor even though he is not a party to the administration suit. Alston v. Trollope, L. R. 2 Eq. 205, 35 Beav. 466, 35 L. J. Ch. N. S. 846, 14 L. T. N. S. 451, 14 Week. Rep. 722, holding that in such case the court is not bound to disallow a claim so barred and waived.

e. Heirs and devisees.

In most jurisdictions where the question has been adjudicated it is held that an executor or administrator, without express authority, cannot waive or toll the statute of limitations as to a debt of the decedent so as to charge realty devised or inherited. Gilpin v. Plummer, 2 Cranch, C. C. 54, Fed.

Cas. No. 5,451 (holding such to be the rule because of the fact that there is no privity between the representatives and the heirs and devisees); Bond v. Smith, 2 Ala. 660 (holding such to be the rule at least when pleaded by the heirs or devisees); Pollard v. Scears, 28 Ala. 484, 65 Am. Dec. 364; Teague v. Corbitt, 57 Ala. 529; Scott v. Ware, 64 Ala. 174; Steele v. Steele, 64 Ala. 438, 38 Am. Rep. 15; Lee v. Downey, 68 Ala. 98; Grimball v. Mastin, 77 Ala. 553; Trimble v. Fariss, 78 Ala. 260; McDonald v. Carnes, 90 Ala. 147, 7 So. 919; Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26, 34 So. 905; Riser v. Snoddy, 7 Ind. 442, 65 Am. Dec. 740; Jones v. Mitchell, 9 Ky. L. Rep. 858 (holding such to be the rule, at least when pleaded by the heirs or devisees); Payne v. Pusey, 8 Bush, 564 (so held in a proceeding by the administrator to subject the realty to payment of the administrator's individual claim); Grotenkemper v. Bryson, 79 Ky. 353 (holding that an acknowledgment or promise by an executor could do no more than bind the estate in his hands as assets, if the heirs did not themselves object and interpose the plea of the statute); Withers v. Withers, 30 Ky. L. Rep. 1099, 100 S. W. 253 (holding such to be the rule in a proceeding to subject the realty to payment of barred claims); Houck v. Houck, 112 Md. 122, 76 Atl. 581 (holding that an executor cannot, by a waiver of the statute of limitations, bind the estate as against the interests of the heirs or devisees); Thompson v. Brown, 16 Mass. 172; Re O'Rourke, 12 Misc. 248, 34 N. Y. Supp. 45 (*dictum*); Mooers v. White, 6 Johns. Ch. 360 (Johnson v. Beardslee, 15 Johns. 3, which seemingly holds to the contrary, if it so holds, it is not good law in New York); Bevers v. Park, 88 N. C. 456 (holding that the beneficiaries may plead the statute where the personal representative refuses to do so); Brock v. Kirkpatrick, 60 S. C. 322, 85 Am. St. Rep. 847, 38 S. E. 779; Divine v. Miller, 70 S. C. 225, 106 Am. St. Rep. 743, 49 S. E. 479 (holding that a personal representative may toll the statute of limitations as to the personalty only); Peck v. Wheaton, Mart. & Y. 353. This conclusion is generally based upon the fact that since the real estate, except as charged by will or statute, descends directly to the heirs and devisees, the personal representative has no general interest therein, in consequence of which there is no privity between him and the heirs or devisees, in consequence of which he cannot bind them by his acts.

But in New Hampshire it has been held that an executor or administrator may, where the personal assets are not sufficient to pay the just debts of the decedent, waive the statute of limitations as to debts barred during the lifetime of the debtor, provided only that the claims are not so stale as to raise a strong presumption, aside from the statute of limitations, against their validity. Hodgson v. White, 11 N. H. 208. This decision, however, was based in part at least upon the fact that by New Hampshire statutes the real estate of every person stands charged with the payment of his debts, and that the heir has no greater title to the real estate than he has to the personalty, except that if the personal property is sufficient the realty cannot be taken. In this case the court discussed the general question of the right of a personal representative to charge the real estate of the deceased debtor as to claims barred by the statute of limitations as follows: "If we admit the power of the executor or administrator to remove the bar of the statute of limitations in any case by his acknowledgment or promise, we cannot well make a distinction between the personal and real estate, and deny the existence of the power where its exercise may affect the latter, while we admit it if it will affect the personal alone. . . . The payment of demands, where the right of action is barred by the statute, cannot, on any sound principle, be made to depend upon there being a sufficiency of personal estate for their payment. Nor can there be any marshaling of assets for the payment of debts not barred, in the first instance, and for the others afterwards. If the latter are paid, they are to be paid because, notwithstanding the statute, they are still debts, and the administrator has power to recognize and treat them as such; and if they are debts, duly recognized as such by the proper authority charged with the duty of paying the debts, the real estate is liable to their payment in default of a sufficiency of personal, as much as if the statute had never existed. If, however, evidence should be offered to the court tending to show that the demands for the payment of which the administrator desired to sell the real estate had been paid; or if they were so stale that, aside from the statute of limitations, a strong presumption arose against their validity, that would form a sufficient ground upon which the court in its discretion might well refuse to grant a license to sell real estate for their payment."

And again in New Jersey it has been held that an executor may waive the statute of limitations as to barred claims so as to charge the real estate. In so holding the court in First Nat. Bank v. Thompson, 61 N. J. Eq. 188, 48 Atl. 333, among other things said: "The question then is this, where the administrator is unwilling to plead the statute, must he distribute the personalty according to one rule and the realty according to another? It seems to me that he must distribute both species of assets in the same way. If the creditor is entitled to the one, he is also, in the same measure, entitled to the other. Sections 81 and 92 of the orphans' court act provide that the estate, real and personal, in case the same shall be insufficient to pay all his or her debts, shall be distributed among his or her creditors, in proportion to the sums that shall be due to them respectively. The only exception is that the debts which by the act are made preferred shall be first paid. There is in these provisions no hint

that the creditor entitled to a share of the personalty may stand in a different position as to the realty. The very fact that it is the executor or administrator on whom is cast the duty of distribution militates against the notion that the distinction exists. . . . It does not by any means follow that because the heirs, in an action against them, may plead the statute, therefore the administrator must. This would be to assert that in all cases where lands are to be sold the discretion of the executor is taken away, even as to payment out of personalty; but this is manifestly not the law."

And in the English case of Lowis v. Rumney, L. R. 4 Eq. 451, it was held that an executor may, in the exercise of his discretion, waive the statute of limitations and pay a barred debt even though the personal assets are insufficient to pay the debts, and the same would be valid as against the devisees of the real estate upon which other debts were furnished. The court said: "I think it is much to be regretted that the statute did not destroy the debt, instead of merely taking away the remedy for it. The result is that questions constantly arise, and amongst others, whether an executor may not pay a debt barred by lapse of time. I am of opinion that, in the exercise of his discretion, he may do so, and that it does not make the slightest difference whether the personal estate is sufficient or insufficient. If it be insufficient the statute gives the creditor a remedy against the real estate; but that does not interfere with the discretion of the executor." So, in Castleton v. Fanshaw, 1 Eq. Cas. Abr. 305, it was held that the devisees could not compel the executor to plead the statute of limitations to barred claims against the estate. But see to the contrary the early English cases of Briggs v. Wilson, 5 De G. M. & G. 12, 2 Eq. Rep. 153, 17 Beav. 330; Fordham v. Wallis, 10 Hare, 217, 22 L. J. Ch. N. S. 548, 17 Jur. 228, 1 Week. Rep. 118; and Putnam v. Bates, 3 Russ. 188.

And where the debt has become a judgment lien on the real estate in the lifetime of the debtor, and the bar is not completed during such lifetime, it has been held that the executor may keep the debt alive against the heirs and devisees by acknowledgments and new promises. Latimer v. Peterson, 2 Harr. (Del.) 366. In this connection the court said that there was no reason why an executor could not keep alive a judgment which was a lien on the real estate of the debtor at the time of his death, since "were it otherwise no executor could, by payment of interest or part payment of a judgment, save the estate of his testator from a ruinous sale by the creditor. The creditor could grant no indulgence, although applied to by the trustee appointed by law to protect the assets aided by part payments and promises to discharge the whole debt."

f. Personal liability of representative.

The general question of the liability of a personal representative, as for a devastavit, is not covered.

The principle that a waiver of the statute of limitations by a personal representative having a right to so waive does not render him personally liable except where his lawful power is exceeded or abused seems so clear that but few courts have expressly passed upon it. However, there is some authority on the question. Thus it has been held that where an executor or administrator has power to waive the statute of limitations he is entitled to credit for an amount paid by him in satisfaction of a debt as to which the limitation period had expired, and is not personally liable thereof to the estate. Fairfax v. Fairfax, 2 Cranch, C. C. 25, Fed. Cas. No. 4,613; Williams v. Maitland, 36 N. C. (1 Ired. Eq.) 92; Leigh v. Smith, 38 N. C. 442, 42 Am. Dec. 182; Anderson's Appeal, 3 Walk. (Pa.) 497; Kennedy's Appeal, 4 Pa. 149; Ritter's Appeal, 23 Pa. 95; Re Hollingshead, L. R. 37 Ch. Div. 651, 57 L. J. Ch. N. S. 400, 58 L. T. N. S. 758, 36 Week. Rep. 660; Hunter v. Baxter, 3 Giff. 214, 31 L. J. Ch. N. S. 432, 5 L. T. N. S. 46. And the following additional cases lend material support to the above proposition: Payne v. Pusey, 8 Bush. 564; Shreve v. Joyce, 36 N. J. L. 44, 13 Am. Rep. 417.

And a valid waiver or tolling of the statute of limitations by one of two or more personal representatives, while binding upon the estate, does not render his coexecutors personally liable. Shreve v. Joyce, supra; Hammond v. Huntley, 4 Cow. 493.

And in Kansas it has been held that part payment of a note by the administrator of the maker does not cut off the right of the administrator to plead the statute of limitations in an action against himself as original joint guarantor for the balance of the note. Root v. Bradley, 1 Kan. 437; Barnes v. Garvey, 4 Kan. 555.

But an executor or administrator who pays a debt barred by the statute of limitations, he having no right to waive the statute as to such debts, cannot be allowed for the sum so paid in his account. Re Hill, 2 Connoly, 25, 7 N. Y. Supp. 328; Willson v. Willson, 2 Dem. 462; Freeman v. Freeman, 2 Redf. 137; Burnett v. Noble, 5 Redf. 69; Bucklin v. Chapin, 1 Lans. 443; Re Oosterhoudt, 15 Misc. 566, 38 N. Y. Supp. 179; Spicer v. Raplee, 4 App. Div. 471, 38 N. Y. Supp. 806; Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26.

And in Louisiana it has been held that an acknowledgment by an administrator as such sufficient to toll the statute does not—under the rule that prescription is not to be extended and that to induce an implied renunciation the implication must be clear and unequivocal—amount to an individual renunciation. Beatty v. Tete, 9 La. Ann. 131.

And a personal representative is personally liable if he waives the statute of limitations and pays a debt which is unjust or false, or which has been paid, and he can-

not be allowed therefor. Williams v. Maitland, 36 N. C. (1 Ired. Eq.) 92, holding that where an alleged debt is so old that a presumption arises from lapse of time that it has been paid, the personal representative pays it at his peril; Barnawell v. Smith, 58 N. C. (5 Jones, Eq.) 168, holding that a personal representative who makes a payment upon an alleged debt which is so old that the common-law presumption of payment arises does so at the peril of proving that the debt was just and owing. But in connection with the above North Carolina cases, see Halliburton v. Carson, 100 N. C. 99, 6 Am. St. Rep. 565, 5 S. E. 912, wherein it was said that a personal representative is entitled to credit even though the debt was so old as to be presumptively paid.

And it has been held that the only effect of an attempted waiver by an administrator of the bar of the nonclaim statute is to render himself personally liable. Brown v. Anderson, 13 Mass. 201 (holding that the representative was personally liable upon his promise); Kenyon v. Probate Ct. 27 R. I. 566, 65 Atl. 267 (holding that an executor could not be allowed on his account for moneys paid on a claim extinguished because not sued upon within the statutory period); Langham v. Baker, 5 Baxt. 701.

g. Proof of claim.

It has been held that where the promise is a qualified one the creditor must, in order to rely upon it as a waiver, first prove his debt. To this effect is Kent v. Wilkinson, 5 Gill & J. 497, wherein an administrator, in answer to a demand for payment of a debt of the intestate, said that he thought the debt had been paid and that he could produce the receipts; and that if he could not produce the receipts and it was correct, it should be paid.

G. J. C.

ILLINOIS SUPREME COURT.

CHARLES E. ELY
v.
KING-RICHARDSON COMPANY, Plff. in Certiorari.

ROBERT E. TROSPER, JR.,
v.
SAME, Plff. in Certiorari.

BERT E. MANVILLE
v.
SAME, Plff. in Certiorari.

(265 Ill. 148, 106 N. E. 619.)

Equity — accounting — action on contract.

1. Equity has jurisdiction to entertain a bill for accounting, although complainant's claim is based on contract, if the accounts are so complicated that it will be difficult to present the various items to a jury in such manner that they could satisfactorily determine the amount due.

Accounting — clean hands — employees discharged for organizing rival business.

2. Employees working for compensation based on a percentage of sales, who are discharged because of the attempted organization of a rival business, are not prevented from seeking an accounting in equity for money already earned, on the theory that they do not come with clean hands.

Master and servant — percentage compensation — copies of accounts.

3. Employees who were to be compensated on the basis of percentage of sales, and to whom customers' notes representing their share of the profits had been turned over, are entitled to itemized statements of the acounts and copies of correspondence relating to their payment or collection.

Appeal — modification of decree — materiality.

4. A modification by an appellate court of a decree requiring notes belonging to an employee, which had already been delivered to him by his employer, indorsed by another employee whose authority to do so was disputed, to be delivered to the employee without any requirement as to indorsement, so as to require their delivery with an indorsement without recourse, is immaterial.

Costs — evidence taken under void order.

5. The costs of taking evidence under a motion may be taxed against the losing party, although there was no jurisdiction to order it to be taken, if it was pertinent to the issues of the case and was considered on the final hearing, and the taking of it under the motion added nothing to the costs of the case.

Same — appeal — immaterial modification of decree.

6. The costs of an appeal should not be taxed against appellee because of a modification of the decree by the appellate court which is immaterial.

(October 16, 1914.)

Note. — Rights and remedies of employee discharged for cause, where his compensation depended in whole or in part upon the amount of business or profits.

Generally, as to the rights and remedies of a servant discharged for good cause, see note to Von Heyne v. Tompkins, 5 L.R.A. (N.S.) 524.

As to the death of an attorney employed on a contingent fee, or his withdrawal without the client's fault, before a final adjudication or settlement, as affecting compensation, see note to Sargent v. McLeod, 52 L.R.A. (N.S.) 380.

As to the remedy of a wrongfully dis-

CERTIORARI to the Appellate Court, First District, to review judgments modifying decrees of the Circuit Court for Cook County in complainants' favor in consolidated suits for an accounting, for injunction, and for the appointment of a receiver to take over certain unpaid notes and accounts held by defendant for the exclusive use and benefit of complainants. Reversed.

The facts are stated in the opinion.

Messrs. **Boyle, Mott, & Haight** for plaintiff in certiorari.

Messrs. **Alden, Latham, & Young,** for defendants in certiorari:

Equity has jurisdiction where the accounts are too complicated to be taken at law.

James T. Hair Co. v. Daily, 161 Ill. 379, 43 N. E. 1096; Gleason & B. Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143; Channon v. Stewart, 103 Ill. 541; Buel v. Selz, 5 Ill. App. 116; O'Connor v. Spaight, 1 Sch. & Lef. 305; Foley v. Hill, 2 H. L. Cas. 28; Hargrave v. Conroy, 19 N. J. Eq. 281; Harrington v. Churchward, 6 Jur. N. S. 576, 8 Week. Rep. 302, 29 L. J. Ch. N. S. 521; Alpaugh v. Wood, 45 N. J. Eq. 153, 16 Atl. 676.

A court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter.

Cook County v. Davis, 143 Ill. 151, 32 N.

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charged servant by action for damages for breach of contract, see note to Howay v. Going-Northrup Co. 6 L.R.A.(N.S.) 50, and especially the subdivision at page 85, as to the rule where compensation is based on the fruits or profits of the enterprise.

As to the right to a service reward or bonus, of a servant discharged without cause before the stipulated term of service, see note to Zwolanek v. Baker Mfg. Co. 44 L.R.A.(N.S.) 1214.

As to the right to recover in an action for wrongful dismissal, damages for loss of commissions, see note to Laishley v. Goold Bicycle Co. 1 B. R. C. 123.

While no other case like ELY v. KING-RICHARDSON Co. has been found, passing upon the right to an accounting of an employee whose compensation depends upon the amount of business or profits, as affected by misconduct on his part justifying and resulting in his discharge by the employer, it has been said that "extensive as is the application of the principle expressed in the maxim" that he who comes into equity must come with clean hands, "it has certain limitations," of which "the most important is that a party is not barred from relief because of misconduct not connected with the matter in controversy." 16 Cyc. 148. And under this limitation, the decision in ELY v. KING-RICHARDSON Co. seems to be correct, upon the theory, as stated in the opinion that the accounting sought by the plaintiff, being only in reference to the completed business of years preceding that in which the misconduct occurred and the plaintiff was discharged, as to which business the rights of the respective parties were settled,—was not founded in any way upon his wrongful conduct.

As to the rights, generally, of an employee discharged for good cause, where his compensation depended in whole or in part upon the amount of business or profits, it has been held that one employed under an entire and nonseverable contract to work on a stock farm for one year for one half of the net profits of the farm during the term, who has been discharged for good cause before the end of the year, is not entitled to recover anything for his services. Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A.(N.S.) 524, 93 N. W. 901.

And where a traveling salesman was employed for a definite period on a commission basis, having a drawing account of a certain amount per year, payable monthly, with the provision that no payment of any balance of commissions earned by him during the term should be paid to him until the expiration of the contract, the contract is an entire one, and he cannot recover thereunder the unpaid balance of commissions earned, if he is discharged for good cause before the end of the term, even though the remaining portion of the term is comparatively short. Atkinson v. Heine, 134 App. Div. 406, 119 N. Y. Supp. 122.

So, in Huntingdon v. Claffin, 38 N. Y. 182, where it appears that the plaintiff had been employed to sell goods for the defendant for one year, upon a commission of 1 per cent, of which he was to draw $100 per month to live upon, and leave the balance until the end of the year, agreeing to forfeit the balance coming to him if he did not remain until that time; and he was discharged for good cause before the end of the year, but after he had sold goods to the amount of $275,000 and had received the sum of $1,900 on his commissions,—it was held that the plaintiff, by his misconduct, forfeited the balance that was due to him.

And in Paul v. Minneapolis Threshing Mach. Co. 87 Mo. App. 647, which was a suit by an employee discharged for a cause, to recover for services up to the time of his discharge, under a written contract which provided for a certain salary and an additional amount if, at the end of the year, his sales should amount to a certain sum or more, although this additional amount was not involved in the case, the court, while holding that the defendant's answer and cross bill did not allege such affirmative facts as would entitle it, under the evidence, to have the court enforce the rule that the plaintiff was not entitled to recover for the reason of his discharge for cause, said: "It is well-settled law that

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E. 176; Biegler v. Merchants' Loan & T. Co. 164 Ill. 197, 45 N. E. 512; Union School Dist. v. New Union School Dist. 135 Ill. 464, 28 N. E. 49; Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Gleason & B. Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143; Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084; Herrick v. Lynch, 150 Ill. 283, 37 N. E. 221.

The court has jurisdiction to decree the assignment of the accounts and notes to complainants.

Ellsworth v. Miner T. Ames Co. 125 Ill. 223, 17 N. E. 467; Weaver v. Fisher, 110 Ill. 146; Gleason & B. Mfg. Co. v. Hoffman, 168 Ill. 25, 48 N. E. 143; 16 Cyc. 51; Gibbens v. Peeler, 8 Pick. 254; Scarborough v. Scotten, 69 Md. 137, 9 Am. St. Rep. 409, 14 Atl. 704; Benson v. Keller, 37 Or. 120, 60 Pac. 918; Clarke v. White, 12 Pet. 178, 9 L. ed. 1046.

Dunn, J., delivered the opinion of the court:

Three separate bills in chancery were filed in the circuit court of Cook county against the King-Richardson Company praying for an accounting and other relief. Answers were filed, the causes were referred to a master, and a hearing by the chancellor resulted in decrees granting the relief prayed for. The defendant prosecuted appeals to the appellate court for the first district, which modified the decrees. Upon petitions presented by the defendant, writs of certiorari were awarded from this court, and the causes have been consolidated for hearing, the questions in all the cases being identical.

The business of the King-Richardson Company is the publication and sale of books through the agency of canvassers. It maintains an office in Chicago for the sale of its publications. The business of this office was conducted by the three complainants, who were called department managers, all the territory in which such business was carried on being divided among them, and the entire expense of the maintenance of the office and the conduct of the business in Chicago being divided among them in proportion to the amount of their sales. They were employed under separate written contracts which gave to each the control of certain territory and the exclusive right to sell the company's publications therein for the

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when a party has wilfully failed to perform the terms and conditions of his contract, and is discharged by reason thereof, he is not entitled to recover for his services rendered in an action on such contract. . . . In Missouri, the rule is that a party, if he sues on his contract, must show performance in order to recover; he cannot recover in such suit for *quantum meruit*. . . . The rule in this state is that when an employee, employed for a definite time, quits or is discharged for good cause before the expiration of the time fixed by the contract, he cannot recover for services performed."

In Matthews v. Park Bros. & Co. 146 Pa. 384, 23 Atl. 208, where it appears that the plaintiff had been employed for two years, as a roller man in the defendant's plate mill at $1.50 per net sheared ton of plate, the defendant guarantying that the plaintiff's wages should not go below $3,500 per year, it was held merely that the plaintiff's discharge for good cause during the term ended the contract relations between the parties, and that the plaintiff, having been paid up to the time of his discharge, could not recover anything for the remainder of the term.

In Kentucky, however, it has been held that an employee discharged for cause while conducting a store under an agreement that, when the profits arising from the business should equal the amount paid by the employer for the store, the employee should receive a half interest therein, while he cannot recover anything under the contract, has a right, independently of the contract, to a just compensation, on the principles of a *quantum meruit*, for his services actually rendered. Foster v. Watson, 16 B. Mon. 377.

And in McWilliams v. Elder, 52 La. Ann. 995, 27 So. 352, a suit by a discharged employee for compensation, in which case it appears that the compensation for a part, at least, of the plaintiff's services, was to have been a share of the profits of a store which he managed for the defendant, although this fact does not seem to have been considered as material to the decision, it was held that, even if the plaintiff was discharged for cause, he was entitled to the value of his services up to the date of his discharge.

So, in Kentucky, it has also been held that an employee discharged for good cause, whose compensation was to have been a certain share of the profits of the business in which he was engaged, is entitled to the value of his services actually rendered, less the damages, if any, sustained by the employer by reason of the conduct of the employee rendering his discharge necessary, or at least justifiable. Fuqua v. Massie, 95 Ky. 387, 25 S. W. 875.

And in Hildebrand v. American Fine Art Co. 109 Wis. 171, 53 L.R.A. 826, 85 N. W. 268, an action by the administratrix of the estate of a discharged employee, to recover salary alleged to be due and unpaid, in which case it appears that the compensation of the decedent was to have been a certain sum for one year, and in addition a percentage on all orders taken for goods to be furnished by the defendant in excess of a certain value, it was held that an employee discharged for cause can recover on his contract of employment for services rendered up to the time of the discharge, sub-

period of three years, from January 1, 1908, to December 31, 1910. Each agreed to devote his time and attention exclusively to the management and development of the sales of the company's publications upon terms and conditions authorized by it. The duties of each were to employ suitable men as field managers and solicitors of sales; to organize and direct them; to require them to furnish adequate security to cover all money advanced and merchandise shipped to them; to conduct necessary correspondence and keep complete records of their work; to employ and manage the office force employed exclusively in his department; to supervise accounts and co-operate with the auditing department for their prompt collection; to travel in his territory when necessary for the interest of the business; to do all in his power to further the interest of the company, and to follow its instructions in the conduct of his department. The company agreed to pay each of the department managers a salary of $150 a month and necessary traveling expenses when working outside the city of Chicago in connection with the business of his department, and at the end of each calendar year to allow him commissions in addition to his salary and expenses, to be determined by charging him with his salary and personal expense account and all salaries, commissions, duebills, and allowances to all employees in his department, together with 39 per cent of the retail price of all books sold by his department and the actual cost of prospectuses and outfit supplies used therein, and crediting him with all cash receipts from business transacted by his department, plus the credit balance, or less the debit balance, arising from the settlement of the office expense account. In settling this latter account the manager was to be charged with all salaries of stenographers and other office assistants engaged exclusively in the conduct of the business of his department, all stationery, printed matter, office supplies, postage, telegrams, telephone tools, and express used in his department, and that proportion of the total expense of the maintenance of the Chicago office which the net sales of his department bore to the total net sales of the office, and he was to be credited with 9 per cent of the retail price of the total net sales of his department, except for 1908, when he was to be credited

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ject to the employer's right to recoup damages on account of the employee's conduct rendering his discharge necessary.

In Louisiana, an overseer of a plantation whose compensation depends upon the amount of sugar made and cotton raised on the plantation is entitled, upon his discharge for good cause, "to a fair remuneration for the value of his services up to the time of his discharge, in estimating which reference should have been had to the stipulations of the contract; to the probable amount which the defendant [overseer] would have received, had there been no violation of the contract; and to the probable receipts of the plaintiff [employer], had the defendant discharged his duty in every respect." Lambert v. King, 12 La. Ann. 662.

And one employed to manage a plantation for a certain share of the produce, who has been discharged during the year for good cause, is entitled under the agreement to pay for the time of his employment in proportion to the value of the crop; that is, to such portion of the value of the stipulated share of the produce as bears the same ratio to the whole value as the period of time before the discharge bears to the whole year. Jeter v. Penn, 28 La. Ann. 230, 26 Am. Rep. 98.

Where the contract is severable, it seems that the discharged employee is entitled to the compensation earned and payable before the discharge, notwithstanding his misconduct and breach of contract. Thus, an advertising manager who has been discharged for cause, and whose compensation consisted of a certain stipend per week and also a commission upon all advertisements solicited by him, is entitled to receive all compensation earned by him up to the time of his discharge, including the agreed commission upon all advertisements obtained by him, which have been published by the employer either before or after the discharge. Abendpost Co. v. Hertel, 67 Ill. App. 501.

And where one was employed by a corporation as manager of its publishing department for a term of two years, and was to receive as compensation one third of the profits of the department, and at the expiration of the contract one third the value of the stock, copyrights, and plates,—the contract providing that during its continuance settlements were to be made every three months, and one third of the accrued net profits as shown by such settlements should then be paid over to the employee,—and he has been properly discharged for cause, he is entitled to recover one third of the profits, if any, which had accrued to the date when the last settlement ought to have been made, at or prior to his discharge; but all other compensation under the contract was forfeited by his misconduct and lost when he was properly discharged. Peniston v. John Y. Huber Co. 196 Pa. 580, 46 Atl. 934.

In Lee v. Flint, Daily Reg. Dec. 29, 1884, as stated in 3 Brightly N. Y. Dig. 4916, it was held that the plaintiff in an action for an alleged wrongful dismissal, who fails to establish a wrongful dismissal, cannot recover commissions under his contract for services before dismissal, which were not stated or claimed in the complaint, even though they were stated in the bill of particulars.

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with 10 per cent. The manager was entitled to any excess of receipts above the total charges against him, and was to be furnished commission statements not later than October 25th of each year, including accounts to October 1st, and thereafter not later than the twenty-fifth day of each month, showing accounts up to the first day of the same month, until all business of the fiscal year should be closed. Remittances for sales were made directly to the company, and were applied first to the payment of the charges mentioned in the contracts of employment of the department managers. Subsequent collections, as received, were credited to the department managers, and it was the practice of the auditor to give to each of the department managers at the end of each month a check for all money collected from the business in his territory. Some of the accounts prior to July 16, 1910, had been settled by the giving of notes, and these notes had been indorsed by the company's auditor and delivered to the complainants, respectively, and charged to them as if they had received so much money. On July 16, 1910, the complainants were discharged by the company without notice and excluded from its office. The company took possession of the notes mentioned, which were in the desks of the complainants in the company's office. Soon after, the complainants filed these bills for an accounting of the business done prior to 1910, that year not being included because the contracts provided for the accounting in October of each year. Besides the money collected and standing to their credit, the complainants demanded that the notes should be delivered to them as well as the uncollected accounts, and all contracts, surety agreements, and correspondence relating thereto. The decree required the payment by the company, in each case, of the amount of money received by the company and due to the complainant, and also the delivery of the notes and accounts and the contracts and correspondence concerning them. The modification made by the appellate court consisted only in the addition to that part of the decree which required the delivery of the notes to the complainants, of the words, "which notes shall be indorsed 'without recourse,' by the defendants."

Although the complainants' claims were based upon contracts, and there was no trust relation between the parties, it is manifest that the amount of those claims, respectively, could be ascertained only by an investigation of the accounts of the plaintiff in error and the books and papers in its possession, and that the accounts themselves were so complicated that it would be difficult to present the various items to a jury in such a manner as to enable the jurors satisfactorily to determine the amount due. In such case it is well settled in this state that a court of equity has jurisdiction to entertain a bill for an accounting. Miller v. Russell, 224 Ill. 68, 79 N. E. 434; Townsend v. Equitable Life Assur. Soc. 263 Ill. 432, 105 N. E. 324.

It is argued on behalf of the plaintiff in error that the complainants are not entitled to any relief in equity because they do not come into court with clean hands. This contention is based upon the fact that the complainants during the year 1910, while they were in the employ of the plaintiff in error, began the organization of a rival corporation in the same business, under the name "the W. E. Richardson Company," for the purpose of carrying on business in competition with the plaintiff in error. It is claimed that the complainants attempted to induce a number of the employees of the plaintiff in error to enter the employment of the new corporation, and in several cases did induce employees of the plaintiff in error to enter into contracts with the W. E. Richardson Company, which were to take effect before their contracts with the King-Richardson Company expired. It was because of this conduct that the plaintiff in error discharged the complainants in July, 1910. Even if the conduct of the complainants was inconsistent with good faith to their employer, and constituted a breach of their contract, they did not thereby forfeit the compensation which they had before earned. They might be liable for damages for the breaches of their contracts,—perhaps they might be enjoined from pursuing a course of conduct inconsistent with their contract obligations,—but they could not be deprived of their compensation already earned. The accounting sought was only in reference to the business of preceding years, which was completed. The rights of the respective parties as to this business were settled, while no accounting of the business of 1910 was due for several months after the bills were filed. There was nothing unlawful or contrary to good morals or public policy in the original contracts of employment, and there is no reason why the complainants should not have an accounting as to their compensation under them. The maxim that he who comes into equity must do equity cannot deprive the complainants of their right to an accounting which is not founded in any way upon their wrongful conduct.

The notes and accounts arising out of the business for the years prior to 1910

were the property of the plaintiff in error. Their amount, when collected, would be immediately due and payable to the complainants according to the express terms of the contracts; the plaintiff in error having already received all that it was entitled to under the contracts. The contracts contained no express requirement upon the plaintiff in error to collect these notes and accounts. Their only provision in this regard was that the complainant should supervise accounts and co-operate with the auditing department for their prompt collection. Whether the discharge of the complainants was justified or not, whether the severance of the relations between the parties was the result of a wrong on the one side or the other, the carrying out of the terms of the contract in regard to the collection of these debts would be attended with difficulty, and unsatisfactory. The plaintiff in error, having no interest in the collection of the debts, had no incentive to diligence, and the complainants, having no control of the evidence of indebtedness, would be subject to inconvenience in making collections. The complainants were the only persons interested in the collection of the debts, and the plaintiff in error was in reality only an intermediary or conduit through which the money must pass. A court of equity having jurisdiction of the subject-matter of the accounting between the parties under these contracts might have appointed a receiver for the collection of these claims. Since the plaintiff in error, though having the title, was without any substantial interest, it was not inequitable for the court, instead of appointing a receiver, to require the delivery of the property itself to the complainants, who alone were beneficially interested in the proceeds. The notes had already been delivered to them, and the auditor of the plaintiff in error had attempted to indorse them, though his authority to make such indorsement is denied by the plaintiff in error. The decree required the delivery of the notes to the complainants, but did not require any further indorsement of them by the plaintiff in error. The modification of the decree by the appellate court was therefore immaterial. To make the decree effective, it was necessary that the complainants should have access to the itemized statements showing payments on account and correspondence referring to the payment and collection of the accounts, and the court properly required that such statements or correspondence, or copies thereof, should be delivered to the complainants.

Before the filing of the answer the complainants made a motion for an order directing the plaintiff in error to deliver to the complainants the notes and accounts in controversy, or give security for their collection and the payment of the amount collected to the complainants at the termination of the cause. This motion was referred to the master, and a large amount of evidence was taken upon this reference. The motion was never brought to a hearing, and it is insisted that the costs of taking this evidence should not have been taxed against the plaintiff in error, as it was by the decree. There was later a general reference of the cause to the same master, and it was stipulated that the evidence taken on the reference of the motion should stand as evidence under the general reference, and such evidence was considered on the final hearing. It is insisted that the court had no jurisdiction to grant the motion, and that therefore the costs made on the reference of the motion should not be taxed to the plaintiff in error. Whether the court could grant the motion or not, the evidence taken was pertinent to the issues in the cause, and was properly taken and considered in the cause. The taking of it added nothing to the costs in the cause, and the court did not abuse its discretion in taxing all the costs against the plaintiff in error.

The complainants have assigned cross errors on the judgment of the appellate court taxing the costs of the appeal against them. We have held that the modification of the decree by the appellate court was immaterial. The costs should not, therefore, have been adjudged against the appellees there, and their assignment of cross errors will be sustained.

The judgments of the Appellate Court are reversed, and the decrees of the Circuit Court affirmed, the costs of all courts to be paid by the plaintiff in error.

IOWA SUPREME COURT.

SAM SNYDER
v.
H. N. KULESH et al., Appts.

(— Iowa, —, 144 N. W. 306.)

Landlord and tenant — right to use wall for advertising purposes.

The owner of a building who while carrying on the business on the second floor, leases the ground floor, has no prior right to use the front outside wall of the lower story adjoining the stairway lead-

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Note. — Right of tenants to use walls for advertising purposes.

The early cases on the subject of the present note are presented in the note to

ing to his place of business, for advertising purposes, which will enable him to prevent the lessee from placing a sign there.

(December 13, 1913.)

APPEAL by defendants from a judgment of the District Court for Pottawattamie County enjoining them from erecting or painting a sign on one of the walls of a building which they had leased from plaintiff. Reversed.

Statement by **Deemer, J.**:

Suit in equity to enjoin the defendants from erecting or painting a sign on one of the walls of a building which defendants had leased from plaintiff. The trial court granted the relief prayed, and defendants appeal.

Mr. A. W. Askwith, for appellants:

Defendants had the right to paint the contemplated sign on the space in question.

24 Cyc. 1047c; Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; Forbes v. Gorman, 159 Mich. 291, 25 L.R.A. (N.S.) 318, 134 Am. St. Rep. 718, 123 N. W. 1089.

Messrs. Saunders & Stuart, for appellee:

The tenant does not have the right to the use of the outer wall of a building to the exclusion of the landlord, who may place a "for rent" sign thereon.

Whipple v. Gorsuch, 82 Ark. 252, 10 L.R.A.(N.S.) 1133, 101 S. W. 735, 12 Ann. Cas. 38.

Deemer, J., delivered the opinion of the court:

Plaintiff is the owner of a two-story brick and stone building on one of the main streets of Council Bluffs, and in the year 1911 leased the defendants the first floor and basement of the building for the term of two years, with an option on their part to extend the term three years after the expiration of the one created by the lease. The premises were rented for pawnshop, a

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Salinger v. North American Woolen Mills, 39 L.R.A.(N.S.) 350, and the present note is supplementary thereto.

As to the right of tenant to lease wall of building for advertising purposes, see notes in 13 L.R.A.(N.S.) 587, and 25 L.R.A. (N.S.) 318.

As to right to use a party wall for advertising purposes, see note in 16 L.R.A. (N.S.) 434.

As shown in the early note it is quite generally held that, in the absence of express provision to the contrary, a lease of a building or a part thereof for business purposes gives the lessee the exclusive right to the use of the outside walls of that portion of the building covered by his lease, for advertising purposes. To the same effect see Di Marco v. Isaac, 74 Misc. 459, 132 N. Y. Supp. 363; Hope Bros. v. Cowan [1913] 2 Ch. 312, 82 L. J. Ch. N. S. 439, 108 L. T. N. S. 945, 57 Sol. Jo. 559, 29 Times L. R. 520; SNYDER v. KULESH above reported.

In Hope Bros. v. Cowan [1913] 2 Ch. 312, 82 L. J. Ch. N. S. 439, 108 L. T. N. S. 945, 57 Sol. Jo. 559, 29 Times L. R. 520, it was held that a demise of a floor or a room or an office bounded in part by an outside wall includes both sides of the wall in the absence of a provision to the contrary, following Carlisle Café Co. v. Muse, 67 L. J. Ch. N. S. 53, 77 L. T. N. S. 515, 46 Week. Rep. 107, cited in the early note.

Accordingly, it was held that the lessee of an office bounded in part by an outside wall could not be enjoined at the suit of the lessor from placing flower boxes outside the office windows.

In Alfred Peats Co. v. Bradley, 149 N. Y. Supp. 613, it was held that a lease of a part of a single-story building, specifically describing the premises as a store and basement to be used and occupied as a sales room and show room, gives the lessee the exclusive right to use the roof for advertising purposes so as to preclude the lessor from erecting a billboard on the roof or authorizing others to do so. But see Macnair v. Ames, 29 R. I. 45, 68 Atl. 950, 16 Ann. Cas. 1208, set out in the early note.

In Yelloly v. Morley, 27 Times L. R. 20, it was held that a lessor who had only a right of re-entry upon the nonperformance of the covenants, or on nonpayment of rent, had no right to remove election posters from the walls of the building placed there by the tenant, it appearing that the tenant had commited no breach of the covenants.

Reynolds v. Clark, — Del. —, 92 Atl. 873, was an action by the tenant against the landlord for damages for personal injuries alleged to have been caused by the negligence of defendant in placing a small board sign bearing the words "for rent" over the cellar door, without tenant's knowledge, in such manner that in opening the door the sign became unhooked from its fastenings and fell upon the plaintiff's head. The court said: "The defendant as owner and landlord had no right in law to place any signboard on the building, without the knowledge and consent of the plaintiff, the tenant, in such a way as to interfere with the quiet use and enjoyment of said property by the plaintiff."

In Hayman v. Rownd, 82 Neb. 598, 45 L.R.A.(N.S.) 623, 118 N. W. 328, a tenant was enjoined from drilling holes into a brick wall and driving wooden pegs therein for the purpose of attaching a sign, where it appeared such use would cause the brick in that part of the wall to become loose and misplaced, upon the ground that such acts rendered the tenant guilty of waste.

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jewelry, and firearms business. The building fronts on what is known as Broadway street, in Council Bluffs, and the entrance to the front room is near the middle of the building. On either side of the entrance there are plateglass windows, and on the outer side of each of the windows are stone columns, each from 14 to 18 inches wide, made to support the upper story and to hold the front in place. On the west side of the west column is a stairway leading to the upper story, and this stairway is a common one used not only for entrance to the second story of plaintiff's building, but also to the second story of an adjoining one; and one half of this stairway is on plaintiff's property, the column on that side of the building being wholly on plaintiff's lot. Just before the commencement of this action, defendants were about to paint a sign, advertising their business, upon the west column, above described, and had employed a sign painter to paint one, some 16 or 18 inches square, when plaintiff commenced this action to enjoin them from so doing. He claimed that defendants had no right to use the outside of his building, and secured a temporary injunction restraining them from painting any sign on the front of the building. The case was presented to the lower court on the theory that the painting of the sign upon the column would greatly disfigure and damage the same, although in a reply plaintiff alleged that the use of black paint upon the stone column would mar the same, and further pleaded that defendants were proposing to erect or paint their sign for the purpose of injuring him, he being a competitor of theirs in business; and that he sought to use the column as a place for painting a sign of his own.

We are not advised as to the reason why the trial court entered the decree it did; for it certainly could not have been upon the theory that the painting of the sign, which defendants were proposing to put upon the column, would in any way injure, mar, or deface it. The record shows that this paint could easily have been removed from the stone at any time, without leaving any stains thereon. So that there is nothing upon which to base the claim of defacement. Plaintiff, before commencing the suit, said to several people that he rented the inside and not the outside of the building to the defendants, and that they had no right to put a sign upon any of the walls or columns. This may have been the basis of the decree, but it has no support either in fact or in law. The lease covered "the lower floor and shed of the brick building and also the basement," and it was without any reservations or covenants which either expressly or impliedly prohibited the use of the walls or columns of the building in any manner not harmful to them or injurious to the building as a whole. Defendants had the right to reasonably use these columns or the walls of the building, if they were exposed, for the purpose of advertising their business, and should not be restrained from such use, unless it was unusual, unreasonable, or harmful. Lowell v. Strahan, 145 Mass. 1, 1 Am. St. Rep. 422, 12 N. E. 401; Forbes v. Gorman, 159 Mich. 291, 25 L.R.A. (N.S.) 318, 134 Am. St. Rep. 718, 123 N. W. 1089. Indeed, this proposition seems to be so fundamental that no authority need be cited in support thereof.

The lease of the lower floor, which, in the absence of reservation, covers the walls and supporting columns, gave the tenant the right to a reasonable use thereof for the purpose of advertising his business, so long as he did not permanently mar or deface the building; and, conceding *arguendo* that the landlord might use part of the space for the purpose of notifying his customers as to where he might be found, it does not follow that in so doing he might deprive his tenant of the reasonable use of the exposed walls or columns to advertise his own business. The sign which defendants proposed to have painted would not interfere with the landlord's use of it for any legitimate and proper purpose, and if it did we are not prepared to say on this record that plaintiff had a prior and superior right to the use of this column for the purpose of advertising his business. There was a sign over the entrance to the building notifying the public that plaintiff was in business in that building and the character thereof, and, while there is some testimony that defendants were not particular in directing customers to him, this did not deprive them of their right to a reasonable use of the building under the lease.

Plaintiff was not, under the showing made, entitled to a permanent injunction. On the contrary, his petition should have been dismissed.

The decree will therefore be and it is reversed, and the cause remanded.

Weaver, Ch. J., and **Gaynor** and **Withrow**, JJ., concur.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY, Appt.,
v.
ILLINOIS CENTRAL RAILROAD COMPANY.

(— Ky. —, 170 S. W. 171.)

Statute — absence of enacting clause — effect.

A statute without an enacting clause is void where the Constitution provides a form of law which includes such clause.

(November 10, 1914.)

APPEAL by the Commonwealth from a judgment of the Criminal Branch of the Circuit Court for Jefferson County, sustaining a demurrer to an information charging defendant with violation of the 2½-cent fare law. Affirmed.

The facts are stated in the opinion.

Messrs. **James Garnett**, Attorney General, and **Robert T. Caldwell**, Assistant Attorney General, for the Commonwealth:

The enacting clause prescribed by § 62 of the Kentucky Constitution is directory only.

State v. Harris, 47 La. Ann. 386, 17 So. 129; Watson v. Corey, 6 Utah, 150, 21 Pac. 1089; Cape Girardeau v. Riley, 52 Mo. 424, 14 Am. Rep. 427; Ex parte Hudson, 3 Okla. Crim. Rep. 393, 106 Pac. 540, 107 Pac. 735; Swann v. Buck, 40 Miss. 268; McPherson v. Leonard, 29 Md. 377; State

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Note. — Statutes: necessity of enacting clause.

I. In absence of constitutional provision requiring an enacting clause, 1060.
II. Under Constitution requiring an enacting clause.
a. Doctrine that requirement is mandatory.
1. In general, 1060.
2. Entire omission of enacting clause, 1061.
3. Failure to comply exactly with constitutional requirements, 1061.
b. Doctrine that requirement is directory.
1. In general, 1063
2. Entire omission of enacting clause, 1064.
3. Failure to comply exactly with constitutional requirements, 1064.
c. Doctrine of substantial compliance, 1064.
d. Miscellaneous, 1065.

As to conclusiveness of enrolled bill in respect of enacting clause, see note to 40 L.R.A.(N.S.) 1, 30.

I. In absence of constitutional provision requiring an enacting clause.

In the absence of a constitutional requirement of an enacting clause, an act of the legislature is not rendered invalid because of the absence of one. Watson v. Corey, 6 Utah, 150, 21 Pac. 1089.

A bill which omitted the enacting clause was held valid in Ex parte Hudson, 3 Okla. Crim. Rep. 393, 106 Pac. 540, 107 Pac. 735, on the theory that the constitutional provision prescribing the style of bills applied only to initiative and referendum legislation, and not to legislation by the legislature. This case was approved by the supreme court of Oklahoma in Turner v. McCain, 26 Okla. 132, 109 Pac. 821; Mayes v. Pitchford, 26 Okla. 129, 109 Pac. 821.

A constitutional provision that "the style of the laws shall be: 'Be it enacted by the legislature of the state of Texas,'" was held inapplicable to a joint resolution as distinguished from a bill, and therefore a joint resolution which substituted the word "resolved" for the word "enacted" in its enacting clause was not invalid. State v. Delesdenier, 7 Tex. 76. This case was approved in Weekes v. Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544.

On the contrary, even in the absence of a constitutional provision requiring an enacting clause, such a clause has been held a necessity, and an act without invalid, in Seat of Government Case, 1 Wash. Terr. 115. A vigorous dissenting opinion is filed in this case by Wyche, associate justice, taking the position that the enacting clause is not a necessity.

II. Under Constitution requiring an enacting clause.

a. Doctrine that requirement is mandatory.

1. In general.

Under a constitutional provision requiring an enacting clause, the majority of the courts hold that an enacting clause is a necessity, the requirement of such a clause being regarded as mandatory. Burritt v. State Contract Comrs. 120 Ill. 322, 11 N. E. 180; May v. Rice, 91 Ind. 546; People v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450; Sjoberg v. Security Sav. & L. Asso. 73 Minn. 203, 72 Am. St. Rep. 616, 75 N. W. 1116; State ex rel. Chase v. Rogers, 10 Nev. 250, 21 Am. Rep. 738; State v. Patterson, 98 N. C. 660, 4 S. E. 350; State ex rel. Gouge v. Burrow, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809; Montgomery Amusement Co. v. Montgomery Traction Co. 139 Fed. 353, affirmed in 72 C. C. A. 682, 140 Fed. 988.

In Smith v. Jennings, 67 S. C. 324, 45 S. E. 821, such a constitutional provision was held mandatory, but the Constitution itself contained a provision that its provisions should be taken, deemed, and construed to be mandatory and prohibitory, and

ex rel. Gouge v. Burrow, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809; Montgomery Amusement Co. v. Montgomery Traction Co. 139 Fed. 358.

Mr. **J. M. Huffaker** also for the Commonwealth.

Mr. **R. V. Fletcher**, with Messrs. **Trabue, Doolan, & Cox**, for appellee:

Chapter 68, Acts of 1914 (2½-cent fare Law), is void for want of an enacting clause.

Seat of Government Case, 1 Wash. Terr. 115; Cushing, Law & Practice of Legislative Assemblies, 9th ed. p. 850, § 2185, note 2; State ex rel. Chase v. Rogers, 10 Nev. 250, 21 Am. Rep. 738; May v. Rice, 91 Ind. 546; Sjoberg v. Security Sav. & L. Asso. 73 Minn. 203, 72 Am. St. Rep. 616, 75 N. W. 1116; People v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450; State v. Patterson, 98 N. C. 660, 4 S. E. 350.

Nunn, J., delivered the opinion of the court:

The Illinois Central Railroad Company was indicted in the Jefferson circuit court for the offense "of unlawfully and wilfully charging an adult in excess of 2½ cents per mile for the carriage of such" as a passenger. This was alleged to be in violation of chapter 68 of the Acts of the 1914 Session of the General Assembly. To this indictment, the lower court sustained a demurrer, and the commonwealth appeals.

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not merely directory, except where expressly made directory or permissory by its own terms.

The court in Vinsant v. Knox, 27 Ark. 266, expresses itself as of the opinion that a constitutional requirement as to an enacting clause is essential and imperative, but concludes by holding that the requirement must at least be substantially complied with, and where there has been no compliance at all the statute is void.

2. Entire omission of enacting clause.

Consequently, a statute which has no enacting clause is void. Walden v. Whigman, 120 Ga. 646, 48 S. E. 159; People v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450; Sjoberg v. Security Sav. & L. Asso. 73 Minn. 203, 72 Am. St. Rep. 616, 75 N. W. 1116; State v. Patterson, 98 N. C. 660, 4 S. E. 350.

A resolution containing no enacting clause, as required by the Constitution, was held invalid in Collier & C. Lithographing Co. v. Henderson, 18 Colo. 259, 32 Pac. 417, under a constitutional requirement that all laws shall be passed by bills; but there were other grounds upon which this resolution was held invalid, and the omission of the enacting clause is not specially discussed.

It is stated in Mathis v. State, 31 Fla. 291, 12 So. 681, that every act must have the enacting clause provided by the Constitution as indicating its source and authority. The facts with reference to the enactment of the law involved in this case do not clearly appear. The court farther on in the opinion cites with approval Dew v. Cunningham, 28 Ala. 466, 65 Am. Dec. 362, as to which see infra.

A joint resolution containing no enacting clause cannot be given the force and effect of law under a Constitution providing that the enacting clause of every law shall be: "Be it enacted by the legislature of the state of Florida." Re Advisory Opinion to Governor, 43 Fla. 305, 31 So. 348. The resolution in question contained the words, "resolved by the senate, the house of representatives concurring," but there is no discussion as to this form being a substantial compliance, nor as to whether a substantial compliance would meet the requirements.

It is stated in State v. Wright, 14 Or. 365, 12 Pac. 708, that a bill without an enacting clause could not be a law, but a single pen stroke through the words "be it enacted," which was doubtless made surreptitiously by some irresponsible party, and not by authority of the legislative assembly, would not have the effect to render the bill void.

A joint resolution which conflicts with a constitutional provision requiring the style of a legislative act to be: "Be it enacted by the legislature of West Virginia," is void. Boyers v. Crane, 1 W. Va. 176. Apparently, it was urged here that the thing which was sought to be done in this case could not be done by a joint resolution, but must be done by enactment; but this is not made clear from the opinion.

In holding that a resolution did not have the force and effect of law, the court considered the fact that an enacting clause, as required by the Constitution, was omitted. State ex rel. Peyton v. Cunningham, 39 Mont. 197, 103 Pac. 497, 18 Ann. Cas. 705.

Some decisions in which the enacting clause is absent go merely to the extent of holding that at least a substantial compliance is necessary, and there being none the statute is void. Vinsant v. Knox, supra.

3. Failure to comply exactly with constitutional requirements.

Where there is an enacting clause which does not comply in every particular with the constitutional requirements, the view is taken by some courts that a substantial compliance is all that is required. Consequently, if there is a substantial compliance, the statute is valid.

The view is expressed in Ferrell v. Keel, 105 Ark. 380, 151 S. W. 269, that an enacting clause in the style: "Be it enacted by the people of the state of Arkansas," is a substantial compliance with a constitutional requirement that the style shall be:

So much of the chapter as is necessary to illustrate the issue is as follows:

Chapter 68.

"An Act to Establish and Regulate the Maximum Rate of Charges for the Transportation of Passengers by Corporations or Companies Operating or Controlling Railroads within the Boundaries of this State in Part or in Whole.

"Sec. 1. That it shall hereafter be unlawful for any common carrier earning as much or more than $4,000 per year per mile gross, from all sources on its said road, and engaged in the carriage of passengers upon a railroad or railroads, between points in this state, to charge in excess of 2½ cents per mile for the carriage of an adult passenger. . . . "

It will be noticed that the act does not contain an enacting clause. For that reason the lower court sustained the demurrer, holding that the act was null and void, because it is in violation of the following section of the Constitution:

"Sec. 62. Style of Laws—The style of the laws of this commonwealth shall be as follows: 'Be it enacted by the general assembly of the commonwealth of Kentucky.'"

The application of this section of the Constitution is the only question involved in the case. As far as this section is concerned, the question is a new one in Kentucky. Whether it is mandatory, we believe there is nothing novel about it.

"Be it enacted by the general assembly of the state of Arkansas;" and this view is approved in King v. McDowell, 107 Ark. 381, 155 S. W. 501.

Where a joint resolution is a proper method of action by the legislature upon certain matters, an enacting clause to such a resolution using the word "resolved," instead of the word "enacted," in the clause, as required by the Constitution, does not render the joint resolution void, since it is a substantial compliance with the constitutional requirement. Smith v. Jennings, 67 S. C. 324, 45 S. E. 821.

The omission of the words, "the state of," from the enacting clause required by the Constitution, *viz.*, "Be it enacted by the general assembly of the state of Tennessee," is not fatal to the validity of the statute, since the clause with these words omitted is a substantial compliance with that required by the Constitution. It is stated that the sovereign authority imported by these two clauses is the same; that they clothe the act with the same dignity, and are equally efficient to promote uniformity in legislation. It is further stated that it is impossible to point out in the form given in the Constitution any element of governmental authority or shade of human thought which is not contained in the enacting clause of the statute, and that no one can read the latter without being impressed with the fact that the statute purports to be enacted by the general assembly of the state of Tennessee. State ex rel. Gouge v. Burrow, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809.

An enacting clause reading: "Be it enacted by the legislature of the state of Alabama," is a substantial compliance with a clause required by the Constitution reading: "Be it enacted by the legislature of Alabama," since the additional words are but a statement of a legal fact and consequence which the Constitution itself inevitably reads into every act. Montgomery Amusement Co. v. Montgomery Traction Co. 139 Fed. 353, affirmed in 72 C. C. A. 682, 140 Fed. 988.

The *dictum* contained in the case of State v. Harris, 47 La. Ann. 386, 17 So. 129, which was followed in the decision in State v. Cucullu, 110 La. 1087, 35 So. 300, indicates an opinion in accord with the doctrine here discussed, but it is not made plain in the decision that the court intends to hold this constitutional requisite mandatory. See facts in case, infra.

On the other hand, the view is maintained that a literal compliance is necessary, and the statute is void unless such a compliance appears.

The omission of the words "senate and" from the enacting clause of a law, under a constitutional provision requiring that the "enacting clause of every law shall be as follows: The people of the state of Nevada, represented in senate and assembly, do enact as follows, and no law shall be enacted except by bill," is fatal to the validity of the law. State ex rel. Chase v. Rogers, 10 Nev. 250, 21 Am. Rep. 738. It is stated in the opinion that it is not contended that any equivalent words for those missing have been used; that on its face the act purports to have been enacted by the people when represented in the assembly only; that without the concurrence of the senate, the people had no power to enact any law, and therefore the bill is void. The words omitted in this case were important, and it is perhaps going too far to treat the decision as requiring an exact compliance in every particular, but the case places a very strict construction upon this constitutional provision.

It is stated in Montgomery Amusement Co. v. Montgomery Traction Co. supra, that such a constitutional provision is mandatory, and not directory; "that no equivalent words will suffice; and that any departure from the mode prescribed is fatal to the enactment, since, if one departure in style, however slight, is permitted, another must be, and the constitutional policy embodied in the section would soon become without any force whatever." The court held, however, that where there was an addition to the words required by the Constitution, the only possible office or effect of which was to state a constitutional and

Cases of this character are always approached reluctantly and with embarrassment. It is no light thing to question the validity of an act of the general assembly. The policy of this court has been to uphold and enforce their enactments whenever possible, and if it could be done without violence to the Constitution. But it has always conceived it to be its duty to declare a law invalid to the extent that it did not come within constitutional limitations. For a century it has been the accepted law of this commonwealth that all constitutional provisions are mandatory, and at least three of our Constitutions were adopted and accepted by the people with that understanding. The proposition that confronts us here is one that accompanies most every case of this character, and that is whether a matter of expediency shall outweigh the Constitution. We have a piece of remedial legislation, supposedly enacted by the people's representatives in answer to a popular demand; yet it is in plain violation of the Constitution, the most solemn and forceful expression of the will of the whole people. To this document, to its mandates, all legislatures, courts, officials,—mere agents and servants of the people,—and the people themselves, must conform. The meaning of the section is unmistakable, for its terms are simple and easily understood. We repeat that it requires all laws shall be styled: "Be it enacted by the general assembly of the commonwealth of Kentucky."

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legal fact which every court is bound judicially to declare is true of every law enacted, the law enacted would not be declared void because of such superfluous words.

In May v. Rice, 91 Ind. 546, under a constitutional provision that "the style of every law shall be: 'Be it enacted by the general assembly of the state of Indiana,'" a resolution entitled, "Be it resolved by the general assembly of the state of Indiana," was held void. The act of the legislature here in question took the form of a resolution, and the main contention in the case was whether the purpose for which the act had been passed could be effected by resolution, a thing which the court denied.

See Re Advisory Opinion to Governor, 43 Fla. 305, 31 So. 348.

b. Doctrine that requirement is directory.

1. In general.

Some courts, however, hold such a constitutional provision as directory merely.

The rule is firmly established in Maryland that such a constitutional provision is directory merely. The case of McPherson v. Leonard, 29 Md. 377, the first case in this jurisdiction passing upon this question, treated the words omitted merely as being words not of the essence of the enactment, and therefore the use of them as being directory. The doctrine of this case was extended in Postal Teleg. Cable Co. v. State, 110 Md. 608, 73 Atl. 681, to the case of the substitution of a different enacting clause from that required. And in State use of Prince George's County v. Baltimore & O. R. Co. 113 Md. 179, 77 Atl. 433, a case involving the same omission as that involved in McPherson v. Leonard, the entire constitutional provision is treated as directory. It will be noticed that in none of these cases was there an entire omission of the enacting clause. But see Levin v. Hewes, 118 Md. 624, 86 Atl. 233.

In Postal Teleg. Cable Co. v. State, supra, the constitutional provision as to the enacting clause was held directory merely, the court stating that if they were passing on this provision for the first time, they might hesitate to hold that it was not mandatory, especially in view of the conclusions reached by many other courts in construing similar provisions, but this court felt bound by the decision in McPherson v. Leonard, supra, where the court held that the use of the words, "by the general assembly of Maryland," in the enacting clause as required by the Constitution, "Be it enacted by the general assembly of Maryland," was directory merely. The court in the earlier case, however, did not go to the extent of holding that this constitutional provision was directory in whole, but merely that the use of the particular words omitted in this case was directory.

It is stated in Swann v. Buck, 40 Miss. 268, that it is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law; that these conditions being fulfilled, all that is absolutely necessary is expressed; the court thus indicating that if there were no enacting clause at all, the decision in that case might have been different.

It is stated in Cape Girardeau v. Riley, 52 Mo. 424, 14 Am. Rep. 427, that the enacting clause is not of the essence of the law; it furnishes no aid in its construction, and its provisions are as clear and intelligible without it as they are with it; it is not material in indicating by what authority the law was enacted, for, being passed in due form by both houses of the legislature, and properly approved by the governor, no allegation of suspicion attached to it; it comes before the court bearing sufficient evidence that it is really and truly a law.

The Oklahoma criminal court of appeals, after reviewing these decisions in Ex parte Hudson, 3 Okla. Crim. Rep. 393, 106 Pac. 540, 107 Pac. 735, expresses its approval of the holding that such constitutional provisions are merely directory, but rests the decision upon another ground.

The alleged act or law in question is unnamed; it shows no sign of authority; it carries with it no evidence that the general assembly or any other lawmaking power is responsible or answerable for it. The question then is: Can this court, sworn to uphold the Constitution, approve or validate an act which was framed and passed in disregard of a constitutional mandate, wholly wanting in the first essential to its validity? For the sake of expediency, or in answer to an alleged popular demand, can we say that the Constitution is not binding on the general assembly? Or can we override it to the extent of usurping a function of the general assembly and presume to amend a bill, or supply the thing needful? To answer the questions affirmatively is to say that the Constitution is nothing more than a set of suggestions framed for the convenience, not the government, of those living under it, and that it may be accepted or rejected, in part or as a whole, at their pleasure. Such an idea of the Constitution is ridiculous, even repulsive, to all who remember that constitutional government originated in a determination of the people to prevent usurpation of power by their agents, and it made no difference in their determination whether such power be used for oppression or expediency. If this purpose of the people is to be effectuated and their objects attained, then the Constitution, the outgrowth of that purpose, must be held inviolable and every section of it mandatory.

Before proceeding further with the consideration of this question, there is another rule of law to remember; and that is that the courts will not go behind an enrolled bill to impeach or support it, or to ascertain its terms. Vogt v. Beauchamp, 153 Ky. 64, 154 S. W. 393; Duncan v. Combs, 131 Ky. 330, 115 S. W. 222, and the numerous authorities there cited. In the details of legislation leading up to final passage and enrolment prescribed by the Constitution, this court will assume that the general assembly, a co-ordinate branch of government, has complied with all of them. But, even if we had that power to review, the situation is not relieved, for the enrolled bill, as appears in the published acts, is without an enacting clause, and the original bill itself was similarly defective. In this respect the bill as published is in the same condition as when introduced.

We believe a provision similar to this is

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2. Entire omission of enacting clause.

The court in Cape Girardeau v. Riley, supra, holds an act valid although there is an entire omission of the enacting clause, under a constitutional provision requiring the style of the laws of the state to be: "Be it enacted by the general assembly of the state of Missouri as follows." Reliance is placed upon the cases of McPherson v. Leonard and Swann v. Buck, supra, both of which cases involved not an entire omission, but an omission of only a part, and in the latter case the court distinctly stated that the act must show the authority by which it is enacted, thus indicating that this requirement had been met by the clause appended to the statute involved in that case.

An act was sustained in Levin v. Hewes, 118 Md. 624, 86 Atl. 233, where there was an "apparent omission" of an enacting clause for the 2d section of the act, the court relying upon the earlier Maryland cases. Whether there was a complete omission of the enacting clause does not appear.

3. Failure to comply exactly with constitutional requirements.

In Postal Teleg. Cable Co. v. State, supra, the constitutional provision that "the style of all laws of this state shall be: 'Be it enacted by the general assembly of Maryland,'" was held directory merely, and therefore an act which was styled, "Be it enacted by the people of the state of Maryland, represented in the general assembly," was not void because of failure to comply with this constitutional provision.
L.R.A.1915B.

The enacting clause in State use of Prince George's County v. Baltimore & O. R. Co. 113 Md. 179, 77 Atl. 433, omitted the words, "by the general assembly of Maryland," the same omission as was involved in McPherson v. Leonard, supra. The statute was sustained.

An enacting clause in the words, "Resolved by the legislature of the state of Mississippi," is a substantial compliance with the constitutional requirement that "style of their laws shall be: Be it enacted by the legislature of the state of Mississippi." Swann v. Buck, supra.

It is stated in Swann v. Buck, supra, that the word "resolved" is as potent to declare the legislative will as the word "enacted;" it is true that a resolution may or may not take effect as a law, depending upon the occasion and object of its use, it may be resorted to as a vehicle to convey the opinions or wishes of the legislature on any subject without describing any rule of conduct to be observed; but whenever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the state, it becomes a law and will take effect as such notwithstanding the use of the word "resolved" in its style, instead of the word "enacted." The requirement of the Constitution is thereby substantially complied with, and the will of the legislature sufficiently declared.

c. Doctrine of substantial compliance.

Still other cases, without expressing any opinion upon whether the requirement is mandatory or directory, hold that where it

found in the Constitution of nearly every state, and in a number of them this identical question has arisen, and, with perhaps one exception,—Missouri,—their courts have held that the absence of an enacting clause is fatal to a bill. Some few states have upheld bills where there was a substantial or attempted compliance with the provision, but in the case we have here there is neither substantial, attempted, nor pretended compliance. There is no enacting clause at all.

The Minnesota Constitution provides that "the style of all laws of this state shall be: 'Be it enacted by the legislature of the state of Minnesota.'" Const. art. 4, §§ 13.

The case of Sjoberg v. Security Sav. & L. Asso. 73 Minn. 203, 72 Am. St. Rep. 616, 75 N. W. 1116, decided in 1898, involved a bill without an enacting clause. The court held the constitutional provision mandatory, and a statute without any enacting clause void. Reaching that conclusion this language was used: "All written laws, in all times and in all countries, whether in the form of decrees issued by absolute monarchs, or statutes enacted by king and council, or by a representative body, have, as a rule, expressed upon their face the authority by which they were promulgated or enacted. The almost unbroken custom of centuries has been to preface laws with a statement in some form declaring the enacting authority. If such an enacting clause is a mere matter of form, a relic of antiquity, serving no useful purpose, why should the Constitutions of so many of our states require that all laws must have an enacting clause, and prescribe its form. . . . It is not necessary to go to the extent of holding that, in the absence of any constitutional provision on the subject, a statute without an enacting clause would be void. But we do hold that the framers of our Constitution, and the people adopting it, advised by the usages of the past and the wisdom and legal learning of the men who had framed the Constitution for so many other states, regarded an enacting clause in a law as useful, necessary, and proper, and that they therefore anchored in the Constitution a requirement that every law should have an enacting clause, and prescribed the form thereof."

The Constitution of Michigan provides that the style of all laws shall be: "The people of the state of Michigan enact." Const. art. 4, § 48. In the case of People

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has been substantially complied with, the act is valid.

The omission from the enacting clause required by the Constitution, *viz.*, "Be it enacted by the general assembly of the state of Louisiana," of the words, "of the state of Louisiana," does not render the act invalid, since there remains the substance of the enacting words required by the Constitution. State v. Cucullu, 110 La. 1087, 35 So. 300.

There is *dictum* of like effect in State v. Harris, 47 La. Ann. 386, 17 So. 129, approved in State v. Collins, 47 La. Ann. 578, 17 So. 128.

An enactment clause reading: "Be it enacted by the general assembly (section first)," instead of an enacting clause reading: "Section first—Be it enacted by the general assembly of the state of Louisiana," does not render the act unconstitutional. State v. Fore, 131 La. 813, 60 So. 255.

See also subdivision II. a, 3, and II. b, 3, supra.

d. Miscellaneous.

A preamble preceding the enacting clause does not invalidate the law. Barton v. McWhinney, 85 Ind. 487.

The absence of an enacting clause to a bill when it is introduced is not fatal where it is subsequently amended. Powell v. Jackson Common Council, 51 Mich. 129, 16 N. W. 369, as interpreted by the court in People v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450.

But the governor cannot supply the enacting clause before signing the bill. Ibid. L.R.A.1915B.

The publication of an act of the legislature omitting the enacting clause is no publication. Re Swartz, 47 Kan. 157, 27 Pac. 839.

The initiative and referendum amendment to § 1, art. 5, of the Constitution of Arkansas, reserving initiative and referendum powers to the people, and providing that the style of all bills shall be, "Be it enacted by the people of the state of Arkansas," does not abrogate the constitutional provision existing at the time of such amendment providing that the style of all laws shall be, "Be it enacted by the general assembly of the state of Arkansas," and therefore a bill enacted by the legislature containing the latter enacting clause is valid. Ferrell v. Keel, 105 Ark. 380, 151 S. W. 269; Adcock v. Coker, 105 Ark. 210, 151 S. W. 253. A bill containing both of these enacting clauses was sustained in Jackson v. State, 101 Ark. 473, 142 S. W. 1153.

It has been held that the enacting clause need not precede certain enactments.

Thus, where the bill adopting a Code is preceded by the words required by the provision of the Constitution designating the style of the laws, the fact that the Code itself has not the prescribed style is immaterial, since it would be impracticable to make the style precede every law called into force by acts of the legislature, and the style which heads the bill adopting the Code may well be regarded as the style of the laws embraced in it. Dew v. Cunningham, 28 Ala. 466, 65 Am. Dec. 362. This holding is approved in Mathis v. State, 31 Fla. 291, 12 So. 681.

W. A. E.

v. Dettenthaler, 118 Mich. 595, 44 L.R.A. 164, 77 N. W. 450, decided in 1898, the court held that the provision of the Constitution was mandatory, and that a law passed without an enacting clause was invalid.

Section 21, art. 2, of the Constitution of North Carolina, is as follows: "The style of the acts shall be: 'The general assembly of North Carolina do enact.'" In that state a bill was passed defining a criminal offense. There was no enacting clause. In State v. Patterson, 98 N. C. 660, 4 S. E. 350, decided in 1887, the court said that, whenever the Constitution prescribed a particular act or thing to be done in a specified way and manner, "such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete, such thing is not effectual, until done in the way and manner so prescribed. . . . The purpose of thus prescribing an enacting clause—'the style of the acts'—is to establish the act; to give it prominence, uniformity, and certainty; to identify the act of legislation as of the general assembly; to afford evidence of its legislative, statutory nature; and to secure uniformity of identification, and thus prevent inadvertence, possible mistake, and fraud. Such purpose is important of itself, and, as it is of the Constitution, a due observance of it is essential. The manner of the enactment of a statute is of its substance. This is so in the nature of the matter, as well as because the Constitution makes it so."

The court goes on to point out that the legislature cannot enact a verbal expression of its will, and that various details of the enactment, such as authentication, etc., are material and essential. Continuing, the court says: "And for the like and other reasons the enacting clause is likewise essential. . . . The Constitution makes it so; and what authority under the Constitution can be heard to say that it is not important and may be dispensed with?"

The Constitution of Indiana requires the style of every law to be: "Be it enacted by the general assembly of the state of Indiana." Const. art. 4, § 1. By a joint resolution of the two houses a bill was passed to appropriate money. The court held that money could only be appropriated by an enactment,—not by resolution. May v. Rice, 91 Ind. 546, in answer to the contention that the resolution was in effect a law, and that it should be so regarded by simply considering the word "resolved" in the enacting clause, to mean "enacted," and in that way bring the measure within the scope of the constitutional requirement, said: "To say that a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be inforced at all, it must be treated as mandatory. And if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the court should enforce it,"—cited from Cooley on Constitutional Limitations, 5th ed. p. 180. "In this case the language of the Constitution is so plain and emphatic that we need not inquire for reason in its adoption. In such a case, our duty is a plain one, to declare and uphold the Constitution. If we may hold the section under discussion to be directory, it seems to us that, to be consistent, we would be compelled to make a like ruling as to every other section of the Constitution."

The Nevada Constitution provides that "the enacting clause of every law shall be . . . : 'The people of the state of Nevada, represented in senate and assembly, do enact as follows.'" Const. art. 4, § 23.

In State ex rel. Chase v. Rogers, 10 Nev. 250, 21 Am. Rep. 738, decided in 1875, it was held that the omission of the words "senate and" from the enacting clause rendered the act null and void. The opinion makes this significant observation: "Every person at all familiar with the practice of legislative bodies is aware that one of the most common methods adopted to kill a bill and prevent its becoming a law is for a member to move to strike out the enacting clause. If such motion is carried, the bill is lost. Can it be seriously contended that such a bill, with its head cut off, could thereafter by any legislative action become a law? Certainly not. The certificates of the proper officers of the senate and assembly that such an act was passed in their respective houses do not, and could not, impart vitality to any act which, upon its face, failed to express the authority by which it was enacted. . . . This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people in their sovereign capacity to the legislature, requiring that all laws, to be binding upon them, shall, upon their face, express the authority by which they were enacted, and as this act comes to us without such authority appearing upon its face, it is not a law."

In Boyers v. Crane, 1 W. Va. 176, the omission of the enacting clause from a joint resolution adopted by the general assembly

of that state was held to render it absolutely void.

In Burritt v. State Contract Comrs. 120 Ill. 322, 11 N. E. 180, the Illinois court, in considering their constitutional provision that the enacting clause of all bills should read, "Be it enacted by the people," held that there was no substantial compliance with the Constitution in the use of "Resolved by the senate, the house of representatives concurring therein."

The text writers declare the law to be as announced in the cases above cited. Lewis's Sutherland, Stat. Constr. 2d ed. §§ 70, 71; Cushing, Law & Practice of Legislative Assemblies, 9th ed. §§ 2101, 2102. With reference to constitutional requirements, Cushing makes the following comment:

"I. Where enacting words are prescribed, nothing can be a law which is not introduced by those very words, even though others which are equivalent are at the same time used.

"II. Where the enacting words are not prescribed by a constitutional provision, the enacting authority must notwithstanding be stated; and any words which do this to a common understanding are doubtless sufficient; or the words may be prescribed by rule."

In Tennessee the courts have adhered to the rule that constitutional provisions are mandatory, although a bill will not be invalidated where there was a substantial compliance. To illustrate: In State ex rel. Gouge v. Burrow, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809, the supreme court of Tennessee had under consideration a section of the Tennessee Constitution which reads as follows: "Be it enacted by the general assembly of the state of Tennessee." Const. art. 2, § 20. A bill had been passed containing all of this enacting clause except the words "the state of." With reference to this section of the Constitution, the court, in an elaborate discussion of the subject, concludes: "We think this one clearly mandatory, and must be complied with by the legislature in all legislation, important or unimportant, enacted by it; otherwise it will be invalid."

But the court held that the enacting clause of the bill did substantially comply with the mandate of the Constitution, and was therefore valid.

Maryland and Mississippi courts have not required literal compliance. For instance, in Mississippi the Constitution says: "The style of the laws . . . shall be: 'Be it enacted by the legislature of the state of Mississippi.'" Const. 1890, § 56. An act began with these words: "Resolved by the legislature of the state of Mississippi." The court sustained the act, holding that the word "resolved" was equivalent to the word "enact," and that the measure was, in fact, a law, notwithstanding the use of the word "resolved." The court said: "The word 'resolved' is as competent to declare the legislative will as the word 'enact.'"

In Maryland the subject was first disposed of by a divided court in the case of McPherson v. Leonard, 29 Md. 377. The Maryland Constitution provides: "The style of all laws of this state shall be: 'Be it enacted by the general assembly of Maryland.'" Const. art. 3, § 29. The act in question omitted the words "by the general assembly of Maryland." The conclusion of the majority court on that subject is as follows: "Being satisfied that the words 'by the general assembly of Maryland' are not of the essence and substance of a law, but their use directory only to the legislature, we cannot, because of their omission from the enactment, declare the law in question unconstitutional and void."

In the later case of Postal Teleg. Cable Co. v. State, 110 Md. 612, 73 Atl. 681, the McPherson Case was again discussed, but the court refused to overrule it, because "it might therefore do great injustice to those who relied on, and had the right to rely on, a decision of this court, to hold that it had been overruled by a case which in no manner involved the clause in question, and we cannot so hold." But of the constitutional provision and the McPherson Case, the court did say: "If we were passing on this provision for the first time, we might hesitate to hold that it was not mandatory; especially in view of the conclusions reached by many other courts in construing similar provisions. There is certainly much to be said in favor of a strict compliance with a clause in the Constitution which uses such plain, comprehensive language as this one does."

In the Mississippi, Maryland, and Tennessee cases, supra, it will be observed that there was an enacting clause to each bill under consideration. The objection went to the failure *in hæc verba* to use the style prescribed. The courts merely held that a substantial compliance was sufficient. But in the instant case there is absolutely no enacting clause. There is nothing to indicate the source from, or authority by, which the law is proclaimed. There is not even a proclamation using as much as the word "enacted" or the word "resolved," or some other word of that character.

In Oklahoma the Constitution provides: "The style of all bills shall be: 'Be it enacted by the people of the state of Oklahoma.'" Const. art. 5, § 3.

A legislative bill without an enacting

clause was held to be good in Ex parte Hudson, 3 Okla. Crim. Rep. 393, 106 Pac. 540, 107 Pac. 735, but in that state there is a constitutional provision for the enactment of laws directly by the people under what is known as the initiative and referendum. The courrt held that the constitutional provision supra had reference alone to direct legislation by the people, and their laws under the initiative and referendum must be styled in the manner provided by Constitution, but the legislature was under no such restriction.

The Missouri Constitution (Const. art. 4, § 24) has a similar requirement as to enacting clause, and there the legislature is the supreme and only lawmaking power. The supreme court of Missouri has held an act of the legislature is valid which has no enacting clause at all. Cape Girardeau v. Riley, 52 Mo. 424, 14 Am. Rep. 427. It based its decision in part on a previous decision of the Missouri court in respect to the validity of writs issued. By one section of the Missouri Constitution it was provided that "all writs shall run in the name of the state." Const. art. 6, § 38. The Missouri court was committed to the doctrine that such a provision in the Constitution was directory merely, and not mandatory, for it had held that a writ was valid, although not running in the name of the state. Exactly the contrary has been the ruling in Kentucky. Section 5, art. 4, of the third Constitution, and § 123 of the present Constitution, provide: "The style of process shall be: 'The commonwealth of Kentucky.'"

In Yeager v. Groves, 78 Ky. 278, this court held invalid a writ of attachment which did not run in the name of the commonwealth of Kentucky, although signed by an officer with power to issue. What was then said with reference to the application of that provision of our Constitution is applicable to the case at hand: "Judicial process is but the command of the sovereign by whose authority the tribunal out of which it issues was established, commanding the person or officer to whom it is directed, or who is authorized to execute it, to do certain acts therein specified, and it is therefore appropriate that such process shall run in the name of the government. But whether appropriate or necessary or not, the Constitution requires it, and what that instrument requires should be done without hesitation or inquiry into the question whether, abstractly considered, the thing required is essential or not. The clerk of a court has no power to command either officers or private persons. His only authority is to issue the command of the commonwealth in those cases in which he has been authorized to use the name of the commonwealth. He is the mere agent of government, with authority to act for it and in its name in issuing judicial process, and he has no more authority to issue such process in his own name than a private person has."

The basis of the Missouri court's opinion destroys its value as a precedent in this state.

Certainly there is no longer room for doubt as to the effect of all provisions of the Constitution of this state. By common consent they are deemed mandatory, and, as stated in a recent opinion, perhaps one hundred cases touching on this subject have been written, but in no one of them has there been any departure from the principle that they are mandatory, and that whenever an act of the legislature is incompatible with the Constitution, there is no alternative for the court to pursue but to declare that fact and pronounce the act inoperative and void. This uniformity of opinion makes it quite unnecessary to cite or make quotations from the long list of cases in Kentucky. Perhaps the first was Bliss v. Com. 2 Litt. (Ky.) 90, 13 Am. Dec. 251. And the most recent are McCreary v. Speer, 156 Ky. 783, 162 S. W. 99, and Penitentiary Comrs. v. Spencer, 159 Ky. 255, 166 S. W. 1017. A reference to the case of Varney v. Justice, 86 Ky. 596, 6 S. W. 457, will serve to illustrate the rule in Kentucky, and from this case we quote: "The Constitution of the state was adopted by the people of the state as the fundamental law of the state. This fundamental law was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it. It was intended by the people that all departments of the state government should shape their conduct by this fundamental law. Its every section was doubtless regarded by the people adopting it as of vital importance, and worthy to become a part and parcel of the constitutional form of government, by which the governors as well as the governed were to be governed. Its very mandate was intended to be paramount authority to all persons holding official trusts, in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be ingrafted in it; but each section and each article was solemnly weighed and considered, and found to be essential to the form of constitutional government adopted. Whenever the language used is prohibitory, it was intended to be a positive and unequivocal negation. Whenever the language contains a grant of power, it was intended as a mandate. . . .

Whenever the language gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed, and in no other manner. It is an instrument of words, granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit except the spirit to be found in them. To say that these words are directory merely is to license a violation of the instrument every day and every hour. To preserve the instrument inviolate, we must regard its words, except when expressly permissive, as mandatory, as breathing the spirit of command."

By an enacting clause, the makers of the Constitution intended that the general assembly should make its impress or seal, as it were, upon each enactment for the sake of identity, and to assume and show responsibility. While the Constitution makes this a necessity, it did not originate it. The custom is in use practically everywhere, and is as old as parlimentary government, as old as kings' decrees, and even they borrowed it. The decrees of Cyrus, King of Persia, which Holy Writ records, were not the first to be prefaced with a statement of authority. The law was delivered to Moses in the name of the Great I Am, and the prologue to the Great Commandments is no less majestic and impelling. But, whether these edicts and commands be promulgated by the Supreme Ruler or by petty kings, or by the sovereign people themselves, they have always begun with some such form as an evidence of power and authority. It may be that in these days some believe the custom useless, and that the section of the Constitution is a relic of antiquity; that it is simply a high-sounding phrase, empty and meaningless, and therefore should be ignored. It may be that some believe an observance of this requirement is not nearly so important or valuable to the people as the present benefits offered in the body of a bill, and they are willing to forego one to acquire the other, but such a thought "makes us rather bear those ills we have, than fly to others that we know not of." It is certain that neither this court nor the legislature—creatures of the Constitution and sworn to uphold it—can afford to ignore or deal lightly with any section of it. Neither can we say, as for one hundred years this court has steadfastly refused to say, that constitutional provisions are directory, or that the section in question is nothing more than a suggestion of form for drafting a bill. If we so hold as to that section, then we may as to another, and another, and of every other section in it, with the result that none of it will amount to more than a suggestion to people, courts, legislatures, and executives, having no binding or mandatory effect upon any of them, so that they may proceed or no, as they please, without let or hindrance. Such a state of affairs is anarchy,—nothing less. The people by their Constitution have set these limitations within which their respresentatives, officers, and servants must act. The very fact that the limitations are set forth in specific terms is sufficient evidence of their importance. No creature of the Constitution has power to question its authority, or to hold inoperative any section or provision of it. As legislation is needed, whether remedial or restrictive, the general assembly should act. When their acts are within the constitutional limitations, they become the law of the commonwealth. There is no other power of enactment. If from a bill an essential is omitted, they alone can supply it. This court can neither amend nor enact. The bill in question is not complete; it does not meet the plain constitutional demand. Without an enacting clause it is void.

The judgment of the lower court is therefore affirmed.

MISSISSIPPI SUPREME COURT.

BLEWETT LEE, Appt.,
v.
EDWIN McMORRIES, Trustee.

(— Miss. —, 66 So. 278.)

Vendor and purchaser — conveyance for support — lien.

No implied equitable lien exists upon real estate conveyed in consideration of support to be furnished the grantor, to enforce performance of the consideration.

(November 2, 1914.)

APPEAL by defendant from a decree of the Chancery Court for Lauderdale County fixing a lien on property paramount to a deed of trust held by him in a suit for the cancelation of the deed. Reversed.

The facts are stated in the opinion.

Mr. C. D. Christian, for appellant:

A vendor's lien in favor of the grantor does not exist.

39 Cyc. 1791, 1792; Abbott v. Sanders, 80 Vt. 179, 13 L.R.A.(N.S.) 725, 130 Am.

Note. — As to the rights and remedies of the parties to a conveyance in consideration of an agreement to support the grantor, including the question of an implied equitable lien, see various references in the footnote appended to Grant v. Swank, ante, 881.

St. Rep. 974, 66 Atl. 1032, 12 Ann. Cas. 898; Griffin v. Byrd, 74 Miss. 32, 19 So. 717.

Defendant took a superior lien to Mrs. Daly, for the reason that she had no lien against the land, but simply a right of action against Mrs. McCarthy for damages for nonsupport which was purely personal against Mrs. McCarthy, and could only be enforced against her by a suit on her undertaking, and bound no party dealing with the property conveyed until after suit filed and *lis pendens* notice given.

Mayer v. Swift, 73 Tex. 367, 11 S. W. 378; Teague v. Teague, 22 Tex. Civ. App. 443, 54 S. W. 632; Prusiecke v. Ramzinski, — Tex. Civ. App. —, 81 S. W. 771; Thurmond v. Thurmond, — Tex. Civ. App. —, 87 S. W. 878; Gardner v. Knight, 124 Ala. 273, 27 So. 298; Brand v. Power, 110 Ga. 522, 36 S. E. 53; Wood v. Owen, 133 Ga. 751, 66 S. E. 951; Lindsey v. Lindsey, 62 Ga. 546; Murray v. King, 42 N. C. (7 Ired. Eq.) 19; Hart v. Dougherty, 51 N. C. (6 Jones, L.) 86.

Messrs. **Sams & McCall** and **Neville & Stone** for appellee.

Reed, J., delivered the opinion of the court:

Mrs. Annie Daly, an elderly lady, on July 10, 1909, executed a deed conveying to her granddaughter, Miss Annie Louis Foley, certain real estate in the city of Meridian. The consideration is stated in the deed in the following words:

"Whereas, my granddaughter, Annie Louis Foley, has for a long time devoted herself to the affectionate care of me in sickness and in health, and in further consideration that she is to take me to the home hereinafter described and to care for me, as she has heretofore done, until I die, and in further consideration of the love and affection, I bear to said granddaughter, I hereby sell, alien, convey and warrant. . . ."

Miss Foley afterwards intermarried with J. G. McCarthy. On July 13, 1910, Mrs. McCarthy and her husband executed a deed of trust on the real estate conveyed by Mrs. Daly, to the Union Bank & Trust Company, as trustee, to secure to appellant, Blewett Lee, a loan evidenced by their promissory note in his favor. On September 1, 1910, Mrs. Daly executed an instrument of writing whereby she conveyed to appellee, Edwin McMorries, as trustee, her entire estate, real, personal and mixed, of whatever description and wherever situated, empowering him generally to collect all amounts due her, and control and manage her property, and particularly to enter such proceedings as he might deem best, to recover and assert rights to the property which she had conveyed to her granddaughter. Appellee, on December 20, 1910, filed his bill of complaint, and later an amended bill, averring that there had been a failure of consideration in the deed from Mrs. Daly to Mrs. McCarthy, in that Mrs. McCarthy had not carried out the stipulation in the deed that she should support Mrs. Daly. Mrs. McCarthy, the Union Bank & Trust Company, and appellant, Blewett Lee, were made parties defendant. Appellee prayed that the deed from Mrs. Daly to Mrs. McCarthy, dated July 10, 1909, and the deed of trust from Mrs. McCarthy and husband to secure the loan from appellant, should be canceled and held for naught, and that the title to the real estate should be revested in him. He further prayed that if he had not asked for proper relief, a charge should be fixed upon the real estate for the support and maintenance of Mrs. Daly to the extent of $100 per month and such charge made a lien. A demurrer to the amended bill was overruled. The case then proceeded to trial upon answer and proof. The chancellor, on final hearing, decreed that Mrs. McCarthy had breached the deed by failing to comply with the covenants thereof, and that Mrs. Daly suffered damages to the extent $1,200, for which a personal decree was given. He refused to cancel the deed, but decreed a first and paramount lien on the property for the payment of the amount of the personal decree. From this action of the chancellor, appellant prosecutes this appeal.

In the case of Dixon v. Milling, 102 Miss. 449, 43 L.R.A.(N.S.) 916, 59 So. 804, this court held that "failure to furnish support in accordance with a promise which becomes the consideration for a deed absolute in form is not sufficient to support a suit for its cancelation."

The question for our decision in this case is, Did Mrs. Daly, the grantor, have a lien upon the real estate she conveyed, to secure such amount as might be required for support provided for in the consideration of her deed?

It has been held that there is not an implied equitable lien in favor of a grantor of real estate to secure a consideration therefor, which is an agreement to support the grantor during life. The reason for this seems to be that the charge is too uncertain and indefinite in character.

Discussing the requisites, extent, and effect of such lien, Mr. Pomeroy, in his Equity Jurisprudence, vol. 3, 3d ed. § 1251, says:

"The grantor's lien, wherever recognized, is only permitted as a security for the unpaid purchase price, and not for any other indebtedness nor liability. There must be a certain, ascertained, absolute debt owing

for the purchase price; the lien does not exist in behalf of any uncertain, contingent, or unliquidated demand."

In the case of Arlin v. Brown, 44 N. H. 102, it was decided that no lien would exist where the only consideration for the conveyance is the agreement of the vendee to support and maintain the vendor during the life of such vendor, and Judge Sargent, delivering the opinion of the court, said: "Where it appears that the consideration of a conveyance is that the vendee shall enter into covenants to do certain things, it has been held that there is no lien. Clarke v. Royle, 3 Sim. 499, 30 Revised Rep. 193; Parrott v. Sweetland, 3 Myl. & K. 655. This is upon the ground that the sale is made, not for a sum of money, but for a security of a different kind, which security itself is the consideration, and the party having received that has been paid all that he contracted for. Buckland v. Pocknell, 13 Sim. 406; Dixon v. Gayfere, 17 Beav. 421, 23 L. J. Ch. N. S. 60, 21 Beav. 118, 1 De G. & J. 655, 27 L. J. Ch. N. S. 148, 3 Jur. N. S. 1157. This principle is held in Brawley v. Catron, 8 Leigh, 522, 528, where it is held that this lien will not be given by a court of equity as a security for unliquidated and uncertain damages, and will therefore not exist where the consideration of the sale is an engagement to support the vendor during his life."

It was decided in the case of Peters v. Tunell, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867, that there would be no implied equitable lien to secure the performance of a consideration which is an agreement to support the grantor during life. We quote from the opinion in this case as follows: "It is in accordance with what is deemed to be the greater weight of authority that a vendor of real property is not entitled to an implied equitable lien to secure the performance of the consideration when that is of such a nature, as is that in this case, that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it."

In Burroughs v. Burroughs, 164 Ala. 329, 28 L.R.A.(N.S.) 607, 137 Am. St. Rep. 59, 50 So. 1025, 20 Ann. Cas. 926, it was held that a lien did not exist where the consideration for the conveyance of land is an agreement to support the grantor during life. Judge McClellan, delivering the opinion of the court in that case, said: "We think there can be no doubt that one essential condition to the creation of a vendor's lien is that there is a definite, 'ascertained, absolute debt, owing alone for the purchase price of the land conveyed;' on the contrary, that no such lien arises where the consideration for the conveyance is an uncertain, indefinite, contingent demand."

Mrs. Daly, the grantor, was not entitled to an equitable vendor's lien upon the land she conveyed, to secure the amount required for her support. Such amount was unliquidated. It was uncertain and contingent. It was not an absolute, certain debt owing for the purchase price. It was indefinite in character. The chancellor erred in fixing the lien on the property.

Reversed and remanded.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARY J. ROBINSON
v.
SAMUEL D. ROBINSON.

(— N. J. —, 92 Atl. 94.)

Appeal — divorce — provision for alimony — effect.

1. Every instalment of permanent alimony paid by a husband to his wife under a final decree therefor in the court of chancery would be in execution of the decree *pro tanto*, the result being that any such payment, pending appeal, would be an impairment of the subject of the appeal to that extent or degree, and also an invasion of the appellant's right to have his property preserved, and not diminished, during the contest in this court, and to protection from this he is entitled. The course which, as thus indicated, is required for the preservation of the rights of the appellant is even more fundamentally required in order that the jurisdiction of the appellate court may not be destroyed or impaired.

Headnotes by Walker, C.

Note. — Appeal as affecting decree for permanent alimony.

The effect upon a decree for permanent alimony of an appeal therefrom is now largely governed by statutory provisions, the majority of which require the filing of an appeal or supersedeas bond as a condition precedent to the staying of the judgment. Of course, to stay enforcement of a decree for permanent alimony in such jurisdictions, compliance with the statutory provision is necessary. But in some jurisdictions the taking of an appeal in itself works a stay of execution of the judgment or decree pending the appeal therefrom.

ROBINSON v. ROBINSON is the only case disclosed by an extended search wherein questions have been raised as to the effect of enforcement of a decree for permanent alimony pending appeal as impairing the subject of the appeal or as destroying the jurisdiction of the appellate court.

But the courts of a number of jurisdictions have considered the effect and appli-

Same — award by appellate court.

2. This court has the power to award alimony pending an appeal; that is, alimony *pendente lite*. That jurisdiction is firmly established. But an application to enforce a final decree for permanent alimony pending an appeal is not an application for alimony *pendente lite*, which may be awarded here, or the parties remitted to the court of chancery to make application there.

(October 10, 1914.)

MOTION by appellee for an order permitting the Court of Chancery to enforce pending appeal a decree directing appellant in a divorce proceeding to pay to her a certain amount weekly for her support and maintenance. Denied.

The facts are stated in the opinion.

Mr. Eli H. Chandler for the motion.

Mr. U. G. Styron opposed.

Walker, C., delivered the opinion of the court:

This is a suit for maintenance. The defense was that the parties are not husband and wife. That issue was decided adversely to the defendant in the court below, and has been brought to this court for review. The final decree establishes the marital status of the parties, and directs the defendant to pay to the complainant, as his wife, $5 per week for her support and maintenance. The defendant appealed from the decree in chancery, and refuses to make the weekly payments as ordered. Application was made to the court of chancery by the complainant for an order to commit the defendant for contempt for his refusal to obey the decree. On the return of an order to show cause in that court it was established that the defendant was able to make the payments ordered, but that he resisted doing so upon the ground that his appeal operated to stay the execution of the decree. The court of chancery declined to adjudge the defendant in contempt in the absence of an order of this court permitting that court to enforce its decree pending appeal.

Counsel for defendant appellant, the complainant here, relies upon Ashby v. Yetter, 78 N. J. Eq. 173, 78 Atl. 799, and contends that upon the authority of that case the court of chancery has the power to enforce its decree, especially so by leave of this court, pending the determination of the appeal. We think that counsel has misconceived the scope of the decision in Ashby v. Yetter. One of the rules concerning proceedings in the court of chancery pending an appeal to this court is thus stated by the vice chancellor in that case at page 188 of 78 N. J. Eq. (which is incorporated in the first syllabus at page 173): "Pending an appeal from an order or decree of the court of chancery, application may be made either to the court of errors and appeals or to the court of chancery for leave to execute the order or decree of the chancery court so

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cability of various statutes and the effect of compliance therewith by the appellant.

Thus, it has been held that where the statutes provided that when an appeal shall be taken in a divorce case the appellate court shall be possessed of the whole case as fully as was the lower court, the trial being *de novo*, the decree appealed from is suspended during final judgment, and permanent alimony granted by the lower court is not available. Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885.

And in New York an appeal from an order granting separation and permanent alimony payable in instalments has been held to stay the proceeding on the judgment pending the appeal, where the appellant entered into an undertaking to secure such alimony as might accrue pending the appeal, pursuant to Code Civ. Proc. § 1732, which provides in part that where a judgment or order directs the payment of money in fixed instalments the undertaking must be to the effect that the appellant will pay each instalment which becomes payable pending the appeal, or the part thereof as to which the judgment or order is affirmed, etc. Samuels v. Samuels, 49 Hun, 608, 17 N. Y. S. R. 680, 1 N. Y. Supp. 787. And see Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. Supp. 304, 12 N. Y. Anno. Cas. 14, wherein it was said that the defendant in a separation suit in which permanent alimony had been granted "duly appealed from such judgment, and gave an undertaking as required by law to procure a stay of proceedings," and that an award of temporary alimony pending appeal should be credited on the amount of the award of permanent alimony in the event of affirmance of the decree.

And in California it has been held that a decree for payment of permanent alimony to be paid out of the rents and profits of real estate by a receiver appointed for that purpose falls within Cal. Code Civ. Proc. § 949, by which the giving of an undertaking in a certain sum "stays proceedings in the court below upon the judgment or order appealed from," and that a defeated party who has appealed from a decree granting permanent alimony, and has given such an undertaking, is entitled to a writ of supersedeas to stay execution upon the judgment pending the appeal. Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61. And it has also been held in California that an attempt to collect permanent alimony by writ of execution pending an appeal from the judgment granting same is a "proceeding upon the judgment," which, pending the appeal, is stayed by giving the undertaking required by Cal. Code Civ. Proc. § 941. Anderson v. Anderson, supra. And see

far forth as may be necessary for the protection and preservation of the subject of the appeal, and such an order will be made when the exigencies of the situation call for it; but no order will be made that would destroy or impair the subject of the appeal."

This case is one for alimony, and alimony can be granted only where the parties to the suit occupy toward each other the position of husband and wife. The marital status of these litigants was established by the chancery decree, and an award of alimony was made. The right of the complainant to compel the defendant to support her is the subject of this litigation.

In Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co. 54 N. J. Eq. 647, 35 Atl. 433, it was held that "The effect of filing an appeal to this court is to prevent the decree in the court of chancery from destroying or impairing the subject of the appeal, or being in any degree used for that purpose."

It will be seen at a glance that Ashby v. Yetter is not out of harmony with this doctrine of the National Docks Case. The orders made by this court in the two cases of Lawton v. Beddell and Gorman v. Hinkle, copied into the vice chancellor's opinion in Ashby v. Yetter, were orders permitting the decree in chancery in each case to be enforced pending appeal, for the protection and preservation of the subject of the appeal, but not permitting the avails of the litigation, or any part thereof, to be turned over to the party who held the decree.

Now, as the payment of permanent alimony is the subject of the decree of the court below in this case, every instalment of that alimony paid by the husband to the wife would be in execution of the decree *pro tanto*, the result being that any such payment, pending appeal, would be an impairment of the subject of the appeal to that extent or degree, and also an invasion of defendant appellant's right to have his property preserved, and not diminished, during the contest in this court. To protection from this, under the National Docks Case and also Ashby v. Yetter, we think he is entitled. The course which, as thus indicated, is required for the preservation of the rights of the defendant appellant is even more fundamentally required in order that the jurisdiction of the appellate court may not be destroyed or impaired.

We do not wish to be understood as holding that this court has not the power to award alimony pending an appeal; that is, alimony *pendente lite*. That jurisdiction is firmly established, and the instances in which it is exercised are numerous. But as this is not an application for such alimony, we have not taken into consideration the question whether the applicant is entitled to an allowance of that kind here, or ought to be remitted to the court of chan-

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Sheppard v. Sheppard, 161 Cal. 348, 119 Pac. 492, wherein it was said that the party against whom permanent alimony had been decreed had appealed from the judgment and had "stayed the execution thereof by giving such an undertaking therefor as is required by law."

And in Iowa it is provided by statute (Iowa Code, § 4128) that no judgment or order shall be stayed pending an appeal unless a certain bond be filed, but that upon the filing of such bond an order shall issue staying all proceedings under the judgment, which statutory provision applies to appeals from decrees awarding permanent alimony. See Russell v. Russell, 156 Iowa, 674, 137 N. W. 925, holding that the filing of a proper bond stayed execution pending appeal on a judgment for permanent alimony.

And in Nebraska a decree for permanent alimony may be suspended during appeal as matter of right by the execution of a supersedeas bond as provided for in Nebraska Code Civ. Proc. § 677, subdiv. 1. See State ex rel. Beard v. Cook, 51 Neb. 822, 71 N. W. 733.

So, in Washington it has been held that an allowance of permanent alimony is not available pending appeal where a supersedeas bond has been filed. Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091. But see Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885, as set out supra.

And in Louisiana a judgment for permanent alimony, or a "pension" as it is there called, is suspended by the filing of a "suspensive appeal bond." See State ex rel. Hill v. Judge of Civil District Ct. 114 La. 44, 38 So. 14. But in Louisiana the filing of a "suspensive appeal bond" upon appeal from a decree of divorce which grants a "pension" does not suspend the effect of a judgment for alimony (pending final judgment in the divorce case) granted in a previous suit for separation from bed and board. Ibid.

As to power to award temporary alimony or counsel fees pending an attempt to set aside a decree of divorce or separation, see the note to Chapman v. Parsons, 24 L.R.A. (N.S.) 1015. And as to jurisdiction to award temporary alimony, suit money, and counsel fees pending an appeal in a divorce suit, see the note to Maxwell v. Maxwell, 27 L.R.A.(N.S.) 712, and the later case of Kjellander v. Kjellander, 45 L.R.A.(N.S.) 943, and Taylor v. Taylor, L.R.A. 1915A, 1044. As to remedy pending appeal from decree in divorce suit for failure to comply with order for payment of temporary alimony, suit money, or counsel fees, see the note to Brown v. Brown, 51 L.R.A.(N.S.) 1119. G. J. C.

L.R.A.1915B.

cery to make application there; the question not being before us.

These views necessarily lead to the denial of the pending motion.

NEW YORK COURT OF APPEALS.

BENEVOLENT & PROTECTIVE ORDER OF ELKS, Respt.,
v.
IMPROVED BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE WORLD et al., Appts.

(205 N. Y. 459, 98 N. E. 756.)

Corporation — benevolent — misleading use of name.

1. A benevolent corporation is entitled to an injunction against the unfair and misleading use of a corporate name by another corporation engaged in similar enterprises, although it is not carrying on any trade or industrial or financial business which can be injuriously affected by such use of the name.

Injunction — use of corporate name — benevolent association.

2. The Benevolent & Protective Order of Elks is entitled to an injunction against the use by another corporation of the name Improved Benevolent & Protective Order of Elks of the World, or any name of which the word "Elks" is a part, where the members of the latter company have never been members of the former so as to gain a right to the use of the word.

Same — use of official names and insignia.

3. A benevolent association has no right to an injunction against the use by a similar order of the same titles for its officers as those used by the officers of the former, or the general use of the colors of the order

(May 24, 1912.)

Note. — Right of benevolent, fraternal, or social order to protection against use of name, insignia, ritual, etc., by another organization.

As to the right to prohibit the wearing of the badge of a society by a nonmember, see Hammer v. State, 24 L.R.A.(N.S.) 795, and the note thereto.

The law as to union labels is discussed in notes to People v. Dantuma, 39 L.R.A. (N.S.) 1190, and State v. Bishop, 29 L.R.A. 200.

Enjoining use of name—in general.

It is well established that a benevolent, fraternal, or social organization will be protected in the use of its name, insignia, etc., by an injunction to restrain another organization from using the same, or others so similar as to be misleading. Grand Lodge, K. P. v. Grand Lodge, K. P. 174 Ala. 395, 56 So. 963; St. Patrick's Alliance v. Byrne, 59 N. J. Eq. 26, 44 Atl. 716.

Thus, in Knights of Maccabees v. Searle, 75 Neb. 285, 106 N. W. 448, the court said that it was not necessary for plaintiff to allege and prove that the public would be misled by the use of a part of its name by another organization, but that it was sufficient to allege and prove that there would be a tendency to so mislead the public.

The confusion likely to follow from the use of similar names is the reason for denying the right to such use, rather than the existence of any vested right in the organization objecting to the use of the name. Re Polish Nat. Catholic Church, 31 Pa. Super. Ct. 87.

In considering the probability of confusion liable to result from the use of similar names, it seems that the courts will take into consideration the class of persons with whom they deal.

Thus, in Legal Aid Soc. v. Co-Operative Legal Aid Soc. 41 Misc. 127, 83 N. Y. Supp. 926, an injunction *pendente lite* was granted to plaintiff, a charitable organization, against defendant, which was apparently engaged in securing damage cases upon contingent fees for its own profit, to restrain the latter from using a name so similar to plaintiff's that it would probably mislead persons of the class who would be apt to deal with plaintiff.

And in Perham v. Richman, 158 Fed. 546, the court refused to enjoin the use by one fraternal and beneficial association of the name "Order of Railroad Telegraphers, Despatchers, Agents, and Signalmen," at the instance of an older and similar organization known as the "Order of Railroad Telegraphers," saying that the names were entirely different, and that no one having sufficient intelligence to be eligible to membership could be deceived as to which of the two he was about to join.

The courts are sometimes called upon to determine which of two organizations having the same name is entitled to the exclusive use thereof in certain territory.

Thus, in State Council, J. O. U. A. M. v. National Council, J. O. U. A. M. 71 N. J. Eq. 433, 64 Atl. 561, it was held that complainant, an organization within the state, which had, for good reasons, seceded from a central organization which it had helped to create, and to which it had voluntarily subordinated itself, and which had since its secession represented an overwhelming majority of the local councils in the state, was entitled to the exclusive use of its name, and to be protected therein by an injunction to restrain the central organization from establishing an organization within the state with the same name as complainant, and with the avowed purpose of taking the place of complainant in the state.

To the same effect is National Council, J. O. U. A. M. v. State Council, J. O. U. A. M. 104 Va. 197, 51 S. E. 166, affirmed in

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Westchester County enjoining them from using the name "the Improved Benevolent & Protective Order of Elks of the World," or any similar title, and from using the emblems, colors, etc. of plaintiff. Modified and affirmed.

The facts are stated in the opinion.

Mr. **Anderson Price**, with Mr. **D. Macon Webster**, for appellants:

Injunctions against the use of names are in protection of trade and traders only.

Levy v. Walker, L. R. 10 Ch. Div. 447, 48 L. J. Ch. N. S. 273, 39 L. T. N. S. 654, 27 Week. Rep. 370; Southern v. How, Popham, 143; Du Boulay v. Du Boulay, L. R. 2 P. C. 430, 6 Moore, P. C. C. N. S. 31, 38 L. J. P. C. N. S. 35, 17 Week. Rep. 594; Day v. Brownrigg, L. R. 10 Ch. Div. 294, 48 L. J. Ch. N. S. 173, 39 L. T. N. S. 553, 27 Week. Rep. 217; Clark v. Freeman, 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 119; Schuyler v. Curtis, 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22.

The case is not one where equity would enjoin the use of a tradename.

Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L.R.A. 42, 43 Am. St. Rep. 769, 39 N. E. 490; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Croft v. Day, 7 Beav. 84; Burgess v. Burgess, 3 DeG. M. & G. 896, 22 L. J. Ch. N. S. 675, 17 Jur. 292, 25 Eng. Rul. Cas. 186; Holloway v. Holloway, 13 Beav. 209; Levy v. Walker, L. R. 10 Ch. Div. 436, 48 L. J. Ch. N. S. 273, 39 L. T. N. S. 654, 27 Week. Rep. 370; Turton v. Turton, L. R. 42 Ch. Div. 128, 58 L. J. Ch. N. S. 677, 61 L. T. N. S. 571, 38 Week. Rep. 22, 54 J. P. 151; Loonen v. Deitsch, 189 Fed. 487; Johnston v. Orr-

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203 U. S. 151, 51 L. ed. 132, 27 Sup. Ct. Rep. 46.

In Great Hive, L. M. v. Supreme Hive, L. M. 135 Mich. 392, 97 N. W. 779, 99 N. W. 26, it appeared that complainant was an incorporated beneficial association having jurisdiction in the state of Michigan only, and that defendant was a similar organization having jurisdiction in all parts of the United States except Michigan, each having the same secret work and insignia, their only difference being as to their plans of insurance; and that upon deciding to extend its work and insurance business into the field formerly occupied by defendant exclusively, complainant sought to enjoin defendant from interference with such extension. The court held, however, that complainant was estopped from using the same ritual, secret work, badges, and paraphernalia used by defendant in its territory, and granted an injunction restraining complainant from competing with defendant in its former exclusive field, by using the same, or substantially the same, ritual, secret work, badges, and paraphernalia.

But a fraternal organization having exclusive rights to use its ritual, secret work, badges, and paraphernalia in a certain territory will not be granted an injunction protecting those rights when they have never been denied or invaded. Ibid.

Neither will they consider in advance the question of whether the proposed new ritual, secret work, badges, and paraphernalia of one order differ sufficiently from those used by another to enable it to carry on its work competitively in the same territory. Ibid.

Of course, where there is a manifest intent to deceive by the use of a similar name equity will step in to prevent such deception. Thus, in Salvation Army v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471, the court reversed a decision of the lower court which denied to complainant, an organization known as the Salvation Army in the United States, an injunction to restrain defendant from using the name "Salvation Army," or any name so similar as to be liable to deceive the public, or from using uniforms, insignia, or badges of office similar to those used by plaintiff, the court deeming it to be clear that the purpose of defendant in assuming the name that it did, and in adopting similar titles and uniforms, etc., was to take advantage of the widespread knowledge on the part of the public of plaintiff's organization, and to receive for itself whatever benefit might flow therefrom.

And if a fraudulent intent to deceive is present, the court will act regardless of the consideration whether defendant would otherwise have the right to use generic terms in its name. Cape May Yacht Club v. Cape May Yacht & Country Club, 81 N. J. Eq. 454, 86 Atl. 972.

But it is not necessary that an actual intent to deceive be shown to entitle one organization to protection against the use of a similar name by another, it being sufficient merely that plaintiff has a superior right to the use of its name, and that the name adopted by defendant is so similar that plaintiff's business and the purposes for which it was organized will be injuriously affected by its continued use. Society of War 1812 v. Society of War 1812, 46 App. Div. 568, 62 N. Y. Supp. 355; Cape May Yacht Club v. Cape May Yacht & Country Club, supra.

And even if actual fraud should be deemed necessary to the granting of relief, it may be presumed from the fact that defendant knowingly adopted the name of another corporation, or one so similar that its natural and necessary tendency would be to cause loss to the other. Grand Lodge, K. P. v. Grand Lodge, K. P. 174 Ala. 395, 56 So. 963.

The fact that the two fraternal organiza-

Ewing, L. R. 7 App. Cas. 219, 51 L. J. Ch. N. S. 797, 46 L. T. N. S. 216, 30 Week. Rep. 417; LePage Co. v. Russia Cement Co. 17 L.R.A. 354, 2 C. C. A. 555, 5 U. S. App. 112, 51 Fed. 941; Colonial Dames v. Colonial Dames, 29 Misc. 10, 60 N. Y. Supp. 302, affirmed without opinion in 63 App. Div. 615, 71 N. Y. Supp. 1134, which was affirmed in 173 N. Y. 586, 65 N. E. 1115.

The names Benevolent & Protective Order of Elks, and Improved Benevolent & Protective Order of Elks of the World, have not enough similarity to support this action.

A suffix indicating the locality of the corporation is enough to distinguish it in use from another corporation of the same or nearly the same name without the suffix.

Farmers' Loan & T. Co. v. Farmers' Loan & T. Co. 21 Abb. N. C. 104, 1 N. Y. Supp. 44; International Trust Co. v. International Loan & T. Co. 153 Mass. 271, 10 L.R.A. 758, 26 N. E. 693; Saunders v. Sun Life Assur. Co. [1894] 1 Ch. 537, 63 L. J. Ch. N. S. 247, 8 Reports, 125, 69 L. T. N. S. 755, 42 Week. Rep. 315; Re United States Mortg. Co. 83 Hun, 572, 32 N. Y. Supp. 11.

Where no instance, and especially where no proof, is given, that confusion has arisen or is proven, no injunction can be granted.

Hygeia Water Ice Co. v. New York Hygeia Ice Co. 140 N. Y. 94, 35 N. E. 417;

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tions draw their membership from different races which do not mingle socially or fraternally is not sufficient ground for denying injunctive relief against the use of similar names, insignia, etc. Benevolent & P. O. E. v. Improved Benev. & P. O. E. 122 Tenn. 141, 118 S. W. 389. See also Grand Lodge, K. P. v. Grand Lodge, K. P. supra.

Where the proceeding to restrain one organization from using the name of another was not based upon the fact that the defendants were colored persons, and the issues were submitted without reference to race or color, and the evidence authorized a finding against defendants regardless of any considerations of color, such a finding is not in conflict with the Constitution of the United States as denying equal protection of the laws. Creswill v. Grand Lodge, K. P. 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453, 67 S. E. 188, reversed on other grounds in 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822.

It will be noted that in BENEVOLENT & P. O. E. v. IMPROVED BENEV. & P. O. E. the court points out that, though the question of color appeared in the evidence, the rights of the parties were necessarily determined precisely as though the members of both corporations were of the same color.

—not limited to pecuniary bodies.

The right to injunctive relief is not limited to business and trading corporations, but is given to charitable, benevolent, and patriotic societies not organized for pecuniary gain. Salvation Army v. American Salvation Army and Society of War 1812 v. Society of War 1812, supra.

Thus, in Grand Lodge, K. P. v. Grand Lodge, K. P. 174 Ala. 395, 56 So. 963, the court said: "While there may be some differences and distinctions in the law in regard to restraining the use of the same names between business corporations and those which are merely benevolent or fraternal in character, yet there is no doubt that courts of chancery will protect corporations which are purely fraternal or benevolent in character and purpose, where their names have been wrongfully assumed by other corporations for similar purposes, when the objects and results of such wrongful assumption of name lead to confusion and detriment to the older corporation and to the public."

This would seem to be the correct view of the matter, for, while not conducted for profit, the kind of organizations under consideration frequently have large property rights, and all depend in some way for their existence upon the maintenance of a distinctive identity, by means of which they may appeal to the public for support in the way of contributions or the acquisition of supporting members, and these facts are taken into consideration by the courts in granting relief.

Thus, in Cape May Yacht Club v. Cape May Yacht & Country Club, supra, it is held that equity will lend its aid to restrain the unfair use of the name of a corporation formed not for pecuniary profit, to protect its property rights, *i. e.*, the corporate entity, membership, its popularity and influence, and all that goes with them, of which the name is merely a badge.

In People ex rel. Felter v. Rose, 225 Ill. 496, 80 N. E. 293, the court says (*obiter*) that a corporation has such a property right in its corporate name, whether organized for pecuniary profit or not, as a court will protect by enjoining the use by another company of the same name, or one so similar as to mislead the public.

And in Benevolent & P. O. E. v. Improved Benev. & P. O. E. supra, the court, in enjoining the use by respondents of their name, badges, etc., because of the similarity to those used by complainant, took into consideration the fact that, while complainant was not engaged in business for profit in the sense of commerce or trade, yet it did employ certain business activities for the purpose of maintaining itself, and of procuring funds to carry out its charitable and social enterprises, and that for those purposes its name had become valuable in appealing to the public, and that the close similarity between the names and the badges used by the two organizations would result in great financial detriment to complainant.

Richardson & B. Co. v. Richardson & M. Co. 27 N. Y. S. R. 808, 8 N. Y. Supp. 52.

Where the names of the parties are merely descriptive of the business of the corporation, no monopoly can arise.

Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Van Beil v. Prescott, 82 N. Y. 630; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 331, 45 Am. Rep. 229; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Koehler v. Sanders, 122 N. Y. 65, 9 L.R.A. 576, 25 N. E. 235; Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co. 61 Hun, 552, 16 N. Y. Supp. 397; Colonial Life Assur. Co. v. Home & C. Assur. Co. 33 Beav. 548, 33 L. J. Ch. N. S. 741, 10 Jur. N. S. 967, 10 L. T. N. S. 448, 12 Week. Rep. 783.

Messrs. **Brennan & Curran**, for respondent:

The injunction order was properly granted.

Society of War 1812 v. Society of War 1812, 46 App. Div. 568, 62 N. Y. Supp. 355; Taendsticksfabriks Akticbolagat Vulcan v. Myers, 139 N. Y. 367, 34 N. E. 904; Re Social Democratic Party, 182 N. Y. 442, 75 N. E. 415; International Committee, Y. W. C. A. v. Y. W. C. A. 194 Ill. 194, 56

It may be more difficult to show that the use of the name is injurious, and a fraud on the public, in the case of an association not conducted for pecuniary profit, than one that is not, but there is no difference in principle between the two. Daughters of Isabella v. National Order, D. I. 83 Conn. 679, 78 Atl. 333, Ann. Cas. 1912A, 822.

But in Colonial Dames v. Colonial Dames, 29 Misc. 10, 60 N. Y. Supp. 302, affirmed in 63 App. Div. 615, 71 N. Y. Supp. 1134, which was affirmed in 173 N. Y. 586, 65 N. E. 1115, the court made a distinction between organizations having financial gain as their object, and those seeking merely to accomplish patriotic and unselfish ends, saying: "Reasons which may be all-sufficient to induce a court to restrain a defendant from making money that a plaintiff is entitled to make may be wholly inadequate to warrant such interference where it is a question of doing good deeds," and refused to enjoin the use by other associations of similar names, especially in view of the fact that plaintiff had permitted such organizations to use those names without objection for several years, and in the absence of any proof that anyone had been deceived or seriously confused by the similarity of the names.

And in Most Worshipful Grand Lodge, F. A. & A. M. v. Grimshaw, 34 App. D. C. 383, it is held that courts of equity will not adjudicate the right of different charitable or religious associations to hold themselves out to be the regular representatives of some particular order or religious system, but that there must be some pecuniary injury from the use of a name to warrant inquiry and justify relief.

—effect of incorporation.

Ordinarily, the fact that one of the associations involved has incorporated under the name it has assumed will give it no superior right thereto.

Thus, dissatisfied members of a voluntary association cannot by incorporating under the same name deprive the association from using that name, and a motion for an injunction to accomplish that end will be denied. Black Rabbit Asso. v. Munday, 21 Abb. N. C. 99.

A seceding body cannot by incorporating under the name of the parent body acquire an exclusive right to the use of the name, and the fact that the latter is not incorporated is immaterial, as is also the fact that it is doing an unlawful business. Grand Lodge, A. O. U. W. v. Graham, 96 Iowa, 592, 31 L.R.A. 133, 65 N. W. 837.

The fact that a formerly voluntary society became incorporated gives it no right to claim the exclusive privilege of using the name under which it had been known. Supreme Lodge, K. P. v. Improved Order, K. P. 113 Mich. 133, 38 L.R.A. 658, 71 N. W. 470.

However, in Paulino v. Portuguese Beneficial Asso. 18 R. I. 165, 20 L.R.A. 272, 26 Atl. 36, where members of a voluntary association appointed a committee to procure a charter for the association, and the members of the committee procured the charter under the same name as that of the association, and organized themselves as the corporation, it was held that the members of the voluntary association could not enjoin the incorporators from using the name of the association in its business, as the right of a corporation to use the name conferred upon it is as much a part of its franchise as any other privilege granted to it, and cannot be annulled at the suit of a private person, but can be taken away only by another act of the legislature or at the suit of the state.

But the effect of that case is weakened by Aiello v. Montecalfo, 21 R. I. 496, 44 Atl. 931, which was a suit by an unincorporated club or society organized in part to give dramatic entertainments, to restrain an incorporated society subsequently formed for the same purposes from using the same name, in which an injunction was granted in spite of the fact that the argument was made that this would amount to a revocation of defendant's charter at the suit of private parties. The case does not refer to Paulino v. Portuguese Beneficial Asso., but cites Armington v. Palmer, 21 R. I. 109, 43 L.R.A. 95, 79 Am. St. Rep. 786, 42 Atl. 308, which involved two business concerns,

L.R.A. 888, 62 N. E. 551; Macon Lodge No. 230, B. & P. O. E. v. Thomas, Apr. 1906 — Ga. —; German Hanoverian & O. Coach Horse Asso. v. Oldenberg Coach Horse Asso. 46 Ill. App. 281; Hazelton Boiler Co. v. Hazleton Tripod Boiler Co. 40 Ill. App. 430; Nathan Mfg. Co. v. Edna Smelting & Ref. Co. 130 App. Div. 512, 114 N. Y. Supp. 1033; Holmes, Booth & Haydens v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324; Merchants' Detective Asso. v. Detective Mercantile Agency, 25 Ill. App. 250; Salvation Army v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471.

The name "Improved Benevolent & Protective Order of Elks of the World" is substantially the same as the name "Benevolent & Protective Order of Elks."

Re United States Mercantile Reporting & Collecting Asso. 22 N. Y. S. R. 494, 4 N. Y. Supp. 916.

The plaintiff was equally entitled to an injunction restraining the use of the defendant's corporate name, seal, membership card, name of title of officers, and emblem.

Willard Bartlett, J., delivered the opinion of the court:

This is a suit to restrain the defendant from using a corporate name so closely resembling that of the plaintiff as to be calculated to mislead and deceive the public

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and that case distinguishes the Paulino Case on the ground that it was in effect a suit to annul the charter, inasmuch as it sought to enjoin respondents, who were the officers of the corporation, from using the charter, and to compel them to deliver it to complainants, who would have no authority to act under it since they were not named in it as incorporators. This distinction would appear to be valid as far as it goes, but the court apparently overlooked the fact that in the Paulino Case one of the items of relief asked was that respondents be enjoined from using the name, and the court passed specifically upon that question as indicated above. It may be that because of the form of the pleadings the court was obliged to grant or deny the relief asked as a whole, but if so that fact does not appear in the case, and the other reason indicated is given for refusing to enjoin the use of the name.

—laches.

The power of a beneficial corporation to enforce the exclusive right to the use of the name under which it is incorporated may be lost by acquiescence and laches. Grand Lodge, A. O. U. W. v. Graham, supra; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822, reversing 133 Ga. 837, 134 Am. St. Rep. 231, 67 S. E. 188, 18 Ann. Cas. 453.

Thus, in Council of Jewish Women v. Boston Section Council, J. W. 212 Mass. 219, 98 N. E. 862, the court refused to grant an injunction in favor of a fraternal corporation incorporated in New York, to enjoin a local section of the organization which was incorporated in Massachusetts from severing its connection with the parent order and retaining its name, the court saying that the name of defendant appears to have been assumed without objection from anyone, and that it is now too late to make such objection.

But where plaintiff made strenuous objections to the use of its name by defendant as soon as the latter came into the state of New York, in which plaintiff was incorporated, and began an action to prevent such use in less than a year, it was held that it was not guilty of such laches as to bar it from equitable relief, though it appeared that defendant had been incorporated and had operated in another state for several years. Salvation Army v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471. And evidence given at a later trial, that defendant came into the state in September instead of in April of the next year, did not show enough difference to charge plaintiff with laches. Salvation Army v. American Salvation Army, 122 N. Y. Supp. 97, affirmed without opinion in 141 App. Div. 931, 126 N. Y. Supp. 1145, which was affirmed in 205 N. Y. 619, 98 N. E. 1115.

Refusal of charter.

An organization may be protected in the use of its name by refusal to issue a charter to another organization under the same or a similar name. This may be accomplished by the officer or court whose duty it is to issue charters refusing to issue one under the proposed name, or by an injunction being issued to restrain such officer from issuing the proposed charter, or to restrain the incorporators from procuring a charter.

Thus, in Re Charter of I. C. Lodge, No. 17, I. B. & P. O. E. 39 Pa. Super. Ct. 365, an application for a charter for a proposed corporation of "Iron City Lodge No. 17, Improved Benevolent & Protective Order of Elks of the World," was refused upon the exception of the "Pittsburg Lodge No. 11, Benevolent & P. O. E.," on the ground that confusion was created by the similarity of the names and emblems used by applicant to those used by exceptant.

And in Re Maccabee Soc. 27 Pa. Co. Ct. 651, the opinion of the attorney general was given that the insurance commissioner was authorized to refuse registration to a foreign fraternal beneficial society on the ground that its name was so similar to a similar organization in the state that confusion would follow.

In the absence of a showing of abuse of discretion, the decision of a court in refus-

and persons having transactions with either corporation. The plaintiff has been awarded the injunction which is sought, and, upon a unanimous affirmance of the restraining judgment, the defendant has appealed to this court. Although there are nominally two defendants, they constitute but one organization, and will be treated as one defendant in this opinion.

The plaintiff was incorporated by a special act of the legislature (Laws of 1871, chap. 88), under the name of the Benevolent & Protective Order of Elks, "to protect and aid its members and their families, and to accumulate a fund for that purpose, which said fund shall be used and appropriated for no other purposes whatsoever;" and it is authorized to acquire and hold real and personal estate to the value of $200,000, to sell and dispose of the same, to have and use a common seal, and to establish branch organizations. The corporation has grown and prospered, being now represented by branches in many other states of the Union, and having an aggregate membership of about 280,000 persons.

The defendant corporation, on the other hand, is of comparatively recent origin, having been organized under the membership corporations law (Consol. Laws 1909, chap. 35) in 1907. In the certificate of incorporation it is named the Grand Lodge of the Improved Benevolent & Protective Order of Elks of the World, but in its publi-

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ing the petition of a charitable organization for permission to adopt a certain name, the refusal being based on the similarity of the proposed name to that of another similar organization, will not be reversed on appeal. Philadelphia Lying-In Charity v. Maternity Hospital, 29 Pa. Super. Ct. 420; Re Polish Nat. Catholic Church, 31 Pa. Super. Ct. 87.

The incorporation of a fraternal benefit association with a name designed and tending to mislead the public to think it is that of one already in existence may be enjoined at the instance of the older organization, instead of waiting till it is incorporated and then enjoining it from acting under that name. Modern Woodmen v. Hatfield, 199 Fed. 270.

In Knights of Maccabees v. Searle, 75 Neb. 285, 106 N. W. 448, it is held that under a statute providing for the incorporation of societies which contains a provision that if the auditor shall find, among other things, "that the name or title is not the same, or does not so nearly resemble a title in use as to have a tendency to mislead the public, he shall approve the same and forthwith issue a certificate of organization," the decision of the auditor is not final, and the courts may enjoin him from issuing a permit to a society to use a name which is so similar to another as to have a tendency to mislead the public.

In People ex rel. Felter v. Rose, 225 Ill. 496, 80 N. E. 293, it was held that a mandamus would not be issued to compel the secretary of state to issue a certificate of incorporation to petitioner under the name of "National Liberty League," his refusal being on the ground that there already was an incorporated society in the state by the name of "National Liberty Legion." Three of the seven judges dissented on the ground that the statute providing for the incorporation of bodies not organized for pecuniary profit contained a proviso that a certificate should not be issued to a corporation or society under the name of any then existing, while the similar provision as to pecuniary organizations prohibited the issuing of a license to two companies having the same or similar names, such provisions being deemed to show that the legislature did not intend to prohibit the use of names which were similar merely, in the case of nonpecuniary corporations. The majority of the court pointed out that the use of a misleadingly similar name might be enjoined whether the organizations were for pecuniary profit or not, and said that if it granted the mandamus, it might afterward be put in the absurd position of being required to sustain an injunction against the use of the name which it had compelled the secretary of state to authorize.

And in Ex parte Walker, 1 Tenn. Ch. 97, the court holds that it has power to refuse to incorporate an organization under a name so similar to one already in existence as to be likely to deceive or lead to unnecessary confusion, upon objection being made by the existing corporation, inasmuch as the objection might be raised after incorporation by a bill for injunction, in which case the court would have undoubted jurisdiction.

In Y. W. C. A. v. St. Louis, W. C. A. 115 Mo. App. 228, 91 S. W. 171, it was held that an existing incorporated benevolent society was not entitled to intervene and become a party to a proceeding before a court to incorporate another similar organization, in order to oppose the granting of a charter to the latter on the ground of similarity of the names, or to appeal from the decree of incorporation, the statutes apparently contemplating that such proceeding be *ex parte*. The court suggested that if the interests of the old society would be disturbed by the existence of the new one under the name given it, there might be a remedy by injunction.

But though the law makes no provision for another person to make himself a party to an application to a superior court for the grant of a charter to a private corporation, for the purpose of objecting to the grant, equity will act in favor of another corporation or association which has acquired a proprietary right in the name by which it is known, and enjoin applicants from fraudulently appropriating such name and obtaining a charter under it for a simi-

cations it appears simply as the Improved Benevolent & Protective Order of Elks of the World; the designation as Grand Lodge being omitted. Its objects as defined in the certificate are similar to those of the plaintiff, and it has established some branch organizations in this state and elsewhere. The evidence indicates that its membership is made up chiefly of colored persons, while the members of the plaintiff corporation and its branches are exclusively white. According to one of the witnesses for the defendant, "there is a membership of about 80,000 colored Elks in the United States." While the question of color crops up in the evidence in this record, it does not appear to have any legal significance in the litigation. The rights of the parties have been determined in the courts below, and must be adjudicated here precisely as though the members of both corporations were all of the same color.

The grievance of the plaintiff is that the defendant has pursued a course designed to mislead and confuse the public by a deceptive imitation of the plaintiff's name, seal, emblem, membership card, and the titles of its officers. This grievance is established by the findings of the trial judge at special term, and the unanimous affirmance thereof by the appellate division, which precludes us from considering any of the points of the appellant based upon the alleged insufficiency of the evidence.

There is one question of law, however, which may appropriately be discussed,

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lar organization, and copying its insignia, badges, and emblems to the detriment of plaintiff. Creswill v. Grand Lodge, K. P. 133 Ga. 837, 134 Am. St. Rep. 231, 67 S. E. 188, 18 Ann. Cas. 453, reversed on other grounds in 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822.

In Lane v. Brothers & Sisters of Evening Star Soc. 120 Ga. 355, 47 S. E. 951, the court enjoined certain individuals from obtaining a charter under a name already used by plaintiff to designate a department of its organization.

The president of an unincorporated society may maintain an action for a preliminary injunction to restrain certain members from procuring the incorporation of a society by the same name, in order to protect the name and preserve the organization of the society. McGlynn v. Post, 21 Abb. N. C. 97; Rudolph v. Southern Beneficial League, 23 Abb. N. C. 199, 7 N. Y. Supp. 135.

The action of a state auditor in giving a mutual benefit corporation a right to use the same name as another association is not conclusive under a statutory provision that "no corporation or association organized under this act shall take any name in use by any other organization, or so closely resembling such name as to mislead the public," so that the later organization could enjoin the earlier one, which was not incorporated, from continuing to use the name. Grand Lodge, A. O. U. W. v. Graham, 96 Iowa, 592, 31 L.R.A. 133, 65 N. W. 837.

But in American Order, S. C. v. Merrill, 151 Mass. 558, 8 L.R.A. 320, 24 N. E. 918, a bill was brought by a fraternal beneficiary corporation known as "American Order of Scottish Clans," to enjoin individuals from organizing another corporation by the name of "the Order of Scottish Clans," and also to enjoin the insurance commissioner and the secretary of the commonwealth from issuing to them a charter; and after the supœna was served, the organization was completed and the charter issued, which facts were set up in a supplemental bill. The court, though it was found as a fact that the

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name in question was so similar to that of plaintiff as to be mistaken therefor, refused to grant relief on the ground that the decision of the secretary was conclusive under a statutory provision that his certificate "shall be conclusive evidence of the existence of such corporation at the date of such certificate;" nor could plaintiff maintain its bill on the ground that it was entitled to have its name protected as a tradename, as it received its name under the statute, subject to whatever interference by subsequent corporations might be permitted under the statute.

In an equitable proceeding to enjoin the granting of a charter to an organization under a name containing the distinctive words of plaintiff's name, where it appeared that other and older organizations, not parties to the suit, were chartered and were operating under the same distinctive words as part of their names, it was not error to deny the relief asked, the burden of showing a right to the exclusive use of the words in question being upon plaintiff, and it not being necessary that the organization actually entitled to use the words should be a party. Independent Order, G. S. & D. S. v. Mack, 139 Ga. 835, 78 S. E. 336.

In Re First Presby. Church, 111 Pa. 156, 2 Atl. 574, where an old church known as the Fourth Presbyterian Church of Pittsburg passed out of existence by action of its members and the presbytery, though its civil body perhaps survived for some purposes, an exception by it to a petition to a court by another organization to be permitted to amend its charter and take the same name, which proposed change had the sanction of the presbytery, was not sustained, the court saying that the taking of the same name would not vest the new organization with any trusts or property rights which may have continued to exist in the old one, and that any such rights would be protected by the courts.

In Re Societa Militare Italiana, 3 Pa. Co. Ct. 441, a charter was granted though exception was taken thereto on the ground that the name proposed was made by com-

since it does not appear ever to have been expressly passed upon by this court, and that is the right to injunctive relief against the unfair and misleading use of a corporate name in the case of a benevolent or fraternal association, where it is not carrying on any trade or industrial or financial business which can be injuriously affected by the action of a similar body in appropriating its name. The appellant strenuously asserts that the law protects only trading corporations against such misappropriation, and there are some expressions in the opinions of English judges which apparently sanction that view. That the doctrine finds no countenance, however, in this state, is clearly and conclusively shown in the able opinion of the late Mr. Justice Patterson in Society of War 1812 v. Society of War 1812, 46 App. Div. 568, 572, 62 N. Y. Supp. 355, 358, where it was distinctly held that the right to relief by injunction against the misuse of a corporate name was not confined to business corporations, but extended equally to benevolent and patriotic societies. He pointed out that many corporations are created under the laws of this state which have nothing to do with trade or commerce, and that "it would be a strange condition if the law could not protect them in that which it has encouraged them to do." His reasoning and conclusion commend themselves to our judgment and command our approval. See also Salvation Army v. American Salvation Army, 135 App. Div. 268, 274, 120 N. Y. Supp. 471.

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bining applicant's name with that of exceptant for the purpose of preventing the latter from becoming incorporated under its unincorporate name.

Nature and similarity of names, badges, etc.

In order to entitle an organization to protection in the use of its name, the name must be of a nature that will admit of appropriation as a distinctive title.

Thus, in New Thought Church v. Chapin, 159 App. Div. 723, 144 N. Y. S. 1026, it is held that an incorporated church organization cannot claim an exclusive right to the use of the words "New Thought" and "Church," either singly or in combination, as the words are all generic in character and of common use, and are neither peculiar, distinctive, nor descriptive.

And in Alchenburger v. Freundschaft Lodge No. 72, D. O. H. 138 Ill. App. 204, affirmed in 235 Ill. 438, 85 N. E. 653, the court refused to grant an injunction in favor of complainant, Freundschaft Lodge No. 72, Deutscher Orden der Harugari, to restrain lodges formed by seceding members from using the words "Freundschaft" or "Lodge," or the two in combination, or the words "Hertha Schwestern" or "Hertha," holding that complainant had no exclusive right to the use of those words.

The tendency of the name, insignia, etc., objected to, to mislead because of its similarity to that of another organization, is the basis upon which the courts act in granting or refusing protection, and the nature of the similarity which they deem sufficient to justify relief, or the dissimilarity which will require its refusal, will be well illustrated by the following cases:

To appropriate and use the distinctive portion of the name of an organization is in effect to appropriate its name. Daughters of Isabella v. National Order, D. I. 83 Conn. 679, 78 Atl. 333.

In International Committee, Y. W. C. A. v. Y. W. C. A. 194 Ill. 194, 56 L.R.A. 888, 62 N. E. 551, it was held that appellee, known as "the Young Women's Christian Association," which was a local incorporation affiliated with the international conference, known as "the International Conference of Women's Christian Associations of the United States and British Provinces," was entitled to an injunction to restrain appellant, a similar organization, from using the name "International Committee of Young Women's Christian Associations," such name being so similar to that of appellee, and so arranged, as to deceive and mislead the public, from whom appellant expected to derive its support, into believing that the appellant was the appellee, or a committee or representative of it and the conference with which it was affiliated, and evidently being designed to accomplish such deception.

In Ex parte Walker, 1 Tenn. Ch. 97, the court considered the name "the Ladies' Good Samaritan Society of Nashville" too similar to "the Nashville Ladies' Good Samaritan Society No. 2," to permit the incorporation of the former under that name, but said that the omission of the word "good" from the name would remove the objection.

The mere addition by defendant of the words "in the state of New York" to the name used by plaintiff will not sufficiently differentiate it, especially where plaintiff is also a New York corporation. Society of War 1812 v. Society of War 1812, 46 App. Div. 568, 62 N. Y. Supp. 355.

In the names "Grand United Order of Odd Fellows in America" and Ancient Order of Odd Fellows, Leeds Unity," the words "Order of Odd Fellows" is the essential and distinctive part, and the other words in the latter name do not make such a difference of designation as would prevent its being a colorable imitation of the name of plaintiff's order, the names, when the character and purpose of the two organizations are considered, being substantially the same. Emory v. Grand United Order, O. F. 140 Ga. 423, 78 S. E. 922.

In Knights of Maccabees v. Searle, 75 Neb. 285, 106 N. W. 448, the court considered that the name "Western Maccabees" would have a tendency to mislead where there was an organization already in the

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The question has seldom been presented to courts of last resort, but the case of International Committee, Y. W. C. A. v. Y. W. C. A. 194 Ill. 194, 56 L.R.A. 888, 62 N. E. 551, is an authority to the same effect. The Young Women's Christian Association of Chicago was one of the large number of associations of women, incorporated and unincorporated, which have existed in this country during a long period, and have been affiliated with one another through the agency of biennial conferences. It was organized in 1877. Its managing board was made up of representatives from nearly all the evangelical churches in Chicago, but no religious or sectarian test had been required of the voting and managing members except that they should be of Christian character. At one of the biennial conferences a movement was set on foot to prescribe a more rigorous religious test, and finally those who favored limiting membership to women who belonged to evangelical churches formed a new organization, which was incorporated in 1891 under the laws of Illinois as the International Committee of Young Women's Christian Associations. Local associations of the same character were formed under this new parent organization, and much confusion arose on account of the similarity of its name to that of the Young Women's Christian Associations generally, and the implication that they were related to one another. It was manifest that the International Committee, etc., was established solely by reason of the failure or refusal of the biennial conference to prescribe the evangelical test which has been mentioned. Under these circumstances, the Young Women's Christian Association of Chicago brought an action against the International Committee of Young Women's Christian Associations to prevent it from using that name, or any similar name likely to mislead or deceive the public, and judgment directing the issuance of an injunction to that effect was affirmed by the supreme court of Illinois.

The public policy of this state against permitting the use of misleading names by corporations of any character is evidenced by the legislation on the subject. Thus, the general corporation law (Laws of 1909, chap. 28, § 6, as amended by Laws of 1911, chap. 638) provides that no certificate of incorporation of a proposed corporation having the same name as a corporation authorized to do business under the laws of this state, or a name so nearly resembling it as to be calculated to deceive, shall be filed or recorded in any office for the purpose of effecting its incorporation, or of authorizing it to do business in this state. This provision is a substantial re-enactment of a section in the first general corporation law (Laws of 1890, chap. 563, § 4.) Even more expressive of the legislative intent to repress the deceptive adoption of pre-existing corporate names is § 948 of the penal law (Consol. Laws 1909, chap. 40) originally enacted in 1908 (but which did not take effect until after judgment was rendered in this action): "No person, society or corpora-

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field known as "the Knights of the Maccabees of the World."

In Re First Presby. Church, 2 Grant, Cas. 240, which was an application to the court for the incorporation of a religious society under the name "First Presbyterian Church of Harrisburg," the court, apparently without any objection being raised by others, refused the application on the ground that there already was a church at the same place incorporated as "the English Presbyterian Congregation of Harrisburg," and that the names were too nearly alike. In reaching this conclusion the court took into consideration that in common parlance the older church would naturally be called the Presbyterian church, and, as the two churches were of different schools, the old one would be forced to adopt words of distinction for its popular name, whatever its charter name may be, which the court ought not to compel it to do.

In Re Sons of Progress, 14 W. N. C. 31, an application for a charter by the "Independent Order Sons of Progress" was denied on exceptions filed by a similar existing organization known as "Order Sons of Progress," the word "Independent" being deemed merely descriptive.

The mere addition of the words "of North America, South America, Europe, Asia, Africa, and Australia, jurisdiction of Georgia," to the distinctive name "Knights of Pythias," cannot be declared as matter of law to constitute such a difference as to make the name free from being an infringement. Creswill v. Grand Lodge, K. P. 133 Ga. 837, 134 Am. St. Rep. 231, 67 S. E. 188, 18 Ann. Cas. 453. This case was reversed in 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822, solely on the ground of laches, but the court expressed its opinion, without deciding, that the evidence failed to show an intent to deceive on the part of defendant, or to prove that its use of the distinctive words "Knights of Pythias" and the emblem of that order operated in any degree to deceive the public or to work pecuniary damage to complainant.

In Re Waverly Ladies, R. C. 1 Pa. Dist. R. 605, an objection of the "Society of the Red Cross," a charter was refused to another organization under the name of "the Waverly Ladies of the Red Cross," because of the similarity of the name, but was granted upon the words "order of" being added before the words "Red Cross."

In Supreme Lodge, K. P. v. Improved Order, K. P. 113 Mich. 133, 38 L.R.A. 658, 71 N. W. 470, it was held that the name "Improved Order, Knights of Pythias,"

tion shall with intent to acquire or obtain for personal or business purposes a benefit or advantage assume, adopt or use the name of a benevolent, humane or charitable organization incorporated under the laws of this state, or a name so nearly resembling it as to be calculated to deceive the public with respect to any such corporation. A violation of this section shall be a misdemeanor." In case of a threatened violation the section goes on to provide for an injunction, and if it shall appear that the defendant is in fact using the name of a benevolent, humane, or charitable organization incorporated as aforesaid, or a name so nearly resembling it as to be calculated to deceive the public, an injunction may be issued "without requiring proof that any person has in fact been misled or deceived thereby."

The appellant insists that the names of the parties here have not enough similarity to support the action, and that in any event the judgment should not go further than to prohibit the use of the defendant's name without the prefix "improved" and the suffix "of the world." We think that the names are so similar as to be extremely likely to deceive, and that a limitation of the injunction in the manner suggested would not give the plaintiff the relief to which it is entitled. Indeed, the plaintiff's organization has become so well and widely known simply as Elks (as the trial court has found) that the assumption of a title containing that appellation by any other independent benevolent corporation or fraternal order would in and of itself convey the false impression that there was some connection between them. Therefore the learned judge at special term was right in enjoining the defendant from in any wise using the word "Elk" or "Elks" as part of its title or incorporation. The case would be quite different if the members of the defendant organization had ever been members of the plaintiff corporation, and had seceded therefrom because of dissatisfaction with its methods of administration or for any other good and sufficient reason. In that event, the representation that the members of the defendant were Elks, or had been Elks, would be true as matter of fact, and the use of the parent name as part of the name of a new society formed by members of the original organization as an offshoot thereof has sometimes been sanctioned. See Supreme Lodge, K. P. v. Improved Order, K. P. 113 Mich. 133, 38 L.R.A. 658, 71 N. W. 470. Here, however, there has been no secession, and the defendant is in no sense an offshoot of the plaintiff association.

We think the judgment goes too far, however, in forbidding the defendant from using the same titles for its officers as those borne by the officers of the plaintiff. We can perceive no valid legal objection to the use of such titles as exalted ruler, esteemed leading knight, tiler, etc., by any association which chooses thus to designate its officials. This is a harmless imitation of the plaintiff, complementary rather than

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could lawfully be taken by a new order formed by members who withdrew from the "Supreme Lodge, Knights of Pythias," because the latter changed its policy of permitting its ritual to be printed in the German language, the court considering that there was sufficient difference between the names to prevent the ordinary run of mankind from being misled. As to the use of the distinctive words "Knights of Pythias," the court said, after considering the history of the orders, that defendants not only could make use of them in naming their order, but were almost bound to do so in order properly to describe it.

The use of the letters "L.O.T.M.M." in connection with the terms "Ladies of the Modern Maccabees" is not an interference with the rights of another organization using the letters "L.O.T.M.," standing for "Ladies of the Maccabees." Great Hive, L. M. v. Supreme Hive, L. M. 135 Mich. 392, 97 N. W. 779, 99 N. W. 26.

In Afro-American O. O. v. Talbot, 123 Md. 465, 91 Atl. 570, the court refused to enjoin an association from using its name, Afro-American Order of Owls, at the instance of an older association known as the Order of Owls, in the absence of evidence that anyone had in fact been misled by the similarity of the names, or that

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defendant had ever used the words "Order of Owls" without the prefix "Afro-American." The court, however, enjoined defendant from using an emblem which it deemed so similar to that of plaintiff that the public might well be misled thereby, saying: "Such a symbol as the one composed of the representations of the owls more readily attracts the eye than do the letters of the alphabet, and is something which can be understood even by those unable to read. The emblem is therefore far more likely to deceive than is the name, and the similarity of number, position, and attitude all tend to the same result. We do not decide that the Afro-American Order is to be precluded entirely from using any figure of an owl as an emblem, but only that the one shown in the evidence is so close a simulation of that of the Indiana order that its continued use would tend to a deception of the public, and should therefore be enjoined:"

In Re Charter of Columbus Security Order, 27 W. N. C. 36, exceptions by the "Universal Order of Security" to the granting of a charter to the "Columbus Security Order" were dismissed, the court not considering the names to be too similar.

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otherwise. The prohibition against the use of the colors of the plaintiff corporation, to wit, purple and white, should also be stricken from the judgment. A case might arise in which the use of a particular combination or arrangement of colors ought to be forbidden, but no such general prohibition as this can be sanctioned.

The chief practical effect of the present judgment is to compel the defendant to adopt another name which contains no reference to the Elks. Its organization is not interfered with, and it may continue to exercise all its functions just as before. If its members desire the name of an animal, there is a long list of beasts, birds, and fishes which have not yet been appropriated for such a purpose. It is only the virtual misrepresentation that they are Elks that is complained of here.

The judgment should be modified by striking out the provisions in regard to the names of officers and the colors used by the defendant, and, as thus modified, affirmed, without costs.

Cullen, Ch. J., and **Gray, Haight, Vann, Werner**, and **Chase**, JJ., concur.

Writ of error denied by the Supreme Court of the United States.

OREGON SUPREME COURT.

W. A. BOOTH, Appt.,
v.
CITY OF PRINEVILLE.

(— Or. —, 143 Pac. 994.)

Highway — estoppel to claim — use.

A municipal corporation is not estopped to claim a duly dedicated highway by permitting it to be inclosed by fences, if the only use made of it is as a corral for horses and a vegetable garden.

(September 15, 1914.)

APPEAL by plaintiff from a decree of the Circuit Court for Crook County in defendant's favor in a suit to quiet title to certain land. Affirmed.

The facts are stated in the opinion.

Mr. **M. R. Elliott**, for appellant:

Continuous adverse possession of a portion of a street for ten years or more immediately prior to February 23, 1895, would extinguish any right in the municipality.

Silverton v. Brown, 63 Or. 418, 128 Pac. 47; Grady v. Dundon, 30 Or. 333, 47 Pac. 917.

Long-continued failure of a municipality to accept a donation or dedication justifies the revocation thereof, and the doctrine of equitable estoppel can successfully be invoked against the municipality.

Schooling v. Harrisburg, 42 Or. 494, 71 Pac. 607; Oliver v. Synhorst, 48 Or. 292, 7 L.R.A.(N.S.) 243, 86 Pac. 378.

Mr. **T. E. J. Duffy**, for respondent:

In order to enforce an equitable estoppel against the legal title to land, the case relied upon to work the estoppel must be proven by clear, precise, and conclusive evidence so that the facts constituting the alleged estoppel may be clearly and satisfactorily established.

Marshall v. Williams, 21 Or. 272, 28 Pac. 137.

Estoppel must be pleaded to be taken advantage of.

Rugh v. Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; Remillard v. Prescott, 8 Or. 37; Bays v. Trulson, 25 Or. 109, 35 Pac. 26.

Where there is an opportunity to set up estoppel in the pleadings which is not taken, the estoppel is waived and the matter set at large.

Nickum v. Burckhardt, 30 Or. 464, 60 Am. St. Rep. 822, 47 Pac. 788, 48 Pac. 474.

In order to render an estoppel available, it must be pleaded with particularity, nothing left to inference, if there is an opportunity to do so.

Haun v. Martin, 48 Or. 304, 86 Pac. 371; Interstate Sav. & L. Asso. v. Knapp, 20 Wash. 225, 55 Pac. 48, 931; Ashley v. Pick, 53 Or. 410, 100 Pac. 1103.

The defense of estoppel cannot be considered when not pleaded.

Gladstone Lumber Co. v. Kelly, 64 Or. 163, 129 Pac. 764; Bruce v. Phœnix Ins. Co. 24 Or. 486, 34 Pac. 16.

The city is not estopped from claiming the street, though a long lapse of time has ensued, and the person claiming same has erected fences and made other improvements of like nature on the land in dispute.

Sullivan v. Tichenor, 179 Ill. 97, 53 N. E. 561; Oliver v. Synhorst, 48 Or. 292, 7 L.R.A.(N.S.) 246, 86 Pac. 376.

Where both parties meet upon equal terms and possess the same opportunities of knowledge, and there is neither a false statement nor a fraudulent concealment, there can be no equitable estoppel.

Sims v. Frankfort, 79 Ind. 446; Wolfe v. Sullivan, 133 Ind. 331, 32 N. E. 1017.

Moore, J., delivered the opinion of the court:

This is an appeal by the plaintiff from a decree dismissing his suit instituted to de-

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Note. — For estoppel of municipality to open or use street, see note to Portland v. Inman Poulsen Lumber Co. 46 L.R.A.(N.S.) 1211, and other notes there referred to. L.R.A.1915B.

termine an adverse title to real property and establishing the defendant easement in and right of possession of a part of Third street in Prineville, Oregon, 49 feet along that highway and 80 feet across it. The plaintiff's alleged title to the tract, as against the defendant's, is asserted to have been secured by adverse possession for more than ten years prior to May 24, 1895, when the statute went into effect, prohibiting the right of cities and towns in Oregon to land dedicated or otherwise acquired for public use for streets, etc., to be extinguished by mere prescription. Or. Laws 1895, p. 57. See also L. O. L. § 6371.

It appears from the transcript herein that Monroe Hodges secured from the United States a grant of public land in what is now Crook county, Oregon. He thereafter caused a part of the premises to be surveyed and platted as the town of Prineville. Attached to the plat, a copy of which was received in evidence, is a sealed instrument executed by him and his wife, but not containing any grant to the public of the use of the streets and alleys delineated on the map. The certificate of the notary public taking the acknowledgment, however, is to the effect that Hodges and his wife executed the instrument "for the purpose of making the same a public record, and to dedicate to the public use the streets and alleys therein mentioned, and to fix the boundaries of the streets, blocks, and lots in said town." The plat was duly recorded July 31, 1883. On the west side of the land so surveyed is block 7, which is separated from block 14, immediately north thereof, by Third street.

Lucy S. Booth, the plaintiff's wife, in the fall of 1891, secured the legal title to the north one third of block 7, and thereupon with her husband established a residence on the premises. At that time the north boundary of the land so obtained by her was fenced. Hodges then owned block 14 and had a fence on the south line thereof. He had also built a fence across the street where it is now obstructed, from his south line to the north boundary of the land secured by Mrs. Booth. Soon after moving on block 7 the plaintiff, in consideration of $50, purchased from Hodges the land in controversy herein and an adjoining tract about 30 or 40 feet in length to Crooked river, but no attempted conveyance of the title was made until January 31, 1898, or more than two years after the statute prohibiting the extinguishment of the public use to streets became operative, when Hodges and his wife executed to him a warranty deed therefor, wherein the premises were described as follows: "Commencing at a point 191 feet west of the southeast corner of block 14 of M. Hodges' plat of Prineville, Oregon; thence west to the east bank of Crooked river to low-water mark; thence south along said east bank of Crooked river to a point due west of the northeast corner of block 7, of said M. Hodges' plat; thence east to a point due south of the point of beginning; thence due north to point of beginning."

This deed was recorded February 5, 1898.

The south boundary of block 14 as platted is divided by the survey into three lots, each 80 feet wide, so that by measuring west from the southeast corner of the block 191 feet, as specified in the deed, 49 feet of the street remains The defendant's original easement therein for the use of the public as a highway is conceded, so it will not be necessary to consider the effect of any conveyance made by Hodges of land in the town of Prineville by reference to lots and blocks indicated on the plat from which a dedication of the streets may be implied. It remains, therefore, to be seen whether the defendant's right of possession has been lost by the occupation of the plaintiff and his grantors.

The testimony conclusively shows that from some time prior to the year 1889 to the trial of this cause the premises described in the deed executed by Hodges and his wife to Booth have been inclosed and constantly used as a corral for horses in the winter months and for the growth of potatoes and other vegetables during most of the summers. Plaintiff testified that until the year 1906 he did not know that any part of the land so conveyed to him was included in the street, and that all that he had ever done was to keep up the fences inclosing the tract. No permanent improvements whatever have been made upon any part of such premises. The doctrine of equitable estoppel, which in some jurisdictions is enforced against municipal corporations, is based upon the assumed injustice which would result to private parties who, relying for many years upon the tacit acquiescence of public officers to assert a right to the use of a street, have made permanent and valuable improvements therein, and if they were deprived thereof by opening the highway would sustain great pecuniary loss. Schooling v. Harrisburg, 42 Or. 494, 71 Pac. 605; Oliver v. Synhorst, 7 L.R.A.(N.S.) 243, and notes (48 Or. 292, 86 Pac. 376), Cruson v. Lebanon, 64 Or. 593, 131 Pac. 316. In the latter case the improvements made on the line of an alley consisted of putting out three cherry trees, planting flowers and shrubbery, and growing a large maple tree, and it was held that they were not of sufficient value or importance to authorize an application of the rule of an estoppel *in*

pais. The authorities there cited are so much in point, and the reason given for the legal principle asserted is so cogent, that it is unnecessary to refer to them. The decision in that case is controlling herein.

It follows that the decree should be affirmed; and it is so ordered.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

M. P. SMITH & SONS COMPANY, Appt.,
v.
TREXLER LUMBER COMPANY, Respt.

(— C. C. A. —, 216 Fed. 134.)

Towage — cost of breaking ice — liability.

A contract to pay for towage service necessary to take a vessel from her anchorage to the wharf where her cargo is to be discharged does not include the cost of breaking ice necessary to make the towage possible.

(July 22, 1914.)

APPEAL by libellant from a decree of the District Court of the United States for the Southern District of New York dismissing a libel filed to recover for towage services for the cost of which the libellee was alleged to be liable under the terms of a charter party. Reversed.

Statement by **Rogers**, Circuit Judge:

This suit comes here upon an appeal from a final decree of the United States district court entered on June 18, 1913, dismissing a libel. The action was brought for the breach of a charter party on the part of the respondent in not paying for certain towage services pursuant to the terms of the charter party. The respondent claimed that the towage services should not have been performed at the time they were

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Note. — Services covered by towage agreement.

This note is intended to include only cases considering the extent of an ordinary contract of towage and so does not include cases where a vessel in position of danger due to accident or stress of weather enters into an agreement for towage; nor, of course, does it include cases where, without any agreement, a vessel goes to the assistance of a vessel in distress. The general rule seems to be that a contract for towage contemplates nothing more than the mere propelling of a vessel through the water when nothing more is required than the acceleration of her progress.

The tendency of the courts is to construe towage agreements somewhat strictly and narrowly as regards the services contemplated, and to award additional compensation for extra services, especially where the services were rendered in saving the tow from dangers for which the towing vessel was not responsible.

"A towage service may be described as the employment of one vessel to expedite the voyage of another, irrespective of any circumstances of peril, and when nothing more is required than the accelerating her progress." 38 Cyc. 554.

And so an ordinary contract of towage does not render the towboat liable for tolls exacted of towed vessels in passing through a private canal, which tolls are permitted to be levied by statute. The Fox, 4 Woods, 199, 15 Fed. 639.

And where a tug put the master of a towed vessel on shore to bring off further anchors, it was an extra service not connected in any way with the towage. The White Star, L. R. 1 Adm. & Eccl. 68.

A contract entered into between a tugboat company and shipowners, whereby for stipulated rates the former agreed to perform any towage service which the latter might require, was held in The Flottbek, 55 C. C. A. 448, 118 Fed. 954, not to include services in relieving a boat of said shipowners from distress or danger, and towing it to a place of safety, such service being of a character of salvage service.

And see M. P. SMITH & SONS Co. v. TREXLER LUMBER Co.

And in harmony with the general rule announced, are the cases which have considered the right of the towing vessel to claim extra remuneration in the nature of a salvage, where, during the progress of the voyage, the tow is placed in a position of danger.

Thus, circumstances may supervene which ingraft upon an original towage agreement the character of a salvage service. The I. C. Potter, 40 L. J. Prob. N. S. 9, L. R. 3 Adm. & Eccl. 292, 23 L. T. N. S. 603, 19 Week. Rep. 335.

So, when the supervening circumstances, from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but for such assistance she is entitled to salvage reward. Ibid.

So, where, by the breaking of a ship's hawser, the ship is placed in danger not occasioned or contributed to by the tug, a towage contract is so far suspended as to entitle the tug to a larger remuneration under the head of salvage. The Minnehaha, Lush, 335. The court in the course of its decision said: "When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so under all circumstances and at all hazzards; but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill and

rendered because of the ice on the Passaic river. A charter party was signed on November 16, 1911, by the terms of which it was agreed that upon the arrival of the schooner Melbourne P. Smith in New York harbor on her voyage from Jacksonville, Florida, with a cargo of lumber, the respondent would pay the vessel's towage over and above $25, from Robbins Reef, New York, to the respondent's lumber dock on the Passaic river, New Jersey, and upon her discharge, back to anchorage at the same place in New York bay. It was also agreed that respondent should have the privilege of naming the towing line to perform the service.

The schooner arrived at the port of New York on January 11, 1912, and anchored off Stapleton, Staten island, where she remained until January 15th, when she was taken to Shooter's island, where she remained until January 30th, when she was towed from there to respondent's dock near Newark, New Jersey, on the Passaic river. During all the time the vessel lay at Stapleton and at Shooter's island, and also on the day she was towed, Newark bay and the Passaic river were closed to navigation by ice. The libellant, after giving due notice to respondent to name a towing company, and upon respondent's refusal to do so, employed tugs at an expense of $285 to tow the schooner to its dock on the Passaic river, and after the cargo was discharged, back to its original anchorage off Stapleton, or Robbins Reef. After deducting $25 allowance made by libellant to respondent on account of said towage in accordance with the charter party, and the sum of $25 received on account of such towage, the libellant claims there is due the balance of $235, with interest. This claim is disputed because it involves the expense of breaking ice through Newark bay and the Passaic river in order to tow the schooner to its destination.

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such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if, in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage. It is not disputed that these are the rules which are acted upon in the court of admiralty, and they appear to their lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate."

In The Pericles, Brown. & L. 80, a tug in the performance of a towage brought the vessel to the entrance of a basin where she became stuck so that it was necessary that she be towed out again, in doing which the vessel's rope broke, and as the tide was falling, she was jammed in the entrance of the dock, and was in a condition of considerable peril. It was held that the tug earned salvage reward in saving the vessel from the danger, and this though the tug herself incurred no risk, the court stating that the services rendered were beyond the scope of the contract to tow, and, while it was not disposed for petty services to consider the steam tug relieved from the obligation of the towage contract, yet it did not understand it to be the law that a tug under contract to tow can under no circumstances earn salvage reward, unless she herself incurs risk in the performance of the superior service of saving.

And in The Westburn, 74 L. T. N. S. 200, 8 Asp. Mar. L. Cas. 130, where a vessel which engaged a tug to tow her into a harbor was towed to the entrance of the harbor, but because of a fog was unable to enter, and before the tug could make fast, the vessel went on shore and was in danger, it was held that the services rendered by the tug in getting her out of the place of danger were clearly outside of the scope of the agreement for towage, and that the tug was entitled to salvage.

Where the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of the year. Where

Argued before Coxe and Rogers, Circuit Judges, and Hand, District Judge.

Messrs. **Willard U. Taylor** and **Alfred H. Strickland**, with Messrs. **MacFarland, Taylor, & Costello**, for appellant:

The contract of the charter party is absolute on its face, and it was within the contemplation of the parties that the towage service should be rendered during the winter.

Constantine & P. S. S. Co. v. Auchincloss, 88 C. C. A. 661, 161 Fed. 846; Smith v. Lee, 13 C. C. A. 506, 21 U. S. App. 650, 66 Fed. 344; Stoomvart Maatschaffy Nederlandsche Lloyd v. Lind, 96 C. C. A. 134, 170 Fed. 918; Johnson v. Baugh & Sons Co. 58 Fed. 424.

The libellant, in view of the terms of the charter party, was not compelled to wait until the Passaic river was clear of ice and thereby sustain irreparable loss by reason of the delay.

Clyde Commercial S. S. Co. v. West India S. S. Co. 94 C. C. A. 551, 169 Fed. 275; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 527, 40 L. ed. 515, 524, 16 Sup. Ct. Rep. 379; Mississippi River Logging Co. v. Robson, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773.

Libellant should recover for the expense incurred in employing at least the two tugs in towing to and from respondent's dock.

Monk v. Cornell S. B. Co. 117 C. C. A. 232, 198 Fed. 472.

The ice field not being insuperable, it was the duty of the schooner to open the channel by such a reasonable amount of force as was necessary, and her failure to do so would render her liable to the charterers.

Philadelphia & R. R. Co. v. Peale, Peacock & Kerr, 135 Fed. 608; Stoomvart Maatschaffy Nederlandsche Lloyd v. Lind, 96 C. C. A. 134, 170 Fed. 918; Johnson v. Baugh & Sons Co. 58 Fed. 424; Barrett v. Oregon R. & Nav. Co. 10 Sawy. 523, 22 Fed. 452; Mencke v. Cargo of Java Sugar, 187 U. S. 257, 47 L. ed. 167, 23 Sup. Ct. Rep. 86.

The special defense that the ice condition of Newark bay was a peril of the sea, and

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there is an unexpected change of weather, or other unforeseen accidents occur, rescuing the vessel from danger is extra service, which entitles the tow boat to extra remuneration. The White Star, L. R. 1 Adm. & Eccl. 68.

So where, during the performance of a towing contract, a violent hurricane arises so as to justify a tug in abandoning the contract, and she at great peril to herself continues to tow the vessel during the hurricane without interruption, though taking longer, prevents the vessel drifting upon the shore, and brings her to her destination in safety, the services are salvaged. The I. C. Potter, 40 L. J. Prob. N. S. 9, L. R. 3 Adm. & Eccl. 292, 23 L. T. N. S. 603, 19 Week. Rep. 335.

It was contended in this case that the principle underlying the ingrafting of salvage services upon a towing contract was that the two services were of a different class and the original was service interrupted; and that the service in this case was not of a different class, but remained towage as it was not interrupted, as by the breaking of a hawser or other circumstances. But the court said that the true criterion by which it is to be ascertained whether the towing vessel has become a salvor is whether the supervening circumstances were such as to justify her in abandoning the contract, and that in this case the circumstances were such as to justify the abandoning of the contract, and that the continuance of the towage, which placed both life and property in danger, became a salvage service.

And in The Albion, Lush. 282, while in performance of a towage agreement, the vessels anchored to stop tide. A gale arose and the tug was forced to seek shelter while

the tow was blown to sea; the next day the tug searched for her and with assistance towed her to port. In an action for salvage, one of the contentions of counsel for the tow was that the original contract bound the tug to take all reasonable measures, notwithstanding interruptions, to fulfil the contract, and so no salvage was due: but the court, without alluding to such contention, stated that the services were salvage.

And so also in The Galatea, Swabey, Adm. 349, 4 Jur. N. S. 1064, 7 Week. Rep. 21, it was held that where the fulfilment of the towage contract is rendered impossible because of the wind and weather, the contract is at an end, and subsequent services in rescuing the tow from a position of danger are in the nature of salvage. The court stated that an engagement to tow from one place to another embraces the risk of ordinary weather, but does not embrace the chance of the undertaking being entirely interrupted by the act of God, that is of the state of the weather being such as to compel her to abandon the original undertaking.

Negligence of the tow causing it to strand on a shoal, and negligence rendering it impossible for a tug to pull it off, were held in Wilson v. Charleston Pilots' Asso. 57 Fed. 227, to have ended the towage contract, so that any other services rendered thereafter would have been in the nature of salvage.

And where, through the negligence of the pilot and the master of a tow in attempting to dock in a dangerous condition of the tide, the tow was placed in a position of eminent peril, a condition arose which the parties to the towage contract had not contemplated, and so the services in res-

excepted under the charter party, cannot prevail.

Carver, Carriage by Sea, 5th ed. p. 114; Abbott, Shipping, 5th ed. p. 253; Arnould, Ins. 3d ed. p. 687.

Messrs. **Hyland & Zabriskie**, for respondent:

The contract must receive a reasonable construction.

Schoellkopf v. Coatsworth, 166 N. Y. 77, 59 N. E. 710; 7 Am. & Eng. Enc. Law, 2d ed. 147; Mencke v. Cargo of Java Sugar, 187 U. S. 248, 47 L. ed. 163, 23 Sup. Ct. Rep. 86; The Plymouth Rock, 9 Fed. 416; Williams & B. Adm. 3d ed. 187; The Princess Alice, 3 W. Rob. 139; The Strathnaver, L. R. 1 App. Cas. 58, 34 L. T. N. S. 148, 3 Asp. Mar. L. Cas. 113; The Kingalock, 1 Spunks, Eccl. & Adm. 265.

The contract excepted dangers of the seas, navigation, etc.

Reed v. United States, 11 Wall. 591, 606, 20 L. ed. 220, 222; Clyde Commercial S. S. Co. v. West India S. S. Co. 94 C. C. A. 551, 169 Fed. 275; Pool Shipping Co. v. Samuel, 118 C. C. A. 264, 200 Fed. 36.

Rogers, Circuit Judge, delivered the opinion of the court:

This suit grows out of a dispute over towage services, and involves a determination of the question whether an agreement "to pay vessel's towage" includes the expense of breaking a path through the ice when the ice had to be broken because there was no channel through the bay and the river, which were closed to navigation by the fact that their waters were frozen. Is breaking ice towage, so that a party who has agreed to pay a vessel's towage is under obligation to pay the expense of breaking the ice?

The definition of towage given in 1849 in The Princess Alice, 3 W. Rob. 138, 140, by Dr. Lushington, and which has been so often cited since, was as follows: "Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress."

Towage service is aid rendered in the

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cuing the towed vessel were salvage. The Saratoga, Lush. 318.

But a towage contract is not altered into a service of salvage where the danger in which the vessel is placed is due to the tug's negligent performance of her towage contract. The Robert Dixon, L. R. 5 Prob. Div. 54, 42 L. T. N. S. 344, 28 Week. Rep. 716.

And a towage contract is not ended, superseded, or suspended, and the tug entitled to salvage remuneration for services thereafter rendered, where the danger in which the vessel was placed was due to the negligence of the tug owners in sending a tug unequal to the work to be done in the weather and circumstances to be expected. The Maréchal Suchet, L. R. [1911] P. 1, 80 L. J. Prob. N. S. 51, 103 L. T. N. S. 848, 26 Times L. R. 660, 11 Asp. Mar. L. Cas. 553.

And where in performance of a contract to tow a vessel from the sea to her dock, the vessel grounded in the attempt to enter the dock, the services of the tug in towing her off were within the contemplation of a contract of towage, the vessel never being in any material danger, and no extra risk being run by the tug. The Liverpool, L. R [1893] P. 154, 1 Reports, 601, 68 L. T. N. S. 719, 7 Asp. Mar. L. Cas. 340.

So, where a steamer under contract to tow another vessel to a certain place, in order to protect herself from being crushed by a collision between the tow and a third vessel, cast off and left her to drift into a place of danger, it was held that the services of the steamer in afterward towing her to a place of safety were part of the original contract of towage, and not salvage services. The court said that the steamer was bound to tow to destination, and while she was justified in looking to her own safety in the first instance, and letting the tow go adrift, she was not exonerated from the obligation of following the tow to complete her engagement, and from doing what she could to prevent the mischief which might arise from the temporary interruption of her services. The Annapolis, Lush. 355, 5 L. T. N. S. 37.

In The Hjemmett, 49 L. J. Prob. N. S. 66, L. R. 5 Prob. Div. 227, 42 L. T. N. S. 514, 4 Asp. Mar. L. Cas. 14, action for towage, it was contended that, the vessel having been delayed as the result of a collision, a separate service beyond the original contract, or a sort of subsidiary service, had been performed by the tug, and that some remuneration in respect of that service should be awarded, but the court held that it had no jurisdiction to award any remuneration for the delay beyond the sum agreed to be paid for towage. The court, however, said that it did not wish to be understood, in deciding the case, as expressing any opinion as to what the court might have decided if the action had been an action to recover salvage remuneration for salvage services arising out of the performance of a towage contract; that the questions which might then have to be considered would be two, first, whether, there having been a valid agreement to take a vessel in tow from one place to another, the fact of the ship in tow having been delayed by accident released the tug from her contract, and the second, whether such a delay as occurred in the instant case rendered it necessary that the tug should be paid an additional remuneration beyond the sum agreed to be paid for towage.

J. H. B.

propulsion of a vessel. In The H. B. Foster, 1 Abb. Adm. 222, Fed. Cas. No. 6,290 (1848), District Judge Betts said: "Towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion."

In The Plymouth Rock (D. C.) 9 Fed. 413 (1881), District Judge Addison Brown adopted the definition of Dr. Lushington as already quoted. This definition has recently been referred to approvingly in an opinion rendered in the privy council by Sir Robert Phillimore in The Strathnaver, L. R. 1 App. Cas. 58, 63, 34 L. T. N. S. 148, 3 Asp. Mar. L. Cas. 113 (1875). Here he refers to it as "a very clear and precise statement of the law." In the Century Dictionary towage service is defined as: "Aid rendered in the propulsion of vessels, irrespective of any circumstance of peril; the employment of one vessel to expedite the voyage of another vessel when nothing more is required than the acceleration of her progress. When used in contradistinction to salvage service, it is confined to vessels not in distress."

In the sixty-five years since Dr. Lushington defined the meaning of "towage service," no adverse criticism of his definition seems to have been made, and we are prepared to accept it as an accurate statement of the law. An agreement to pay a vessel's towage is an agreement to pay for the services of a vessel or vessels rendered in the propulsion of another vessel through the water, when nothing more is required than the acceleration of her progress. The breaking of a channel through the ice in order that, after the ice has been broken, a vessel can be towed through, is no part of towage service. And consequently expense involved in breaking the ice and creating the channel cannot be included in the expense of towage.

The charter party gave the respondent the right to name the towing line, and an agreement was made with a certain towing company to do the round trip for $50. But that contemplated a trip through open water, and when the ice closed navigation the agreement was abandoned. Then the libellant made an arrangement with the Tice Towing Line to tow the boat and use three tugs for $75 a tug, and so informed the respondent on the day before the towage began. To the respondent's protest against it, the libellant's agent is said to have replied: "That is the best we can do, and the only one we could get to tow her, and we are going to tow her up there, . . . and we are going to do it anyway."

And this bargain with the Tice Towing Line was concluded by the libellant before any notification was given to the respondent. When notification was given the libellant was told by the respondent that the arrangement was contrary to the charter party agreement, and respondent would not be responsible, and if the vessel was towed it would be wholly at the libellant's risk.

"Then Mr. Bryant [the libellant's representative] got a little bit mad about it; so did I. He said they would tow her up if it took $10,000, and our charter was written in such a way they would make us pay for it."

And the libellant was thereupon informed that the respondent would not pay $225 for the service.

The testimony showed that the ice in the bay was from 10 to 12 inches thick. It also showed that under ordinary circumstances, where the water was free from ice, one tug would have been sufficient to have towed the respondent's vessel. The manager of the towing line was asked, "Under ordinary circumstances, so far as the size of the vessel went, one tug would be perfectly able to take her up?" to which he replied, "Perfectly." As it was three tugs were used. Two tugs were sent ahead to break a channel through the ice. While three tugs had to be used in taking the vessel up to her dock on the Passaic river, only two were employed to bring her back. Seventy-five dollars for each tug was charged for taking her up, and only $60 for bringing her back, making the cost $285 for the entire service.

According to the testimony of the manager of the company that did the towing, two of the three tugs used in going up were used to make a channel by breaking the ice. And the witness West, who was in charge of the tug that did the towing up, testified that the other two tugs "were ahead breaking the ice." A deposition, however, was received in evidence from the master of the schooner, in which he stated: "We had one boat towing ahead and one alongside and a third boat going ahead breaking the ice in the channel."

There is thus some conflict in the testimony, but the district judge found that two tugs were used in breaking ice, and one in towing in going up. Where there is a conflict in the testimony the judge's finding of fact should be accepted. There is no testimony showing that any tug was employed in breaking the ice on the trip back.

The charge for the two tugs used in breaking ice on the trip up cannot be allowed. But the libellant is entitled to charge for the service of the one tug which towed the boat up and of the two tugs which towed her down, less $25 allowed and $25 paid.

The decree is reversed, with half costs of

this court to the appellant, and the cause is remanded to the District Court, with instructions to enter a decree for the libellants for $85 and interest and one half of the costs of that court.

COLORADO SUPREME COURT.

ANDREW C. DEBACA, Plff. in Err.,
v.
GEORGE F. HIGGINS, Receiver of Bank of Grand County.

(— Colo. —, 143 Pac. 832.)

Bank — misappropriation by official — duty to refund.

1. A creditor of a bank official who receives from him a draft or certificate of deposit bearing his signature, to be satisfied out of bank funds, in satisfaction of the claim, is liable to refund the amount received in case the act proves to be a misappropriation of the bank's funds, and the act was not authorized or ratified by the bank.

Same — act of sole stockholders.

2. That the president of a bank owns all its stock and transacts all its business does not charge the bank with notice of his attempt to pay his individual debt out of assets of the bank, so that its failure to object will estop it to contest the validity of the payment, at least if he has pledged stock to another as collateral security.

(April 6, 1914.)

ERROR to the District Court for Arapahoe County to review a judgment disallowing a claim filed with the receiver of an insolvent bank upon a certificate of deposit issued by a bank official in settlement of his individual debt to claimant, and a judgment in favor of the receiver on his cross complaint for the amount of a draft paid to claimant. Affirmed.

Statement by **Gabbert, J.**:

The Bank of Grand County was a corporation organized under the laws of this state. One C. H. Bowlds purchased the entire capital stock of the bank, which was transferred to him. At the time of this purchase a meeting of the board of directors was held, and Bowlds elected director and president, and one Norment director and vice president; but no third director was elected, nor was a cashier elected. Bowlds took possession of the bank, and managed and controlled its business. One Furgerson remained in the employ of the bank and appears to have acted in the capacity of cashier. Bowlds was indebted to plaintiff in error on a promissory note in the sum of $5,000 and interest. During the absence of Furgerson, Bowlds took up this note by giving his check on the bank for $762.50, a draft signed by himself as cashier for $1,000, and a certificate of deposit for $4,000, payable four months after date, which was also signed by him as cashier, each of which was payable to plaintiff in error. The draft and check were paid in due course. At the time of this transaction Bowlds did not have any funds to his credit in the bank. His account was overdrawn, and he never made any deposit to take care of either of these obligations. Two days prior to the issuance of these obligations, Bowlds pledged ninety shares of the stock of the bank to the Central National Bank as collateral security for $5,000 borrowed by him. Subsequently, and within thirty days, defendant in error was appointed receiver of the bank. The loan of the Central National has not been paid, and it still holds the stock pledged as security. Plaintiff in error filed his claim with the receiver for $4,000, upon the certificate of deposit. The receiver objected to its allowance upon various grounds, which were to the effect that the certificate was issued in settlement of Bowlds's personal obligation, and without consideration to the bank. To these objections claimant replied to the effect that the bank was estopped to deny the authority of Bowlds to execute the certificate, and had been guilty of laches in failing to interpose objections to the validity of the certificate. Later the receiver filed a further answer and cross complaint, praying judgment against the plaintiff in error upon the draft and check, upon the same grounds that he opposed the allowance of the claim on the certificate of deposit. The Central National Bank intervened and objected to the claim of plaintiff in error, and claimed that by virtue of its ownership of the stock of the bank pledged by Bowlds, it was entitled to all surplus in the hands of the receiver. The receiver had sufficient assets to pay all claims against the bank except that of plaintiff in error, and approximately $2,000 in addition. The testimony at the trial established facts substantially

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Note. — As to right of one who takes commercial paper of corporation in payment of, or security for, an individual debt of an officer, see note to Kenyon Realty Co. v. National Deposit Bank, 31 L.R.A.(N.S.) 169.

As to imputation of knowledge of bank officers to bank where officers are personally interested, see notes to Brookhouse v. Union Pub. Co. 2 L.R.A.(N.S.) 993; Lilly v. Hamilton Bank, 29 L.R.A.(N.S.) 558; and First Nat. Bank v. Burns, 49 L.R.A.(N.S.) 764.

as above narrated. The court rendered judgment disallowing the claim on the certificate of deposit, and against plaintiff in error for the amount of the draft, with interest. Claimant brings the case here for review on error.

Mr. **Walter M. Appel**, for plaintiff in error:

There being no authority paramount to that exercised by Bowlds, his acts bound the bank, and therefore are binding upon the receiver, who in this proceeding is in privity with the corporation, and is bound by what bound the bank, and is released only by what would have released the bank.

Wing v. Commercial & Sav. Bank, 103 Mich. 565, 61 N. W. 1009; Hirschmann v. Iron Range & H. B. R. Co. 97 Mich. 384, 56 N. W. 842; Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A. (N.S.) 567, 127 N. W. 522; Pensacola Bank & T. Co. v. National Bank, 59 Fla. 347, 52 So. 294; Davenport v. Stone, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722.

Messrs. **Dana & Blount**, for defendant in error, and **Doud & Fowler**, for intervener:

The attempt to elect Bowlds president was ineffective, and he at no time legally became an officer of the bank.

Conway v. John, 14 Colo. 30, 23 Pac. 170; Talcott v. Mastin, 20 Colo. App. 488, 79 Pac. 973; Shires v. Allen, 47 Colo. 440, 107 Pac. 1072; Pueblo Sav. Bank. v. Richardson, 39 Colo. 319, 89 Pac. 799.

Even if Bowlds were duly elected president, he had no authority in his name as cashier to issue the draft and certificate of deposit.

Zane, Banks & Bkg. pp. 120, 151; Morse, Banks & Bkg. 371; West St. Louis Sav. Bank v. Shawnee County Bank (West St. Louis Sav. Bank v. Parmalee) 95 U. S. 557, 24 L. ed. 490.

If Bowlds had authority to represent the bank as cashier, he had no authority to draw the draft and certificate for the payment of his personal obligations, especially in view of the fact that Debaca did not receive the draft and certificate as an innocent purchaser for value.

Hier v. Miller, 68 Kan. 258, 63 L.R.A. 952, 75 Pac. 77; Chrystie v. Foster, 9 C. C. A. 606, 26 U. S. App. 67, 61 Fed. 551; Pueblo Sav. Bank. v. Richardson, 39 Colo. 319, 89 Pac. 799; St. Charles Sav. Bank. v. Orthwein Invest. Co. 160 Mo. App. 369, 140 S. W. 921; Langlois v. Gragnon, 123 La. 453, 22 L.R.A.(N.S.) 414, 49 So. 18; Kitchens v. Teasdale Commission Co. 105 Mo. App. 463, 79 S. W. 1177; Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497; Home Sav. Bank v. Otterbach, 135 Iowa, 157, 124 Am. St. Rep. 267, 112 N. W. 769; Rochester & C. Turnp. Road Co. v. Paviour, 28 App. Div. 623, 51 N. Y. Supp. 1149, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114; Anderson v. Kissam, 35 Fed. 699; Lamson v. Beard, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 39; W. L. Wells Co. v. Avon Mills, 118 Fed. 190; El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co. 65 Kan. 359, 69 Pac. 332; National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co. 118 Mo. 365, 22 S. W. 947; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; Jenkins v. Planters' & M. Bank, 34 Okla. 607, 126 Pac. 757; Greenwood County Bank v. O. B. Walker Teleph. Co. 88 Kan. 287, 128 Pac. 357; Washbon v. Hixon, 87 Kan. 310, 124 Pac. 366; Cobe v. Coughlin Hardware Co. 83 Kan. 522, 31 L.R.A.(N.S.) 1126, 112 Pac. 115; State v. Miller, 47 Or. 562, 6 L.R.A.(N.S.) 365, 85 Pac. 81; Randall v. Rhode Island Lumber Co. 20 R. I. 625, 40 Atl. 763; Lanning v. Trust Co. of A. 137 App. Div. 722, 122 N. Y. Supp. 485; McCloskey v. Goldman, 62 Misc. 462, 115 N Y. Supp. 189; De Jonge v. Woodport Hotel & Land Co. 77 N. J. L. 233, 72 Atl. 439; Germania Safety-Vault & T. Co. v. Boynton, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

Anyone dealing with an agent or cashier under circumstances similar to those in the case at bar is not a bona fide purchaser, but is put upon notice to ascertain the authority of the agent or cashier.

Farmers' Loan & T. Co. v. Madison Mfg. Co. 153 Fed. 310; Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216; St. Louis Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716; Wheeler v. Home Sav. & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598; Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92.

No one owning the entire capital stock of a bank corporation has a right to handle its funds as if it were his individual business.

Durlacher v. Frazer, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306; Morse, Banks & Bkg. § 127 (a); El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co. 65 Kan. 359, 69 Pac. 332; National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co. 118 Mo. 365, 22 S. W. 947; Germania Safety-Vault & T. Co. v. Boynton, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797; Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 522; Demarest v. Spiral Riveted Tube Co. 71 N. J. L. 14, 58 Atl. 161; 10 Cyc. 799; 1 Morse, Banks & Bkg. 4th ed. ¶ 127.

Gabbert, J., delivered the opinion of the court:

The transaction by which plaintiff in error received the draft and certificate of deposit was a personal one with Bowlds, and not with the bank. By the issuance of these obligations Bowlds undertook to discharge his individual indebtedness to the plaintiff in error by issuing a draft and certificate of deposit signed by him as cashier.

The official of a bank in charge of its business is its agent, but his authority is limited to those transactions in connection with the affairs of the bank which are usually exercised by such officer, so that the test to apply, in ascertaining if the bank he represents is bound by his act, is whether the transaction is with the bank and its business, or with the officer personally and in his business. If of the latter character, the bank is not bound thereby, unless it appears that the act of the official for his individual benefit was authorized or ratified. An agent is not vested with authority to appropriate the funds of his principal to pay his debts, and therefore a creditor of a bank official, receiving a draft or other obligation of the bank which the officer represents, in payment of his individual obligation, which show upon their face that they were issued by himself, is advised that thereby the officer is appropriating the assets of the bank to pay his individual indebtedness, and is therefore liable to the bank for the funds so received, or the obligation is nugatory in his hands, unless he establishes that the bank official was authorized to issue such obligations, or his act has been ratified by the bank. Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497; Zane Banks & Bkg. 120; Anderson v. Kissam (C. C.) 35 Fed. 699; Hier v. Miller, 68 Kan. 258, 63 L.R.A. 952, 75 Pac. 77; Langlois v. Gragnon, 123 La. 453, 22 L.R.A.(N.S.) 414, 49 So. 18; St. Charles Sav. Bank v. Orthwein Invest. Co. 160 Mo. App. 369, 140 S. W. 921. Such proof was not made in the case at bar, and it appears that Bowlds never made any deposit with the bank to pay the draft or certificate of deposit.

It is urged, however, on behalf of plaintiff in error, that because Bowlds was the owner of the entire capital stock of the bank, transacted all its business, attended to all its affairs, was not subject to any authority in the conduct of the business of the bank, and because the bank remained silent and made no objection to the authority of Bowlds to issue the certificate of deposit and the draft, the transaction was ratified, and both the bank and the receiver are estopped from questioning the validity of the transaction. Bowlds, as we have stated, and as is claimed by plaintiff in error, was in full control of the affairs of the bank. He was therefore trustee for its stockholders and creditors. This fiduciary relation inhibited him making any use of the corporate assets, except such as might serve the purpose of the corporation. Consequently, he could not appropriate the funds of the bank to his own use as against its creditors and those having an interest in its stock. Prior to the transaction involved, he had transferred ninety shares of the capital stock to the Central National Bank, to secure his note to that institution. This note is unpaid. His attempt to discharge his individual indebtedness with the bank assets was unquestionably wrong and illegal. He was the only one interested in the bank who appears to have had any knowledge of this wrongful act. In such circumstances his silence or acquiescence cannot bind his principal. To hold otherwise would enable a bank official in sole charge of the affairs of a bank, to ratify his own wrongful act by his own silence and his own acquiescence. The law will not permit fraud to be perpetrated in this manner. We must not be understood, however, as intimating that plaintiff in error, or those representing him, were guilty of any fraud, for they were not. When we speak of fraud, we refer to the act of Bowlds in appropriating the funds of the bank to his own use to discharge his individual indebtedness. It was this fraud of which plaintiff in error had notice that vitiates the transaction.

The contention on the part of counsel for plaintiff in error that the judgment is erroneous is based entirely upon the proposition that the transaction was ratified, and therefore binding on the bank, and in considering the case we have merely assumed, but not decided, that it could have been ratified, either in advance or by subsequent action.

It is suggested in the brief of counsel for plaintiff in error that the receiver holds his note against Bowlds, and claims it as an asset of the bank. We do not understand the receiver makes any such claim. If he has the note, it should be turned over to the plaintiff in error.

The judgment of the District Court is affirmed.

Musser, Ch. J., and **Hill**, J., concur.

Petition for rehearing denied November 2, 1914.

KENTUCKY COURT OF APPEALS.

NATIONAL UNION FIRE INSURANCE COMPANY, Appt.,
v.
A. G. CRUTCHFIELD.

SAME, Appt.,
v.
ANDREW ALEXANDER.

(— Ky. —, 170 S. W. 187.)

Insurance — wind — driving waves against building.

A policy insuring against direct loss or damage by tornado, windstorm, or cyclone, except that there shall be no liability for loss occasioned directly or indirectly by high water or overflow, does not cover a loss caused by the wind driving against the building waves of the water of a river which had overflowed its banks and surrounded the insured building.

(November 11, 1914.)

APPEALS by defendant from judgments of the Circuit Court for Henderson County in favor of plaintiffs in actions brought to recover the amounts of policies of tornado insurance. Reversed.

The facts are stated in the opinion.

Messrs. **Yeaman & Yeaman**, for appellant:

The evidence amply sustained the defenses that the loss was caused directly or indirectly by high water, overflow, or waves, and the insurer is not liable.

Even though the evidence left the question in doubt as to whether the loss was caused directly by tornado, windstorm, or cyclone, or was caused directly or indirectly by high water, overflow, or waves, that question should have been submitted to the jury by appropriate instructions.

Beakes v. Phœnix Ins. Co. 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453; Farrell v. Farmers' Mut. F. Ins. Co. 66 Mo. App. 153; Howard F. Ins. Co. v. Norwich & N. Y. Transp. Co. 12 Wall. 194, 20 L. ed. 378; Insurance Co. v. Express Co. (Im-

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Note. — ***Insurance: causes of loss covered by cyclone, hurricane, tornado, or windstorm insurance.***

As to insurance against loss by lightning, see note to Beakes v. Phœnix Ins. Co. 26 L.R.A. 267.

It has been held that the words "tornado" and "hurricane" are synonymous, and mean a violent storm, distinguished by the vehemence of the wind and its sudden changes, while a cyclone is a rotary storm or whirlwind of extended circuit. Queen Ins. Co. v. Hudnut, 8 Ind. App. 22, 35 N. E. 397.

In Jordan v. Iowa Mut. Tornado Ins. Co. 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266, it was said that a windstorm, within the meaning of a policy insuring live stock against damage by tornadoes, cyclones, or windstorms, meant something more than an ordinary gust of wind, no matter how prolonged, and took its meaning measurably, at least, from the words "tornado and cyclone," with which it was associated. It was held in that case that a finding that there was a windstorm within the meaning of the policy was justified where numerous witnesses testified that the wind in question lasted all day, and was the hardest they had ever experienced, and that it blew down and twisted numerous well built windmills in the locality, and that by reason of the wind and snow they were able to see but a short distance, and that it was extremely difficult to go about out of doors during the storm.

And in Kinney v. Farmers' Mut. F. Ins. Soc. 159 Iowa, 490, 141 N. W. 706, which arose out of the same storm as that involved in Jordan v. Iowa Mut. Tornado Ins. Co. supra, it was held that the insured had made out a prima facie case showing that the proximate cause of the death of the insured cattle was the windstorm in question; there being evidence that no more severe storm had ever been experienced in the locality, that it was not a tornado, but a high wind which continued for about a day, and was accompanied by cold weather, sleet, hail, and heavy snow.

And in Jordan v. Iowa Mut. Tornado Ins. Co. supra, where it was contended that the windstorm was not the proximate cause of the loss, but that the injury was due directly to the conditions of the temperature, this question was held to be one of fact, and it was held that the fact that other causes might also have contributed to the loss did not of itself relieve the insurer from liability.

And it was held in the Jordan Case that under a policy insuring live stock against loss or damage by tornadoes, cyclones, or windstorms, the recovery was not limited to a loss due directly to a windstorm, such as a direct physical injury to the stock through being thrown to the ground or driven against some obstacle, or the hurling of some object against them.

A policy of insurance against loss or damage from wind storms, cyclones, or tornadoes does not cover damages from hail, through accompanied by damage caused by wind, under a provision of the policy denying liability for damage "from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles unless other damage occur," since the words "unless other damage occur" are restricted to the last member of the sentence, referring to damage from wind, and do not affect the clause as to damage from hail or lightning. Holmes v. Phenix Ins. Co. 47 L.R.A. 308, 39 C. C. A. 45, 98 Fed. 240.

And under a policy insuring "against

perial F. Ins. Co. v. Fargo) 95 U. S. 227, 24 L. ed. 428; Montgomery v. Firemen's Ins. Co. 16 B. Mon. 427; Leiber v. Liverpool, L. & G. Ins. Co. 6 Bush, 639, 99 Am. Dec. 695; 4 Cooley, Ins. p. 3023; Sklencher v. Fire Asso. of Philadelphia, 72 N. J. L. 48, 60 Atl. 232; Webb v. Protection & E. Ins. Co. 14 Mo. 3; Liverpool, L. & G. Ins. Co. v. Creighton, 51 Ga. 95; Fernandez v. Merchants' Mut. Ins. Co. 17 La. Ann. 131.

Mr. N. P. Taylor for appellees.

Turner, J., delivered the opinion of the court:

These two appeals present the same question and will be disposed of together. In April, 1913, each of the appellees held a policy of tornado insurance issued by the appellant company. They were each the owners of houses and other buildings embraced in the policies, which were situated along the Ohio river, in Henderson county, in a section subject to overflow. The policies insured them "against all direct loss or damage by tornado, windstorm, or cyclone, except as hereinafter provided." One of the exceptions referred to is as follows:

"This company shall not be liable for any loss or damage caused by hail, whether driven by wind or not, snowstorms, frost, or cold weather, nor for the blowing down of metal smokestacks (unless specifically insured), awnings, signs, temporary or board-roof additions, nor for loss or damage to buildings (or their contents) in process of construction or reconstruction, unless same are entirely inclosed and under roof, with all outside doors and windows permanently in place; nor for loss or damage occasioned directly or indirectly by or through any fire, explosion, tidal wave, lightning, high water, overflow, or cloudburst; nor by theft, nor by reason of any ordinance or law regulating the construction or repair of buildings, nor for consequential loss of any kind."

The evidence shows that on Friday, April 4, 1913, the river had reached a very high stage, and that the water had surrounded and was from 2 to 4 feet deep in each

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all such immediate loss or damage sustained by the insured as may occur by tornadoes, cyclones, and windstorms," but providing that the insurer shall not be liable for any loss or damage occasioned by hail, "and this policy is intended to cover such loss only as shall result directly from tornadoes, cyclones, or windstorms," no recovery can be had for damage occasioned by hail, although it would not have occurred had it not been for the high wind prevailing, since the loss was expressly limited to damage directly resultant from tornadoes, cyclones, or windstorm, and excluded loss occasioned by hail. Hartford F. Ins. Co. v. Nelson, 64 Kan. 115, 67 Pac. 440. The court said: "It is an insurance against wind only, and not against damage occasioned by wind in connection with other agencies. The hazard from hail is one separate and distinct from wind. Contracts may be made by companies authorized so to do for indemnity against loss from one or the other or both. It is reasonable to suppose that such indemnity would cost more for loss occasioned by both than either alone. It is a fact of general knowledge that hail is usually accompanied by wind of greater or less violence, and that the liability of falling hail to do damage is thus greatly increased. May we not take note of this general knowledge to explain the language of the policy and make plain the reason why it was therein specifically provided that the policy should not cover loss or damage occasioned by hail? Can there be any question that a policy insuring against loss from hail would have covered the loss in question?"

In Phenix Ins. Co. v. Charleston Bridge Co. 13 C. C. A. 58, 25 U. S. App. 190, 65 Fed. 628, suit was brought on a policy insuring against loss or damage to a bridge by windstorms, cyclones, or tornadoes, but excluding liability caused by high water, floods, or freshets, and the evidence tended to show that the bridge was broken by schooners and barges being driven against it by a cyclone which also caused an abnormal rise in the water, and there was no evidence from which the jury could have found what proportion of the loss, if any, was attributable to the high water. It was held that the court correctly instructed the jury that if the efficient cause of the damage was high water, flood, or freshet, the policy did not cover the loss, but that if the dominant efficient cause was a cyclone, windstorm, or tornado, then a recovery might be had, and the refusal of the court to instruct the jury that if they found that any of the damage was caused by water, no recovery could be had on account of such damage, was held proper, there being no evidence by which the jury could discriminate between the water damage and the wind damage, and the case therefore falling within the rule that when the damage from each cause cannot be distinguished, then the party responsible for the damage caused by the predominating efficient cause is liable for the whole loss.

In Queen Ins. Co. v. Hudnut Co. 8 Ind. App. 22, 35 N. E. 397, where the policy insured a building against loss or damage by cyclones, tornadoes, and hurricanes, it was alleged in the complaint that the building was destroyed by a cyclone or hurricane, and the court held that an answer denying that the loss was occasioned by a tornado, cyclone, or hurricane, but alleging that it was caused by a very high wind forcing a boat against it, was not good as an answer of confession and avoidance, and stated no defense, and said: "The assurers deny that the loss was occasioned by a tornado, cy-

of the insured buildings; that while the river was rising slowly until that day, it had practically been at this stage for several days. On Thursday, April 3d, a brisk wind arose in the afternoon, and blew steadily all night and all day Friday, until the middle of the afternoon, when it became more violent. During all this period the high wind produced heavy waves, which were driven against these buildings, and on the afternoon of the 4th, when the wind became more violent and the waves higher, the buildings were lifted from their foundations and toppled and careened over; and that is the damage sued for in each of these actions. The evidence is conclusive that, but for the high wind, the overflow of the river would not have produced the damage sued for; and it is equally satisfactory that, but for the almost unprecedented stage of the water, the windstorm was not sufficiently severe, in and of itself, to have caused the injuries to the buildings. That is to say, the two concurring causes brought about the damage, which neither by itself alone would have produced.

One of the plaintiffs, being asked whether the damage would have occurred but for the high water, answered: "I don't think we would have had the damage that we did have, if it had not been for the water being as high as it was."

The other plaintiff, when asked what damage there would have been if it had not been for the high water, said: "I cannot answer that. I don't think it (meaning the wind) would have blown the buildings over; nor do I think we would have had any damage without the water."

Another witness for the plaintiffs stated that "the wind caused the water to do it," and if there had been no water to loosen up the foundations, the wind of itself would not have blown the houses from their foundations. Another witness for the plaintiffs stated that "the wind and waves did the work," but that the wind was not sufficient of itself to have done it. Another witness for the plaintiffs states that he was unable to say whether there would have been any damage if the water had not been there, but says "the water was there and the wind was there."

It is therefore perfectly apparent that neither the wind, acting independently of the flood, nor the action of the flood, apart from the high wind, would have caused the damage, and the question is: Under the terms of the contract above quoted, was the appellant liable? The contract was to insure appellee "against all direct loss or damage by tornado, windstorm, or cyclone," except "for loss or damage occasioned directly or indirectly by or through . . . high water [or] overflow." Can it be said, under the facts of this case, that the injury was not at least indirectly occasioned by the high water? The evidence is conclusive that, except for the existence of the flood at the time of the windstorm, there would have been no damage. Neither of these agencies, independent of the other, would have produced the damage; the plaintiffs

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clone, or hurricane, but that it was caused by a very high wind forcing the boat against it. Is this not a confession that a tornado, cyclone, or hurricane caused the injury? The words 'tornado' and 'hurricane' are synonymous, and mean a violent storm, distinguished by the vehemence of the wind and its sudden changes, while the definition of a cyclone is: 'A rotatory storm or whirlwind of extended circuit.' Webster's Unabridged Dictionary. It is evident, therefore, that a hurricane is a very high wind. That the hurricane itself, coming in contact with the building, did not alone cause the damage, is not material, but if it caused another body to come in contact and do the damage, the hurricane would be the direct and controlling cause. The special allegations as to the cause of the injury are inconsistent with the allegations that the loss was not occasioned by a tornado, hurricane, or cyclone, hence they control such general allegation."

The case of Maryland Casualty Co. v. Finch, 8 L.R.A.(N.S.) 308, 77 C. C. A. 566, 147 Fed. 388, writ of certiorari denied 203 U. S. 592, 51 L. ed. 331, 27 Sup. Ct. Rep. 780, is not directly in point, but it was there held that an exception in a policy insuring against loss caused by the accidental discharge from an automatic fire extinguisher, of damage resulting from or caused by earthquakes or cyclones, or by blasting or explosions, included loss from leakage caused by a windstorm resembling more technically a tornado than a cyclone, and causing the injury by its high velocity rather than its circular motion.

In Jordan v. Iowa Mut. Tornado Ins. Co. 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266, where the policy provided that the insurer should not be liable for damage to live stock by snow or hail, or by the blowing of snow or hail, it was held that the burden was on the insurer to show that the loss occurred from causes coming within the exception.

In Poggensee v. Mutual Fire, Lightning & Tornado Ins. Co. 69 Iowa, 157, 58 Am. Rep. 215, 28 N. W. 485, where the policy insured against damage by tornado, hurricane, or irresistible windstorm, it was held in an action to recover for loss caused by a storm alleged to have been a tornado, that evidence of the effect of the storm upon other property in the neighborhood was admissible for the purpose of determining whether the storm causing the loss was in fact a tornado. J. T. W.

L.R.A.1915B.

were insured against loss by one of them, and not from loss by the other.

It is urged for appellees that the proximate cause of the damage must necessarily have been the windstorm, because the water had been practically at the same stage for several days before the windstorm and had caused no damage; but this view loses sight of the admitted fact that the houses were surrounded by water which was standing in them from 2 to 4 feet deep, which could not have been driven against them by the force of the wind, except for this unusual stage of the water,—that is to say, if there had been no such rise in the river as to surround these buildings with water, the wind could not possibly have driven the water against them, so as to cause the damage.

But in this case it is not a question of proximate cause. The parties must be bound by the terms of their contract. Certainly the injury was not directly caused by the windstorm, for if the water had not surrounded the houses the windstorm could not have blown it against them; certainly the flood, which at the time surrounded the houses, was at least indirectly the cause of the damage, for if it had not been there it could not have been blown against the buildings. We are constrained to hold that the loss suffered was not embraced in or contemplated by the contract of insurance. It is apparent, from the situation of these buildings along the Ohio river in a territory subject to overflow, that the parties had in mind and contracted with reference to the very situation which arose, *viz.*, the loss by water being driven by the wind during a flood against the houses.

We are of opinion that the lower court should have directed a verdict for the appellants as they asked, and the judgments are each therefore reversed for a new trial, and for further proceedings consistent herewith.

GEORGIA SUPREME COURT.

HELEN CUTSINGER, Plff. in Err.,
v.
CITY OF ATLANTA et al.

(— Ga. —, 83 S. E. 263.)

License — to conduct hotel — right to require.

1. The business of keeping a hotel, lodging house, or rooming house is one so far affecting the public health, morals, or welfare that it is competent for the legislature, in the exercise of the police power, to authorize municipal authorities to require persons conducting such a business to obtain a license.

Same — delegation of power — arbitrary discretion.

2. The conferring by the legislature, in general terms, of the power to grant or refuse licenses of the character mentioned in the preceding headnote, in the discretion of the municipal council, without prescribing the bounds of such discretion, will not, *ipso facto*, render the grant of power void, as being an effort to confer arbitrary power, but will be treated as authorizing the municipal authorities to exercise a reasonable discretion in the grant or refusal of such licenses.

Same — resort to courts.

3. After the 13th section of the act approved August 19, 1912 (Acts 1912, pp. 562, 573), had provided that the keepers of hotels, lodging houses, and rooming houses in Atlanta should apply to the mayor and general council for a license, which might be granted or refused in the discretion of that body, if, by the further provision that "their action in the premises shall be final," it were intended to confer arbitrary power upon the mayor and general council, by declaring that even for an arbitrary or capricious use of such power there could be no resort to the courts for relief, it would be violative of the 14th Amendment to the Constitution of the United States, and also of the clause of the state Constitution which declares that no person shall be deprived of life, liberty, or property except by due process of law. If it be construed to mean that the municipal officers can use a rea-

Headnotes by LUMPKIN, J.
L.R.A.1915B.

Note. — Power to require license to keep inn, hotel, boarding or lodging house, or restaurant.

Generally, as to power of municipal corporation to make right to transact certain business depend upon consent of municipal authorities, see note to Montgomery v. West, 9 L.R.A.(N.S.) 659.

As to constitutionality of statutory regulations as to safety and sanitary conditions of tenement, lodging, and boarding houses, see note to Bonnett v. Vallier, 17 L.R.A.(N.S.) 486.

As to validity of contract of unlicensed innkeeper, see note to Levison v. Boas, 12 L.R.A.(N.S.) 617. And see, generally, as to effect of failure to procure license when required, notes cited in Index to L.R.A. notes, "License."

For a note on proprietor of hotel conducted on European plan as keeper of restaurant within ordinance, see New Galt House Co. v. Louisville, 17 L.R.A.(N.S.) 566.

The present note does not cover the question of the power to require licenses for the sale of liquor in inns, hotels, etc.

Power to impose, generally.

It has been held that the regulation of,

sonable administrative discretion in regard to the granting or refusing of the licenses mentioned (which are licenses under the police power), and that their action shall be final in the sense that no appeal lies to any other body or court for the purpose of reviewing their action, the provision will not be violative of the clauses of the state and Federal Constitutions mentioned.

(a) Applying the rule that where an act of the legislature is susceptible of two constructions, under one of which it would be unconstitutional and under the other constitutional, the latter is to be preferred, the construction last hypothetically stated in the preceding headnote will be placed upon the clause of the act under consideration.

Injunction — against penal action — protection of property.

4. While as a general rule a court of equity (or one exercising equitable jurisdiction) will not enjoin a proceeding before a recorder of a city, instituted for the purpose of punishing the violation of a penal ordinance, yet in certain cases a court having equitable jurisdiction may intervene to protect property or property rights from irreparable damage by wrongful conduct of municipal officers, although repeated prosecutions in the recorder's court, or threats thereof, may be used as a means of consummating the wrong.

Pleading — demurrer — sufficiency.

5. The allegations of the petition in this case were sufficient to withstand a general demurrer, which admits the facts alleged; and it was error to sustain the demurrer and dismiss the petition.

(October 3, 1914.)

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cheap lodging houses through the medium of a license fee is a valid exercise of the police power by the legislature. Com. v. Muir, 38 W. N. C. 328.

And in Bostick v. State, 47 Ark. 126, 14 S. W. 476, a statute authorizing county courts to grant tavern licenses in their several counties if they are satisfied that such licenses should be granted, and providing for license fees ranging from $10 to $100, and requiring all persons keeping public taverns to obtain licenses, and making a failure so to do a misdemeanor, was held to be a valid exercise of the police power of the state, and not a tax within the meaning of a constitutional provision giving the general assembly power to tax all privileges, pursuits, and occupations which are of no real use to society, and providing that all others shall be exempt.

And under the power conferred by the Constitution a city has been held authorized to impose a license fee upon hotels.

Thus, in St. Louis v. Bircher, 76 Mo. 431, under the provisions of the Constitution separating the city from the county of St. Louis, and requiring the city to assume certain obligations and giving it the right to adopt a charter form of government, the city was held empowered to impose a license tax upon hotels.

And it was held in that case that § 1, art. 10, of the Constitution, providing that the taxing power might be exercised by municipal corporations under authority granted by the general assembly, applied only to municipalities deriving their authority from the legislature, and did not apply to the city of St. Louis, which derived its charter authority by virtue of the Constitution. Ibid.

It is generally held that the authority of municipalities to impose license fees upon hotels must be expressly granted by the legislature, and will not be presumed.

Thus, it has been held that the authority of a city to enact an ordinance requiring the payment of license fees by hotels must plainly appear in the statute claimed to confer such power, and that it will not be inferred from terms of doubtful import. L.R.A.1915B.

Ft. Smith v. Gunter, 106 Ark. 371, 154 S. W. 181.

And in Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753, it was held that while the business of innkeeper has an aspect of public interest which might warrant the legislature in passing an act for the regulation of such business, yet where that power has not been exercised by the legislature directly, and has not been expressly delegated to a municipality, an ordinance imposing a license on hotels passed by the latter is void.

And in Atlantic City v. Hemsley, 76 N. J. L. 354, 70 Atl. 322, it was held that where premises are licensed as a hotel by a city under the power conferred by its charter, and it is essential to such grant and to the maintenance of the hotel that it should have spare rooms for the accommodation of its guests, and the city charter does not specifically empower it to pass an ordinance imposing a sleeping room tax upon hotels, it has no power to impose such a tax.

The authority to regulate and license rooming houses and hotels was expressly conferred upon the board of commissioners of Salt Lake City by §§ 206x4, 206x38, chap. 120, Laws 1911, the terms of which do not appear in the report of the case. Larsen v. Salt Lake City, — Utah, —, 141 Pac. 98.

It has been held that an act giving municipal corporations power to regulate hotels includes the power to license as a means of regulating, and that an ordinance passed by a municipality requiring hotel keepers to obtain licenses is therefore valid. Russellville v. White, 41 Ark. 485; Helena v. Miller, 88 Ark. 263, 114 S. W. 237.

And in Ft. Smith v. Gunter, supra, it was held that under an act authorizing cities "to regulate hotels and other houses for public entertainment," a city might impose a license on restaurants.

And a town incorporated under Pol. Code 1895, §§ 685–710, authorizing towns incorporated thereunder to fix, assess, and collect taxes on occupations, professions, businesses, and all taxable property located

ERROR to the Superior Court for Fulton County to review a judgment in defendants' favor in an action brought to enjoin them from interfering with the operation of plaintiff's business, or proceeding with quasi criminal prosecutions against her. Reversed.

Statement by **Lumpkin**, J.:

Helen Cutsinger, who alleged that she was a citizen of the United States, and of Fulton county, Georgia, filed her petition against the city of Atlanta, the chief of police of that city, the recorder, and the mayor, aldermen, and members of council, alleging in substance as follows:

On and prior to October 7, 1912, the city of Atlanta had permitted a rooming house or lodging house to be conducted at No. 115½ Decatur street. Being physically unable at that time to conduct it herself, she employed one Harding to conduct it for her. On the date mentioned Harding applied for and obtained a license to operate the business and conduct it for the plaintiff until she was able to take charge of it for herself. Early in January, 1913, having resumed the conduct of her own business, the plaintiff applied to the city clerk for a license, tendering him $6.25, the amount due for one quarter, in accordance with the tax ordinance of the city. The clerk declined to receive the tender or issue the license, stating that she would be compelled to file a written application therefor. While not conceding the right of the mayor and gen-

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therein, has power to adopt and enforce an ordinance providing for a license tax upon persons operating restaurants in the town. Lewis v. Harris, 12 Ga. App. 305, 77 S. E. 108.

So, in St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571, a charter of a village providing that the "corporation may by by-laws regulate . . . the construction, location, and use of victualing shops," was held to supersede a general law empowering the selectmen of towns to license such places, and it was held that under such charter the village might impose a license fee upon keepers of victualing shops.

And in ex parte Lemon, 143 Cal. 558, 65 L.R.A. 946, 77 Pac. 455, a municipal corporation was held to have power to pass an act requiring hotel and restaurant keepers to pay a license fee even though it amounted to a tax for revenue, such power being conferred upon it by virtue of its special act of incorporation, and continuing notwithstanding § 3366 of the Code of 1901.

And in the following cases effect was given to legislative acts imposing license fees on innkeepers and taverns, the validity of the acts not being in question: Lord v. Jones, 24 Me. 439, 41 Am. Dec. 391; State v. Fletcher, 5 N. H. 257; State v. Kane, 15 R. I. 395, 6 Atl. 783; State v. Stone, 6 Vt. 295.

And in Albert v. Brewer, 9 La. Ann. 64, a statute imposing an annual tax on keepers of coffeehouses was held legal; the ground upon which its legality was attacked, however, is not stated.

The city council of Atlantic City, by the charter of the city, was given power to license and assess innkeepers and tavern keepers, and such power was reserved to it by § 115 of the act of 1902, regulating and providing for the government of cities, and this power was held not inconsistent with a provision of such act vesting city councils with power to license or prohibit the sale of liquors and regulate the terms and conditions upon which licenses should be granted, or with another provision directing that in granting licenses the form of application and mode of procedure prescribed for the granting of such licenses by the general laws of the state should be observed, since it was held that these sections were intended to make more effective the power granted by the city's charter. Conover v. Atlantic City, 73 N. J. L. 596, 64 Atl. 146.

In San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366, it was held that one who keeps a restaurant is not engaged in the business of selling goods within the prohibition of an act giving cities power to impose license taxes, but providing that "no license taxes shall be imposed upon any person who at any fixed place of business . . . sells or manufactures goods, wares, or merchandise, except such as require permits from the board of police commissioners," since a restaurant is primarily an eating house, and is not, according to ordinary speech, a place where the business of manufacturing or selling goods is carried on, and a license tax on restaurants accordingly was held valid.

But in Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753, where an act providing for the incorporation of cities specifically enumerated the various subjects in reference to which the police control was given, but did not mention hotels, a clause giving municipalities power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances," was held not to authorize a city to impose a license fee on hotels, since such clause was not a general delegation of all the police power of the state, but merely of the power necessary to be exercised with reference to the subjects enumerated.

In Landon v. Gilbert, — N. J. L. —, 91 Atl. 1035, an act authorizing a commission form of government provided that all ordinances passed before the adoption of such form of government, not inconsistent with the rights and powers granted by the act, should remain in force and effect until altered or repealed by the commission; and where the commissioners repealed an ordinance providing for excise commissioners, but did not repeal any ordinances adopted

eral council to pass upon such applications as to a business of this character, which was a useful and lawful business, or to deny her a license, yet, in order to be in harmony with the defendants, if possible, she filed an application for a license to operate a lodging house for men only at the place named. Pending this application she was advised by the chief of police, through her counsel, that "no case would be made against her" for conducting the business until after the application had been passed on, and then only if it should be refused. She accordingly proceeded with the conduct of her business until a few days before the filing of the petition, when she was notified by a police officer who stated that he was acting under the direction of the chief of police, that her application had been refused and she would be compelled to close, and would not be allowed longer to operate her lodging house; that if she attempted to do so, she would be charged with the commission of a violation of the municipal ordinance of the city against doing business without a license; that her employees would be arrested, and that she would be carried before the recorder and tried and punished by fine or imprisonment; and that other cases would be instituted against her from day to day until she closed her lodging house. During all the time in which she has been engaged in the business, she has been conducting an orderly place, catering to white male trade only, and complying with the laws of the state and the ordi-

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by the latter commissioners, it was held that an ordinance of the excise commissioners providing for the licensing of inns and taverns, and forbidding the granting of licenses within certain distances of churches and schools, remained in force, and that a resolution passed by the commissioners of the city granting an inn and tavern license inconsistent with such act was invalid.

In Sights v. Yarnalls, 12 Gratt. 292, it was held that a city authorized by its charter to impose a tax upon ordinaries at hotels, in addition to any state tax that might be levied upon the same, was fully authorized to make the payment of such tax a condition precedent to the applicant's right to demand that a license should be issued.

In Helena v. Miller, 88 Ark. 263, 114 S. W. 237, it was held that in fixing a hotel license a fee might be charged to defray the reasonable expense of issuing the license and of enforcing such police inspection or superintendence as might be lawfully exercised over the business.

And it was held that an ordinance requiring hotel keepers to obtain licenses was not invalid because it contained no provision for the inspection and superintendence of the business to be licensed. Ibid.

Vesting power in board or in commissioners.

In White v. Mears, 44 Or. 215, 74 Pac. 931, a legislative act conferring power to license sailors' boarding houses was held not void for the reason that it vested in the board arbitrary power to grant or deny applications, in violation of a clause of the Constitution providing that "no law shall be passed granting to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens," although the act in question authorized the board to reject any application it deemed advisable, where by other parts of the act the board was required to issue licenses upon the production of satisfactory evidence of the applicant's respectability, competency, etc.

In Bancroft v. Dumas, 21 Vt. 456, a statute providing for the election of commissioners in the several counties who should be authorized to grant licenses to such persons as they thought proper to keep inns or taverns and retail spirituous liquors was held not unconstitutional on the ground that it had not a uniform operation throughout the state, because the commissioners of some counties were liberal in granting licenses while those of others were not.

Effect of imposition of other tax.

The fact that a revenue tax is imposed upon hotel property by a city does not render a license tax on the hotel invalid on the ground of double taxation. St. Louis v. Bircher, 7 Mo. App. 169, affirmed in 76 Mo. 431.

And a license tax for the privilege of keeping a hotel, of $40 and 1 per cent of the actual rental or estimated value of the same, is not invalid on the ground that the tax imposed on the rental value is double taxation. Fulgum v. Nashville, 8 Lea, 635.

Neither does the imposition of a tax on the franchise of hotel and other corporations, provided for by § 37, chap. 168. Laws of 1897, prevent the imposition of a license tax on corporations for the privilege of conducting the business contemplated by their charters. Cobb v. Durham County, 122 N. C. 307, 30 S. E. 338.

Reasonableness and classification.

It has been held that an ordinance classifying restaurants for the purpose of a license tax, into those where meals are cooked and served by the proprietor or a member of his family, and those where they are not, and imposing a lower tax upon the former, is not void as an unjust discrimination. Ex parte Lemon, 143 Cal. 558, 65 L.R.A. 946, 77 Pac. 455.

So, the exemption of hotels of less than ten rooms from the payment of a license tax is a reasonable and valid classification. Fulgum v. Nashville, supra.

And there is nothing unreasonable or oppressive in graduating the amount to be

nances of the city, and seeking to earn an honest living by the proper pursuit of a legitimate line of business. She has been persecuted, harassed, humiliated, and damaged by the chief of police, by continually "flooding" her place of business with police officers and plain-clothes detectives without any search warrant or other legal authority. By reason of these continued raids, the business and patronage of her lodging house has been considerably and materially diminished, and her revenue has been much reduced. She caters to a class of "country white male trade," and the poorer classes of white men, many of whom pay only 25 cents for a bed and cot. Such men are easily intimidated and alarmed at police raids and illegal searches, and they either leave or do not return to her place of business; and she is also humiliated, disgraced, and mortified by such continued illegal and unwarranted action on the part of the police officers under the direction of the chief. She has had as many as ten policemen in her house at one time. A squad of "plain-clothes men" will suddenly enter her house, the officer in command will take charge of the front door, the only place of exit, and will send his force from room to room searching her house. The police squads have taken possession of her lodging house register, and have gone from room to room, and asked the occupant of each bed or room his name, waking them, if necessary, and seeing if they were in the proper room, and if their names corresponded to

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paid for a hotel license by the number of rooms which may be devoted to the accommodation of the public, and it is not necessary to prove the number of rooms actually occupied to justify such license tax. St. Louis v. Bircher, supra.

And in Com. v. Muir, 38 W. N. C. 328, a legislative act regulating public lodging houses not licensed as a hotel, inn, or tavern, in which ten or more persons are lodged for a price for a single night of 25 cents or less for each person, was held not to violate the constitutional provision that taxes shall be uniform on the same class of subjects.

And there is no violation of the Constitution on the ground of discrimination where an act imposes a license "on all hotels, boarding or lodging houses, restaurants, or eating houses of any kind . . . whose gross receipts are over $1,000, and less than $2,000, the sum of $10 and one half of 1 per centum on all gross receipts over and above $2,000," since the legislature has a right to exempt hotels whose receipts are less than $1,000. Cobb v. Durham County, supra.

In Ft. Smith v. Gunter, 106 Ark. 371, 154 S. W. 181, it was held that the power to license and regulate hotels, etc., granted to municipalities, was conferred solely for police purposes, and gives them no right to use it as a means of revenue, but it was held that a charge of $25 per annum, $15 for six months, and $3 per month for hotels and other houses of public entertainment was a reasonable regulatory fee, and did not amount to a tax.

And in Helena v. Miller, 88 Ark. 263, 114 S. W. 237, it was held that the fees fixed for hotel licenses by an ordinance providing for a fee of $25 for hotel keepers, $15 for boarding house keepers, and $20 for livery stable keepers, were not unreasonable, there being nothing to show the amount the collection of such licenses would raise, nor the expense of issuing the license or the expense of inspection and superintendence.

It has been held that a by-law authorizing trustees of a village to license for one year or less any person to keep a victualing shop within the limits of the village, under such regulations as they may prescribe, and providing for a penalty of $10 for a violation of the by-law, was reasonable, and not in restraint of trade or contrary to common right. St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571.

In Sights v. Yarnalls, 12 Gratt. 292, an ordinance for a license tax on the keepers of ordinaries at hotels provided for a tax according to the rental value, and for the highest class it provided that if the annual rental value exceeded $1,000, there should be a tax of $380 on the first $1,000 and 25 per cent on the excess. The court in this case said that from the record it could not undertake to say that this license tax was unjust, unequal, or exorbitant, or that the exercise of the discretion vested in the city council as to the amount of the tax was undue, improper, or oppressive.

Violation of provision against special or local laws.

The provision of the Constitution forbidding the legislature to pass special or local laws for the punishment of crimes and misdemeanors is not violated by an act providing that no person shall be permitted to keep, conduct, or carry on at points situated on the Willamette and Columbia rivers within the state of Oregon a sailors' boarding house or hotel where sailors are boarded, lodged, or harbored, without first having obtained a license, and that any persons conducting such places without first obtaining licenses shall be guilty of misdemeanors, since such act should be liberally construed, and, giving it such interpretation, it means that no person without first having obtained a license shall, in the state of Oregon, keep a sailors' boarding house or hotel, or board, lodge, or harbor seamen to be furnished to or for ships while in the Columbia or Willamette rivers, and so construed it applies to the entire class of persons within the state who are or may be engaged in the business sought to be regulated. White v. Mears, 44 Or. 215, 74 Pac. 931. J. T. W.

the names on the register. To the best of her knowledge and belief, at none of these times has there been any warrant of any kind or character for such action. She has protested against these raids, but has been advised that she had better submit without comment and allow such persecution, as it would be necessary for her to have the permission of the chief of police in order to procure her license, and that he would oppose her obtaining the license if she did not submit. She filed her application for the license on January 3, 1913, but the council did not refuse it until March 6th following. During that period her place of business has been under constant police surveillance and subject to frequent raids, and at no time has there been a single complaint of any violation of any city, state, or Federal law by her or any occupant or patron of her lodging house. Although she has conducted her business at the place mentioned for months, and in absolute compliance with the law and all police regulations, and has submitted to the police raids mentioned, nevertheless she is advised by a representative of the police that she must close her place of business and yield her right to make an honest living, "unless she meekly submits to the will of the chief of police, J. L. Beavers, who, petitioner believes, is responsible for the denial of her application for license by the mayor and general council of the city of Atlanta." Her lodging house is located near the police headquarters and within two blocks of the call officer of the police department. On March 23, 1913, the chief of police went in person to her place of business, took charge of her register, instructed an officer who accompanied him to take the names of men who had registered therein, ordered her to allow no one else to register, and to close up her house, and served her with a copy of charges to appear at the recorder's court for violating the rooming house ordinance. A case was docketed against her, which is now pending. "Your petitioner is advised and believes that said Chief Beavers, although he knew that he had used every endeavor possible to find your petitioner violating some law or ordinance, had failed, yet wrote the police committee of the general council, to whom this application was referred, and recommended to them that the application of the petitioner be denied." The action of the chief of police in making this case, and in threatening to make other cases from day to day, is based upon an amendment to the charter to the city of Atlanta, enacted by the legislature in 1912 (Acts 1912, p. 573, § 13), which reads as follows: "That the mayor and general council be and they are hereby authorized to regulate hotels, lodging houses, dance halls, rooming houses, and similar places, and they are further authorized and empowered, by ordinance, to require all person or persons owning or operating such hotels, houses, or halls to apply for a license for the operation of same, and such license may be granted or refused in the discretion of the mayor and general council, and their action in the premises shall be final. For a violation of such ordinance or the operation without a license granted, as herein provided, any person or persons adjudged guilty thereof in the recorder's court shall be subject to a sentence to pay a fine of not exceeding $500, or to work on the public works of the city for not exceeding thirty days, either or both, in the discretion of the recorder."

Under this the mayor and general council adopted an ordinance, the 1st section of which reads as follows: "Be it ordained by the mayor and general council, that any person, firm, or corporation desiring to open or operate a hotel, lodging house, dance hall, rooming house, or similar place, shall, before opening or operating such house or place, file a petition for a license addressed to the mayor and general council. If said license is granted, then the city clerk is authorized to issue and receipt for a business license for such house; but if such license is refused, then such business license shall not be issued, and it shall be unlawful for any person, firm, or corporation to operate such house or place."

The 2d section imposed a penalty upon "any person, firm, or corporation owning or operating any hotel, lodging house, dance hall, rooming house, or similar place, without being granted a license therefor by action of the mayor and general council." Under this ordinance the defendants are now seeking to close her house, stop her business, and involve her in a multiplicity of criminal prosecutions. The application which she filed was referred to a subcommittee of the general council, known as the police committee, though without notice to her. She is advised and believes that the chief of police, "by private official letter" to the chairman of the police committee, without notice to her, undertook to prejudice the chairman and other members of the police committee, and through their report the mayor and general council, against granting the application of the plaintiff, and, to the best of her knowledge and belief, undertook privately in personal conversation to influence the members of the police committee to make an adverse report upon her application, without giving her

the privilege of knowing the reasons assigned for such action on the part of the committee, or an opportunity to be heard upon them and to reply thereto. At one time her counsel happened to be present at a meeting of the committee, and spoke to them in relation to her application, but she is not advised as to whether the committee had passed adversely upon it at that time or not. At that particular meeting the chief of police was present, but offered no public objection to the application, and no notice was given or opportunity for her or her counsel to answer any objection at that meeting. The entry upon the application shows an adverse report by the committee, dated January 20th, but it was not passed upon by the council until March 6th. She is advised and believes "that said police committee met in secret session about half an hour before the meeting of the general council, and, upon the information, not under oath, of the said Chief Beavers, adversed or passed unfavorably upon the petition of application." The action of the general council followed the recommendation of the police committee without any investigation on the part of the general council; and under the ordinances of the city she would not have been permitted to be present and to have discussed the merits of her application, and the only method of reaching the city government was through its police committee. She is a woman of mature years, now past middle life. On account of her great weight (286 pounds), and on account of her having undergone several surgical operations, she is unable to do manual labor or remain long standing upon her feet. She is familiar with the lodging house business, and it is practically the only business with which she is familiar and which she is physically able to carry on. She has built up a sufficient business to support herself reasonably, and the name and good will of her business at the location mentioned is an intangible, but valuable, asset. There can be no reason for any denial of a license to operate a lodging house at this location. The place is located on the second floor of a building, with a stairway entrance to the street, and affects and injures no one; but the location is one where a hotel or lodging house of a cheap character is needed to accommodate a class of poor laboring men working in that locality, and men from the country who have come to town for the sale of their goods and the purchase of merchandise. The business was in operation at the time of the passage of the ordinance above mentioned, and the plaintiff had made large investments in furniture, in papering and painting of walls and woodwork, in carpeting of floors, halls, and steps, and in the installation of gas and electric fixtures and equipment. Practically all of this expenditure will be lost if she is compelled to cease doing business, as well as the name and good will of her business. "Petitioner is advised and believes that, owing to the antagonistic attitude of the chief of police toward her, she will not be allowed by the mayor and general council of the city of Atlanta to have any license to operate a lodging house at any other point available to her in the city of Atlanta, and that her rights and her experience in the lodging house business are forever lost to her, as far as being able to use the same in the city of Atlanta." The patronage of a lodging house is affected by so many considerations that it is impossible to estimate the damages which would result from a destruction of the business. To press the proceeding in the recorder's court would expose her to humiliation, embarrassment, expense, and possibly to temporary confinement, should it become necessary for her to have the action of the recorder reviewed by certiorari; and this might continue for months before the case could be heard. The plaintiff, having no real estate, and not being allowed to continue her business, could in all probability procure no bondsman, but would be compelled to languish in jail, and in the meantime her property, her business, would be destroyed; and even though she should ultimately win, the victory would be an empty one, and she would be discharged from jail without a vestige of property left. The multiplicity of the threatened quasi criminal cases would bankrupt her in the payment of counsel fees and other expenses. "Such action amounts to nothing more or less than absolute confiscation of the property of the petitioner and her utter ruin financially and in a general business in the city of Atlanta." She will therefore be irreparably damaged, and have no legal remedy or redress. "Your petitioner shows that said criminal prosecutions now threatened to be continued are obviously nothing but a circuitous method of depriving petitioner of her property and her property rights in said business, and are nothing more than an attempt by the municipal authorities of the city of Atlanta, under the pretense of seeking the good of the portion of society intrusted to their supervision, in fact to attack the vested rights, property rights, of your petitioner." The threatened repeated prosecutions, under color of municipal ordinances, if not prevented, will practically destroy her vested property rights, "and said criminal prosecutions are the wresting of the criminal side of the law from its legitimate purpose, in matters to

which they do not properly apply, and are used merely as a cloak to hide the effort to prevent petitioner from engaging in her usual and lawful occupation."

The act of the legislature above quoted is unconstitutional, as being in violation of the 14th Amendment of the Constitution of the United States (Civil Code 1910, § 6700), in that it attempts to vest in the mayor and general council the arbitrary right to abridge the privilege of the plaintiff to do business, and thus denies to her due process of law and the equal protection of the laws. The ordinance is unconstitutional for the same reason, as is also the action of the mayor and council. The act of the legislature and the ordinance based upon it are also in conflict with the provision of the state Constitution which declares that "protection to person and property is the paramount duty of government, and shall be impartial and complete." Civil Code 1910, § 6358. They also violate the provision of the state Constitution that "no person shall be deprived of life, liberty, or property except by due process of law." Civil Code 1910, § 6359. The act of the legislature and the ordinance are unreasonable, and seek to invest the mayor and general council with arbitrary power, with no rule or regulation to guide it, or to prescribe terms for its exercise, or put any limitation upon it, and without prescribing any terms or conditions upon which a permit or license can be obtained, or allowing any appeal from the decision of the general council, or prescribing any rules of procedure. Even if discretion is lodged in the municipal authorities, it has not been fairly administered, but has been arbitrarily and grossly abused, amounting to a discrimination against her and an oppression of her as a citizen, and it is being capriciously exercised in an arbitrary manner. In fact the abuse of discretion amounts to a failure to exercise municipal discretion, and to an arbitrary undertaking to exercise unlimited power without recognition of the rights of the plaintiff, and without giving to her an opportunity to be heard in her own behalf. She is willing to submit to any reasonable regulations which do not amount to a prohibition or a confiscation of her property and civil rights, and she offers to submit to any reasonable rule and regulation which may be imposed. She prays that an injunction be granted to prevent the defendants from interfering with the operation of her business, or proceeding with quasi criminal prosecutions against her.

The defendant demurred to the petition on the grounds that no cause of action was set out, that it undertook to enjoin a criminal prosecution by equitable procedure, that it appeared that the city was authorized to grant or reject the application for license, and that it had rejected the same, and no injunction should be granted against the further prosecution of the plaintiff, and that no grounds of equitable interference are set out. The demurrer was sustained, and the plaintiff excepted.

Mr. **William M. Smith** for plaintiff in error.

Messrs. **J. L. Mayson** and **W. D. Ellis, Jr.**, for defendants in error:

When the legislature has classified certain businesses as capable of being operated to the detriment of the community, and has seen fit to authorize a municipality to select only such locations and such persons as they deem best for the operation of such a business, their refusal to license any particular person is not without cause, is not arbitrary, and is not an illegal act simply to destroy a business.

2 Dill. Mun. Corp. 5th ed. § 594; Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95, 72 Pac. 970; Waterloo v. Waterloo, C. F. & N. R. Co. 149 Iowa, 129, 125 N. W. 819; Dunbar v. Augusta, 90 Ga. 390, 17 S. E. 970; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982; State ex rel. Walker v. Section "A" Crim. Dist. Judge, 39 La. Ann. 132, 1 So. 437; Morris v. Columbus, 102 Ga. 792, 42 L.R.A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; Cranston v. Augusta, 61 Ga. 572; Perdue v. Ellis, 18 Ga. 586; State v. Hill, 126 N. C. 1139, 50 L.R.A. 473, 36 S. E. 326; Boehn v. Baltimore, 61 Md. 259; Rund v. Fowler, 142 Ind. 214, 41 N. E. 456; Dubois v. Augusta, 1 Dudley (Ga.) 30; Jacksonville, T. & K. W. R. Co. v. Harris, 33 Fla. 217, 39 Am. St. Rep. 127, 14 So. 726; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; Whitcomb v. Springfield, 2 Ohio C. D. 138; Kansas City v. McAleer, 31 Mo. App. 433; Slaughter Houses Cases, 16 Wall. 36, 21 L. ed. 394; Barthet v. New Orleans, 24 Fed. 563; Darcantel v. People's Slaughter House & Refrigerating Co. 44 La. Ann. 632, 11 So. 239; Ex parte Heilbron, 65 Cal. 609, 4 Pac. 648; New Orleans v. Charouleau, 121 La. 890, 18 L.R.A.(N.S.) 368, 126 Am. St. Rep. 332, 46 So. 911, 15 Ann. Cas. 46; Phillip v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Stein v. Lyon, 91 App. Div. 593, 87 N. Y. Supp. 125; St. Louis v. Edward Heitzeberg Pack-

ing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; St. Louis v. Galt, 179 Mo. 8, 63 L.R.A. 778, 77 S. W. 876; Green v. Savannah, 6 Ga. 1; Montgomery v. Parker, 114 Ala. 118, 21 So. 452; Varney & Green v. Williams, 155 Cal. 318, 21 L.R.A.(N.S.) 741, 132 Am. St. Rep. 88, 100 Pac. 867; Curran Bill Posting & Distributing Co. v. Denver, 47 Colo. 221, 27 L.R.A.(N.S.) 544, 107 Pac. 261; Com. v. Boston Advertising Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; Bostock v. Sams, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665; State v. Phillips, 107 Me. 249, 78 Atl. 283; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; Com. v. Kingsbury, 199 Mass. 542, 127 Am. St. Rep. 513, 85 N. E. 848; Kaufman v. Stein, 138 Ind. 49, 46 Am. St. Rep. 368, 37 N. E. 333; Atty. Gen. v. Williams (Knowlton v. Williams) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77; Welch v. Swasey, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745; State v. Freeman, 38 N. H. 426; Oldknow v. Atlanta, 9 Ga. App. 594, 71 S. E. 1015; Topeka v. Boutwell, 53 Kan. 20, 27 L.R.A. 593, 35 Pac. 819.

The 14th Amendment did not undertake, nor could it undertake, to remove from the states the police powers that existed at the time of the adoption of the Constitution.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Algeyer v. Louisiana, 165 U. S. 590, 41 L. ed. 836, 17 Sup. Ct. Rep. 427; Plessy v. Ferguson, 163 U. S. 555, 41 L. ed. 262, 16 Sup. Ct. Rep. 1138.

Although the courts may decree as to the propriety of the legislation, unless the same beyond all question exceeds the power so granted, there will be no judicial interference.

Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192.

Lumpkin, J., delivered the opinion of the court:

1. The police power to grant licenses by which one person can conduct a certain business and another cannot, or by which a business may be conducted at a certain place and not at another, necessarily involves some discrimination for the public welfare. Such licenses have been broadly grouped into four classes: (1) Where promiscuous or indiscriminate freedom to act will disturb public order, or interfere with the common use of public places. A type of this class is in regard to permitting the use of public streets for parades or processions, which may impede public traffic or cause serious collisions if all be allowed the privilege, or the granting of permission to a street railway to lay its tracks in a street, which does not require the same permission to be granted to all other similar companies to the exclusion or injury of the general public. (2) Where an occupation is offensive to comfort or endangers public safety, it may be so restricted as to locality or the manner in which it shall be conducted as not to cause injury. Chemical factories and slaughterhouses furnish examples of this class. (3) In some occupations the lack of personal qualifications or competence causes the danger to the public, and requires to be guarded against. Doctors, dentists, and plumbers are illustrations of this class. (4) Some occupations are held to be such as to involve danger to the public peace, order, or morality, and therefore to be proper subjects for regulation or licensing, so as to prevent injury to the public. This is sometimes done by regulating the manner in which the business shall be conducted, and sometimes by means of a license law, so as to see that the business does not fall into the hands of persons of such evil character or reputation as might cause harm to the public. Pawnbrokers and junk dealers illustrate this class, where the grant of a license to a lawbreaker or thief might open the door to making the place one for the reception of stolen goods. In the first two classes the basis of distinction is objective,—that is, based on the nature or character of the business; in the last two, they relate rather to the person. Freund, Pol. Power, § 639. This classification and these illustrations, not declared to be exhaustive, refer to the police power generally, and not particularly to that granted to towns or cities.

In the growth of municipalities, where the population becomes dense, and new relations and new dangers arise, for the common welfare and protection more extensive power to cope with the new situation becomes necessary,—power to prohibit certain evils and to meet certain dangers. Hence arises the grant of such power as to regulate, prohibit, or license certain businesses within the municipal limits (in the proper sense of the word "license," as distinguished from the imposition of a license tax for revenue). The authorities recognize some businesses as proper subjects of police

licenses, but doubt or deny whether others can be declared to be legal unless permitted. We need not discuss the difference. Suffice it to say that the keeping of lodging houses or rooming houses is a business so far affecting the public interest as to authorize the grant of legislative authority for its regulation and licensing, in order to see that such houses do not become places for the practice of vice or crime or menaces to the public welfare. Munn v. Illinois, 94 U. S. 113, 129, 24 L. ed. 77, 85; Bostick v. State, 47 Ark. 126, 14 S. W. 476.

2. In regard to conferring upon the city officials a discretionary power to grant or refuse licenses in those cases which are proper subjects of police licenses, there are two lines of authority. One holds that there should be some uniform rule of action prescribed governing the exercise of the discretion, and that the conference of a general discretion without this, at least as to occupations not subject to be wholly prohibited, is invalid as conferring arbitrary power. Montgomery v. West, 149 Ala. 311, 42 So. 1000, 9 L.R.A.(N.S.) 659, 13 Ann. Cas. 651, 123 Am. St. Rep. 33, and note, discussing a number of decisions. The other class of decisions holds that, as it is sometimes difficult for the legislature in advance to prescribe all of the conditions upon which the license shall be issued, it is competent for them to confer upon a municipal council the power in general terms; it not being presumed that this is intended to confer power to act arbitrarily, or that the authorities will so act. 2 Dill. Mun. Corp. 5th ed. § 598, and citations. In some of the cases the ordinances under consideration appear to have been adopted by virtue of what is called the "general welfare clause" in municipal charters, and the discussions were based on the general requirement that municipal ordinances must be reasonable. In others, the direct question of the constitutionality of such ordinances or acts was passed upon. Judge Dillon says: "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specific and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid, because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts, because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 2 Dill. Mun. Corp. 5th ed. § 600.

Some occupations are of such a character that they may be prohibited altogether. The one most frequently before the courts is that of selling intoxicating liquors. There are other occupations which cannot be prohibited, though they may be regulated. 2 Dill. Mun. Corp. 5th ed. § 666. So there are certain things which a person has no inherent right to do, such as using the public streets or places for purposes other than their normal use. Some of the decisions, in upholding the grant of general discretionary powers, have taken note of the distinction between things which might be prohibited and those which could not be. But others have not done so.

In the case at bar, the business of keeping lodging houses is a legitimate business. The power to regulate and license it is conferred by express legislation. The question therefore arises upon the validity of the act of the legislature. In Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. Supp. 449, an ordinance was adopted under a charter power to regulate and license the sale of meats. The ordinance provided for the issuance of a license by the mayor upon direction of the council after a two-thirds vote. Spring, J., in delivering the opinion of the court, said: "The right of the individual to carry on any gainful, lawful occupation without municipal interference, unless conducted in a manner detrimental to the public, is guaranteed to him as one of his inalienable prerogatives. On the other hand, the right of the legislature, and by its delegation the municipality, to enact laws or ordinances for the preservation of the public health, even though individual loss results, is a necessary power incident to the government of cities. The maxim, *Salus populi lex suprema est*, is more than a mere sentiment, and has become one of the props of the police power, an elastic mantle whose ample folds cover much municipal legislation which finds no other justification. Between these two clashing principles it is often difficult to determine when the action of the municipality transcends its powers and transgresses upon the rights of the individual."

And see Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731 (an ordinance prohibiting the making of any public address upon public grounds, except in accordance with a permit from the mayor); Wilson v. Eureka City, 173 U. S. 32, 43 L. ed. 603, 19 Sup. Ct. Rep. 317

(a prohibition against moving any frame building over any of the public streets or squares, without the written permission of the mayor); Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633 (an ordinance requiring certain things to be done in regard to an application for a license to sell cigarettes, and providing that, "if the mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be intrusted with the sale of cigarettes," he should issue a license); Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390 (an act providing for the determining by a board of registration of the qualification of persons seeking to practise medicine); Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673 (an ordinance prohibiting the maintaining of a dairy and cow stable in the city, without having first obtained permission so to do from the municipal assembly, which ordinance was authorized by a statute declaring that the mayor and assembly were authorized to prohibit the erection of cow stables and dairies within prescribed limits, and to remove and regulate the same); New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144 (a section of the Sanitary Code of New York, providing that no milk should be received, held, or kept, either for sale or delivery, without a permit in writing from the board of health, and subject to the conditions thereof, and declaring a violation of the section to be a misdemeanor).

From these decisions it will appear that the Supreme Court of the United States has held that the conferring of discretionary power to grant or refuse licenses in occupations subject to police licenses is not *per se* in violation of the 14th Amendment to the Constitution of the United States, on the ground that the exact terms on which the discretion is to be exercised are not prescribed. In some of these cases the occupation or act involved was such as might have been prohibited altogether, but that fact was not always relied upon in the decisions. In the last case cited, however, the business under consideration was that of selling milk, which was not of the character mentioned. The decisions of that high court are binding as to the Federal Constitution; and we think that in the present instance it is better to follow them in construing the similar "due process clause" of our state Constitution. Whether it would not be fairer and more just, as far as practicable, to prescribe in advance the requisites for obtaining a license, so that they may be known to one desiring to apply, is not the question. We are here dealing with a direct act of the legislature and its constitutionality. Is this power an arbitrary and unlimited one? Arbitrary and absolute power in municipal officers over persons and property is not an American institution; nor is it consonant with constitutional government. In the celebrated case of Yick Wo v. Hopkins, 118 U. S. 356, 369, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1071, Mr. Justice Matthews said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery."

In times of peace and prosperity, when the struggles of the past against the evils arising from the abuse of power are partly forgotten, or recalled only as historic events, there is sometimes a restlessness and impatience with constitutional guaranties and restraints; but the framers of the Constitution placed them in that instrument, not as mere glittering generalities, but as profound and lasting safeguards against the dangers of arbitrary power. Among them was the statement that "protection to person and property is the paramount duty of government, and shall be impartial and complete;" that "no person shall be deprived of life, liberty, or property except by due process of law;" and that "no person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this United States, in person or by attorney, or both." Sometimes the discretion conferred in regard to granting licenses has been loosely called "judicial." If it were really so, in the sense of being a judgment of an inferior judicatory, another section of our Constitution would confer on the superior court the right to review the judgment by writ of certiorari. Civil Code 1910, § 6514. We think that such was not the intent of the act under consideration, but to confer ministerial discretion. For an arbitrary abuse of such power has the citizen no recourse in the courts? The authorities above cited do not sanction the conferring of arbitrary authority or its exercise. On the contrary, they sustain the general grant of discretionary power to issue licenses under the

police power (certainly as to things which cannot be prohibited, as the sale of whisky can be), on the ground that it does not seek to confer arbitrary power, and that, if the power is sought to be arbitrarily and wrongfully exercised, the courts will apply a remedy. In Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. Supp. 449, supra, it was said: "It will be observed that in some of the cases adverted to the test upon which the discretion of the mayor was to be exercised was defined in the act or ordinance creating the authority, while in others there was no limitation placed upon it. It does not follow that the omission to prescribe the bonds of the authority carries the conclusion that it is vested arbitrarily in the official or body to whom it is committed. The difficulty of defining, in a given case, what standard shall be applied in the disposition of the petition, and the fact that the conservation of the public health is the basis for the existence of the authority, indicate the reason for the absence of the definition; but it is no warrant for the inference that the power is an arbitrary one to be exercised in ruthless disregard of the rights of any class or individual."

And again (79 App. Div. at page 409): "While it is unnecessary for us to pass upon the question of the power of the court to review a flagrant abuse of discretion by the common council, suffice it to say that, if a case of that kind were properly presented, the court would doubtless not lack the ability to find some effective way to reach it for condemnation."

In Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064, 1073, supra, Mr. Justice Matthews said: "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This, he said, was true, whatever may have been the intent of the ordinances as adopted. In other words, the ruling seems to be that the ordinance itself might be unconstitutional, or that there might be an unconstitutional administration of it by the public authorities, so as to deprive a person of constitutional rights, and in either event relief could be afforded.

In Reetz v. Michigan, 188 U. S. 505, 508, 509, 47 L. ed. 563, 566, 567, 23 Sup. Ct. Rep. 390, 392, supra, while the expression was used by Mr. Justice Brewer that the court knew of no provision of the Federal Constitution which forbade a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question, if nothing in the state Constitution prevented so doing it is evident that he merely meant that there need be no provision in the statute for an appeal or certiorari, or like method of review, to satisfy the requirements of the Constitution of the United States. He clearly did not mean that arbitrary and capricious action violative of constitutional rights was beyond remedy by the courts; for he distinctly said: "But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts."

In People ex rel. Lieberman v. Vandecarr, 81 App. Div. 128, 80 N. Y. Supp. 1108, a section of the Sanitary Code of New York prohibiting the keeping or selling of milk without a permit from the board of health was attacked as unconstitutional, on the ground that it conferred arbitrary power on the board. The appellate division of the supreme court of New York held that it was not intended to confer such absolute and arbitrary power in the selection of those who might and those who should not sell milk, but only the power to exercise a reasonable discretion. In the opinion it was said: "Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the Sanitary Code vested in them arbitrary power to license one dealer, and refuse a license to another similarily situated, undoubtedly it would be invalid. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, supra; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, supra; Noel v. People, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; Dunham v. Rochester, 5 Cow. 462; Brooklyn v. Breslin, 57 N. Y. 591. But such was not its purpose, nor is that its fair construction."

The decision of the appellate division was affirmed by the court of appeals of New York, 175 N. Y. 440, 108 Am. St. Rep. 781, 67 N. E. 913. On review in the Supreme Court of the United States, Mr. Justice Day said (199 U. S. 552, 559, 50 L. ed. 305, 309, 26 Sup. Ct. Rep. 144, 145, supra): "The court of appeals affirming the decision of the appellate division, did not speak with equal emphasis upon this point; but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion."

Accepting this construction of the state statute by the highest court of the state, the Supreme Court of the United States held that the statute was not unconstitu-

tional; but Mr. Justice Day added (199 U. S. at page 562): "There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court."

In Re Jacobs, 98 N. Y. 98, 108, 50 Am. Rep. 636, the court of appeals of New York discussed at some length the police power of the state. In the opinion Earl, J., said: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons; and so far as it imposes restraints, the police power must be exercised in subordination thereto."

The Constitution of this state not only recognizes the necessary power of the courts to declare laws in violation of the state or Federal Constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void. Civil Code, 1910, § 6392.

From what has been said it will be seen that the legislature had power to confer on the municipal council authority to exercise a reasonable discretion in granting or refusing a license to one desiring to keep a lodging house or rooming house, and that the conference of this power in general terms did not *ipso facto* render the act void, but that the legislature could not constitutionally confer upon the council arbitrary or unlimited power, or prevent the citizen wronged by an arbitrary or capricious exercise of the power, not based on a legitimate use of discretion, from appealing to the courts to protect him from oppression.

3. The act under consideration declares: "That the mayor and general council be and they are hereby authorized to regulate hotels, lodging houses, dance halls, rooming houses, and similar places, and they are further authorized and empowered, by ordinance, to require all person or persons owning or operating such hotels, houses, or halls to apply for a license for the operation of same, and such license may be granted or refused in the discretion of the mayor and general council, and their action in the premises shall be final."

No attack is made upon the provision in regard to regulation. We have also ruled as to the power to exercise discretion in granting a license. It remains to refer to the clause, "and their action in the premises shall be final." It will be noticed that the terms of the act include not only lodging houses and rooming houses, but also hotels. If the mayor and council have the power arbitrarily and capriciously to refuse a license to a lodging house keeper, with no mode of relief, they can do the same thing to the proprietor of a hotel. If this be so, then the continued operation of every hotel in the city of Atlanta can be made to depend upon the favor or caprice of municipal officers. One may be preferred over another without cause, and there is no remedy, if their "action is final" in the sense that there can be no resort to the courts for relief. It is no answer to this to say that the present officials may be of such character that they will not be likely to abuse the power, or that there is no presumption that this will be done. This clause is susceptible of two constructions,—one, that the grant of discretionary power, with the added provision that the action of the mayor and general council shall be final, operated to confer arbitrary power and to prevent resort to the courts for relief even in cases of arbitrary or capricious action; the other, that the section gave to the officials a reasonable administrative discretion, and provided that their action should be final in the sense that no appeal to any other body or to a court would lie to review their action, without attempting to debar the applicant from seeking the aid of the courts under proper circumstances. From what has already been said it will be seen that, under the former construction, the provision would be unconstitutional; under the latter, it would not be. Under the rule that in such cases the construction which will uphold the constitutionality of the law is rather to be preferred, we adopt the second construction hypothetically stated above.

4, 5. We next come to consider the exercise of equitable jurisdiction, and whether a case for it is made by the allegations of the plaintiff. It has been announced a number of times by this court that generally equity will not interfere with the administration of the criminal law as such, and that the rule is ordinarily applicable to proceedings to punish for the violation of municipal ordinances which are quasi criminal in character. But it has also been frequently added that there are exceptional cases; and it has been pointed out that there is some difference between the state and a municipality as to immunity from suits. The subject has been discussed in Georgia

R. & Electric Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296, and Shellman v. Saxon, 134 Ga. 29, 27 L.R.A.(N.S.) 452, 67 S. E. 438. In the latter case it was said: "In some cases, involving special facts, injunction may be granted against the unlawful enforcement of municipal ordinances, although they are penal in character, for the protection of property or property rights or franchises against irreparable injury; as, for instance, where, under the guise of enforcing a penal ordinance, it is manifest that prosecutions and arrests are threatened for the sole purpose of unlawfully taking or destroying property, or preventing the exercise of a franchise granted by the state."

In Peginis v. Atlanta, 132 Ga. 302, 35 L.R.A.(N.S.) 716, 63 S. E. 857, the power was claimed by the municipal authorities of Atlanta to revoke any business tax license, and an illegal effort was made by an *ex parte* resolution to declare that the business of the keeper of a lunch counter or restaurant (who also sold cigarettes, cigars, tobacco, and "soda-fount drinks") had been maintained in such manner as to become a nuisance, to revoke the license of the proprietor, and to compel him to cease business. He showed that irreparable damage would result from closing his business, or from preventing him from continuing to conduct it by means of continued prosecutions or otherwise, and he prayed for an injunction. This court held that he was entitled to it. In the opinion Mr. Justice Atkinson said: "If such power were conceded to the city authorities, they might refuse to allow any dry goods merchant, hardware dealer, hotel proprietor, confectioner, butcher, or baker to conduct his business, . . . at will, after its establishment, by revoking his license. No such arbitrary power is conferred on municipal councils or municipal authorities."

It is true that the license there involved was one to raise a license tax, under the revenue power; but the decision throws light on two points: (1) That hotels were mentioned along with other useful and lawful occupations; and (2) it held that, under the facts of the case, equity would restrain an arbitrary and unlawful effort to stop the business of the plaintiff, and to work irreparable damage to him, although repeated prosecutions might be used as one means of accomplishing that end. It, moreover, shows how far-reaching a power has been contended for by municipal authorities.

If we look to the allegations of the present petition, they set out, in substance oppressive conduct on the part of the chief of police, strenuous and continued efforts to find some violation of a law or ordinance on the part of the plaintiff or her lodgers, followed by failure, the perfectly proper conduct by her of the business in compliance with all laws and ordinances, and at a place unobjectionable for the purpose, the submission by her to imposition lest the chief should in revenge prevent her from obtaining a license, which was held up for more than two months, his efforts by letter and personally to prejudice the members of the committee of council, followed by arbitrary action on their part, based on no reason or investigation, and amounting to no real exercise of discretion. She further set out facts showing threats to stop her from doing business by constant prosecutions in the recorder's court, and danger of irreparable injury to property rights. The allegations are set out in the report of facts.

The municipal authorities did not see fit to deny the allegations of the plaintiff, but relied on a demurrer, which for the present purpose admits the truth of the facts alleged. They may or may not appear to be true on a hearing. But we think they set out a case sufficiently to withstand a general demurrer. This does not, of course, mean that an injunction will be granted if the allegations of facts are not true. If it appears that they are untrue, and that the municipal officers have exercised a reasonable discretion in the matter, the court should not enjoin them. Nor will the court take the place of the council as a licensing authority. But that is a very different thing from contending that, conceding the facts alleged, a court of equity can afford no relief against the irreparable damage which it is claimed will result from an arbitrary or capricious abuse of the power.

Counsel for the city relied strongly on the case of Starnes v. Atlanta, 139 Ga. 531, 77 S. E. 381. It was decided on a headnote, and the facts set out show no reference to any constitutional point, but a ruling that the facts of that case placed it within the general rule, rather than within the exceptions thereto. It was argued, however, that the various constitutional points raised in the present case were also raised by the record in that case, and that the dismissal of the petition on demurrer was affirmed by this court. An examination of the record on file will show several material differences in the two cases. No effort to declare the decision of the municipal officers to be final was then before the court. The kinds of business involved were different. In the Starnes Case it was the conduct of a sanatorium for the treatment of persons afflicted with nervous troubles and of

those addicted to the liquor and drug habit; here it is the conduct of a lodging or rooming house for the accommodation of persons desiring a place to sleep. There it was charged in general terms that the municipal council acted arbitrarily in refusing a license. The general allegations on that subject were specially demurred to as vague, and as failing to allege any facts in support of the general statement, and the defendant prayed that the paragraph of the petition on that subject be stricken. There was also an allegation that the ordinance was arbitrarily enforced. This likewise was specially demurred to, and it was prayed that this paragraph be stricken. The same is true as to the allegations seeking to set up irreparable injury, and those in regard to threats of numerous prosecutions. All of the grounds of the demurrer were sustained by the trial court. Such being the case, the ruling made by this court rested on different facts from those here involved. In the case now before us there was no special demurrer for want of sufficient specifications on any particular subject; but the defendant relied on a general demurrer. There is a difference in what will withstand a general demurrer and what will be good as against a special demurrer. Seaboard Air-Line R. Co. v. Pierce, 120 Ga. 230, 47 S. E. 581. Here also, there were much more specific allegations of fact on the subjects mentioned,—of arbitrary action and irreparable damage to property rights.

Of the case of Neall v. Atlanta, 141 Ga. 31, 80 S. E. 284, it need only be said that Neal did not apply for any license, and therefore no question of arbitrary conduct in refusing to grant one arose. He claimed that his business was not within the purview of the ordinance as to sanatoriums, although it was alleged that he had already been found guilty in the recorder's court. These two cases, therefore, do not control the present one.

We do not discuss cases arising on applications for mandamus, as no such point is here involved. We may only remark that our Civil Code 1910, § 5441, does not accord with some of the decisions as to the limitations upon such a proceeding. No question is raised as to the propriety of making the recorder a party. The petition sets out a case of action sufficient to withstand a general demurrer, and dismissing it on such a demurrer was error.

Judgment reversed.

All the Justices concur.

L.R.A.1915B.

GEORGIA SUPREME COURT.

COLUMBUS RAILROAD COMPANY, Plff. in Err.,
v.
JOHN F. NEWSOME.

(— Ga. —, 83 S. E. 506.)

Proximate cause — hurling animal against pedestrian.

Where an electrically propelled street car is negligently run against a horse and buggy being driven across the street car track at a street intersection, and the horse is hurled against a person in the street, injuring him, the negligence of the servants of the street car company operating the car will be deemed the proximate cause of the injury.

(November 13, 1914.)

Headnotes by EVANS, P. J.

Note. — Liability of street railway for injury to one other than passenger struck by object hurled by car.

Generally, as to liability of railroad company for personal injuries from negligent operation of trains, to persons on adjoining property or highway, see note to St. Louis, I. M. R. Co. v. Jackson, 31 L.R.A.(N.S.) 980.

As to liability of elevated railway company for personal injury to one on surface, see note to Carney v. Boston Elev. R. Co. 42 L.R.A.(N.S.) 90.

Negligence; proximate cause; *res ipsa loquitur*.

Street railways owe a duty in the operation of their cars to exercise reasonable care, and are liable for an injury to one struck by an object hurled by a car where their failure to exercise such care was the proximate cause of the injury, and the person struck was not guilty of contributory negligence. The question whether due care has been exercised in a given case depends, of course, upon the facts which are made to appear.

In Lahey v. Central Park, N. & E. R. Co. 2 Misc. 537, 22 N. Y. Supp. 380, where one engaged in laying pipe in the street was injured by a pipe which was thrown against him by reason of a car striking it, it was held that the evidence warranted the jury in finding the driver of the car negligent, upon its appearing, among other things, that the work of digging cuts and lowering pipe near the point where the injury occurred had been going on for several days, and that the defendant had placed a watchman there to see that the cars passed safely, but that the watchman was temporarily absent at the time of the injury, and that the driver of the car came up at a rate of 6 miles an hour and continued on without stopping, although a workman put up his hand to stop the approaching car. The decision in Schmidt v. Steinway & H. P. R. Co. 132 N. Y. 566, 30 N. E. 389, infra, was

ERROR to the Superior Court for Muskogee County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by **Evans**, P. J.:

John F. Newsome sued the Columbus Railroad Company, and alleged, in substance, as follows: The defendant is engaged in the business of operating a system of street railroads in the city of Columbus, operating its cars thereon by electricity. The system of railroads is composed in part of two lines of railroad track running north and south on Broad street in that city, parallel with each other, and about 30 feet apart. In the center of Broad street at its intersection with Twelfth street, and between the two railroad tracks, the defendant maintains a transfer station, at which it is usual and customary for the cars to stop for the purpose of discharging and taking on passengers. Across Twelfth street, north of the transfer station, is located a drinking fountain, at which horses, mules, and other animals are permitted to be watered, which fountain is located about midway between the two tracks in Broad street. Petitioner was riding in a buggy, and the horse attached to it was stopped at the drinking fountain for the purpose of being watered; petitioner remaining in the buggy while the horse was drinking. While waiting for the horse to drink, an unknown negro man driv-

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distinguished in this case upon the ground that in that case the driver's conduct was different inasmuch as he stopped the car as he approached the cut and afterward received a signal to proceed.

In Schmidt v. Steinway & H. P. R. Co. 55 Hun, 496, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939, it appeared that a sewer was being excavated alone the side of the defendant's track, and that sewer pipes were being placed on end to guard it for the night; that one of defendant's cars was stopped by the driver before he came to the first of the pipes; that he was told to go on by a man stationed at the excavation, who had been there the four preceding days controlling the passage of the cars, and who was shown to have been placed there by someone other than the contractor, and who was also shown to have a right to signal the cars to move; that the driver started the car and ran into a pipe which was in plain sight, knocking it into the excavation and causing an injury to the plaintiff, who was working in the trench. It was here held that the company owed extreme vigilance in the management of its cars, and that this duty was increased by the excavation, and that the company should have placed a man there if dangerous.

It was further held too much to require the plaintiff to produce a witness to the contract of employment between the man who signaled the car to proceed and the railway, the court holding that a prima facie case was made for the jury upon its being shown that the man who signaled the car acted for the defendant, and that the defendant was then called upon to interpose its defense, and that if the jury found that the man in question was employed by the defendant, it would be liable for his act in signaling the car to move when it was not safe to do so, thereby causing the plaintiff's injury.

On a subsequent appeal of this case, however, where the evidence was practically the same, with the exception that it appeared that the person who had signaled the cars to proceed was the foreman of the contractor, and that another car had just passed the pipes without striking them, it was held that the evidence showed no negligence on the part of the defendant. 132 N. Y. 566, 30 N. E. 389, reversing 32 N. Y. S. R. 912, 10 N. Y. Supp. 672. The court said: "It is quite apparent that the driver of the car proceeded upon the signal of the foreman of the contractor, under a supposition that the sewer pipes had been properly placed a sufficient distance from the track to allow his car to pass without hitting. It is said that he must have known that men were working in the trench; that he could have seen the pipe standing by the side of the sewer and that he should have taken other precautions to avoid the accident; that he should have measured the distance and made sure that his car would not hit the pipe. This view appears to have been taken by the general term, the presiding judge saying that the company owed extreme vigilance in the management of its cars, and this duty was increased by the excavation. We do not, however, understand the rule to be as broad as there stated. A careful man is guided by a reasonable estimate of probabilities. His precaution is measured by that which appears likely in the usual course of things. The rule does not require him to use every possible precaution to avoid injury to others. He is only required to use such reasonable precautions to prevent accidents as would ordinarily be adopted by careful, prudent persons under like circumstances. . . . Had the pipe stood in front of the defendant's car so that the driver could have seen that the car must necessarily strike it, a different question would have been presented."

In Eddy v. Cedar Rapids & M. C. R. Co. 98 Iowa, 626, 67 N. W. 676, where the plaintiff, a street repairer, was injured by reason of a plank which he had placed near the track being struck by a car and thrown against him, it was held a question for the jury whether, under all the evidence, the motorman was negligent in not giving a signal as the car approached the plaintiff, who was not so near the track as to be in danger of being struck by the car.

ing a horse or mule attached to a buggy, and traveling in a westerly direction on Twelfth street, drove upon the east line of the railroad track, just north of the transfer station, for the purpose of crossing the same, and while on the track a car of the defendant, which had been stopped at the transfer station, was started off north across Twelfth street, and was negligently and carelessly run upon the horse and buggy which was being driven by the negro, and the horse was thrust and thrown over and against petitioner and the buggy in which he was sitting, striking petitioner with great force and violence, knocking him from the buggy, and injuring him in the manner set out. The horse which struck petitioner was being driven by the negro across the railroad track in Twelfth street, the same being a public street, about 25 or 30 feet north of the transfer station, in full, open, and unobstructed view of the motorman in the control of the street car; and, while the negro man was in the act of crossing over the railroad track, the motorman started off the car and ran the same against and upon the buggy, knocking the horse against petitioner. The negro man was free from fault, and the negligence of the motorman in starting off the car while the negro man was crossing the track, and running the same upon the horse, was the direct and proximate cause of the horse being thrust against petitioner. It is charged that the defendant was negligent in that the motorman started off the car

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And in Purulewski v. Detroit United R. Co. — Mich. —, 147 N. W. 597, which was an action to recover for an injury received through a plank being thrown from a heavily loaded coal wagon in a collision between the wagon and the street car, and striking a pedestrian, it was held that the question of the motorman's negligence in failing to have his car under control and so to keep it from the time he saw the wagon attempting to cross the track was for the jury where there was evidence that the car was 450 feet away when the wagon first started to cross the track, and that the view was unobstructed; and the conductor and motorman testified that it was at least 225 feet away when first seen; and that the motorman knew the tracks were slippery, but did not immediately put his car under control, but simply shut off the current and let the car roll along.

And in Obenland v. Brooklyn Heights R. Co. 127 App. Div. 418, 111 N. Y. Supp. 686, there was held to be evidence from which the jury might find the defendant guilty of negligence where its motorman, who was in the rear car of a five-car train where he could not see objects with which the train might collide, backed the train along a place which, with the defendant's consent, was used as a public street, with the result that the train collided with a wagon which the plaintiff was unloading near the track, pushing it against him and injuring him.

And in Hull v. Berkshire Street R. Co. 217 Mass. 361, 104 N. E. 747, the case was held properly for the jury, and a finding for the plaintiff justified, where there was evidence from which it might be found that an electric car of the defendant company was traveling down grade at a speed of from 40 to 50 miles an hour swaying from side to side; that the plaintiff in his automobile was going in the opposite direction and exercising reasonable care; that the trolley wheel left the wire when the car was about 400 feet distant from the automobile; that after some violent movements up and down it was broken off near the base, hurled into the air, and thrown against the forward wheel of the automobile causing it to be turned sharply toward a bank; that the plaintiff, expecting that his machine was about to "turn turtle," jumped out and was injured, and that the electric car was not brought to a stop until it had gone two or three hundred feet beyond the automobile.

And it was held that unless some explanation was offered, the fact that the trolley pole, while being used for the purpose for which it was designed, broke and was thrown violently from the car, would warrant an inference that reasonable care had not been taken to make the apparatus safe, and that the negligence was prima facie that of the defendant, which had exclusive control and management of the car. Ibid.

But it was held that if the evidence explained the cause of the breaking of the pole, there was no occasion to resort to presumption, and that the jury must decide from the facts whether the accident was due to negligence on the part of the defendant. Ibid.

It was held that the mere fact that the parties offered direct evidence to explain the occurrence, and failed in the attempted explanation, would not deprive the plaintiff of the benefit of the presumption of culpability arising from the doctrine of *res ipsa loquitur*. Ibid.

In De Glopper v. Nashville R. & Light Co. 123 Tenn. 633, 33 L.R.A.(N.S.) 913, 134 S. W. 609, it was held as a matter of law that no negligence rendering the defendant liable was shown where it appeared that the plaintiff, when passing a heavily loaded street car, was struck in the eye by a hard substance coming from under the car wheels while they were revolving rapidly in the same place, in an attempt to ascend a grade; that an expert testified that the probable effect of car wheels rapidly revolving in the same place was the throwing off of slivers of steel, either from the track or the wheels, or both, with considerable force; that the track was examined after the accident and particles of sand were found upon it, but the witness could not say whether the defendants were using sand just be-

while the negro was driving across the railroad track, and negligently and carelessly ran the car against the horse, thrusting and throwing the horse against petitioner; that the motorman failed to exercise ordinary care and diligence in starting off the car while the horse and buggy driven by the negro were upon the railroad track; that the motorman was negligent in failing to exercise due care in stopping the car before striking the horse and buggy; that the motorman failed to exercise due care to avoid striking the horse and buggy, when the danger of striking the same was apparent to him, or should have been apparent by the exercise of ordinary and reasonable care; and that the motorman, seeing the horse and buggy upon the track, did not make any effort to stop the car so as to avoid striking the horse and buggy. The defendant demurred on the ground that no cause of action was set out, and that the proximate cause of the alleged injury was not the defendant's negligence. The demurrer was overruled, and the defendant excepted.

Messrs. **F. U. Garrard** and **A. S. Bradley** for plaintiff in error.

Mr. **T. T. Miller** for defendant in error.

Evans, P. J., delivered the opinion of the court:

According to the petition, the plaintiff was on a public street in the city of Columbus, where he had a right to be. He was not guilty of any negligence in stopping his horse to water at the drinking fountain provided for that purpose. The unknown negro man was driving his horse along the streets, and over the defendant's track, in the exercise of due diligence. It is alleged that the defendant was negligent in certain particulars in running its cars against the horse driven by the negro man, and thrusting the horse against petitioner and injuring him. The only question, therefore, which can arise, is whether the

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fore or at the time of the accident; that it was customary to use sand on the track whenever needed to prevent the wheels from slipping; that there was no evidence tending to show that the defendant's appliances were defective, and no proof of the negligent operation of the car other than the facts that it was heavily loaded and that the motorman in applying the power caused the wheels to revolve rapidly in the same place.

The court held that the doctrine of *res ipsa loquitur* did not apply where both the act which caused the injury and the defendant's negligence in relation to the act must be inferred from the accident itself, and said: "If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an interference of negligence, then the rule of *res ipsa loquitur* would apply; but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent, unless you know what it is. It is said in one case that the maxim under consideration can have no application where the injured person and the alleged negligent person were both in the exercise of an equal right and were each chargeable with the same degree of care. . . . The only fact that is directly proven from which it is possible that negligence might be inferred is the fact that the car was heavily loaded upon a steep ascent in defendant's track, so much so that it stalled and the application of the power to its machinery caused the wheels to slip and revolve rapidly. Nothing else appears than the facts stated. It is not proven that the car was overloaded, or carelessly loaded, or that the power was negligently or improperly applied. It is a matter of common knowledge that the wheels of a street car may turn rapidly at the same place upon the rails of the track, when both the wheels and the rails are in perfect condition and the motorman is in the exercise of due care. Street cars are run for the accommodation of the public, as well as profit to the company, and the courts cannot say that the fact that the company permits a large number of passengers to occupy the car sufficient to load it heavily is an act of negligence. To so hold would work very great inconvenience to the traveling public, and impair the efficiency of the car service."

In Nelson v. Narragansett Electric Lighting Co. 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep. 711, 58 Atl. 802, which was an action against an electric light company, it was held that placing an electric light in close proximity to a trolley wire at a curve was not the proximate cause of an injury to one struck by glass falling from the globe when shattered by a trolley leaving the wire, since the failure to keep the trolley on the wire was prima facie negligence, and was the act of a responsible person intervening between the placing of the light and the injury.

Contributory negligence.

The plaintiff was held guilty of contributory negligence in Eddy v. Cedar Rapids & M. C. R. Co. 98 Iowa, 626, 67 N. W. 676, where it appeared that he was a regular repairer of sidewalks and street crossings, and knew that street cars frequently passed along the street upon which he was rebuilding a cross walk; that he placed a plank in position and, while leaning over

negligence of the company proximately caused the plaintiff's injury. We think it clear from the allegations in the petition that the plaintiff sustained his injury on account of the negligence of the defendant's motorman, and that such negligence was the proximate cause of the injury. The hurling of the horse against the petitioner under the circumstances described in the petition is controlled by the same principles which would apply to the projection of an inanimate object set in motion by the defendant's negligence. In the celebrated squib case (Scott v. Shepperd, 2 W. Bl. 892, 3 Wils. 403) it was held that an action of damages would lie for originally throwing a squib which, after having been thrown about in self-defense by other persons, at last put out the plaintiff's eye. In Alabama G. S. R. Co. v. Chapman, 80 Ala. 615, 2 So. 738, the plaintiff had been walking on the track of the defendant's road and got down on the edge of the embankment to permit an approaching train to pass. A cow came up on the other side of the embankment, and was thrown from the track by the engine, and bounced down and hit the plaintiff. There was evidence tending to show that the engineer was negligent in running his engine against the cow; and it was held that, if the animal was thrown from the track by the negligence of those in charge of the train, the injury to the plaintiff would be deemed to have been proximately caused by the engineer's negligence. In Quill v. New York C. & H. R. R. Co. 16 Daly, 313, 11 N. Y. Supp. 80, a passing train collided with a coal cart at a railroad crossing. The cart was thrown against a person standing on a highway, inflicting injuries which caused his death. It was contended that the collision between the engine and the coal cart was due to the negligence on the part of the company's servants in not giving proper and timely warning of the approaching train. A recovery in favor of the administrator of the decedent was sustained. The facts in the

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examining the bearings, a car approached from behind him and struck the plank, which had been placed too near the track; that although his hearing was good, he failed to hear the car until it was close to him, when he jumped back, but was struck by the plank and injured; and that if the plank had been moved back from the rail a few inches, it would not have been struck.

But in Obenland v. Brooklyn Heights R. Co. 127 App. Div. 418, 111 N. Y. Supp. 686, where the plaintiff was injured by a wagon which he had backed up to a platform to unload being pushed against him by a street car which ran into it, it was held that it could not be said as a matter of law that he was guilty of contributory negligence. The court said: "He had cramped his wagon so that, as he supposed, the horse and wagon were in a position of safety. The fact that he did not make further observation during the ten minutes before the accident does not warrant a holding that he was negligent as matter of law. Either the plaintiff was mistaken in judgment, or by a slight movement of the horse the wheel had been turned too near the track for safety; but a mistake in judgment is not negligence, and I do not think that one can be said to be negligent as matter of law for continuing work in a place which he supposed, after making observation, to be safe."

And the question of contributory negligence was held to be for the jury in Weingarten v. Metropolitan Street R. Co. 62 App. Div. 364, 70 N. Y. Supp. 1113, where the plaintiff was engaged in moving a heavy beam from the street along a runway, and the plaintiff testified that as a car approached he raised his hand to the driver of the car and told him to stop; that the driver was looking at him and took hold of the brake handle, and plaintiff thought he was going to stop, and turned to his work on the beam, when the car proceeded and struck the beam, and threw it against the plaintiff, it being held that it could not be said as a matter of law that he did not use ordinary care.

In Lahey v. Central Park, N. & E. R. Co. 2 Misc. 537, 22 N. Y. Supp. 380, where a workman who was engaged in laying pipe in the street was struck by a pipe with which a car collided, it was held that the evidence did not disclose any contributory negligence on the part of the plaintiff or his fellow workmen in placing the pipe too close to the track, it being held that any reasonable and temporary occupation by them of the defendant's tracks in the prosecution of their work was justifiable, and could not be made the basis of a charge of negligence.

In Obenland v. Brooklyn Heights R. Co. supra, it was held that the plaintiff, who was injured by his wagon being pushed against him by defendant's car, was more than a mere licensee casually upon the defendant's premises, and was rightfully, with the knowledge and consent of the defendant, in a place which in appearance and use was a public street, where it appeared that the accident occurred at a place used as a public street to the defendant's knowledge; that a platform had been built partly by the defendant and partly by plaintiff's employer between the defendant's tracks and the employer's brewery, and that the employer had paid and was paying the defendant for the use of a part of the platform; that the plaintiff had been accustomed to use the platform in unloading his wagon as he was doing at the time of the accident for three years, and his employer had been so using it for thirteen years.

J. T. W.

case of the Western & A. R. Co. v. Bailey, 105 Ga. 100, 31 S. E. 547, are very similar to the facts of this case. An engineer negligently ran his train upon a trespasser walking upon the track, killing him and hurling his body against a track hand who was standing near the track; and it was held that the plaintiff was entitled to recover on the ground that "the negligence of the defendant put in motion the destructive agency, and the injury sustained by the plaintiff was directly attributable thereto." See Savannah Electric Co. v. Wheeler, 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38.

There was no error in overruling the demurrer. There is no merit in the special demurrer.

Judgment affirmed.

All the Justices concur, except **Fish**, Ch. J., absent.

GEORGIA SUPREME COURT.

NATIONAL BANK OF TIFTON, Plff. in Err.,
v.
MARY E. JAMES SMITH, Impleaded, etc.

(— Ga. —, 83 S. E. 526.)

Husband and wife — wife's suretyship — liability.

1. One who contracts with the payee of an accommodation note, executed by a married woman, that on the faith of its security he will indorse a note for the payee for discount at a bank, and receives her note with full knowledge of all the facts, enters into an arrangement to make the married woman ultimately liable to pay the debt of another; and such a transaction will fall within the law's condemnation of contracts of suretyship by a married woman.

Evidence — declarations of agent.

2. Before the declarations of an agent are admissible, it must appear that the declarant was the agent of his principal at the time, and also had authority to make the admissions, or that they were made in the course of the transaction, so as to be a part of the *res gestæ*.

Appeal — incompetent evidence — reversal.

3. The verdict discharged one defendant, and reduced the liability of the other to the extent of his plea of set-off. The evidence authorized (if it did not require) the verdict in favor of the former, and as to this defendant a new trial was properly refused. As to the latter, on account of the admissions of incompetent evidence, a new trial is granted.

(November 13, 1914.)

ERROR to the Superior Court for Jones County to review a judgment in favor of defendant Smith, and an order overruling a motion for new trial, in an action brought to recover the amount alleged to be due on a promissory note. Affirmed in part.

Statement by **Evans**, P. J.:

This was an action by the National Bank of Tifton against Mrs. Mary E. James Smith and W. E. James, to recover principal, interest, and attorneys' fees alleged to be due upon a note for $5,000, signed by Mary E. James Smith, payable to the order of the James Manufacturing Company, and indorsed by the James Manufacturing Company and W. E. James. The

Headnotes by EVANS, P. J.

Note. — Validity of contract by married woman incapable of binding herself as surety, to indemnify one against liability as surety for a third person.

In Druckamiller v. Coy, 42 Ind. App. 500, 85 N. E. 1028, a married woman joined in a mortgage of her husband's lands as indemnity to a surety for the husband upon the surety's contract to pay her a stated sum if a foreclosure of the mortgage should become necessary; subsequently the surety was induced to secure some other debts of the husband, and take a second mortgage upon the lands, and the wife agreed to cancel the surety's contract to pay her upon foreclosure as above stated; foreclosure became necessary on account of the surety's payment of the debts secured, and the lands were sold for less than the sums paid. In an action by the wife on the above contract, the court said: "It is evident that the contract between appellee and appellant was not a contract of suretyship. Under it, as alleged, appellee assumed no liability for the debts of her husband. After the contract was executed, whether her husband paid his debts, or appellant paid them for him, could not affect her separate property. She did not pledge any of her property further than to waive her right to her inchoate interest in her husband's real estate, and this, under our decisions, she had power to do." The subsequent contract releasing her rights under the first was sustained, the court stating: "It was not a contract of suretyship; but a contract into which, under the statute, appellee [the wife] was empowered to enter."

A note executed by a married woman to a surety who had paid a certain sum for her husband was held not binding upon her in Russell v. Rice, 19 Ky. L. Rep. 1613, 44 S. W. 110, and therefore a note executed in lieu of the first was not enforceable although executed subsequently to a judgment giving her the rights, powers, and privileges of a *feme sole*. W. A. E.

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defendants pleaded that the note was given by Mary E. James Smith to the James Manufacturing Company without consideration; that W. E. James negotiated with the Commercial Bank of Macon a loan for $5,000, and procured E. A. Buck to become his indorser thereon, and, to secure Buck, W. E. James deposited with him the note sued on; that afterwards this indebtedness to the Macon bank was paid in full by W. E. James; and that, after the note sued on was past due, W. E. James procured a loan from the National Bank of Tifton for $5,000, which was indorsed by E. A. Buck, who, without right or authority, deposited with the plaintiff bank the note in suit.

Mary E. James Smith pleaded that the note in suit was without consideration, and was made solely by her as an accommodation to W. E. James and the James Manufacturing Company, in order that the latter might secure the indorsement of E. A. Buck on notes given to the Commercial National Bank and the American National Bank of Macon, Georgia; that she was a married woman, and E. A. Buck had full knowledge of that fact and of all the circumstances attending the execution of the note in suit, and the purposes for which it was made; that in substance her contract was one of suretyship; and that she is not liable thereon by reason of the statute forbidding a married woman to bind her separate estate by a contract of suretyship. W. E. James pleaded that he gave to the president of the plaintiff bank a note for $2,500, signed by his mother, Mary E. James Smith, payable to the James Manufacturing Company, and indorsed by the company and by himself, for the purpose of having the same discounted by the bank; that the bank did discount the note; that he subsequently paid the same to the person to whom the bank had discounted it; and that he never received any of the proceeds on the discount, and he asks for a verdict and judgment of set-off for the amount alleged to have been received by the bank. The jury returned a verdict in the favor of Mary E. James Smith, and in favor of the plaintiff against the other defendant, W. E. James, for $2,500 principal, besides interest and attorneys' fees. The plaintiff moved for a new trial, which was refused.

Mr. **John R. L. Smith**, for plaintiff in error:

It was error to allow Mrs. Smith to testify that there was no consideration for her signing the note sued upon; such testimony being objected to on the ground that the note being under seal, it could not be claimed in her behalf that there was no consideration for it.

Rutherford v. Executive Committee, 9 Ga. 54; Justices of Lee County v. Smith, 13 Ga. 502; Smith v. Smith, 36 Ga. 190, 91 Am. Dec. 761; Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67; Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567.

The undertaking of Mrs. Smith was original, and not collateral. It was separate from that of Buck's, and not joined with it, and she was not liable to the person to whom Buck was liable.

Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Hill v. Cooley, 112 Ga. 115, 37 S. E. 109; Villa Rica Lumber Co. v. Paratain, 92 Ga. 370, 17 S. E. 340; 16 Am. & Eng. Enc. Law, 168; 1 Brandt, Suretyship & Guaranty, § 5, p. 20.

The assumption by Buck of the obligation to the bank constituted in law a consideration for the contract of Mrs. Smith. Hence the verdict in her favor was contrary to law.

Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; 16 Am. & Eng. Enc. Law, 172.

The payment by defendant James of the $2,500 was not so involuntary as to enable him to recover it, or set it off as a liability of the bank to him.

Arnold v. Georgia R. & Bkg. Co. 50 Ga. 304; First Nat. Bank v. Americus, 68 Ga. 119, 45 Am. Rep. 476; Williams v. Stewart, 115 Ga. 864, 42 S. E. 256; Hoke v. Atlanta, 107 Ga. 416, 33 S. E. 412.

Even in its broadest sense, as including not only suretyship, but guaranty also, there can be no suretyship without a promise to answer for the debt, default, or miscarriage of another. .

Stearns, Suretyship, §§ 1, 32, 35, pp. 1, 37, 41; Pingrey, Suretyship & Guaranty, §§ 2, 382, pp. 2, 400; Childs, Suretyship & Guaranty, § 8, p. 3; 27 Am. & Eng. Enc. Law, 431; 32 Cyc. 14; Richardson v. Allen, 74 Ga. 722; Manry v. Waxelbaum Co. 108 Ga. 14, 33 S. E. 701; State v. Henderson, 120 Ga. 784, 48 S. E. 334; Reid v. Flippen, 47 Ga. 273; Chapin v. Merrill, 4 Wend. 657; Green v. Cresswell, 10 Ad. & El. 453, 2 Perry & D. 430, 9 L. J. Q. B. N. S. 63, 4 Jur. 169; Reader v. Kingham, 13 C. B. N. S. 344, 32 L. J. C. P. N. S. 108, 9 Jur. N. S. 797, 7 L. T. N. S. 789, 11 Week. Rep. 366; Wildes v. Dudlow, L. R. 19 Eq. 198, 44 L. J. Ch. N. S. 341, 23 Week. Rep. 435; Courtis v. Dennis, 7 Met. 510; Read v. Cutts, 7 Me. 186, 22 Am. Dec. 184; Kearnes v. Montgomery, 4 W. Va. 29; Hill v. Cooley, 112 Ga. 116, 37 S. E. 109; Maynard v. Maynard, 12 Ga. App. 279, 77 S. E. 109; 1 Brandt, Suretyship & Guaranty, § 5, pp. 19, 20; 16 Am. & Eng. Enc. Law, 168.

Mr. **J. B. Jackson** also for plaintiff in error.

Messrs. **R. D. Smith, R. N. Hardeman, and F. H. Johnson** for defendant in error.

Evans, P. J., delivered the opinion of the court:

1. There was evidence tending to show that W. E. James and another person constituted a partnership under the firm name of James Manufacturing Company. This partnership desired to make a loan from certain banks, and Mrs. Smith gave the note in suit for the purpose of enabling her son to borrow the money upon the indorsement of E. A. Buck. It was agreed between Buck and James that the former would indorse the note of the partnership upon the security of his mother's note. Buck did indorse the note, and the loan was made to the James Manufacturing Company. At the time of his indorsement, Buck knew that Mrs. Smith was a married woman, and had given this note to her son as accommodation paper, to aid in procuring his indorsement. It was admitted that the note in suit was acquired by the plaintiff bank after its maturity, being deposited for collection by Buck. The court instructed the jury that if Mrs. Smith signed the note sued on without consideration, and with the purpose of allowing her son to use it to secure Buck against loss by reason of his indorsement for James of a certain note to the Macon bank, and if Buck was acquainted with all of the facts at the time the note was transferred to him, and if Mrs. Smith was a married woman, she would not be liable thereon. The plaintiff raises the point that the facts hypothesized by the court do not constitute a contract of suretyship.

In this state a wife is a *feme sole* as to her separate estate, unless controlled by the settlement; and, while she may contract, she cannot bind her separate estate by any contract of suretyship. Civil Code 1910, § 3007. So that it becomes necessary to determine whether the transaction referred to in the court's instruction is included within this statutory prohibition. The Code declares: "The contract of suretyship is that whereby one obligates himself to pay the debt of another," etc. Civil Code 1910, § 3538.

And again: "The obligation of the surety is accessory to that of his principal," etc. § 3539.

It is contended that there cannot be a liability of suretyship unless the surety and his principal are obligated, not only for the same debt, but also to the same creditor. Many authorities have been called to our attention by the plaintiff, to establish the proposition that the obligation of the surety is for the debt, default, or miscarriage of his principal. Most of these cases concern the statute of frauds. In Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649, it was held that a promise by one person to indemnify another for becoming surety for a third is not within the statute of frauds, and need not be in writing. We recognize that there is a distinction between contracts of suretyship and contracts of indemnity.

"In a contract of indemnity the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person, or against loss resulting from such liability. The contract of the indemnitor is an original undertaking. The indemnitor is liable only to the indemnitee and his assigns; and unless he has stipulated for it, he has no remedy over against the party for whose benefit the contract was made." 1 Brandt, Suretyship & Guaranty, § 5, pp. 19, 20.

Such is undoubtedly the rule where the indemnitor is under no legal disability to make the contract against liability on which the indemnity is taken. Should the general rule apply in a case where the indorser's indemnitor is prohibited by law from making the indorsement for which the indemnity is to operate as a substitute? An accommodation indorser is a surety, and the statute forbids a married woman to make a contract of suretyship. A married woman cannot make herself liable by becoming an accommodation indorser, and the spirit of the statute outlaws a contract fixing an ultimate liability for the same debt which she cannot primarily contract. The whole arrangement contemplated a loan to the son on the faith of the mother's suretyship. If the son had borrowed the money from the bank on a note with his mother, her relation to the bank would have been that of a surety, and her indorsement would have been ineffectual to bind her to pay her son's debt, on account of the prohibition of the statute. Instead of undertaking to contract directly with the son's creditor, she contracted with one to assume a relation of suretyship on the faith of her promise that the ultimate liability of her son's default should be borne by her. The practical effect of the transaction and the common intent of the parties to it was that, if the son failed to pay the debt, the mother would be answerable for his default. It is true that the mother was not liable to the son's immediate creditor, but her contract was designed to make her liable for the same debt when it was paid by the indorser. One who contracts with the payee of an accommodation note executed by a married woman,

that on the faith of its security he will indorse a note for the payee for discount at a bank, and receives her note with knowledge of all the facts, enters into an arrangement to make the married woman ultimately liable to pay the debt of another; and such a transaction will fall within the law's condemnation of contracts of suretyship by a married woman.

2. The defendant W. E. James prayed that he recover the sum of $2,500 from the proceeds of the note which he claims to have discounted with the plaintiff's bank, and for which he never received credit. He was allowed this sum as a credit on the note sued on, by the verdict of the jury. The court allowed this defendant to testify with reference to the note which it was contended that J. L. Brooks had discounted for James, and which James had paid, and for which he contended that he had received no credit, as follows:

Q. Did Brooks ever admit to you that he didn't give you credit for this money? Did he ever make any admission about this $2,500 note?

A. He said he would make it good to me when he got out of his trouble in Albany.

It appeared that at one time Brooks was president of the plaintiff bank, but his connection with the bank had been severed when this statement was made. The burden was on the defendant to make it appear that Brooks was the agent of the bank at the time he was alleged to have made the admission to which objection was taken. He failed to carry this burden, and the testimony was inadmissible. Sweet Water Mfg. Co. v. Glover, 29 Ga. 399. But inasmuch as this evidence related solely to the defense of the defendant W. E. James, and had no connection with the defense of Mrs. Smith, we will order a new trial only as to the issue made by the plea of W. E. James, and not disturb so much of the verdict as exonerated Mrs. Smith from liability.

3. The motion for new trial contains other assignments of error. Either they are so clearly without merit, or so involved in the proposition discussed in the first division of this opinion, that it will not be necessary to separately notice them. The verdict in favor of Mrs. Smith was authorized, if not demanded, by the evidence, and a new trial is granted as to the defendant W. E. James.

Judgment affirmed in part and reversed in part.

All the Justices concur, except Fish, Ch. J., absent.

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LOUISIANA SUPREME COURT.

JOHN RUSSO, Appt.,
v.
ORPHEUM THEATRE & REALTY COMPANY.

(— La. —, 66 So. 385.)

Theater — removal of patron.

1. The superintendent of a theater owes a duty to its patrons to maintain order and quiet during a performance. If he believes —and has good reason to believe—that a certain man in the audience is guilty of an

Headnotes by O'NIELL, J.

Note. — Humiliation as element of damages for exclusion from place of amusement.

The earlier cases on this question may be found in notes to Buenzle v. Newport Amusement Asso. 14 L.R.A.(N.S.) 1242, and Aaron v. Ward, 38 L.R.A.(N.S.) 204.

Since the compilation of the above notes no case except RUSSO v. ORPHEUM THEATRE & REALTY CO. has arisen in which a person has brought damages for humiliation by being excluded from a place of amusement.

In Interstate Amusement Co. v. Martin, 8 Ala. App. 481, 62 So. 404, a performer at a theater invited plaintiff, a patron, to the stage, and in the presence of the audience addressed to him insulting and defamatory language. The court stated that for the act of the employee within the line or scope of his employment the employer was liable, where such act constituted a breach of a duty of the employer to the plaintiff arising out of a contract between them. The alleged act of the employee was a breach of his employer's duty to the plaintiff not to subject the latter to insult or indignity. In this case, however, a judgment for plaintiff was reversed, the court observing that it was reversible error to permit the plaintiff to answer questions as to whether the language embarrassed or humiliated him, since it is improper to admit evidence as to the effect of an occurrence upon one's mind or sensibility. The court also observed that the evidence was such as to support a conclusion that the act of the plaintiff in going upon the stage and putting the performer in handcuffs was not, as was alleged in the plea, an abandonment of his position or relation as the guest or patron of the defendant, but was a compliance with a request made in behalf of the defendant to anyone in the audience, and so may be regarded as an act which the defendant invited the plaintiff as its patron or guest to perform.

Generally as to nature and extent of rights of holder of ticket of admission to place of amusement, see notes to Horney v. Nixon, 1 L.R.A.(N.S.) 1184, and Marrone v. Washington Jockey Club, 43 L.R.A.(N.S.) 961.

J. D. C.

improper disturbance, the superintendent is justified in requesting him to be quiet, provided it is done quietly and politely and without causing unnecessary humiliation.

Same — summoning police.

2. When, under the foregoing circumstances, the person requested to be quiet follows the superintendent back to the latter's place in the foyer, provokes a disturbance with him, and persists in loud talking, the superintendent—especially after politely endeavoring to persuade the man to be quiet and return to his seat—is justified in summoning a police officer to quiet him.

Same — exclusion from building — mistake — liability.

3. When a policeman, summoned under the circumstances above stated, finds the man complaining so loudly as to disturb the audience, the officer is justified in demanding that he be quiet or go out of the theater; and, if the disturber thereupon walks out, the proprietor of the theater will not be held liable in damages to him for humiliation or injury to his reputation, even though the superintendent may have been mistaken as to who was guilty of the original disturbance.

(November 4, 1914.)

APPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for alleged humiliation and injury to plaintiff's reputation by removal from defendant's theater. Affirmed.

The facts are stated in the opinion.

Mr. Joseph H. Brewer, for appellant:

Where a person is wrongfully expelled from a hall for admission to which he has paid the price demanded, his damages are not limited to the amount paid for admission; but he may be compensated for indignity and disgrace, or any other damages actually sustained by him.

Smith v. Leo, 92 Hun, 242, 36 N. Y. Supp. 949; Weber-Stair Co. v. Fisher, — Ky. —, 119 S. W. 195; Cremore v. Huber, 18 App. Div. 231, 45 N. Y. Supp. 947; Magoverning v. Staples, 7 Lans. 145; Drew v. Peer, 93 Pa. 234; MacGowan v. Duff, 14 Daly, 315; May v. Shreveport Traction Co. 127 La. 420, 32 L.R.A.(N.S.) 206, 53 So. 671.

As part of the compensatory damages, there can be given a suitable recompense for injury to plaintiff's feelings and the humiliation and indignity.

Hamilton v. Third Ave. R. Co. 53 N. Y. 25; Buck v. Webb, 58 Hun, 185, 11 N. Y. Supp. 617; Fisher v. Metropolitan Elev. R. Co. 34 Hun, 433; Schmidt v. New Orleans R. Co. 116 La. 311, 7 L.R.A.(N.S.) 162, 40 So. 714; Sedgw. Damages, 8th ed. p. 67, L.R.A.1915B. § 47; Johnson v. Levy, 118 La. 447, 9 L.R.A.(N.S.) 1020, 118 Am. St. Rep. 378, 43 So. 46, 10 Ann. Cas. 722; Lewis v. Holmes, 109 La. 1030, 61 L.R.A. 274, 34 So. 66; Bernard v. Kelley, 118 La. 132, 42 So. 723.

Messrs. **Dinkelspiel, Hart, & Davey** for appellee.

O'Niell, J., delivered the opinion of the court:

The plaintiff has appealed from a judgment of the district court rejecting his demand for damages for alleged humiliation and alleged injury to his reputation. He avers that, while he was peacefully attending a performance in the defendant's theater, the superintendent unjustly accused him of being drunk and of using loud and boisterous language, and without just cause had him ejected from the theater by a police officer.

During a matinée performance at which the plaintiff and a companion occupied seats in the third row from the rear of the parquet, someone in the audience became boisterous, and loudly addressed a remark to one of the performers. The plaintiff and his witnesses say it was done by someone a few rows in front of him. The superintendent and an usher insist that the disturbance was made by the plaintiff. Be this as it may, the superintendent, who was standing close by, believing that the plaintiff had committed the disturbance, and, being so assured by one of the ushers, walked over and placed his hand upon the plaintiff's shoulder and requested him to be quiet. The plaintiff and his companion say that the superintendent thereupon accused the plaintiff of being drunk, and said that if he did not "cut out" the noise he would be put out of the house. The superintendent and the usher deny that the former said or did anything more than to politely request the plaintiff to be quiet. No one heard what was then said except the plaintiff, his companion, the superintendent, and the usher. The superintendent immediately returned to his place in the foyer, and, a moment later, the plaintiff followed him there and remonstrated with him, saying that he (the superintendent) had made a mistake, that he (plaintiff) had not created any disturbance, and asking why the superintendent had not got after the guilty person. The plaintiff and his witnesses say that the superintendent then caught the plaintiff by the arm, again accused him of being drunk, and attempted to eject him from the theater; and that the plaintiff only said: "I have done nothing; if you want to put me out, get a policeman." The defendant's wit-

nesses, on the contrary, say that, while the plaintiff was remonstrating loudly with the superintendent, the latter did nothing more than to put his hand upon the plaintiff's arm and say politely: "That is all right; be quiet and go back to your seat." They say that the plaintiff continued disturbing the audience until the police officer arrived and the two walked out of the theater. It is admitted by the plaintiff that he did not return to his seat, and it is admitted by the superintendent that he sent for the police officer, who was in the upper balcony.

The plaintiff and his witnesses say that the police officer took hold of him and escorted him out of the theater, accusing him of being drunk. The defendant's witnesses deny all of this. The police officer says that, when he arrived in the foyer, the plaintiff was talking very loudly, disturbing the audience, and, addressing the officer and referring to the superintendent, said: "This man is getting onto me and saying I am making a noise, and I am not." The officer told him to shut up or leave the theater. The officer says that the plaintiff persisted in his loud talk while he (the officer) tried to quiet him, and that the plaintiff walked out of the theater ahead of the officer.

The superintendent and the police officer deny that either of them accused the plaintiff of being drunk, and their testimony is corroborated by that of other witnesses who were in a position to hear the accusation if it was made.

There is considerable doubt that the plaintiff was guilty of the original disturbance, but the superintendent, believing that the plaintiff was the guilty party, was acting within the proper performance of his duty when he requested him to be quiet. The plaintiff or his companion did not then tell the superintendent that he was mistaken, or that someone in front of them had made the noise. There was no one else in that section of the parquet who could have seen or heard the superintendent address the plaintiff in his seat, except two ladies, who were two rows behind the plaintiff. Testifying in his behalf, they say they thought nothing of that incident, and that their attention was not distracted from the performance until the plaintiff arose and followed the superintendent back to the foyer. Our conclusion is that it was the plaintiff's going back into the foyer and provoking the disturbance with the superintendent that brought on whatever humiliation he suffered.

The judgment appealed from is affirmed at the cost of the appellant.

MINNESOTA SUPREME COURT.

JOSEPH MATZ, Doing Business as Joseph Matz Company, Respt.,
v.
MARTIN MARTINSON, Appt.

(127 Minn. 262, 149 N. W. 370.)

Contract — effect of intoxication.

1. A contract entered into by a person in such a state of intoxication that he is unable to comprehend its terms is voidable, but not void. If, after having knowledge of and comprehending its terms, he affirms it, it becomes valid and binding. His failure to disaffirm it within a reasonable time after having such knowledge is deemed an election to affirm it.

Note — maker intoxicated — ratification.

2. Where defendant executed a promissory note for a valid pre-existing debt, and, for at least five years after full knowledge of the transaction, recognized the note as valid and repeatedly promised to pay it, he cannot therefore interpose as a defense thereto that he was intoxicated when he signed it, and testimony to prove such intoxication may properly be stricken from the record.

Trial — statutory duty of court.

3. Section 7998, Gen. Stat. 1913, does not deprive the court of the power to strike out immaterial evidence, nor require it to submit to the jury questions having no bearing upon the outcome of the suit. Where the court states the case as it is, explains the rules of law which apply, and permits the jury to return such verdict as they may deem proper under the circumstances, the court has fully performed the duty imposed upon it by this statute.

(November 6, 1914.)

Headnotes by TAYLOR, C.

Note. — Validity of contract made with intoxicated person.

This note is a continuation of notes to Wright v. Waller, 54 L.R.A. 440; Kuhlman v. Wieben, 2 L.R.A.(N.S.) 666; and Miller v. Sterringer, 25 L.R.A.(N.S.) 596, —where the earlier cases upon this question are collected and discussed.

For intoxication as defense to bill or note in hands of bona fide holder, assuming that it would be invalid as between the immediate parties, see note in 46 L.R.A.(N.S.) 212.

The right to affirmative relief in equity from contract on ground that it was procured from complainant while intoxicated is treated in note in 17 L.R.A.(N.S.) 1066.

Marriage contracts are not within the scope of the present note. As to mental capacity essential to a valid marriage, see notes in 40 L.R.A. 737, and 38 L.R.A.(N.S.) 818.

APPEAL by defendant from an order of the District Court for Wilkin County denying new trial of an action brought to recover an amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. **Leonard Eriksson**, for appellant:

Intoxication which is so excessive as to deprive one of his understanding is a good defense to an alleged contract made while the defendant was in that condition.

Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57; Wright v. Fisher, 65 Mich. 275, 8 Am. St. Rep. 886, 32 N. W. 605; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101.

It is a question of fact for the jury whether the degree of drunkenness existed which vitiated the contract.

Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Cochran v. Toher, 14 Minn. 385, Gil. 293; Thomp. Trials, 1118, 1174; Beach, Contr. 746.

Messrs. **Lewis E. Jones** and **D. J. Jones**, for respondent:

Defendant must rescind or repudiate his contract within a reasonable time.

Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 9 L.R.A.(N.S.) 970, 111 N. W. 602; Lyon v. Phillips, 106 Pa. 57.

To avoid a contract on the ground of intoxication, it must be shown either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that undue advantage was taken of the party's situation.

Maxwell v. Pittenger, 3 N. J. Eq. 156; Woodson v. Gordon, Peck (Tenn.) 196, 14 Am. Dec. 743; Henry v. Ritenour, 31 Ind. 136.

There being no evidence that plaintiff induced or procured the alleged intoxication, the contract may be ratified by defendant when sober, and if so ratified will be enforced.

Eaton v. Perry, 29 Mo. 96; Hawley v. Howell, 60 Iowa, 79, 14 N. W. 199; J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 9 L.R.A.(N.S.) 970, 111 N. W. 602.

A party to a voidable contract must disaffirm within a reasonable time, and where there is mere delay to disaffirm and nothing to explain or excuse it, whether the delay is for more than a reasonable time is for the court, and a delay of three years and a half is unreasonable.

Goodnow v. Empire Lumber Co. 31 Minn. 468, 47 Am. Rep. 798, 18 N. W. 283; Eisen-

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Degree of intoxication.

Supplementing notes in 54 L.R.A. 440, and 25 L.R.A.(N.S.) 596.

In accordance with the general rule as stated in the earlier notes, that it must be shown that a man was incapable of exercising judgment, of understanding the proposed engagement, and of knowing what he was about when he entered into the contract, or else it will be held binding, the court in Sievertsen v. Paxton-Eckman Chemical Co. 160 Iowa, 662, 133 N. W. 744, 142 N. W. 424, held erroneous an instruction that plaintiff might be relieved of liability on his contract and note because of intoxication, without proving that at the time of executing the same he was so drunk as not to know what he was doing; there being no explanation of the proposition so stated, nor any reference to the claim that defendant's agents had induced the plaintiff to drink with them.

In Snead v. Scott, — Ala. —, 62 So. 36, it is stated that to render the contract voidable it must be made to appear that the party was intoxicated to such a degree that he was "incapable of exercising judgment, understanding the proposed engagement, and of knowing what he was about when he entered into the contract sought to be avoided." Wright v. Waller, 127 Ala. 557, 54 L.R.A. 440, 29 So. 57. Of course where drunkenness is superinduced by the other party with fraudulent intent, a less degree of incapacity may suffice to avoid the contract. On the issue of the incapacity of plaintiff's father, by reason of drunkenness at the time, to make the mortgage to Snead, proof merely that he "was drunk" on the morning the mortgage was executed had no tendency *per se* to show that he was without contractual capacity. There must be some evidence of a resultant condition indicative of that extreme impairment of the faculties which amounts to contractual incapacity. Nor was the mortgagor's drunkenness on the afternoon of that day, nor the fact that he had been drinking heavily for six months prior thereto, competent evidence upon this issue, in the absence of some evidence of incapacity by reason of drunkenness at the time he made the contract, even if such evidence of remote drunkenness were in any case admissible.

A drunkard is held incompetent to execute a conveyance only upon proof that at the time of the act his understanding was clouded, or his reason dethroned by actual intoxication. Somers v. Ferris, — Mich. —, 148 N. W. 782.

A deed executed by a person so destitute of reason as not to know the nature or consequences of his act, though his incompetency be produced by intoxication, is voidable and may be avoided by himself, though the intoxication was voluntary, and not produced by the circumvention of the other party. Coody v. Coody, 39 Okla. 719, L.R.A.1915, —, 136 Pac. 754. To the same effect is Straughan v. Cooper, — Okla. —, 139 Pac. 265.

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menger v. Murphy, 42 Minn. 84, 18 Am. St. Rep. 493, 43 N. W. 784.

Taylor, C., filed the following opinion:

This is a suit upon a promissory note. The defense interposed is that defendant was so drunk when he signed it that he was incapable of entering into a contract. At the close of the evidence all testimony tending to prove such drunkenness was stricken out on motion of plaintiff. The testimony so stricken out would have supported a finding by the jury that defendant was intoxicated to the extent claimed, and consequently the action of the court in striking it out presents the question as to whether the fact of such intoxication was a defense to the suit.

1. The note, together with a chattel mortgage upon some horses, was executed on January 10, 1906. Defendant had previously mortgaged the horses to a third party. He subsequently sold them, and apparently applied the proceeds upon the first mortgage. He paid none of such proceeds to plaintiff. Plaintiff made no attempt to enforce his mortgage, and never received anything thereunder. He made several threats to prosecute defendant criminally for selling mortgaged property, but no prosecution was ever instituted. Defendant, at the trial, admitted and testified that he was informed of the note and mortgage and knew that he had executed them on January 11, 1906, the next day after their execution; that the note was given for a prior debt, and that he owed such debt; that after knowing that he had executed the note, he repeatedly promised to pay it; that he made two payments upon it—one of $50 in September, 1908, and another of $50 in October, 1908; and that he made no claim to plaintiff that the note was invalid, because executed while he was intoxicated, until some time in the spring of 1913. His wife testified that one of plaintiff's attorneys came to the house at a time when her husband was absent; and that, in response to an inquiry as to whether they could make a payment upon the note, she informed him that they would not pay it as her husband was intoxicated when he signed it. She was unable to fix the date of this conversation with any definiteness, but stated that it occurred some two years before the trial. As the trial took place in December, 1913, this conversation probably occurred some time in 1911. It is not claimed that there was any act repudiating the note prior to this conversation; but defendant contends that this conversation, and the statement which he himself made in the

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Where a person when drinking intoxicating liquor seemed to lose all control of his mental as well as moral faculties, could be easily persuaded to do almost anything, had no idea of the value of money, no capacity to attend to business, and would sell or pawn his clothing or anything that he had at any price for the purpose of getting whisky, it was held in Matthis v. O'Brien, 137 Ky. 651, 126 S. W. 156, that it was not necessary that a person of such known intemperate habits and disposition should be wholly under the influence of liquor to enable him to avoid a contract made under circumstances indicating that an unconscionable advantage had been taken of him whereby his interest in his brother's estate had been obtained for a grossly inadequate consideration. It was sufficient if his weakness and necessities were taken advantage of, and a contract obtained that no man in his sound and sober senses would have entered into.

The rule is stated in Dewitt v. Bowers, — Tex. Civ. App. —, 138 S. W. 1147, that a person cannot escape liability on a contract upon the mere ground that he was intoxicated at the time of its execution, unless it is proved that he was so intoxicated that he was unable to understand the nature of the contract and the consequences of its execution. He may be intoxicated to such a degree as to be excited, or so as to prevent him from acting with that degree of care he would use were he sober, still he would not be released from his contractual liability. His contract cannot be avoided, in other words, unless his drunkenness was of such a character that he did not know its true intent or meaning, which is an amelioration of the early common-law rule that asserted that a contract entered into by an intoxicated person was binding upon him. In this case plaintiff sought to recover money paid for property purchased, on the ground that there had been no meeting of minds with respect to such property, each claiming different property as the subject of the contract. While plaintiff testified that he was intoxicated at the time he executed the contract, the court stated that where there were neither allegations nor proof supporting the theory that the contract was void because executed by plaintiff while he was so drunk that he did not comprehend what he was doing, it was error to submit that issue to the jury.

Void or voidable ratification.

Supplementing notes in 54 L.R.A. 448, and 25 L.R.A.(N.S.) 600.

As shown in the earlier note the effect of intoxication, even when of the degree necessary to impugn the contract, ordinarily renders it voidable only, and not void. To the same effect is Snead v. Scott, — Ala. —, 62 So. 36.

So, upon the question whether a contract of release was void or only voidable, the court in Birmingham R. Light & P. Co. v. Hinton, 158 Ala. 470, 48 So. 546, said that

spring of 1913, constituted a disaffirmance of the note and absolved him from any obligation to pay it.

Although a party may repudiate a contract entered into when he was in such a state of intoxication that he could not comprehend its terms, it is well settled that such contract is not void, but voidable only. If, after becoming sober and comprehending its terms, he affirms it, it becomes valid and binding. If he elects to repudiate it, he must give notice thereof with reasonable promptness. He is allowed a reasonable time after he understands the nature and effect of the transaction in which to disaffirm it; but, if he takes no steps to disaffirm it within a reasonable time after he has such knowledge, he is deemed to have ratified it. Carpenter v. Rodgers, 61 Mich. 384, 1 Am. St. Rep. 595, 28 N. W. 156; J. I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 9 L.R.A.(N.S.) 970, 111 N. W. 602; Kelly v. Louisville & N. R. Co. 154 Ala. 573, 45 So. 906; Strickland v. Parlin & O. Co. 118 Ga. 213, 44 S. E. 997; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; Fowler v. Meadow Brook Water Co. 208 Pa. 473, 57 Atl. 959; 17 Am. & Eng. Enc. Law, 2d ed. 401.

The note in controversy was given for a valid debt previously contracted. Defendant does not claim any defense to the debt, nor that he was overreached in any manner. He recognized the note as a valid and binding obligation for fully five years, and during that time made numerous promises, both verbally and by letter, that he would pay it. The record shows conclusively that he ratified the execution of the note after having full knowledge of the transaction. Therefore whether he was intoxicated when he signed it became wholly immaterial, and evidence tending to show such fact was properly stricken from the record.

2. Defendant complains of the manner in which the case was submitted to the jury. He offered no defense except the claim that the note was invalid because signed while he was intoxicated. As already pointed out his subsequent ratification of the note precluded him from asserting this defense. When the case went to the jury plaintiff's note stood admitted, and there was no evidence tending to show any defense to it whatever. Plaintiff moved the court to direct a verdict in his favor. Defendant objected under chapter 245, Laws of 1913. Gen. Stat. 1913, § 7998. The trial judge endeavored to follow this statute. He denied plaintiff's motion. He called the attention of the jury to the note, and to the defense of intoxication, and gave them two forms of verdict. He told them that the testimony as to intoxication had been stricken out and was not to be considered by them. He further told them to take the note, and, if plaintiff was entitled to recover, to return a verdict for the amount

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there can be no distinction in principle where mental incapacity to contract is set up in avoidance of the contract, whether it is produced by intoxication from strong drink or by the administration of drugs or opiates. In either case the mental incapacity is of a temporary character. The courts, however, in respect to contracts have taken a clear distinction where the incapacity is the result of permanent insanity, and where it is the result of intoxication, and hence, only temporary. In the former case the contract is void, while in the latter it is merely voidable.

Drunkenness does not create such legal incapacity as will alone render a contract wholly void. Though it may furnish the party suffering from it ground for rescission, yet, being voidable only, the contract may be affirmed and made binding by him after he becomes sober. Sellers v. Knight, — Ala. —, 64 So. 329.

A deed obtained from one while intoxicated was held in Sellers v. Knight, supra, to have been ratified by the grantor where his conduct was as follows: Demand made upon grantee for payment of mortgage debt; voluntary delivery of mortgage to lawyers with direction to foreclose it under the power; voluntary execution for the foreclosure deed, after full information of its purport; voluntary inducement of and arrangement with one to buy at the foreclosure sale; voluntary execution, with his wife and others, of the deed to grantee.

A contract by one while temporarily intoxicated, being voidable, and not void, is open to affirmance or disaffirmance on the termination of the temporary incapacity produced by the drugs and opiates. If disaffirmed, the duty rests upon the party to return the money received. A party may not repudiate a contract, and at the same time hold onto and enjoy the benefits received under it. Birmingham R. Light & P. Co. v. Hinton, supra.

The effect of an adjudication of incompetency by reason of habitual drunkenness is largely the same as an adjudication of incompetency by reason of insanity, as to subsequent acts of the incompetent while the adjudication remains in force, and subsequent contracts made by the incompetent so far as they affect his property are void, even though made in a temporary period of sobriety. Anderson v. Hicks, 150 App. Div. 289, 134 N. Y. Supp. 1018. This case actually involved a marriage contract, and so is not strictly within the scope of the present note. The court observed that whatever the legal effect of an adjudication of habitual drunkenness upon a subsequent marriage, a mere committee of the person had no right by virtue of such office to represent him either for or against the marriage. J. D. C.

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thereof, but that he did not direct a verdict for plaintiff.

Defendant contends that withdrawing the evidence as to intoxication from the jury infringed the rights secured to him by the statute. This somewhat unusual statute reads as follows: "When at the close of the testimony any party to the action moves the court to direct a verdict in his favor, and the adverse party objects thereto, such motion shall be denied and the court shall submit to the jury such issue or issues, within the pleadings on which any evidence has been taken, as either or any party to the action shall request, but upon a subsequent motion, by such moving party after verdict rendered in such action, that judgment be entered notwithstanding the verdict, the court shall grant the same if, upon the evidence as it stood at the time such motion to direct a verdict was made the moving party was entitled to such directed verdict." Gen. Stat. 1913, § 7998.

It may be noted in passing that defendant made no request for the submission of any issue to the jury, but merely objected to the granting of plaintiff's motion. This statute has no reference to the reception or rejection of evidence, and in no way changes or restricts the power of the court to determine questions arising in respect thereto. The court has precisely the same power to receive, exclude, and strike out evidence that it had before the passage of the statute. Evidence offered for the purpose of proving facts which, if established, would not affect the result of the action, may properly be excluded or stricken out as immaterial.

The statute contemplates the existence of questions which are for the jury to determine, and which have a bearing upon the result of the action. Such questions may arise either because the facts are in controversy, or because different conclusions may be drawn from the undisputed facts. But if there be no such questions, there are no issues for submission to the jury. The court is not debarred from stating to the jury the rules of law which govern the case, and should do so. He performs his full duty under the statute when he states the case to the jury as it actually is, explains the rules of law which apply, and directs them to return such verdict as they may deem proper under the circumstances. Whether the court no longer possesses the power to direct a verdict in any case, if objection be made thereto, is neither involved nor decided herein.

The record in the present case discloses no error affecting any substantial right of defendant, and the order denying a new trial is affirmed.

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NEBRASKA SUPREME COURT.

ARTHUR J. ROGERS, Plff. in Err.,
v.
STATE OF NEBRASKA.

(— Neb. —, 149 N. W. 318.)

Evidence — false pretenses — opinion of stranger.

Where the plaintiff in error, who was convicted upon the charge of obtaining money by false pretenses, obtained the money by means of a check given on a bank at El Paso, Texas, and the bank refused payment of the check and sent a telegram to another bank, characterizing the defendant as a fraud who had never had an account in the bank on which he had drawn his check, and requesting that the defendant should be apprehended, such telegram is not admissible in evidence. It will be regarded as a communication between third parties and as mere hearsay, made by one who speaks without the sanction of an oath and without opportunity for cross-examination.

(October 30, 1914.)

ERROR to the District Court for Lancaster County to review a judgment convicting defendant of obtaining money under false pretenses. Reversed.

The facts are stated in the opinion.

Messrs. **Sterling F. Mutz** and **Harold M. Noble**, for plaintiff in error:

The court erred in permitting a private prosecutor to assist the state.

Blair v. State, 72 Neb. 501, 101 N. W. 17; Biemel v. State, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556; McKay v. State, 90 Neb. 63, 39 L.R.A.(N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034; Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116.

Representations relative to a future event are not sufficient to sustain the crime of obtaining money under false pretenses.

Maxwell, Crim. Proc. 129; Dillingham v. State, 5 Ohio St. 280; Biddle v. United

Headnote by HAMER, J.

Note. — Admissibility in prosecution for false pretenses of statements or communications between the prosecutor and a third person.

ROGERS v. STATE seems to lay down the correct general rule upon this question.

Thus, in Brown v. State, 48 Tex. Crim. Rep. 433, 88 S. W. 811, where the defendant had obtained money by pretending to sell certain land which he represented to belong to his principal, the court held inadmissible evidence of a statement made by a third person to the prosecutor, to the effect that he had acquired no title to the land by his deed.

States, 84 C. C. A. 415, 156 Fed. 759; Holton v. State, 109 Ga. 127, 34 S. E. 358; Edge v. State, 114 Ga. 113, 39 S. E. 889; Austin v. People, 63 Ill. App. 303; People v. Miller, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418; Winnett v. State, 18 Ohio C. C. 515, 10 Ohio C. D. 245; People v. Orris, 52 Colo. 244, 41 L.R.A.(N.S.) 170, 121 Pac. 163; State v. Hollingsworth, 132 Iowa, 471, 109 N. W. 1003; West v. State, 63 Neb. 257, 88 N. W. 503; Cook v. State, 71 Neb. 243, 98 N. W. 810.

Statements or conversations by third persons out of defendant's presence, and not a part of the *res gestæ*, are inadmissible against him.

Bedford v. State, 36 Neb. 702, 55 N. W. 263; Re Fennerstein's Champagne, 5 Am. L. Reg. N. S. 468, notes; People v. Gillespie, 111 Mich. 241, 69 N. W. 490; Roby v. State, 96 Wis. 667, 71 N. W. 1046; State v. Rocker, 130 Iowa, 239, 106 N. W. 645;

Messrs. **Grant G. Martin**, Attorney General, and **Frank E. Edgerton**, Assistant Attorney General, for the State.

Hamer, J., delivered the opinion of the court:

The plaintiff in error, Arthur J. Rogers, was tried and convicted in the district court of Lancaster county. He was charged with the crime of obtaining money under false pretenses. There is evidence tending to show that he represented to the cashier of the First National Bank of Havelock, H. R. Frank, that he had money on deposit in the Union Bank & Trust Company of El Paso, Texas, subject to check, and more than sufficient to pay his check for the sum of $50, being the check which he presented to the bank at Havelock and on which that bank paid the money.

Several errors are assigned by plaintiff in error, but as at least one of the assignments must be sustained, we will content ourselves with a consideration of that assignment. The evidence shows that after the check had been paid by the bank at Havelock, July 30, 1913, that bank sent the check to its correspondent, the Central National Bank of Lincoln, Nebraska, and that in due course of business it reached the Union Bank & Trust Company at El Paso, Texas, on or about August 7, 1913. Payment was refused. Upon the trial a telegram addressed to Central National Bank was identified by the agent of the telegraph company as having been received by its Lincoln office in due course of business, and by an officer of the bank to which it was addressed, and as having been received in the regular course of business by the bank. This telegram, over the objection of plaintiff in error that it was irrelevant, immaterial, and not the best evidence, was received in evidence. It was also objected by plaintiff in error that it was not shown that it was original, and that no sufficient foundation had been laid, and that it was hearsay. The body of the telegram offered in evidence reads:

El Paso, Texas, Aug. 7, 1913.
Central National Bank, Lincoln, Neb.

Items totaling $75 signed Arthur J. Roger on us. Yours July 30th cleared to-day. Party bank fraud. Never an account here and unknown to us, and request you have apprehend and report at once American Bankers Association for action. Has been operating this game for the last six months. If we can assist you command us further.

Union Bank & Trust Company.

The matter contained in the telegram was the statement of one not under oath and

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And in Amos v. State, 123 Ala. 50, 26 So. 524, where a third person in whose hands defendant pretended to have money sent a postal to the prosecutor denying such fact, the court says: "Standing alone, the card would have been only the hearsay statement of Moore, and as such inadmissible. But in connection with the other evidence tending to show that the defendant upon reading it virtually admitted its contents by saying that he had lied about having money in Moore's hands, the card was clearly admissible as giving point and meaning to the admission."

The exception made in the preceding case is applied in State v. Miller, 49 Mo. 505, in which it is held that where the prosecutor inquires of a third person whether defendant owns certain property, and such third person says that he does not, the fact that the prosecutor repeats this statement to defendant, and he does not deny it, renders it admissible. See in this connection the note to O'Hearn v. State, 25 L.R.A. (N.S.) 542, "Uncontradicted statements in presence of accused as a confession or admission."

In People v. Andre, 157 Mich. 362, 122 N. W. 98, on former appeal, 153 Mich. 531, 117 N. W. 55, a conversation between a bank and the prosecutor was held admissible to show that the contents of a financial statement left at the bank by defendant had been brought to the knowledge of the prosecutor, although such conversation was held inadmissible to prove that such financial statement had been made.

For admissibility upon issue of forgery, of declarations out of court by person whose name is charged to have been forged, see note to State v. Ready, 28 L.R.A.(N.S.) 240.

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not attending the trial. Its introduction offered no opportunity to cross-examine touching the matters contained in it. The statement is clearly that of a person not before the court, and not subject to cross-examination, and it was a communication by one third party to another. In Bedford v. State, 36 Neb. 702, 55 N. W. 263, there was the consideration of the same sort of question. The court say: "These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives. 1 Chitty, Crim. Law, ** 368, 369; 1 Phillipps, Ev. 4th Am. ed. 170. As, where a witness testified that he was induced to institute proceedings by letters of a third party. Lewis v. Manly, 2 Yeates, 200. But the letters could not be received as evidence of the facts stated in them. (5 Am. L. Reg. N. S. 468.) 'All acts, declarations, etc., made by third persons are obnoxious to two objections: (1) That they are *res inter alios acta*, and therefore irrelevant. (2) That they are mere hearsay, the assertions of parties without the sanction of an oath and an opportunity for cross-examination.'"

No case has been cited where a communication of this kind between third parties has been admitted. The telegram was highly prejudicial, and it was clearly error to admit it.

The bill of exceptions shows that special counsel appeared in the case to assist the county attorney. He examined the most important witnesses for the state, among others Mr. Moye, the secretary of the bank at El Paso. He also examined Mr. C. E. Sapp. When T. R. Sapp was recalled he conducted his examination. He closed the argument to the jury. He was anything but mild in his manner and in his language, and was such a prosecutor as is not contemplated by the statute. Section 5599, Rev. Stat. 1913, provides that the county attorney may procure assistance in the trial of any person charged with the crime of felony. The statute contemplates that he shall be paid by the county board for his services. The theory of the statute is that an impartial prosecutor will be selected to assist the county attorney "under the direction of the district court." The purpose of the statute is to exclude counsel employed by private capital or procured by persons who seek their own self-interests, or who wish to gratify personal animosities. L.R.A.1915B.

This method of selecting assistant counsel is not to be used as an engine of oppression. The employment of the prosecutor is not to be placed in the hands of wealth. The object of the statute was to put these interests out. The statute looks to the employment of an assistant who shall stand evenly balanced between the accused and the state. Special counsel seems to have been crisp in his temper and incisive in his speech. He resented the necessary interruptions of counsel, and his remarks are not free from the suggestion of personal violence.

In McKay v. State, 90 Neb. 63, 39 L.R.A. (N.S.) 714, 132 N. W. 741, Ann. Cas. 1913B, 1034, the act in question was discussed. It is said in the opinion cited: "We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are ofttimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. . . . It has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by sordid motives. . . . It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the guilty receive their just deserts. . . . Counsel called to assist in the prosecution should govern his actions in like manner."

When counsel are brought into the case to assist the county attorney, all the reasons that require fair treatment of the accused upon the part of the county attorney apply to his assistant. The judgment of the District Court is reversed.

Sedgwick, J., concurs in conclusion. Rose, J., not sitting.

NEW YORK COURT OF APPEALS.

EMMA J. HESKELL, Admrx., etc., of Frank Heskell, Deceased, Respt.,
v.
AUBURN LIGHT, HEAT, & POWER COMPANY, Appt.

(209 N. Y. 86, 102 N. E. 540.)

Electricity — permitting use of pole — duty as to safety of wires.

An electrical company which tacitly permits a telephone company to attach wires

to its pole in a public street owes no duty to employees of the latter to keep its wires in safe condition so as to prevent injury to them in case they go upon the pole to look after the wires of their employers.

(June 17, 1913.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Cayuga County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. **William H. Harding,** for appellant:

The defendant was under no obligation to plaintiff to exercise active vigilance, but was bound only to refrain from inflicting a wilful injury, and is not liable for any passive negligence.

Hickok v. Auburn Light, Heat & P. Co. 200 N. Y. 464, 93 N. E. 1113; Freeman v. Brooklyn Heights R. Co. 54 App. Div. 596, 66 N. Y. Supp. 1052; Fox v. Warner-Quinlan Asphalt Co. 204 N. Y. 240, 38 L.R.A. (N.S.) 395, 97 N. E. 497, Ann. Cas. 1913C, 745; Hector v. Boston Electric Light Co. 161 Mass. 558, 25 L.R.A. 554, 37 N. E. 773, 15 Am. Neg. Cas. 714; Sias v. Lowell, L. & H. Street R. Co. 179 Mass. 343, 60 N. E. 974; Birch v. New York, 190 N. Y. 397, 18 L.R.A.(N.S.) 595, 83 N. E. 51; Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203, 14 Am. Neg. Cas. 201; Downes v. Elmira Bridge Co. 179 N. Y. 136, 71 N. E. 743; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Nicholson v. Erie R. Co. 41 N. Y. 525; Racine v. Morris, 136 App. Div. 467, 121 N. Y. Supp. 146; McAlpine v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; Splittorf v. State, 108 N. Y. 205, 15 N. E. 322; Victory v. Baker, 67 N. Y. 366; Sweeny v. Old Colony & N. R. Co. 10 Allen, 372, 87 Am. Dec. 644; Redigan v. Boston & M. R. Co. 155 Mass. 46, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Sullivan v. Boston & A. R. Co. 156 Mass. 378, 31 N. E. 128; Lagerman v. New York C. & H. R. R. Co. 53 App. Div. 283, 65 N. Y. Supp. 764, 8 Am. Neg. Rep. 503; Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. Supp. 473; Sterger v. Van Sicklen, 132 N. Y. 499, 16 L.R.A. 640, 28 Am. St. Rep. 594, 30 N. E. 987; Magar v. Hammond, 183 N. Y. 387, 3 L.R.A. (N.S.) 1038, 76 N. E. 474, 19 Am. Neg. Cas. 445; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Walsh v. Fitchburg R. Co. 145 N. Y. 301, 27 L.R.A. 724, 45 Am. St. Rep. 615, 39 N. E. 1068; Shea v. Westinghouse Electric & Mfg. Co. 147 App. Div. 660, 132 N. Y. Supp. 612; Brush Electric Light & P. Co. v. Lefevre, 93 Tex. 604, 49 L.R.A. 771, 77 Am. St. Rep. 898, 57 S. W. 640; Gunhouse v. Fraenkel, 153 App. Div. 359, 138 N. Y. Supp. 444; Calumet Electric Street R. Co. v. Grosse, 70 Ill. App. 381; Reardon v. Thompson, 149 Mass. 268, 21 N. E. 369; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Petur v. Erie R. Co. 151 App. Div. 578, 136 N. Y. Supp. 79; Carroll v. State, 153 App. Div. 514, 138 N. Y. Supp. 442.

Messrs. **Olmsted, Van Bergen, & Searl,** for respondent:

It was the duty of the defendant to construct and maintain its dangerous wires on the pole in such a manner as to render the pole as free from danger as it could be made by the exercise of reasonable care in adopting those safeguards and methods of construction which are in common use.

Braun v. Buffalo General Electric Co. 34 L.R.A.(N.S.) 1089 and note, 200 N. Y. 484, 140 Am. St. Rep. 645, 94 N. E. 206, 21 Ann. Cas. 370; Wittleder v. Citizens' Electric Illuminating Co. 47 App. Div. 410, 62 N. Y. Supp. 297; Caruso v. Troy Gas Co. 153 App. Div. 431, 138 N. Y. Supp. 279; Paine v. Electric Illuminating & P. Co. 64 App. Div. 477, 72 N. Y. Supp. 279; Dwyer v. Buffalo General Electric Co. 20 App. Div. 124, 46 N. Y. Supp. 874; Caglione v. Mt. Morris Electric Light Co. 56 App. Div. 191, 67 N. Y. Supp. 660; Wagner v. Brooklyn Heights R. Co. 69 App. Div. 349, 74 N. Y. Supp. 809; Horning v. Hudson River Teleph. Co. 111 App. Div. 122, 97 N. Y. Supp. 625, affirmed in 186 N. Y. 552, 79 N. E. 1107; Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778; Griffin v. United Electric Light Co. 164 Mass. 492, 32 L.R.A. 400, 49 Am. St. Rep. 477, 41 N. E. 675; Rowe v. Taylorville Electric Co. 213 Ill. 318, 72 N. E. 711, 19 Am. Neg. Rep. 215; Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161; Ziehm v. United Electric Light & P. Co. 104 Md. 48, 64 Atl. 61; Brown v. Edison Electric Illuminating Co. 90 Md. 406, 46 L.R.A. 745, 78 Am. St. Rep. 442, 45 Atl. 182, 7 Am. Neg. Rep. 253; Baries v. Louisville Electric Light Co. 118 Ky. 830, 80 S. W. 814, 85 S. W. 1186; Walters v. Denver Consol. Electric Light Co. 17 Colo. App.

Note. — Generally, as to liability for injury of employees of another company while on defendant's poles, or poles used jointly, see note to Denison Light & P. Co. v. Patton, 45 L.R.A.(N.S.) 303, and collateral notes there referred to.

192, 68 Pac. 117, 11 Am. Neg. Rep. 574; Nelson v. Brandford Lighting & Water Co. 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490; Colusa Parrot Min. & Smelting Co. v. Monahan, 89 C. C. A. 256, 162 Fed. 276; Finch v. Ottawa, 111 C. C. A. 199, 190 Fed. 299.

Collin, J., delivered the opinion of the court:

The death of the plaintiff's intestate resulted from his contact with an electrically charged wire belonging to the defendant while upon one of its poles. The action is to recover the damages sustained by reason of the death.

Inasmuch as the decision of the appellate division was not unanimous, we must ascertain by a scrutiny of the evidence whether or not there was any proof permitting the jury to return a verdict in favor of the plaintiff. If there was no evidence that tended to support the verdict, the submission of the case to the jury was error. Hickok v. Auburn Light, Heat, & P. Co. 200 N. Y. 464, 93 N. E. 1113; King v. Ft. Ann. 180 N. Y. 496, 73 N. E. 481.

Under the evidence and the charge to them, the jury might have found as the facts most favorable to the plaintiff: The pole stood in a street of the city of Auburn, and belonged to and was used by the defendant to support its wires in its business of furnishing electricity for light, heat, and power. The wires were upon cross-arms affixed to it, and carried powerful and dangerous currents of electricity. The intestate was not an employee of or connected with the defendant. He was an employee of the Auburn Telephone Company, two of whose wires were fixed to the pole at its very top, and therefore above the cross-arms which supported defendant's wires. On the date of the accident, May 20, 1911, the intestate was directed by the telephone company to ascertain and report to it what was to be done to remedy a reported defective condition of the telephone wires, and he came in contact with the wire while he was executing the direction. The telephone wires were extended to defendant's pole from a pole of the telephone company which was located across the street from it, and was a part of the telephone system. They passed from defendant's pole downward at an angle with it into a building. They were fixed to the pole of defendant without any express arrangement or agreement between the companies or specific consent on the part of the defendant. The defendant, through a long time prior to the accident, knew of and passively acquiesced in this location of the telephone wires. The intestate received the shock from which his death resulted through contact with a defectively insulated part or the dangerous position of one of defendant's wires.

The trial justice denied the motions of the defendant that the plaintiff be nonsuited, and that a verdict in its favor be directed, and submitted the case to the jury upon the theory that if they found the defendant knew that the wires of the telephone company were on its pole, and acquiesced in their remaining there until further notice, and that the linemen of the telephone company would have to go up the pole from time to time, the duty of the defendant toward those linemen, as toward its own employees, was to render the situation on the pole as free from danger as it could be made by the exercise of reasonable prudence in adopting those safeguards which experience had shown would lessen the dangers that otherwise would be present, and if the defendant neglected to fulfil that duty, and the intestate was not guilty of contributory negligence, the plaintiff was entitled to their verdict. The facts which the jury found as the evidence, and the charge permitted, did not justify the submission to them, or support the verdict.

The pole was the private property of the defendant, which, although it was within the street, had the right, inherent in ownership, to exclusively possess, use, and control it. The telephone company was not by virtue of any arrangement or agreement with the defendant the transferee or possessor of any fraction of that right. It, in the original fastening of the wires to the pole, was, as to the defendant, a trespasser, and the termination of that relation and the rise of another could be found only through implication in the silent assent of the defendant to its action. It ceased being a trespasser because, under the verdict of the jury, the attitude of the defendant toward it in regard to the use of the pole was not hostile or prohibitive, and was tacitly and impliedly permissive and acquiescent. It did not acquire any legal right to go upon or use the pole. The sufferance and acquiescence of the defendant implied its permission, and permission involves a license, but it created no right, and the defendant could at any moment have forbidden the telephone company the further use for any purpose. Under the facts as found, the relation of the telephone company to the defendant was that of a licensee as to the purposes for which it used the pole. Nicholson v. Erie R. Co. 41 N. Y. 525.

Common apprehension, sound reasoning, and legal principles have defined or recognized two classes in those who, as licensees,

enter upon and use the property of others. The one class consists, speaking generally, of those who act upon the invitation, express or implied, or the inducement of the owner, or who necessarily enter on business with him, or in the discharge of a public or private duty; the other consists of those who act voluntarily, without invitation, express or implied, or inducement from the owner, or not through a private or public duty. The duty of the owner to either class differs fundamentally from that to the other, and to each it is clearly and with a precision frequently impossible in the law established and prescribed. While the ascertainment of the law is easy, judicial industry, apprehension, and discrimination must frequently be exercised to decide to which class a licensee complaining of the acts of an owner belongs. The determination of that question in the present case will denote the legal duty of the defendant toward the intestate, and the conclusion as to whether or not the evidence tended to support the verdict will be consequent.

Mere permission or consent, whether express or implied from sufferance or passive acquiescence, to do a certain thing, gives a license, but does not necessarily imply an invitation to do it. The circumstances which may offer or sustain an implied invitation to a person to enter upon the property of another are, as the authorities attest, manifold, and whether they have that effect cannot be tested by any general and invariable rule. The supreme court of Massachusetts has formulated a rule potently indicative of the essentials of an implied invitation, if not comprehensive and absolute, as follows: "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128. The rule is approved in the recent cases of Norris v. Hugh Nawn Contracting Co. 206 Mass. 58, 31 L.R.A.(N.S.) 623, 91 N. E. 886, 19 Ann. Cas. 424; Standwood v. Clancey, 106 Me. 72, 26 L.R.A. (N.S.) 1213, 75 Atl. 293; Purtell v. Philadelphia R. Coal & I. Co. 256 Ill. 110, 43 L.R.A.(N.S.) 193, 99 N. E. 899, Ann. Cas. 1913E, 335. In Hargreaves v. Deacon, 25 Mich. 5, the court said: "We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In the absence of some relation which inures to the mutual benefit of the owner or occupant of the property and the injured person, or to the former alone, it is generally held there is not an implied invitation on the part of the former.

Between the defendant and the telephone company there was no mutuality. It was a matter of complete indifference to the former whether the wires of the latter were on or off the pole. There was between them no privity or contractual relation. The pole was not maintained by the defendant for the use of the telephone company as well as itself. The defendant did not receive any compensation, accommodation, privilege, or benefit on account of the use of the pole by the telephone company. The sole relation between them was that created by the gratuitous permission of the defendant, implied through its passive acquiescence, that the telephone company might, until otherwise notified, have its wires as they were upon the pole and exclusively for its own benefit and convenience. The facts as found by the jury did not constitute an invitation, express or implied, to the telephone company to go upon or use the pole, and in doing so it and its employees were mere volunteers or naked licensees, who used the pole subject to all the concomitant conditions and perils, and to whom the sole duty of the defendant was abstention from inflicting intentional or wanton or wilful injury. Nicholson v. Erie R. Co. 41 N. Y. 525; Fox v. Warner-Quinlan Asphalt Co. 204 N. Y. 240, 38 L.R.A.(N.S.) 395, 97 N. E. 497, Ann. Cas. 1913C, 745; Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Birch v. New York, 190 N. Y. 397, 18 L.R.A.(N.S.) 595, 83 N. E. 51; Sullivan v. Waters, 14 Ir. C. L. Rep. 466; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Fitzpatrick v. Cumberland Glass Mfg. Co. 61 N. J. L. 378, 39 Atl. 675, 4 Am. Neg. Rep. 193; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411.

Manifestly the intestate in going upon the pole in the discharge of his duty as the employee of the telephone company was in the same relation to the defendant which his employer held. Sullivan v. Tioga R. Co. 112 N. Y. 643, 8 Am. St. Rep. 793, 20 N. E. 569.

The cases in which a company is under

the duty of exercising reasonable care and prudence in securing the safety of the employee of another upon its pole go upon a principle inapplicable to and inhibited by the facts of this case. Illingsworth v. Boston Electric Light Co. 161 Mass. 583, 25 L.R.A. 552, 37 N. E. 778; Cincinnati Gas & Electric Co. v. Archdeacon, 80 Ohio St. 27, 88 N. E. 125, 21 Am. Neg. Rep. 251; Downs v. Missouri & K. Teleph. Co. 161 Mo. App. 274, 143 S. W. 889; Newark Electric Light & P. Co. v. Garden, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74; Trout v. Laclede Gaslight Co. 151 Mo. App. 207, 132 S. W. 58; Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470, 479, 480, 73 N. E. 990, 18 Am. Neg. Rep. 36; Sullivan v. Tioga R. Co. 112 N. Y. 643, 8 Am. St. Rep. 793, 20 N. E. 569.

The evidence does not authorize the claim, and it is not made, that there was on the part of the defendant an act of affirmative, intentional, or wilful misfeasance, fault, or wrong. There was rather a negligent failure to so act that its wires would have been in safe condition and location,—a default in not doing something which it might refrain from doing lawfully and without responsibility or liability to the intestate.

The pole did not suggest that it was property which anyone had a right to use and assume to be in safe condition, as does the crossing of a railroad, private in fact, but public in use and enjoyment (Barry v. New York C. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377; Lamphear v. New York C. & H. R. R. Co. 194 N. Y. 172, 86 N. E. 1115; Sweeny v. Old Colony & N. R. Co. 10 Allen 368, 87 Am. Dec. 644; Bowler v. Pacific Mills, 200 Mass. 364, 21 L.R.A. (N.S.) 976, 128 Am. St. Rep. 432, 86 N. E. 767, nor did the telephone company or the intestate use the pole through any inducement or allurement put forth by the defendant.

The principle which was decisive in Braun v. Buffalo General Electric Co. 200 N. Y. 484, 34 L.R.A.(N.S.) 1089, 140 Am. St. Rep. 645, 94 N. E. 206, 21 Ann. Cas. 370, does not apply to the facts here. In the Braun Case the intestate was injured while upon the property of his employer, across which ran the wires of the defendant therein, who might reasonably have apprehended that conditions might arise or exist through which the owner of the property or his employees might come in contact with the wires. Had the wires of the defendant here been upon a pole of the telephone company, it would have been under the duty toward the intestate of exercising reasonable care to maintain a proper insulation.

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A decision that a property owner who permits, expressly or impliedly, the affixing to his trees or structures by a telephone or telegraph company, of its wires, enters into the duty towards it and its employees of exercising reasonable vigilance and care to maintain a safe access to them, would be contrary to the common understanding and practice, would be unjust, and might give rise to serious consequences. The evidence presented by the record before us did not tend to support the verdict or permit the submission of it to the jury.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

Cullen, Ch. J., and **Gray**, **Werner**, **Hiscock**, **Cuddeback**, and **Miller**, JJ., concur.

WASHINGTON SUPREME COURT.
(Department No. 1.)

HURLEY-MASON COMPANY, Respt.,
v.
STEBBINS, WALKER, & SPINNING, Appt.

(79 Wash. 366, 140 Pac. 381.)

Sale — duty of testing for quality.

1. A contractor purchasing cement from

Note. — Implied warranty in addition to stipulated test.

In considering the question of the existence of an implied warranty and its survival after acceptance of the article to which it relates, there should be kept in mind the character of the implied warranty which the purchaser seeks to raise for his protection; for, a case denying the existence of an implied warranty, say of the fitness of a machine for a particular purpose, where the machine is purchased under a definite description as to its size, etc., would not be authority for holding that the sale of a machine by description would preclude an implied warranty that the machine was suitable for the purpose for which such articles are usually used. Upon this general question, see note in 35 L.R.A. (N.S.) 258; and as to whether an express warranty of quality will exclude an implied warranty of quality, see note in 33 L.R.A.(N.S.) 501. As to whether a sale by sample excludes all implied warranties other than that the goods shall conform to the sample, see note in 29 L.R.A.(N.S.) 139; and as to acceptance with knowledge of defect, as waiver of breach of warranty, see note in 35 L.R.A.(N.S.) 501.

It may be said to be the general rule of implied warranties that, as to defects discoverable by reasonable inspection or test, the acceptance of the goods after such inspection or test, or opportunity for inspec-

a dealer subject to specified tests of architects appointed by the owner of buildings, which his contract with the owner stipulates shall be made by persons appointed by the architect, either at the mill or at the site of the building, is bound to make the tests, and cannot throw the burden on the dealer.

Same — time and place of tests.

2. One contracting for cement which is to conform to certain specified tests may select the place for making the tests, but if the place of delivery is selected, they must be made within a reasonable time after delivery.

Same — warranty — acceptance — effect.

3. A sale of cement subject to specified tests is not a warranty collateral to the contract, but a condition of the contract, so that acceptance of the cement tendered satisfies the obligation of the vendor.

Same — implied warranty — fitness for use intended.

4. A contract by a dealer to sell, subject to specified tests, cement for the concrete work of a building, does not include an implied warranty that the material will be fit for the use intended, if there are no latent defects not discoverable by the application of the tests specified.

(April 29, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County in plaintiff's favor in an action brought to recover damages for alleged breach of

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tion or test, will constitute a waiver of the right to assert any implied warranty relative to the goods, the breach of which such test or inspection did or would have disclosed. See note in 35 L.R.A.(N.S.) 280.

And upon this point, see also Kelly Asphalt Block Co. v. Barber Asphalt Paving Co. 136 App. Div. 22, 120 N. Y. Supp. 163, holding that where paving blocks appeared to be all right on examination, the purchaser was not required to subject them to every known test, but after the usual examination could accept them, relying upon the manufacturer having performed its contract as to the character and quality of the article furnished; and it is said that it is elementary that the implied warranty arising upon the sale of articles to be manufactured does not survive acceptance in the case of a defect discoverable upon inspection, but that "upon inspection" means customary and ordinary inspection. This case was again before the appellate division 153 App. Div. 907, 137 N. Y. Supp. 1125, but on other grounds, and the decision therein was affirmed, 211 N. Y. 68, L.R.A.1915—, 105 N. E. 88.

The rule that an implied warranty will not survive acceptance after a test, or inspection or opportunity therefor, at least as to defects which are thereby disclosed, or which would have been disclosed had the inspection or test been made, applies, of course, with full vigor where by the contract of sale a duty is imposed upon the purchaser to make such test, and this in effect is the holding of HURLEY-MASON CO. V. STEBBINS, WALKER, & SPINNING.

In a note in 50 L.R.A.(N.S.) 780, it is said that "in the sale of goods where the quality may be ascertained upon inspection, parties may agree that the goods shall be inspected by the purchaser within a limited time after delivery, and that if the goods do not comply with the warranty, notice shall be given at once to the seller, otherwise the warranty will be conclusively presumed to have been fulfilled; and such agreement is binding upon the purchaser, and, in the absence of fraud, imposes upon him the duty of making the inspection and returning the goods if he claims they do not answer the warranty."

And, as shown in a note in 36 L.R.A. (N.S) 469, where articles are purchased subject to test, the use of the article beyond the stipulated time, or if no time is stipulated beyond a reasonable time, constitutes an acceptance and a waiver of the right to rescind for breach of warranty.

In Thomas Mfg. Co. v. Griffin, 16 Tex. Civ. App. 188, 40 S. W. 755, the court quotes with approval from Bonham Cotton Press Co. v. McKellar, 86 Tex. 694, 26 S. W. 1056: "When the seller of machinery warrants its quality and capacity, and the contract provides that, before the purchaser shall be bound, the machinery shall be put in operation and tested, and when the test has been fairly made, and the purchaser has accepted the property, he can no longer claim damages, either in an action by him or by way of recoupment for the purchase money or breach of the warranty."

And as applying this doctrine, see—

—International Filter Co. v. Cox Bottling Co. 89 Kan. 645, 132 Pac. 180, holding that where a contract for the sale of an article provides that it is to be returned to the seller within a certain time if the results to be obtained from its use are not satisfactory, it cannot be claimed that the sale raised an implied warranty entitling the purchaser to a reasonable time to return the article if it prove unsatisfactory;

—Boyer v. Neel, 50 Mo. App. 26, holding that the provisions in a contract for the sale of a machine, warranting the machine to be of good material and durable, and with proper handling to do as good work as any other machine, and providing that if the machine upon trial does not comply with this warranty, written notice shall be given the seller, preclude any implied warranty as to the fitness of the machine for the purpose for which it was purchased;

—Sheafe v. Zastrow, 30 S. D. 158, 138 N. W. 16, holding that where there are express warranties as to the quality and heating capacity of a heating plant, and a provision for testing it, there is no implied warranty with reference thereto.

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an executory contract for the sale of cement. Reversed.

The facts are stated in the opinion.

Messrs. **B. S. Grosscup** and **W. C. Morrow**, for appellant:

In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished fails to correspond with the contract does not survive the acceptance of the property by the vendee, after opportunity to ascertain the defect by inspection.

Waeber v. Talbot, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288.

The fact that the plaintiff's agent for this inspection may have been negligent in performing his work, and may have passed three carloads without testing the same, cannot prejudice the rights of defendant herein.

Savercool v. Farwell, 17 Mich. 308.

In the case of sales of goods by sample by a manufacturer, it is generaly held that the law implies a warranty that the goods are merchantable as to latent defects. But the contrary is true as to sales by samples made by jobbers.

Remy v. Healy, 29 L.R.A.(N.S.) 139, note.

Plaintiff's claim for damages was barred by the contract because not presented to defendant in time.

Wolf Co. v. Northwestern Dairy Co. 55 Wash. 665, 104 Pac. 1123; Staver & Walker v. Rogers, 3 Wash. 603, 28 Pac. 906.

Where a purchaser of a machine purchased subject to a test refuses to receive it at the contract price because of defects disclosed by the test, but offers a less sum, which is accepted, he cannot thereafter invoke the law of implied warranty relative to the working qualities of the machine. Byrd v. Campbell Printing Press & Mfg. Co. 90 Ga. 542, 16 S. E. 267.

Whether or not the general rule that an implied warranty will not survive acceptance after a test or inspection, or opportunity therefor, will apply where the contract provides for a test, but the test provided for would not disclose defects in the article as to which the purchaser would otherwise be entitled to raise for his protection an implied warranty, is a question which has been considered by few cases. In a note in 50 L.R.A.(N.S.) 755, it is said that the clause relative to a test of machinery refers to the working qualities of the machinery, and does not cover a general warranty, express or implied, as to the durability of the machine or the material used therein.

This is the doctrine of The Nimrod, 141 Fed. 215, affirmed in 72 C. C. A. 300, 141 Fed. 834, holding the fact that a contract for the sale of a boiler provided that the boiler was to be satisfactory to the engineer of the purchaser, and that it was received and placed in the purchaser's tug, would not exclude the implied warranty of the manufacturer that the boiler should be reasonably fit for the desired purpose, and that the material and workmanship should be good, as to any defects in the boiler in these regards discoverable only by actual use.

And see Aultman, M. & Co. v. Hunter, 82 Mo. App. 632, holding that where the purchaser of a machine on trial kept it after the trial upon the agreement of the seller to make it work satisfactorily, the implied warranty arising from the sale, that the machine would do the work it was manufactured and sold to do, was not thereby waived.

And in Timken Carriage Co. v. Smith, 123 Iowa, 554, 99 N. W. 183, it is held that the provision in a contract of sale that if the article sold shall break on account of defective material, it will be replaced by the seller, does not preclude the raising of the usual implied warranty of quality.

A provision for the exchange of an article sold if it does not wear satisfactorily has been held not to preclude the raising of an implied warranty that the article is merchantable and reasonably fit for the purpose for which it was intended. Main v. Dearing, 73 Ark. 470, 84 S. W. 640. To the same effect is White v. Mercantile Jewelry Co. 6 Ga. App. 860, 65 S. E. 1075; Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939.

It has been held that the purchaser of an article, after testing it, may invoke in his behalf and rely upon an implied warranty that the article purchased was fit for the purpose for which it was manufactured and sold.

Thus, in Parsons Band Cutter & Self Feeder Co. v. Mallinger, 122 Iowa, 703, 98 N. W. 580, the purchaser of a machine under express warranties which apparently contemplated a trial was permitted to rescind the contract of purchase for breach of the implied warranty that the machine was fit for the purpose for which it was purchased. In this case the express warranties were held not to apply, because by the terms of the contract they were conditioned upon the performance of certain things by the purchaser which he, with the acquiescence of the seller, did not perform.

And in Marbury Lumber Co. v. Stearns Mfg. Co. 32 Ky. L. Rep. 739, 107 S. W. 206, it is held that where the purchaser of a locomotive to be manufactured for a certain purpose, after giving the machine a test, notified the seller that it was not fit for the purpose for which it was purchased, and offered to rescind the contract, when subsequently sued for the purchase price he was entitled to recoup damages for breach of an implied warranty that it was reasonably fit for the use for which it was intended. It is not clear in this case whether or not the contract provided for a test. It does appear, however, that the seller sent a man to start the locomotive according to the agreement between the parties. A. G. S.

Mr. T. L. Stiles, for respondent:

Plaintiff had a right to rely on the fact that defendant, knowing the terms of the agreement, would ship no material that did not meet the requirements mentioned, and was not fit for the work.

Tacoma Coal Co. v. Bradley, 2 Wash. 600, 26 Am. St. Rep. 890, 27 Pac. 454; Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129, 30 N. W. 295; Gould v. Stein, 149 Mass. 570, 5 L.R.A. 213, 14 Am. St. Rep. 455, 22 N. E. 47; Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886; McQuaid v. Ross, 22 L.R.A. 187, note.

Mere delivery to a carrier is not acceptance, or any other than a conditional delivery.

Eaton v. Blackburn, 52 Or. 300, 20 L.R.A. (N.S.) 53, 132 Am. St. Rep. 705, 96 Pac. 870, 97 Pac. 539, 16 Ann. Cas. 1198; 35 Cyc. 226.

Ellis, J., delivered the opinion of the court:

Action to recover damages for an alleged breach of an executory contract for the sale of cement. The plaintiff had a contract with the Northern Pacific Railway Company to construct a passenger station in the city of Tacoma, in accordance with certain plans and specifications. Much of the work consisted of reinforced concrete walls, which the plaintiff's contract with the railway company required should be built of Portland cement of a quality specified in the contract as follows: "Cement, when not otherwise specified, shall be Portland of the Vulcanite, Atlas, Lehigh, Alpha, Saylor, or other brands, from approved manufacturers, that will fulfil the standard tests of the architects. It shall be inspected by a firm approved by the architects, either at the mill or at the site, and five (5) cents per barrel shall be allowed by the contractor for this inspection." Then follow tests substantially the same as those hereinafter set out in the plaintiff's order for the cement from the defendant. The contract for the purchase of the necessary cement is evidenced by the following written order, counter offer, and acceptance:

Aug. 20, 1909.

Messrs. Stebbins, Walker, & Spinning, Tacoma, Wash.

Gentlemen:—

We herewith confirm our order for 15,000 barrels or more of Atlas cement to be delivered to us in the care of the Northern Pacific Railroad at St. Paul, for $1.40 per barrel less 30¢ per barrel for empty sacks. This cement is purchased subject to the following tests as specified by the architects for the Tacoma depot:

(b) Tests:

(1) Fineness: On No. 100 sieve of 10,000 meshes per square inch (Stubbs wire gauge) 92 per cent must pass through.

(2) Initial set: Initial set as determined by time required for cake of plastic neat cement to bear wire ½ inch diameter loaded to weigh 4 ounces, without appreciable imprint, shall not be less than forty-five minutes from time of adding water.

(3) Final set: Final set as determined by the time required for cake of plastic neat cement to bear ¼ inch diameter loaded to weigh 1 pound, without appreciable imprint, shall not be more than five hours from time of adding water.

(4) Soundness: Cold water test. Pats of plastic paste about 3 inches in diameter by ½ inch thick at center with thin edges, kept in moist air until final set, and for the balance of twenty-eight days in water of temperature approximately 65 degrees Fahr., shall not crack, warp, nor soften.

(5) Neat tensile test: Briquets of cement paste, mixed five minutes with minimum amount of water necessary to make mortar thoroughly soft and plastic at the end of twenty-four hours, break at not less than 125 lbs. per square inch, and at the end of seven days, break at not less than 400 lbs. per square inch.

Please wire immediately and have the company ship 1,000 barrels at once.

Yours truly,
Hurley-Mason Company,
By Chas. B. Hurley.
Tacoma, Sept. 21, 1909.

Hurley-Mason Co., City.

Gentlemen:—

As per verbal agreement between your Mr. Hurley and the writer, we propose to deliver to you Atlas Portland cement under the following conditions:

The Hurley-Mason Company shall be known as the purchaser, and Stebbins, Walker, & Spinning shall be known as the seller, in the following paragraphs:

First. The seller agrees to furnish the purchaser, and said purchaser agrees to accept from the seller, the Atlas Portland cement herein specified in the quantity of fifteen thousand (15,000) barrels to be delivered as hereinafter set forth. It being understood and agreed between the parties herein that the seller is to be under no obligation to make shipment in excess of five thousand (5,000) barrels in any one month. Shipment of cement herein specified to be made in carload lots. Entire quantity required to be ordered forward in time for shipment prior to April 1st, 1910.

Second. That the seller will furnish under this contract Atlas Portland cement that will conform to the requirements of the specifications covered by your letter of August 20th, 1909, to the seller, which becomes a part of this contract. All claims of the purchaser upon the seller must be made in writing, and filed with the seller within five (5) days after the cement is received; failure to file a claim within the time allowed will be acknowledgment by the purchaser of the receipt of the cement in good condition, and in the quantity specified in the bill of lading and invoice.

Third. That the seller will furnish Atlas Portland cement required under this agreement at the following price, to wit, f. o. b. cars, St. Paul, Minnesota, one dollar forty-five cents ($1.45) per barrel in cloth bags.

Fourth. That the seller will purchase Atlas cloth bags at 7½ cents each, subject to the following conditions: [No question arises from the conditions which follow. We omit them.]

Yours very truly,
Stebbins, Walker, & Spinning,
Per L. R. Walker.

The purchaser agrees to accept from the seller Atlas Portland cement subject to the conditions set forth above.

Hurley-Mason Co.,
By Chas. B. Hurley, Prest.

The defendant began delivering the cement about the middle of September; the same being tested at the mill of the Atlas Cement Company, the manufacturer, at Hannibal, Missouri, by Hunt & Company, the testers approved by the architects of the railroad company under the plaintiff's contract with the railroad company. It appears that the plaintiff made no tests at all, but relied upon the tests made by Hunt & Company at the mill. By the latter part of November, about 2,500 barrels of cement had been accepted and used on the work with satisfactory results. About November 20th the plaintiff claims that it used about 444 barrels of the cement then arriving in Tacoma which, upon pouring the concrete into the forms, would not set soon enough, and, though allowed to remain until December 7th, never solidified. On the latter date, by order of the inspector for the railway company on the work, this concrete was taken out. At about the time that this cement was being used, the plaintiff received a telegram from the engineer for the railway company, stating that three carloads of cement had been shipped without testing. The remainder of the cement then on hand being under suspicion, which, it seems, was about 600 barrels, was loaded onto cars, sent to the Commercial dock in Tacoma, where subsequently samples were taken from it for the purpose of making tests on behalf of the various persons interested, namely, the railway company, the plaintiff, the defendant, and the Atlas Cement Company, the manufacturer. The evidence details the manner in which these samples were taken, and the results of the tests made by different experts for the various interests represented in the transaction. These tests did not agree. The plaintiff claims that this evidence showed that the cement in question did not meet the tests prescribed in the contract, while the defendant claims exactly the contrary.

The plaintiff claimed damages in the sum of $4,114.66, including the cost of new cement, sand, and gravel used in replacing the concrete taken out, the labor of tearing it out, the expense of building new forms, charges for superintendence, use of plant, insurance, wages of watchman and timekeeper, and freight paid upon the cement used in the concrete taken out, and also on the cement ordered off the work, and the cost of testing. The plaintiff also claimed $2,339.62 for sacks returned to the defendant not paid for. Against this the plaintiff admitted that the defendant has a valid offset of $2,900 for 2,000 barrels of cement furnished. The court made findings in favor of the plaintiff and entered judgment against the defendant in the sum of $3,520.91, with costs. The defendant appeals.

In our discussion we shall proceed upon the assumption that the cement, for the damages occasioned by the use of which the respondent sued, would not have met the tests prescribed in the contract at the time it was delivered to the respondent at Tacoma. We shall assume that this was sufficiently shown by the tests of the remainder of the cement made after the rejection of the work by the railroad company's architect. Such was the effect of the court's finding. The view which we take of the law of the case makes it unnecessary to review the evidence upon which this finding was based.

On the law of the case, appellant contends that the facts do not establish a warranty, but merely a sale of cement to be accepted upon a test by the purchaser. The respondent contends that the judgment should be sustained upon two elements of warranty: An express warranty that the cement would comply with the five tests specified in the contract, and an implied warranty that the cement would be reasonably fit for the known purpose for which it was purchased. These contentions present three questions, the solution of which must be determinative of this case. They are these: (1) Upon whom, as between appellant and respondent, was the duty of making the tests, and when

and where? (2) Was the provision that the sale was subject to the given tests a warranty collateral to the contract, surviving acceptance of the cement, or was it a condition of the contract, satisfied by acceptance? (3) Was there any implied warranty that the material would be fit for the purpose for which it was purchased?

1. In determining who, as between the appellant and respondent, was to make the tests, and when and where the tests should have been made, we must look to the terms of their contract and to the situation of the parties and of the subject-matter. The contract provided: "This cement is purchased subject to the following tests as specified by the architects for the Tacoma depot." The five specified tests are then set out. These words were the words of the respondent. They were contained in its order. They were used for its own protection, and must be construed with reference to that purpose. The respondent knew that it was obligated to use no cement that would not meet these tests. It knew that it was obligated by its contract with the railway company to pay for an inspection by the application of these tests at the rate of 5 cents a barrel. It knew that under its contract with the railway company these tests were to be made "either at the mill or at the site" of the depot "by a firm approved by the architects." It knew that an inspection by the appellant would not be binding upon the railway company, and would be no protection to the respondent. It therefore purchased the cement subject to the tests for which it was already, and in any event, obligated to pay. On the other hand, the appellant was not a manufacturer, but a dealer. The contract was executory. The cement was not at hand. It is fairly inferable that it was not then even in existence. The cement was not in the appellant's possession, and both parties knew that it never would be prior to its delivery to the respondent. Respondent knew that the cement was to be made at the mill of the Atlas Portland Cement Company, at Hannibal, Missouri, and furnished to the respondent "f. o. b. cars St. Paul, Minnesota." The appellant would have no opportunity to test the cement. It therefore sold "subject to" the tests specified, which is a very different thing from an agreement to make the tests itself. A sale of an article subject to inspection or test is a very different thing from the sale of an inspected or tested article. In the absence of stipulation to the contrary, the one places the duty of inspection or test upon the purchaser prior to acceptance and use, and the other places that duty upon the eller prior to delivery. When the terms and purpose of the contract, the situation of the parties and of the subject-matter, are considered, there can be no question that the respondent assumed the duty of making the tests. In practice it made the inspector approved by the railway company's architect its agent for the inspection.

As to the place of the tests, it is obvious that the respondent could select its own place. The appellant could not insist upon these tests being made prior to its delivery of the cement to the respondent. To that extent it took the risk of the rejection of the cement after its delivery. The respondent, however, could not select its own time for making the tests. No time being specified in the contract, it had only a reasonable time after delivery. It was certainly contemplated that the tests should be made before the use of the cement, since it is obvious that the use of the cement would render the specified tests impossible. The appellant contends that those tests should have been made within five days after the cement was received, because the contract provides that all claims of the purchaser upon the seller must be made within that time. This provision, however, applied only to the condition in which the cement was received, not to its quality. It could not apply to a failure to meet the tests, since some of the tests required a longer time than five days for the making.

2. Was the provision that the sale was subject to the tests a warranty collateral to the contract, or was it a condition of the contract? The respondent contends that it was a warranty of quality. We do not so construe it. The sale was made "subject to" the tests. If an inferior article was shipped, the respondent had a reasonable time for inspection and test, and an acceptance or refusal to accept. The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale. This is a very different thing from a collateral undertaking that all cement delivered should meet the tests. A sale subject to inspection should never be construed as a warranty against defects which the inspection contemplated would disclose. Much confusion will be avoided by observing this distinction, which inheres in the very nature of the undertaking on the one hand, and in the remedy for its breach on the other. Respondent admits that "the mention of tests in the contract was nothing more than a further description of the required quality." This is true so far as it goes, but it also furnished the specific means to the respondent to determine that fact prior to acceptance.

Benjamin on Sales, after pointing out the fact that much confusion has arisen from the habit of treating conditions precedent

as warranties, quotes from Lord Abinger as follows: "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, collateral to the express object of it. But in many of the cases the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfil." The author adds: "There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability; and, if this condition be not performed, the purchaser is entitled to reject the article, or, if he has paid for it, to recover the price as money had and received for his use, whereas, in case of warranty, the rules are very different." Benjamin, Sales, 7th ed. § 600.

The American note to the text points out the difficulty of laying down any definite rule for determining when a stipulation is a condition of the contract itself, and when an independent warranty collateral to the agreement, as follows: "In determining whether certain duties, liabilities, or stipulations, either express or implied, on the one side, are strictly conditions essential to the liability of the other party on his stipulations or promises, or are only independent and separate covenants, the breach of which may give a right of action or counterclaim, but which does not prevent or extinguish a cause of action against the other, no other rule, worthy of the name of rule, can be laid down than that it is always a question of the intention of the parties, manifested by the expressions they have used as applied to the subject-matter of the contract, and read in the light of surrounding circumstances." American note to Benjamin, Sales, 7th ed. p. 595.

Judged by the situation of the parties and their relation to the subject-matter, it is clear that the provision for tests in the contract before us is a condition of the contract, and not a collateral warranty. The terms of the contract lead inevitably to the same conclusion.

An executory contract for the sale of an article tested to a given standard is a very different thing from an executory contract for the sale of an article subject to given tests. The one is a collateral warranty, placing the consequences of a failure of the article to perform to the given standard upon the seller, so that the purchaser's remedy survives his acceptance. The other is a condition of the contract precedent to acceptance, placing the consequences of the failure to inspect or make the tests upon the purchaser. It furnishes its own remedy, namely, a rejection of any article not meeting the tests as not fulfilling the contract. Obviously the remedy on such a condition precedent cannot survive acceptance. The purchaser failing to make the tests prior to acceptance has no remedy for defects which the tests would have disclosed, in the absence of further words constituting an express warranty or circumstances raising an implied warranty that the article will be fit for the purpose for which it was purchased. Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422. An executory sale subject to tests involves the same principles as an executory sale subject to inspection. The prescribed tests are but the mode of inspection appropriate to the nature of the given article. Where an executory sale is made with the provision that the article is subject to inspection, whether written into the contract or implied from the custom of the trade, such a provision is held, by what we conceive to be the better considered authorities, a condition precedent, and not a warranty.

In Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305, the action was for a breach of an executory contract to sell and deliver a crop of tobacco growing on the defendant's land. The contract contained a condition that the tobacco should be well cured and boxed and in good condition. The tobacco, when delivered, was in bad condition, had not been properly cured, and was wet, sweaty, and rotten. It was accepted and retained without notice to the defendant of its defects, without return or offer of return, and without any request that it be taken back. Some months after acceptance, the plaintiffs brought the action to recover damages for the failure of the article to comply with the contract. The court said: "But the stipulation in respect to the quality and condition of the article when delivered constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco to be delivered the spring following, well cured and in good condition. The article bargained for, and to be furnished in the future, was a merchantable crop of tobacco. This was what the vendor agreed to sell and the vendee to purchase. It was the sale of a particular thing by its proper description merely; and the descriptive words used for defining the thing agreed to be sold were of the substance of the contract, not collateral to the main object of it. . . . In cases of executory contracts for the sale and delivery of personal property, the remedy of the ven-

dee to recover damages on the ground that the article furnished does not correspond with the contract does not survive the acceptance of the property by the vendee, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. The retention of the property by the vendee is an assent, on his part, that the contract has been performed. The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. This the vendee is to determine upon the receipt of the property."

It has sometimes been intimated that the foregoing decision was overruled by the same court in the case of Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719, but we do not so read that case. In Day v. Pool, there was a sale of rock candy syrup with an express warranty that it would not "crystallize or the sugar fall down." There was nothing to indicate that the sale was made subject to inspection or test. The court held the provision in the contract as to the character of the syrup an express warranty surviving acceptance, and not a condition satisfied by acceptance. Referring to Reed v. Randall, supra, the court said: "That case would have been decided the other way, had there been an express warranty as to the quality of the tobacco,"—thus clearly distinguishing that case rather than overruling it. The authority of Reed v. Randall is recognized in the comparatively recent case of Carleton v. Lombard, A. & Co. supra.

In Waeber v. Talbot, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288, the action was brought to recover damages for breach of an alleged warranty on an executory sale of a number of cases of "Talbot Extra Fine Peas, Sieve 23—24." It appeared that such sales were, by the custom of the trade, made subject to inspection. The plaintiffs, on delivery, accepted the goods, some ten days later discovered their defective quality, but continued to handle them for some months, when they offered to return the remainder of the peas. The defendant refused to receive them. The court said: "The defendants were bound to deliver the quality of goods called for by the contract, which was the highest grade they packed; and, if an inferior article was shipped, the plaintiffs had a reasonable time for inspection, rescission, and offer to return. This action does not fall within that class of cases where a dealer sells an article, describing it by a name of commerce, the identity of which is not known to the purchaser, and which he cannot ascertain by inspection, and where a warranty is therefore implied that the article sold is that described." After considering many decisions pointing out the distinction between a condition of the contract and a collateral warranty, the court concluded: "Treating the general description in the case before us as a part of the contract of sale, the plaintiffs were abundantly protected; and, if they failed to inspect, rescind, and return the goods, it is because they neglected to avail themselves of the remedies which the law afforded them. In cases of executory contracts for the sale and delivery of personal property, the remedy of the vendee to recover damages on the ground that the article furnished fails to correspond with the contract does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect."

It seems to us a sound rule, deducible from the authorities, that, where an executory sale is made subject to inspection, an acceptance by the buyer with or without inspection, and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon inspection by any ordinary tests, or by the tests prescribed by the contract, in the absence of an express warranty intended to survive acceptance. Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; McCormick v. Sarson, 45 N. Y. 265, 6 Am. Rep. 80; Mason v. Smith, 130 N. Y. 474, 29 N. E. 749; Norton v. Dreyfuss, 106 N. Y. 90, 12 N. E. 428, 13 N. E. 937; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372; Savercool v. Farwell, 17 Mich. 308; Thompson v. Libby, 35 Minn. 443, 29 N. W. 150; Locke v. Williamson, 40 Wis. 377; Barry v. Danielson, 78 Wash. 453, 139 Pac. 223. In the case last cited there was also an additional express guaranty which would have survived acceptance. Such acceptance is an admission that the contract has been performed (Beck v. Sheldon, 48 N. Y. 365), in the absence of fraud of the seller preventing or interfering with inspection by the purchaser (Dutchess County v. Harding, 49 N. Y. 321), and in the absence of latent defects not discoverable by inspection or prescribed tests (Carleton v. Lombard, A. & Co. 149 N. Y. 137, 153, 43 N. E. 422).

The respondent contends that there was an implied warranty that the material furnished would be fit for the purpose for which it was purchased. It is not claimed, however, that the cement furnished possessed latent defects not discoverable by the stipulated tests, but only by actual use. The respondent, in making his contract, prescribed the tests. It must be held to have assumed, since it exacted no specific war-

ranty of fitness, that cement meeting these tests would have met the respondent's purpose. Under the circumstances, it is clear that the specific stipulation of tests involved no warranty of what cement meeting those tests would do or produce when placed in a wall.

In Beck v. Sheldon, 48 N. Y. 365, 371, the defendant ordered certain iron by a specific brand and numbers for the making of stoves. The iron furnished bore those numbers, and there was no evidence that it was improperly branded. The iron was delivered and used. None was returned nor a return offered. In an action for the purchase price, the purchaser claimed damages for the poor quality of iron delivered, insisting that the iron should have been suitable for the purpose intended. The court said: "It is said that the fracture showed a grain or crystallization, and a character of iron which was not sustained by its result when smelted. So the judge finds, and such was the evidence. He finds also that the only contract was that Poughkeepsie pig iron Nos. 1 and 2 should be furnished, and that the pig iron, according to the contract, was duly delivered by the plaintiff to the defendants. There was therefore no contract either that iron should produce particular results when smelted, or that the actual result should be the same with that indicated by the fracture. On this point also the defendants acted upon their own judgment, receiving neither guaranty nor representation from the seller. If their expectations are not realized, they must themselves bear the loss."

In International Pav. Co. v. Smith, B. & R. Mach. Co. 17 Mo. App. 264, the plaintiff purchased certain boilers which the defendant undertook to deliver tested to 200 pounds to the square inch, and furnish the testers' certificate before shipment. The certificate was furnished. The plaintiff contended that the contract implied a warranty that the boilers were reasonably fit for the purpose for which they were purchased. The court said: "The matter of implied warranty which the plaintiff assumes is itself an integral element of the express warranty, into which it is merged, and by which its effect is circumscribed. The plaintiff's complaint is that the boilers were not strong enough, or sufficiently capable of sustaining pressure, for the purposes to which they were to be applied. It was to this specific quality of strength that the express warranty was directed, and in which the extent of the defendant's liability was limited by the words used."

While in the case just quoted the contract contained an express warranty placing the duty of testing upon the seller, we can see no reason why a sale subject to test by the purchaser would not also exclude any implied warranty as to things which the test would disclose. See also Thompson v. Libby, 35 Minn. 443, 29 N. W. 150. According to the great weight of authority, there is a distinction between executory sales by manufacturers and executory sales by dealers; the rule being that, on a sale by a manufacturer, there is an implied warranty of fitness for the purpose intended, and of freedom from defects not discoverable by ordinary inspection and tests, while, on a sale by a dealer, there is no such implication, in the absence of a specific warranty to that effect. All that is required of a dealer is an exercise of good faith and fair dealing. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; Farrow v. Andrews, 69 Ala. 96; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Remy v. Healy, 161 Mich. 266, 29 L.R.A.(N.S.) 139, 126 N. W. 202, 21 Ann. Cas. 74; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 635, 45 N. E. 856; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422.

In the case before us, the appellant was not a manufacturer, but a dealer. It sold the cement subject to inspection, according to tests prescribed by the purchaser. The purchaser failed to make the tests, though it was fairly inferable from the record that it knew the appellant was not making the tests and had not tested any of the cement. It is probably true that on a sale even by a dealer without specific warranty, and not subject to inspection or test, there is an implied undertaking that the thing sold shall be reasonably fit for the purpose intended, where that purpose is known to the seller, but, on the record here, there is no room for the application of such a rule.

The authorities cited by the respondent are clearly distinguishable from the case here. In Tacoma Coal Co v. Bradley, 2 Wash. 600, 26 Am. St. Rep. 890, 27 Pac. 454, there was involved a sale of bricks by the manufacturer for the construction of coke ovens. The sale was not expressly subject to inspection or test, and the order for the bricks negatived any implication to that effect. It contained the caution: "I want you to be very careful about the quality. Do not send anything but what is A No. 1, and send quick as possible." And again: "This is a trade you will want to hold and you can only do it by sending nothing but the best." The court held that the manufacturer, in filling this order, did so under an express warranty of the quality of the bricks. While recognizing the rule, as sustained by the New York and Wisconsin authorities, that, in the absence

of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property after an opportunity to discover defects, unless notice has been given to the vendor, or the vendee returns or offers to return the property, the court points out the fact, which we have also noted, that this rule does not apply in cases of express warranty of quality. In that case, moreover, the evidence tended to show that there was no method of ascertaining whether the bricks were fit for the purpose intended other than actual use. Had there been some well-known test, and had the purchaser bought subject to such test without any express warranty of quality, there can be little question that the decision in that case would have been different. A review of the cases cited from other jurisdictions discloses an equal inapplicability. In Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129, 30 N. W. 295, the defects complained of were latent defects which could not be discovered by ordinary inspection. In Gould v. Stein, 149 Mass. 570, 5 L.R.A. 213, 14 Am. St. Rep. 455, 22 N. E. 47, there was an express warranty that the goods should be "as per sample" and "of second quality." In Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886, there was a sale of flax seed for planting, with a stipulation that the seller would purchase the crop when grown. Whether the seed would grow or not could not be determined by ordinary inspection. It was held that there was an implied warranty that they were fit for the purpose for which they were sold.

We are driven to the conclusion that, under the contract here in question, the duty of applying the tests prescribed was upon the respondent; that the provision that the sale was subject to test was a condition precedent, the remedy upon which did not survive acceptance; and that there was no implied warranty that the cement was fit for the purpose for which it was bought.

The appellant admits that it owes the respondent $494.76 for freight on certain of the cement from Hannibal, Missouri, to Minneapolis, Minnesota, and the further sum of $2,339.62 for sacks returned. The court found that these sums have never been paid. The respondent admits a counterclaim in favor of the appellant of $2,900. The court found this amount as $2,913.37. Eliminating from the court's findings the consequential damages which we hold under the contract the respondent cannot recover, there is apparently due to the appellant a balance of $79.

The judgment is reversed, and the cause is remanded, with direction to enter judgment in accordance with this opinion.

Crow, Ch. J., and **Main**, **Gose**, and **Chadwick**, JJ., concur.

MISSISSIPPI SUPREME COURT.

STATE OF MISSISSIPPI, Appt.,
v.
J. F. RICKS.

(— Miss. —, 66 So. 281.)

Threat — to prosecute — attempt to rob.

Sending a letter threatening a trespasser with prosecution unless he compensates the sender for the injury done is not within the operation of a statute providing that every person who sends a letter threatening to accuse a person of crime, or to do an injury to him with a view to extort money, shall be guilty of an attempt to rob.

(November 2, 1914.)

APPEAL by the state from a judgment of the Circuit Court for Sunflower County sustaining a demurrer to an indictment charging defendant with sending a letter with the felonious intent of extorting money. Affirmed.

The facts are stated in the opinion.

Mr. **George H. Ethridge**, Assistant Attorney General, for the State:

The letter was sufficient to constitute a threat within the meaning of the statute.

State v. Logan, 104 La. 760, 29 So. 336; Com. v. Coolidge, 128 Mass. 55; State v. Bruce, 24 Me. 71.

Messrs. **Chapman & Johnson**, for appellee:

The act forbidden by the statute is purely statutory, and was not a crime under the common law; unless prohibited by statute, one could by threats of personal violence and menaces with a deadly weapon force another to pay him money which he believed to be justly due him, and not be guilty of robbery.

State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586; Mann v. State, 47 Ohio St. 556,

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Note. — Efforts to collect debt as extortion.

The above-stated question was treated in the note to Slater v. Taylor, 18 L.R.A. (N.S.) 77, and the present annotation is merely supplementary thereto.

The term "extortion" in this, as well as the earlier, note is used in its broad or or-

11 L.R.A. 656, 26 N. E. 226; State v. Hammond, 80 Ind. 80, 41 Am. Rep. 791; People v. Griffin, 2 Barb. 427; Reg. v. Coghlan, 4 Fost. & F. 316; Reg. v. Johnson, 14 U. C. Q. B. 569.

Since to come within the statute the threat must be to accuse one of a crime, absolutely no offense has been charged.

State v. Dailey, 127 Iowa, 652, 103 N. W. 1008; Rank v. People, 80 Ill. App. 40; Finch v. State, 64 Miss. 461, 1 So. 630; 38 Cyc. 297.

Cook, J., delivered the opinion of the court:

Omitting the formal part, the indictment presented by the grand jury of Sunflower county against appellee is in these words:

"That J. F. Ricks, late of the county aforesaid, on the 23d day of March, A. D 1914, with force and arms, in the county aforesaid and within the jurisdiction of court, unlawfully, knowingly, and feloniously did then and there make, send, and deliver to one W. B. Martin a certain written letter, in the words and figures following, to wit:

"'August 18, 1913.

"'Dr. W. B. Martin,

"Indianola, Mississippi.

"Dear Sir:—

"I went up and found that you have cut and deadened quite a bit of my timber, and don't think you had a right to do this. It seems, though, that you may have asked me to deaden this land. I think you have damaged me considerably. I don't want to make this a personal matter. Let me have $400 and I will cancel our contract. I will say it is of no use to write about it, it is $400 or I will prosecute you criminally. You know that you got that money. Let me hear from you at once.

"'J. F. Ricks.'

"By which said letter he, the said Ricks, did then and there unlawfully, knowingly, and feloniously threaten to accuse the said W. B. Martin of crime, with the unlawful and felonious intent of him, the said Ricks, to extort from the said W. B. Martin the said sum of $400 in money, of the value of

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dinary, as contradistinguished from its technical, sense, and therefore applies to persons generally.

In the recent case of State v. Conradi, 131 La. 631, 60 So. 16, it was held that a threat to institute a civil proceeding for the collection of a debt did not fall within the meaning of Louisiana act No. 110 of 1908, providing "that, if any person shall knowingly send or deliver or cause to be sent or delivered or shall cause to be received by another, any letter . . . threatening to accuse him, . . . or to cause him . . . to be accused of any crime, offense or misdemeanor, or to charge him . . . with any fault, infirmity, or failing, or to publish or to make known his . . . faults, misfortunes or infirmities or failings, . . . or to injure or impair his . . . good name, reputation or credit, . . . or to, in any manner, cause him . . . to become subjected or liable to any public scandal or public ridicule, or to subject him . . . to any scandalous notoriety or shall threaten to kill, maim, wound, murder, kidnap or subject him . . . to bodily harm of any kind, with intent to extort money . . . shall be imprisoned," etc.; but that a threat to do the things or any of them mentioned in the statute with intent to extort money, whether claimed as due or not, would fall within its meaning. This latter phase of the decision is further illustrated by the case of State v. Logan, 104 La. 760, 29 So. 336, wherein it was held that the making of threats to commit a felony was not the proper way to collect a debt, and that a threat to kill, conditioned upon the nonpayment of an alleged debt, was within the meaning of a statute (Louisiana act No. 63 of 1884) declaring that "any person" who "shall threaten to kill . . . with intent to extort money," shall be punished, etc. (This provision was amended and re-enacted in act No. 110 of 1908, which is set out above.)

And that the publishing or threatening to publish by placard of a mere offer to sell an alleged debt does not constitute publishing with intent to extort money where the publication is made in good faith, see Reg. v. Coghlan, 4 Fost. & F. 316.

But that the law does not authorize the collection of just debts by the malicious threatening to accuse the debtor of crime, see the *dicta* in Com. v. Coolidge, 128 Mass. 55.

And see Cohen v. State, 37 Tex. Crim. Rep. 118, 38 S. W. 1005, wherein it was said that under a statute making it an offense to send, with intent to extort money, a letter threatening to charge another with crime, a party may be guilty although the sendee may be justly indebted to the sender, since the object of the statute is to prevent the use of the criminal laws to collect debts, but that proof of the existence of a debt should be allowed in order that the jury might correctly determine whether or not the letter was sent with the "view of extorting money."

Somewhat analogous to STATE v. RICKS is the case of Reg. v. Johnson, 14 U. C. Q. B. 569, wherein it was held that demanding with menaces (threats to kill) money (rents) actually due was not a demand with intent to steal under 4 and 5 Vict. chap. 25, § 11.

Upon the general question of extortion or robbery as affected by right, or belief in right to property sought to be procured, see the note to Re Sherin, 40 L.R.A.(N.S.) 801.

G. J. C.

L.R.A.1915B.

$400, of the personal property of the said W. B. Martin, against the peace and dignity of the state of Mississippi."

To this indictment appellee interposed a demurrer, assigning the following grounds:

"First. Said indictment contains no allegation that the defendant threatened to accuse W. B. Martin of a crime of which he could be legally convicted and punished.

"Second. The indictment does not specify what crime the defendant threatened to accuse the said W. B. Martin of having committed.

"Third. The indictment shows on its face that it is an honest effort on the part of a creditor to collect a debt, and shows no intent to extort money from the said W. B. Martin, but the letter shown in said indictment only demands a reasonable compensation for property of the defendant destroyed by the said Martin, which demand is accompanied with a threat to prosecute the said Martin criminally.

"Fourth. Said indictment shows clearly that the said Martin is indebted to the said defendant in the sum of $400 for certain timber cut and deadened by the said Martin, and that the object of the defendant in writing the letter set out in said indictment was merely to obtain payment of it, and the existence of such indebtedness is not negatived in said indictment.

"Fifth. Said indictment on its face shows that there is no intent on the part of the said defendant to extort from the said Martin money, or anything of value.

"Sixth. Said indictment alleges no crime known to the laws of the state of Mississippi.

"Seventh. Other causes to be assigned at the hearing hereof."

The court sustained the demurrer, and the state appeals. The gist of the crime which the state sought to charge against appellee was the sending of a letter with the felonious intent to extort money. If it should be conceded that Dr. Martin was, in fact, guilty of unlawfully cutting or deadening the timber of appellee, and had thereby damaged appellee as alleged in the letter, does it follow that appellee is guilty of an attempt to rob by merely sending the letter demanding reparation, and threatening to prosecute unless reparation is made? The crime with which the state intended to charge appellee is purely statutory, and of course the act charged must clearly fall within the terms of the statute.

The indictment was drawn under § 1364, Code of 1906, which we quote, *viz.*: "Every person who shall knowingly send or deliver, or shall make, and, for the purpose of being sent or delivered, shall part with the possession of any letter or writing with or without a name subscribed thereto, or signed with a fictitious name, or with any letter, mark, or other designation, threatening therein to accuse any person of a crime or to do an injury to the person or property of any one, with a view or intent to extort or gain money or property of any description belonging to another, shall be guilty of an attempt to rob, and shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five years."

The indictment does not aver that Dr. Martin did not cut appellee's timber; it does not aver that Dr. Martin had not damaged appellee to the extent of $400. We infer from the letter that appellee threatened to prosecute Martin if Martin did not pay for the damage done appellee. Appellee had a right to demand the payment of damages, if it be conceded that he had been damaged. It is not a violation of the statute in question to write a letter charging one with the commission of a crime, nor is it a violation of the statute to threaten to prosecute the person addressed for the crime charged. The statute makes an attempt to extort money by means of a written communication a felony, and defines the same as an attempt to rob.

The position of the state is that the mere sending of the letter threatening to prosecute if the money claimed be not paid constitutes the crime, and that it makes no difference whether the person to whom the letter is addressed justly owes the amount demanded or not. There is nothing in the indictment negativing the idea that appellee was demanding the payment of what he believed to be a just claim.

Construing the letter most favorably to the accused, it would seem that he was charging Dr. Martin with trespass which had damaged him to the amount demanded, and telling him that there was no use to write about it; that he would prosecute unless the amount demanded was paid. Can it be said that the threat to prosecute was made "with a view or intent to extort or gain money, etc.?" Is it an attempt to rob to demand by letter the return of stolen money, accompanied by a threat to prosecute if the money is not returned? One may write his debtor and charge him with destroying the writer's property, and that in doing so he had committed a crime; that the writer would not prosecute if he was paid for the damages inflicted, but, unless he was paid, he would prosecute. This, we think, would not be extortion under the statute. Statutes similar to the one under discussion have been construed by the courts of sister states.

In Mann v. State, 47 Ohio St. 556, 11 L.R.A. 656, 26 N. E. 226, the court was con-

struing a statute reading: "Whoever verbally accuses any person of a crime punishable by law, with intent to extort or gain from such person any chattel, money or valuable security, or any pecuniary advantage whatsoever, shall be imprisoned in the penitentiary not more than five years nor less than one year, and may be fined not more than $1,000."

The court said: "An honest effort on the part of a creditor to collect a just debt, by accusing or threatening to accuse the debtor of a crime with which the debt is connected, or out of which it arose, does not, in our opinion, come within the purview of the statute; nor should the statute be construed as covering the case of an owner who demands from the offender a reasonable compensation for property which he has maliciously and criminally destroyed, and accompanies his demand with a threat to accuse the offender of the crime."

See also State v. Hammond, 80 Ind. 80, 41 Am. Rep. 791; People v. Griffin, 2 Barb. 427.

Affirmed.

GEORGIA SUPREME COURT.

CLIFF BYRD, Plff. in Err.,
v.
STATE OF GEORGIA.

(— Ga. —, 83 S. E. 513.)

Evidence — expert witness — opinion as to cause of wound.

1. It was competent for a witness who testified that he had experience in firing shells of a given description and had observed the impression made upon objects when struck by a shot fired from shells of that character, and who had also examined and probed the wound of the person alleged to have been murdered, to state as his opinion that the wound upon the deceased was made by the discharge of a shell of the character referred to.

Appeal — instruction — justifiable homicide.

2. The contention of the plaintiff in error in this case being that he fired the fatal shot to prevent the deceased from shooting and killing him, the court did not err in charging the jury as follows: " 'Justifiable homicide,' as applicable to the defense set up in this case, means killing in self-defense, or in defense of person against one who manifestly intends by violence or surprise to commit a felony on the person killing."

(November 11, 1914.)

ERROR to the Superior Court for Quitman County to review a judgment convicting defendant of murder and an order overruling a motion for new trial. Affirmed.

The facts are stated in the opinion.

Messrs. **M. C. Edwards** and **E. B. King**, for plaintiff in error:

An opinion of a witness is not admissible in the evidence when all the facts and circumstances are capable of being clearly detailed and described, so that the jurors may be able to readily form a correct conclusion therefrom.

Milledgeville v. Wood, 114 Ga. 370, 40 S. E. 239.

The witness gave no evidence upon which to base his opinion, and a nonexpert witness could not express an opinion under such circumstances.

Bowden v. Achor, 95 Ga. 244, 22 S. E.

Headnotes by BECK, J.

Note. — Admissibility of opinion evidence as to kind or nature of weapon or object with which wound or other external injury was inflicted.

The general rules and principles applicable to this class of cases are set out and discussed somewhat at length in the note to Castanie v. United R. Co. L.R.A.1915A, 1056, which treats the question of the admissibility of opinion evidence as to the cause of death, disease, or injury, and which should be examined in connection with the present note. And as to admissibility of opinion evidence as to whether wounds or other external injuries were or were not self-inflicted, see note to Miller v. State, L.R.A. 1915A, 1088. And for a treatment of the general question as to the admissibility of opinion evidence as to cause (other than from a medical point of view) of an occurrence or accident, see the note to Cumberland Teleph. & Teleg. Co. v. Peecher Mill Co. L.R.A.1915A, 1045.

L.R.A.1915B.

To summarize briefly the rules which have been established by the weight of authority, it may be said that the opinions of experts as to the kind, nature, or character of a weapon or object with which a wound or other external injury was inflicted, are admissible where to form such an opinion peculiar knowledge, skill, or experience not common to men of ordinary understanding is essential, but that the opinions of experts are not admissible where the facts are fully presentable, and are such that a jury, composed of men of ordinary understanding, can itself form an intelligent opinion; that such witnesses, especially where they have examined or attended the injured person, may express an opinion as to what weapon could or might have been used to inflict the wound, but that in some instances they cannot express an opinion as to what did cause the wound in question; that where the character of the instrument is the vital issue in the case, the opinions of experts upon that question invade the province of the

254; Graham v. State, 102 Ga. 650, 29 S. E. 582.

Mr. **A. L. Hensan**, with Mr. **Warren Grice**, Attorney General, for the State:

The witness, having sworn that he was familiar with these rung shells, that he had used them, and knew the effect they produced, was probably qualified as an expert.

White v. Clements, 39 Ga. 232; Macon & W. R. Co. v. Johnson, 38 Ga. 410, 11 Am. Neg. Cas. 292; Ball v. Mabry, 91 Ga. 781, 18 S. E. 64, 9 Am. Neg. Cas. 197; May v. Dorsett, 30 Ga. 116; Central R. & Bkg. Co. v. Kent, 84 Ga. 351, 10 S. E. 965; Wheeler v. State, 112 Ga. 43, 37 S. E. 126.

The opinion of nonexperts is admissible in evidence where the question under consideration is one of opinion, and where such witnesses state the facts and circumstances upon which the opinion expressed by them is predicated.

Perry v. State, 110 Ga. 234, 36 S. E. 781; Ryder v. State, 100 Ga. 528, 38 L.R.A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; Frey v. Macon Sash, Door & Lumber Co. 112 Ga. 242, 37 S. E. 376; Moon v. State, 68 Ga. 687.

Messrs. **B. T. Castellow, R. R. Arnold,** and **Pottle & Hofmayer**, also for the State.

Beck, J., delivered the opinion of the court:

Cliff Byrd and Melvin Byrd were jointly indicted for the murder of Jim Mandeville. Cliff Byrd alone was put on trial. The

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jury and are inadmissible; and that the opinions of nonexperts are admissible where they have special knowledge obtained from observation and the facts cannot be fully reproduced, but inadmissible where special knowledge is necessary which nonexperts lack.

Expert opinions.

Thus, the opinions of experts as to the kind or character of the weapon with which a wound was inflicted is generally admitted where the subject-matter is such that the formation of an intelligent opinion depends upon the exercise of peculiar skill or knowledge. The following cases admit expert opinions of the class under consideration upon this ground: American Agri. Chemical Co. v. Hogan, 213 Fed. 416 (wounds made with acid); Clemons v. State, 48 Fla. 9, 37 So. 647 (fractures of cheek bone and of skull could not have been done by blow of man's naked fist); BYRD v. STATE (wound was made by the discharge of a "cut or rung shell"); State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122 (wounds were produced with sharp metal instrument); State v. Baker, 157 Iowa, 126, 135 N. W. 1097, 138 N. W. 841 (wounds were made with a blunt or rounded fairly heavy object); State v. Knight, 43 Me. 11 (wounds upon the deceased were made, in examining physician's opinion, with a pointed, cutting, and sharp instrument,—in this case the court said that "to determine the general character of the instrument from a wound produced must necessarily depend upon the experience and skill of one accustomed to examine wounds"); State v. Clark, 34 N. C. (12 Ired. L.) 151 (whether skin of the throat of deceased was cut by sharp instrument or torn); State v. Wilcox, 132 N. C. 1120, 44 S. E. 625 (wound or bruise on temple, of the character in question, would be produced by a blow of a blunt, covered instrument); State v. Noakes, 70 Vt. 247, 40 Atl. 249 (infant's skull could have been fractured by pressure of the hands). In State v. Clark, supra, the court interestingly discussed this phase of the question as follows: "It is an established rule in the law of evidence, that, in matters of art and science, the opinions of experts are evidence, touching questions in that particular art or science. The rule is founded in necessity; because persons of ordinary avocations, including jurors and judges, are not generally capable of judging correctly upon many questions which must be determined in order to the decision of a legal controversy, and which depend on scientific knowledge or skill in art. Resort is then had to the information of those who made it or are supposed to have made it the business of their lives to study the principles of that science or art and carry them out into practice. The information derived from them may not lead, in the minds of those constituting the tribunal, to certain and satisfactory conclusions, and indeed it is often unsatisfactory, especially when opposing opinions are delivered by different professors. Yet from necessity they must be received, because those opinions are the best accessible evidence on the matters in issue; and when received, their weight must depend on the impression made thereby on those who hear them. In reference to questions involved in controversies like the present, namely, as to the nature and effect of a wound described to a witness, it certainly is to a considerable extent a matter of science to be able to judge of them correctly. Whether a wound was made by a shot or a sword or other sharp instrument can, beyond all doubt, be better judged of by one who has habitually examined and treated wounds of such kind; as for example, an old surgeon in the Army,—than by one without experience or scientific theory, whatever may be the degree of his general intelligence on other subjects. So, surgeons familiar with fields of battle, and the appearance of dead bodies lying there long without burial, may be competent at the distance of three months not only to distinguish what kind of wound caused the death, but also to distinguish wounds made on the body before or at the death, from lacerations of the dead body by the tearing or crushing of wild beasts or other brutes. At all events, when professors of the science

jury returned a verdict of guilty. A motion for a new trial was overruled, and Byrd excepted.

1. The court did not err in permitting a witness who had examined the gunshot wound upon the body of the decedent to give in evidence, over the objection that the witness had not been shown to be an expert, his opinion that the wound was made "with a cut or rung shell;" as the witness was immediately thereafter, and in connection with his answer, examined upon the subject of his knowledge of the character of wounds made with shell of the description referred to. He testified that he was familiar with the "impression that rung shells make when discharged near an object and against an object;" and, further, that while he had not had actual experience in shooting human bodies with rung shells, he had shot rung shells at and against other objects, and had observed the effect of such shots, and that the effect of converting an ordinary shell into a "cut or rung shell" would be to make the shot go more in a body. The witness also explained that a "rung shell" is a shell that is cut around between the powder and the shot, leaving just enough of the shell after cutting it around to hold the shot, so that, when it is discharged, the end of the shell with the shot in it is torn loose from the other part of the shell, with the result that the whole load of shot goes on in the end of the rung shell; and that when a shell is fired in the way described, the shot is held in a bulk

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swear they can thus distinguish, it would be taking too much on themselves for persons who, like judges, are not adepts, to say the witness cannot thus distinguish, and on that ground refuse to hear his opinions at all. By such a course the judge would undertake of his own sufficiency to determine how far a particular science not possessed by him can carry human knowledge, and to determine it in opposition to the professors of that science. That course would subject the principle on which the rule of evidence is founded, and exclude the evidence in all cases, since, in truth, its utility depends on having the aid of men of science at that point, at which it is necessary to supply the deficiency in the knowledge of those who are not experts."

And upon the general ground that such witnesses are better qualified to form an opinion than are the jurors, experts especially acquainted by reason of professional examination or treatment with the injury in question have been allowed to express their opinions as to the character of the object with which it was inflicted, especially where they have described the injury and stated the facts on which the opinions were based. The following cases support this rule: Littleton v. State, 128 Ala. 31, 29 So. 390 (wound on throat produced by blunt instrument); People v. Sullivan, 2 Cal. Unrep. 552, 8 Pac. 520 (wound on head made with a dull instrument); People v. Durrant, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499 (hands were means used to strangle deceased); People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833 (caliber of bullet with which wound was inflicted); People v. Knapp, 16 Cal. App. 682, 117 Pac. 792 (wound on head was necessarily caused by some blunt instrument); People v. Brewer, 19 Cal. App. 742, 127 Pac. 808 (opening in uterus could have been made by a "syringe, hard rubber syringe"); Territory v. Egan, 3 Dak. 119, 13 N. W. 568 (physician who was present at inquest testified what produced certain marks or scars on neck of deceased); People v. Hagenow, 236 Ill. 514, 86 N. E. 370 (punctures and lacerations of uterus caused by "hard substance" being forced through it); People v. Spencer, 264 Ill. 124, 106 N. E. 219 (character of instrument [fire arm] making wound); Franklin v. Com. 105 Ky. 237, 48 S. W. 986 (wound was made with a rifle loaded, first, with a bullet, and then with shot put down on the ball); State v. Voorhies, 115 La. 200, 38 So. 964 (kind of weapon with which wound was inflicted—inferable only that the answer was that the weapon used was a gun); State v. Lucy, 41 Minn. 60, 42 N. W. 697 (scalp wound could not have been caused by blow of naked fist, but must have been made with blunt instrument, either quite heavy or used with great force); Smith v. Chicago & A. R. Co. 119 Mo. 246, 23 S. W. 784, 4 Am. Neg. Cas. 746 (wound on hip "appeared to have been made by some blunt instrument, probably a rock"); Jerome v. United R. Co. 155 Mo. App. 202, 134 S. W. 107 (*dictum*—opinion whether wound resulted from a bullet or from the cut of a knife); Metropolitan L. Ins. Co. v. Wagner, 50 Tex. Civ. App. 233, 109 S. W. 1120 (wounds were made with knife); Betts v. State, 60 Tex. Crim. Rep. 631, 133 S. W. 251 (bruises found on head of deceased could have been inflicted with hair brush—the court said: "Medical experts are permitted to give their opinions that . . . certain wounds were inflicted by certain instruments"); Mendum v. Com. 6 Rand. (Va.) 704 (wounds made with a knife or dirk by stabbing); Carthaus v. State, 78 Wis. 560, 47 N. W. 629 (fracture of skull could have been done with a club like the small end of a baseball bat). In Metropolitan L. Ins. Co. v. Wagner, supra, the court discussed the admission of opinion evidence with respect to the nature of the weapon with which a wound was inflicted, as follows: "From the examination of the wounds and of the knife found near the body it was admissible for the witness to give his professional opinion, not only as to the kind of instrument used in their infliction, but that they were or could have been made with the knife. That the jury could, from all the facts and circumstances

when it strikes an object, whereas when an ordinary shell is fired the shot will begin to scatter soon after leaving the muzzle of the gun. He further described the wound which resulted in the death of the deceased, in a manner tending to show that it had been inflicted with a gun discharging a "cut or rung shell." It was competent for the witness, after showing that he had experience in firing at objects with shells of the description in question, and showing that he had knowledge of the appearance of an object shot with such a shell, to give in evidence his opinion that the wound which he examined upon the deceased was made with shot discharged from a shell of the kind described by the witness and the effect of which he had had opportunity to observe. It would have been proper and more regular to have examined the witness touching his qualification as an expert, upon the subject of wounds made by shot from shells of the kind then in question, before asking his opinion as to the kind of shell which had been used in inflicting the wound upon the deceased; but, inasmuch as the facts upon which the witness based his opinion were immediately afterwards stated, the irregularity in allowing him to state his opinion first is not cause for a new trial.

2. Complaint is made of the following charge of the court:

"'Justifiable homicide,' as applicable to the defense set up in this case, means killing in self-defense, or in defense of person against one who manifestly intends by violence or surprise to commit a felony on the person killing."

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testified to, have drawn the conclusion as to the kind of instrument used does not militate against the admissibility of expert testimony upon the question. Though it would seem, from the undisputed facts, that no man of ordinary intelligence could have deduced any other conclusion from them than that the penknife found near the deceased's left hand was the instrument with which the wounds were made, it is apparent from the verdict (if it is entitled to be considered as the expression of a conclusion deduced from the testimony) that the jury did not reach such a conclusion. Such a verdict, if it is entitled to any respect at all, demonstrates that upon such a question a jury requires the aid of expert testimony, in order to arrive at a proper conclusion."

And in the following cases the opinions of experts as to the kind, nature, or character of the weapon or object with which a wound or other external injury was inflicted, were admitted without statement of the grounds of objection or discussion of the rules of admissibility: Rash v. State, 61 Ala. 89 (physician who examined wound testified that it must have been caused by coming in "contact with a hard substance"); Humphrey v. State, 74 Ark. 554, 86 S. W. 431 (caliber of pistol bullet which made wound); Williams v. State, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512 (injury to neck as produced by pressure of man's foot upon it); People v. Carpenter, 102 N. Y. 238, 6 N. E. 584 (wounds were made with crescent shaped knife); Ferebee v. Norfolk-Southern R. Co. — N. C. —, 83 S. E. 360 (*dicta* that physicians may give their opinions "as to the producing causes of wounds, whether or not they were gun shot wounds or produced by sharp or blunt instruments," etc.); Com. v. Campbell, 31 Pa. Super. Ct. 9 (injuries to head were caused by blows of a blunt instrument); Hunter v. State, 30 Tex. App. 314, 17 S. W. 414 (perforations in abdomen of deceased were made with a blunt instrument—witness gave in detail his reasons for the opinion).

And where special knowledge or skill is essential to the formation of an intelligent opinion as to the character of the object with which a wound was inflicted, admission of the opinion of a qualified expert as to such character does not invade the province of the jury. Clemons v. State, 48 Fla. 9, 37 So. 647 (blow of man's naked fist as cause of fractures of cheek bone and skull).

And the opinion of an expert who has examined or observed a wound when fresh, as to the nature of the object or thing with which it was inflicted, has been held admissible upon the ground that the jury could not form any definite conclusion as to the nature, cause, or character thereof, because the injured part could not be produced upon the trial in the condition in which it at first appeared. See State v. Gunnoe, — W. Va. —, 83 S. E. 64, holding admissible the opinion of a physician who conducted an autopsy shortly after the killing of a person in a physical struggle, that a break or scratch on the face of the accused, who was present at the autopsy, was fresh and was caused by a finger nail.

But the opinions of experts as to the kind or nature of the weapon with which a wound was inflicted is generally held inadmissible where the facts can be fully given to the jury, and to answer the question no particular scientific experience or knowledge is necessary, as the jury is as competent to decide in such a case as the expert. Wilson v. People, 4 Park. Crim. Rep. 619 (physicians who made post-mortem examination not allowed to state that in their opinion the wound on the head of deceased was made by a blow of some blunt instrument like the head of an ax or hammer). While the above-stated rule is one undoubtedly sustained by authority, it seems extremely doubtful if the Wilson Case upon its facts falls within that rule. In fact it seems to be clearly contrary in this respect to the decided weight of authority.

And where the question asked an expert calls for an answer upon the vital issue in the case, it has been held that the subject is not a proper one for expert testimony; the ground being that to admit the opinion of a witness to the possible influence of the

It is insisted that "this limitation of the meaning of 'justifiable homicide' as applicable to this particular case is too narrow; that the court should have charged further, under the evidence in the case, §§ 74 and 75 of the Penal Code."

The criticism is without merit. The plaintiff in error and his brother, Melvin Byrd, were jointly indicted for the murder of Jim Mandeville. The evidence shows that they went to the house of the deceased, being armed, the plaintiff in error with a shotgun, and his brother, Melvin, with a pistol. The testimony of the only eyewitness shows that the deceased was not the aggressor in the fatal encounter; and in the statement of the defendant himself when on trial it was claimed, not that he shot to protect his brother, but that he fired to prevent the deceased from shooting him. It was, according to the defendant's statement, for the sole purpose of saving his own life that he fired the shot which resulted in the death of Jim Mandeville; and it was evidently with reference to this issue, clearly made between the claim of the accused that he was acting in self-defense, and the testimony of a third party who saw the shooting, and who swore to a state of facts showing the deceased acted on the defensive against an assault with a deadly weapon, that the charge complained of was given.

There was no merit in the other criticisms upon the charge of the court, and the evidence authorized the verdict.

Judgment affirmed.

All the Justices concur.

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jury would deprive the defendant of his right to have the jury render its verdict upon the facts in the case, and to this extent would substitute the judgment of the expert for what should be the judgment of the jury. See People v. Heacock, 10 Cal. App. 450, 102 Pac. 543, holding that where the cause of death was the vital issue in the case, an expert who had examined the wounds on deceased's head could not properly testify that in his opinion they could not have been caused by deceased's head coming in contact with the corner of a lounge or by falling downstairs.

And it has been held that an expert witness should not be allowed to speculate upon mere hypothetical probabilities as to the nature of an instrument with which a wound was inflicted. See People v. Rogers, 13 Abb. Pr. N. S. 370, holding that a medical expert could not properly be allowed to testify that in his opinion the wound on plaintiff's head was quite as likely produced by a stone thrown against the skull of deceased as that it was produced by the blow from a club with which prisoner had struck deceased; the court saying that the question was properly excluded because calling for the opinion of the witness upon a mere probability without any basis of fact.

As above stated, when the opinion of the expert is confined to the nature of the weapon with which the wound in question "could" or "might" have been inflicted, there seems to be no valid objection to its admission, at least such opinions were admitted in the following cases: Costello v. State, 176 Ala. 1, 58 So. 202 (wound "could" have been inflicted by fall against dresser); People v. Sampo, 17 Cal. App. 135, 118 Pac. 957 (wound "could" have been caused by use of the "rock" in question); People v. Munn, 2 Cal. Unrep. 519, 7 Pac. 790 (fracture in decedent's skull "could" have been caused by blow from man's fist); State v. Porter, 34 Iowa, 131 (strong blow from chair "could" have produced an appearance similar to that of the neck of the deceased); State v. Seymour, 94 Iowa, 699, 63 N. W. 661 (wounds "could" have been made by a club like the one in evidence); State v. Breaux, 104 La. 540, 22 So. 222 (wound upon the head of deceased "could" or "might" have been inflicted with a certain ax which was exhibited); State v. Pike, 65 Me. 111 (wound "might" have been produced by contact with a body of hard material where there were no sharp angles or points, or with a hard substance like a sofa); Davis v. State, 38 Md. 15 (wounds on deceased's head "might" have been inflicted by a crowbar or an adz); Colt v. People, 1 Park. Crim. Rep. 611 (pistol ball "likely" to produce such a wound as that in question); Gardiner v. People, 6 Park. Crim. Rep. 155 (wounds on head and fracture of skull "might" have been produced by blows from a musket shown the witness); People v. Rogers, supra (wounds on head of deceased "might" have been made by blow from a stick, from any heavy instrument, from a Scotch ale bottle, or from a heavy stone); People v. Carpenter, 102 N. Y. 238, 6 N. E. 584 (crescent-shaped knife "would" produce the described wounds); State v. Chee Gong, 17 Or. 635, 21 Pac. 882 (wound "likely to have been produced with a knife); State v. Martin, 47 Or. 282, 83 Pac. 849, 8 Ann. Cas. 769 (injuries to deceased's face could not have been caused by a blow from a man's naked fist); Waite v. State, 13 Tex. App. 169 (described piece of iron piping "would," in the hands of a man of ordinary strength, used as a bludgeon, produce the wounds found upon the head of the deceased); Banks v. State, 13 Tex. App. 182 (same as next preceding case); Kirk v. State, — Tex. Crim. Rep. —, 37 S. W. 440 (wounds "could" have been made by a stroke upon the head with a pistol of the character exhibited in court); Sebastian v. State, 41 Tex. Crim. Rep. 248, 53 S. W. 875 (wound was inflicted with "some instrument that had the power to cut as well as bruise. It might have been a piece of iron, a pistol, or knucks"); Tune v. State, 49 Tex. Crim. Rep. 445, 94 S. W. 231 (wound on the child's head "could" have been made with a man's fist and "could" have been made with a blunt in-

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strument); Girtman v. State, — Tex. Crim. Rep. —, 164 S. W. 1008 (wounds on the head "could" have been made with a 45 caliber pistol used as a club); Bowers v. State, 122 Wis. 163, 99 N. W. 447 (wounds and bruises on the head "might" have been produced by a blunt instrument,—witness also was allowed to state that he did not think they could have been produced by blows of the fist). In People v. Sampo, 17 Cal. App. 135, 118 Pac. 957, supra, the court said: "Nor was it error, it may be observed in this connection, to permit the physicians to testify that the wound could have been inflicted by means of said rock. The physicians were not asked by whom the wound was inflicted, nor whether the wound was caused by the use of the rock exhibited to them, but were simply asked whether, in their opinion, such a wound as the one they found on the head of the deceased could have been inflicted by means of the rock found by Mrs. Callandri. . . . Opinions of medical doctors as to the means which might have been employed in producing wounds upon the human body are always receivable in evidence as those of experts upon that proposition, and we know of no principle to which the admission of such testimony is repugnant. The manner by which a wound is produced is as much within the range of subjects as to which opinions of experts may be given in evidence, as is the proximate or approximate cause of death; and no one will dispute the competency, as evidence, of the opinion of a physician as to the direct or remote cause of one's death."

But in a few instances the courts have gone further, and held the rule to be that while an expert witness may express his opinion as to with what weapon or other object a wound could or might have been inflicted, he cannot be permitted to express an opinion that the wound was inflicted with a particular weapon, where the nature of the weapon is a disputed question of fact; the ground being that in such case the determination of the issue is for the jury, and that an expression of a direct opinion thereon by an expert would be an invasion of the jury's domain. See State v. Senn, 32 S. C. 392, 11 S. E. 292, holding that a physician who examined the body of the deceased could testify what agency was, in his opinion, capable of producing the injuries (bruises, etc., on neck) found, that to allow him to express his opinion that they were caused by a particular agency (the human hand) exceeded the proper limits of expert testimony; Walters v. Stacey, 122 Ill. App. 658, wherein it was held that while it was competent to show by experts whether the wounds on a boar might or could have been inflicted by the tusks of another boar, it was not permissible to show that such wounds were in fact inflicted by defendant's boar; and People v. Hare, 57 Mich. 505, 24 N. W. 843, holding that a physician could not testify as to what was the cause of a wound, but that it would have been proper to have asked as to what in his opinion might have caused it. And see State v. Seymour, 94 Iowa, 699, 63 N. W. 661, holding it improper to ask a physician who had attended the deceased after he was injured, whether the club in evidence was the identical one which produced the wound found on deceased.

But where the nature or character of the instrument or weapon used to inflict a wound is a collateral issue and practically immaterial, it has been held that allowing an expert witness to state that the injuries in question must have been made with the fist, there being no testimony that the deceased was struck with a pistol, or a pair of knucks, or the butt of a whip, was not erroneous. State v. Stockman, 82 S. C. 388, 129 Am. St. Rep. 888, 64 S. E. 595. But see Ulrich v. People, 39 Mich. 245, wherein it was held that where it was wholly immaterial what kind of an instrument was used to inflict a wound, exclusion of a medical opinion that the wound in question was made with a hard instrument more or less sharp was proper.

Nonexpert opinions.

Of course where special knowledge or skill is necessary to enable one to form an intelligent opinion as to the kind of a weapon with which a wound was inflicted, a witness not having special knowledge or skill should not be allowed to express an opinion upon the point. In the following cases opinions of such witnesses were held inadmissible: Prince v. State, 100 Ala. 144, 46 Am. St. Rep. 28, 14 So. 409 (wound caused by rifle bullet or pistol bullet); Caleb v. State, 39 Miss. 721 (witness having no scientific knowledge held incompetent to express an opinion whether a wound in question was made by gun shot or by knife thrust).

And a nonexpert cannot give an opinion as to the nature of a weapon with which wounds were inflicted, where he has no knowledge of the facts sufficient to form a basis for an intelligent opinion. Conde v. State, 33 Tex. Crim. Rep. 10, 24 S. W. 415 (gun shot as means with which wound was inflicted—witness had not seen wound).

But where a nonexpert witness has formed an opinion as to the nature of the object which inflicted an injury, based on observed facts, and the facts are such that they cannot be fully reproduced and made palpable to the jury so as to fully enable them to reach an intelligent conclusion, it has been held that such an opinion is admissible. See Graham v. State, 28 Tex. App. 582, 13 S. W. 1010, wherein a nonexpert witness was allowed to testify that in his opinion the bruises, etc., upon deceased's face "seem to have been made with a rough, hard substance").

And in the following cases wherein it merely appeared that the witnesses saw the wounds in question, nonexperts were allowed to state with what weapons, in their opinion, such wounds were inflicted: Wise v. State, 100 Ga. 68, 25 S. E. 846 (wounds were made with and looked like they were

made with a knife); State v. Nieuhaus, 217 Mo. 332, 117 S. W. 73 (wounds looked like burns made with a hot iron); Morris v. State, 30 Tex. App. 95, 16 S. W. 757 (wounds had appearance of having been made with a shot gun and a Winchester bullet); Thomas v. State, 45 Tex. Crim. Rep. 111, 74 S. W. 36 (wound was made by shotgun fired within a few feet of deceased); Espinoza v. State, — Tex. Crim. Rep. —, 165 S. W. 208 (wound made with knife).

And in the following cases, over the objection that the testimony in question was a mere opinion and as such inadmissible, evidence as to the kind or character of the weapon with which external injuries were inflicted was admitted as a fact, rather than an opinion: Perry v. State, 87 Ala. 30, 6 So. 425 (wherein a witness who had sat on the coroner's jury which investigated the cause of death was allowed to testify that "the child's neck looked like it had been struck with a hot iron, and looked scarred"); Fuller v. State, 117 Ala. 36, 23 So. 688 (wherein it seems that the opinion of a nonexpert who saw a wound that "it was cut with a knife" was regarded as admissible, as a descriptive fact, rather than a mere opinion).

And in Taylor v. State, 41 Tex. Crim. Rep. 148, 51 S. W. 1106, it was held without discussion of the applicable rules of evidence that the opinion of a nonexpert as to the character of a weapon with which wounds were inflicted was inadmissible ("child was whipped with a rope," and "wound in the head, I am pretty certain, was made with a sharp stick or board").

Miscellaneous.

In Macon v. State, 179 Ala. 6, 60 So. 312, in the report of which it does not appear whether the witness was an expert or a nonexpert, it was held that "there was no error in allowing a state's witness to testify that the wound on the head of deceased seemed to have been made with a blunt instrument."

And in State v. Rainsbarger, 74 Iowa, 196, 37 N. W. 153, it was shown in evidence that the wounds upon the head of the deceased could have been made by instruments of the character of the "knuckles" which defendant had in his possession, but the kind of witness or witnesses by which this was shown does not appear. G. J. C.

MINNESOTA SUPREME COURT.

ALBERT L. ORDEAN et al.
v.
HENRY J. GRANNIS et al.

(118 Minn. 117, 136 N. W. 575, 1026.)

Writ — service — publication — mistake in name.

1. Where a summons is served by publication, and there is an error in the name of a defendant, though the true name and the name given be not strictly *idem sonans*, if the names when printed look substantially alike to the eye, and it appears that neither defendant nor those who knew him could be misled by the difference, judgment by default rendered on such service is valid as against collateral attack.

Same — immaterial error.

Applying this rule, it is held, where the true name of defendant was "Albert B. Geilfuss, assignee," and the name as published was "Albert Guilfuss, assignee," the difference between the names, each considered as a whole, was not such a defect as rendered the judgment void.

Judgment — collateral attack — erroneous partition.

3. Where a court has jurisdiction of the subject-matter and the parties, and renders a judgment which it had jurisdiction to enter if the facts pleaded and proved warranted it, such judgment, though erroneous under the pleadings and proof in the case, is not void, and cannot be attacked collaterally. This rule applied to a decree of sale in a partition action, though it may have been erroneous under Gen. Stat. 1894, § 5782, because the liens on the property exceeded in amount its value.

(June 7, 1912.)

CROSS APPEALS from a judgment of the District Court for St. Louis County in an action brought to determine adverse claims to certain real estate; plaintiffs appealing from so much of the judgment as limited their recovery to four fifths of the property involved and denied the lien of a mining lease on the other fifth; and defendants appealing from so much as awarded plaintiffs four fifths of the property and disallowed an alleged judgment lien on the property. Reversed on plaintiff's appeal.

Note. — Applicability of doctrine of idem sonans to substituted or constructive service of process.

This question is discussed in an earlier note, Schoenfeld v. Bourne, 30 L.R.A. (N.S.) 122, where reference is made to annotation on allied subjects. For analogous cases consult also Index to L.R.A. Notes, "Name," § 16.

In ORDEAN v. GRANNIS the court questioned the applicability of the doctrine of *idem sonans* where the summons is served by publication, and says that the true test should not be whether the names are strictly *idem sonans*, but whether they look substantially the same in print. The decision of the state court in this case was affirmed by the United States Supreme Court (234 U. S. 385, 58 L. ed. 1363, 34 Sup. Ct. Rep. 779), that court holding that the service in question sufficiently satisfied the requirement of due process of law. The

Headnotes by BUNN, J.
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Messrs. **Jaques & Hudson, John G. Williams,** and **William Elder,** for plaintiffs:

The name "Albert Guilfuss, assignee," instead of "Albert B. Geilfuss, assignee," in the summons and proceeding, would not mislead or confuse.

Lane v. Innes, 43 Minn. 137, 45 N. W. 4; Meyer v. Kuhn, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; Clifford v. Thun, 74 Neb. 831, 104 N. W. 1052.

The question of the meaning, scope, and intent of the statutes relating to actions for the partition of real estate was one calling for judicial determination in the partition action, and whether it was determined correctly or not, its determination is not subject to collateral attack.

Otis v. Rio Grande, 1 Woods, 279, Fed. Cas. No. 10,613; Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 318; Van Fleet, Collateral Attack, § 66; Mathews v. Eddy, 4 Or. 225; Dugan v. Baltimore, 70 Md. 1, 16 Atl. 501; Griffith v. Bogert, 18 How. 158, 15 L. ed. 307.

Mr. **H. J. Grannis,** for defendants:

Under the common law, the courts could order an actual partition of lands, but had no right to decree a partition by sale. The power to direct the partition of property by sale, and a division of the proceeds, is statutory, and this authority, being in derogation of the common law, the statutory requirements with respect to the conditions under which a sale may take place must be strictly followed and construed.

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court recognizes that the doctrine of *idem sonans* is generally applicable to constructive notice of suits. Speaking with reference to the facts of the case, the court said: "Were we to theorize, we might say that while each of these tests [*idem sonans* and similarity of appearance in print] is helpful, neither is altogether acceptable if perfect accuracy were the aim; not the test of *idem sonans*, because it does not appear that all persons would necessarily pronounce Geilfuss with the long 'i,' or Guilfuss with the short 'i,' and not the test of the appearance of the names as printed and placed in juxtaposition, because in fact, as the name appeared in the summons published and mailed, it was 'Guilfuss' alone, without any name in juxtaposition to serve as a standard for comparison. And we think both tests are inadequate if applied without regard to what was contained in the summons besides the mere name and addition,—'Albert Guilfuss, assignee.' The record, as it happens, contains no copy of the summons; but from findings and admissions that are in the record, we know that it was in due form, and therefore that it contained such notice of the commencement of the action and of its purpose, and such warning to appear and answer, as would constitute due process of law is served upon a defendant within the jurisdiction (Minn. Stat. 1894, §§ 5194, 5195); and that it contained, *inter alia*, a brief description of the property sought to be divided (Minn. Stat. 1894, § 5773, marginal note, supra). The underlying question is a practical one,—whether, notwithstanding the misnomer, the summons as published and mailed, being otherwise unexceptionable, constitutes a substantial compliance with the Minnesota statute, and sufficient constructive notice to the party concerned. In determining this, we need not confine ourselves to the test of *idem sonans*, nor to the appearance of the name in print, but may employ both of these, with such additional tests as may be available in view of what is disclosed by the record. One such additional test, we think, is whether, when two letters reached the postoffice at Milwaukee, one addressed 'Albert Guilfuss, assignee,' the other addressed 'Albert B. Guilfuss,' they or either of them would, in reasonable probability, be delivered to Albert B. Geilfuss, then a resident of that city. Another is whether, assuming that the summons as so mailed, or as published in Duluth, and containing the misspelled names or either of them had come to the eye of the veritable Albert B. Geilfuss, or of any person knowing him by that name, and sufficiently interested in him to acquaint him with its contents if apprised that it was intended for him, the summons, as a whole, would probably have conveyed notice that Albert B. Geilfuss was the person intended to be summoned. Both of these questions are, we think, to be answered in the affirmative. In view of the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that the letters would reach—indeed, they did reach—the true Albert B. Geilfuss, in Milwaukee. And it seems to us that any person knowing him, and knowing the correct spelling of his name, and having reason to acquaint him with the contents of a notice of this character if supposed to be intended for him, would probably realize for whom such notice was intended, notwithstanding the name was spelled 'Guilfuss.' The general resemblance between the names is striking, however they are to be pronounced. And the designation 'assignee' was an additional means of identification. That Geilfuss himself, upon receiving the notice, would be sufficiently warned that it affected his interest in the Minnesota lands under his judgments against McKinley, is free from doubt. He would, of course, observe the misnomer; but, having received the notice which it was the purpose of the law to convey to him, he could not safely ignore it on the ground of the mistake in the name, any more than, if personally served with summons within the state of Minnesota, he could have ignored it on account of a similar misnomer."

The doctrine of *idem sonans* was held applicable in Webster v. Heginbotham, 23

Smith v. Hill, 168 Ala. 317, 52 So. 949; Rowe v. Gillelan, 112 Md. 108, 76 Atl. 500; Berry v. Lewis, 118 Ky. 652, 82 S. W. 252, 84 S. W. 526; Knapp, Partition, p. 323, 30 Cyc. 267; 12 Current Law, 1195; Tieman v. Baker, 63 Tex. 641; Keener v. Moss, 66 Tex. 181, 18 S. W. 447; Knapp v. Gass, 63 Ill. 492; LeMoyne v. Quimby, 70 Ill. 399.

That part of the judgment in the partition case, which directed a sale, is void, and may be impeached upon collateral attack.

Sache v. Wallace, 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348; Iltis v. Greengard Bros. 109 Minn. 208, 123 N. W. 406; Re Mousseau, 30 Minn. 202, 14 N. W. 887; State ex rel. Holland v. Miesen, 98 Minn. 19, 106 N. W. 1134, 108 N. W. 513; Charles v. White, 214 Mo. 187, 21 L.R.A. (N.S.) 481, 127 Am. St. Rep. 674, 112 S. W. 545; Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603; Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747; Newman v. Bullock, 23 Colo. 217, 47 Pac. 379; Russell v. Shurtleff, 28 Colo. 414, 89 Am. St. Rep. 216, 65 Pac. 27; Bigelow v. Forrest, 9 Wall. 339, 19 L. ed. 696; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Indiana & A. Lumber & Mfg. Co. v. Brinkley, 91 C. C. A. 91, 164 Fed. 963; Michigan Trust Co. v. Ferry, 99 C. C. A. 221, 175 Fed. 667; United States use of Wilson v. Walker, 109 U. S. 258, 27 L. ed. 927, 3 Sup. Ct. Rep. 277; Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup.

Colo. App. 229, 129 Pac. 569, to substituted service by publication in an action to quiet title to land, where John F. Monson was designated in the summons J. Fred. Munson, a name by which he was commonly known in the community, Monson being pronounced as spelled Munson, and the identity of the patentee of the land with defendant in the suit being established by evidence; and a recorded *lis pendens* or notice of suit against J. Fred. Munson was held constructive notice of the suit to a subsequent purchaser of the land in controversy, from John F. Monson. The court states that there is good reason and abundant authority for holding, as we do, that the names "Monson" and "Munson" are *idem sonantia*, and that the variation in orthography is immaterial and the objection trivial. The modern doctrine seems to be, and ought to be, that variant orthography must be such as to tend at least to mislead the opposite party, to his prejudice. The court refused to extend the rule beyond the facts as disclosed by the evidence. The case was affirmed on rehearing in 23 Colo. App. 238, 129 Pac. 572.

So, in a notice by publication, a defendant in foreclosure proceedings, whose name was Elizabeth D. Borthwick, was described as Elizabeth D. Bothwick. It was held in Harrell v. Neef, 80 Kan. 348, 102 Pac. 838, that the names were *idem sonans* and the notice sufficient.

So, in Davison v. Bankers' Life Asso. 166 Mo. App. 625, 150 S. W. 713, a divorce was held not invalid because, in the order of publication, the defendant's name "Davison" was incorrectly spelled "Davidson," the names being *idem sonans*. The court quotes from 4 Words & Phrases, 3380, that "the rule of *idem sonans* is that absolute accuracy in spelling names is not required in a legal document or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error."

And where, in an order of publication in a tax suit, the name "Hamilton" was spelled "Hamelton," and the Christian name "Abigail" was spelled "Abigal," the names were, in Skillman v. Clardy, 256 Mo. 297, 165 S. W. 1050, held *idem sonans*, so as not to invalidate the notice.

But an order of publication in a suit affecting a section of land was held bad, and defendant's claim to the tract unfounded, where the publication ran against Herberling instead of Heberling, the court observing that the names were not *idem sonans*, were not of common derivation, nor was there any evidence that one was a corruption of the other in general use. Heberling v. Moudy, 247 Mo. 535, 154 S. W. 65.

So, in Scarry v. Bunker-Culler Lumber Co. 233 Mo. 686, 136 S. W. 294, it was held that a publication against "John S. Carrey" in a tax suit was not a sufficient notice to bring "John S. Scarry" into court, since the names are not *idem sonans*. It was said: "The ordinary pronounciation and sound of the name Scarry, as one would naturally suppose, and as the evidence showed, is Skerry, and not Carrey. The names are entirely dissimilar, both to the eye and ear. No person hearing the one pronounced or seeing it in print would ever suppose that the one was intended for the other. The attentive ear would have no difficulty whatever in distinguishing the pronounciation of the name Scarry from that of Carrey. That being true, they are not *idem sonans* within the meaning of the books." To constitute a valid service by publication, said the courts, notice must be given to the person by his correct name, or by a name which is known to the law as *idem sonans;* that is, such a name as the eye and ear of those who know the person could not fail to recognize that the person referred to in the publication was the person against whom the suit was brought.

So, in Myers v. De Lisle, — Mo. —, 52 L.R.A.(N.S.) 937, 168 S. W. 676, a tax suit, notice by publication addressed to J. A.

Ct. Rep. 773; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8–20, 51 L. ed. 345–350, 27 Sup. Ct. Rep. 236; Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; Corwithe v. Griffing, 21 Barb. 9; Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co. 201 N. Y. 379, 94 N. E. 871; Gray v. Larrimore, 4 Sawy. 638, Fed. Cas. No. 5,721; Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; Kretsinger v. Brown, 91 C. C. A. 450, 165 Fed. 612.

The owner of the judgment and the person to be served in the partition action was Albert B. Geilfuss, assignee.

Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Thompson v. Bickford, 19 Minn. 17, Gil. 1.

The surnames Guilfuss and Geilfuss are not the same, within the rule of *idem sonans*, or otherwise.

Blinn v. Chessman, 49 Minn. 140, 32 Am. St. Rep. 536, 51 N. W. 666; Hubner v. Reickhoff, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; 16 Am. & Eng. Enc. Law, 122; Schoenfeld v. Bourne, 159 Mich. 139, 30 L.R.A.(N.S.) 122, 123 N. W. 537; Steinman v. Jessee, 108 Va. 567, 62 S. E. 275; Grober v. Clements, 71 Ark. 565, 100 Am. St. Rep. 91, 76 S. W. 555; Entrekin v. Chambers, 11 Kan. 362; Newman v. Bowers, 72 Iowa, 465, 34 N. W. 212; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Scarry v. Bunker-Culler Lumber Co. 233 Mo. 686, 136 S. W. 294; Cleveland, C. C. & St. L. R. Co. v. Peirce, 34 Ind. App. 188, 72 N. E. 604; Jenne v. Jenne, 7 Mass. 94; Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874; Riffle v. Ozark Land & Lumber Co. 93 Mo. App. 41; McCabe v. Equitable Land Co. 88 Neb. 453, 129 N. W. 1018; Miller v. Keaton, 236 Mo. 694, 139 S. W. 158.

Not only are the surnames Geilfuss and Guilfuss not *idem sonans*, but the names, "Albert B. Geilfuss, assignee," and "Albert Guilfuss, assignee," taken as a whole, are not *idem sonans*, but are separate and distinct names.

Clary v. O'Shea, 72 Minn. 105, 71 Am. St. Rep. 465, 75 N. W. 115; Atwood v. Landis, 22 Minn. 558; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114; Skelton v. Sackett, 91 Mo. 377, 3 S. W. 874; People ex rel. Owen v. Dunn, 247 Ill. 410, 93 N. E. 305; Chicago & A. R. Co. v. Smith, 78 Ill. 96; Fanning v. Krapfl, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; Thornily v. Prentice, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728.

Bunn, J., delivered the opinion of the court:

Plaintiffs brought this action to determine adverse claims to real estate in St. Louis county. The trial resulted in a judgment to the effect that plaintiffs were the owners of an undivided four-fifths interest in the land, and defendant Grannis the owner of an undivided one-fifth interest. Plaintiffs appealed from this judgment, as did also defendants Grannis and Dickerman.

There is no controversy over the facts, which are fully stated in the findings, and may be briefly stated as follows:

November 8, 1895, George A. Elder owned an undivided one-fifth interest in the land,

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Myer was held insufficient to support a judgment against J. A. Myers, the two names not being *idem sonans*.

And in Miller v. Keaton, 236 Mo. 694, 139 S. W. 158, which was a tax suit against nonresidents, it was held that an order of publication directed to Kitie A. Viger" was not a sufficient notice to "Katie A. Viger," since "Kitie" is not *idem sonans* with "Katie."

As stated in the earlier note, the doctrine of *idem sonans* has been applied in a great number and variety of cases where the service of process was by substitution or publication under the wrong name, and the service was upheld or invalidated without any discussion as to the applicability or nonapplicability of the doctrine to such exceptional cases. No attempt has been made to treat these cases exhaustively.

Thus, the publication of an original notice in attachment proceedings, designating the defendant as "Chase Marker," instead of "Chan Marker," was held in Schaller v. Marker, 136 Iowa, 575, 114 N. W. 43, a fatal misnomer.

So, in an action to quiet title the names James Karney in the redemption notice, and James Carney in the affidavit of publication, were held in McCash v. Penrod, 131 Iowa, 631, 109 N. W. 180, "*idem sonans*," and the mistake not a fatal defect.

So, where plaintiff's name as it appeared in the summons and complaint was "H. B. McKnight," and the name appeared correctly in the copy of summons and complaint mailed to defendant, but in the summons as published the name appeared as "H. B. Knight," it was held in McKnight v. Grant, 13 Idaho, 629, 121 Am. St. Rep. 287, 92 Pac. 989, that the mistake was not fatal to the jurisdiction, and that a judgment by default entered thereon was not void on account of such mistake.

It is held in Xeter Realty Co. v. Samorini, — La. —, 66 So. 318, that title will not be confirmed against John Buhler, when John Butler is cited, though through a *curator ad hoc*, as the former owner.

J. D. C.

Mesaba Land Company an undivided one-fifth, John McKinley an undivided one-fifth, and Poca Iron Company an undivided two-fifths. On or prior to this date there were docketed ten judgments against George A. Elder, and each was a lien upon his interest in the land. On or prior to November 8, 1895, there were docketed some forty-seven judgments against John McKinley, and each was a lien upon McKinley's undivided interest in the land. Among the judgments against McKinley were two rendered in favor of Albert B. Geilfuss, assignee,—one for $2,854.02, which was docketed in the judgment lien docket as in favor of Albert Geilfuss, assignee; the other for $2,125.60, which was docketed as in favor of Albert B. Geilfuss, assignee.

November 8, 1895, George A. Elder commenced a partition suit against the other owners of undivided interests in the land. In this action all of the judgment creditors of Elder and of McKinley were made defendants, except that the name Albert Geilfuss, assignee, or the name Albert B. Geilfuss, assignee, did not appear in the summons or other files in the action. The summons named Albert "Guilfuss," assignee, as a defendant. There was no personal service of the summons upon Albert B. Geilfuss, assignee, who was the real owner of the two judgments, and resided in Milwaukee, Wisconsin. The summons was duly served by publication upon the defendant designated as Albert Guilfuss, assignee, and a copy of the summons was addressed to said name at Milwaukee, Wisconsin. Neither "Geilfuss" or "Guilfuss" appeared in the action.

The complaint in the partition action described the interests of the parties and the liens on their interests, including the numerous judgments, and asked for a partition of the lands, or, in case that could not be done, for a sale under the decree of the court. The trial resulted in a decision and judgment that the lands could not be divided, and ordering them sold by a referee to the highest bidder, the proceeds to be divided among the defendants according to their respective rights under the law. Thereafter the sale was made to August Schupp for $6,700, and duly confirmed by the court, and a deed executed and delivered to the purchaser. Plaintiffs' title to the lands is derived by mesne conveyances from Schupp.

The judgment of Geilfuss, assignee, against McKinley for $2,854.02, was in 1901 assigned to F. L. Buell. Thereafter execution was issued on this judgment and levied on McKinley's one-fifth interest in the lands, which was sold to Buell on the execution sale. Defendant Grannis succeeded by mesne conveyances to whatever title was acquired by Buell under this execution sale, and claims title to an undivided one-fifth interest in the lands by reason thereof. This claim the trial court sustained.

In 1900 Charles E. Dickerman recovered a judgment for $23,095.34 against George A. Elder in the district court of St. Louis county, which was docketed. Defendants Grannis and Dickerman became the owners of this judgment, and in February, 1910, the interest of Elder in the lands in controversy, if he had any interest therein, was sold on execution sale under such judgment to the defendants Grannis and Dickerman, who claim a lien upon an undivided one-fifth interest in the lands by reason of this execution sale. This claim was not sustained by the trial court.

1. Upon the appeal of plaintiffs but one question is involved. The trial court held that no jurisdiction was acquired in the partition suit over the judgment lien of Albert B. Geilfuss, assignee. If this is correct, it is clear that the lien of his judgment on the McKinley interest was not affected by the decree in the action, and that the subsequent sale of that interest under execution on the judgment gave a good title thereto to the purchaser. If, on the other hand, the court acquired such jurisdiction, the McKinley interest in the lands passed to the purchaser at the partition sale, and is owned by plaintiffs. This, of course, is on the assumption that the court had jurisdiction to decree a sale in the partition action, a question which will be determined in the decision on defendants' appeal.

The precise question is whether a service by publication on "Albert Guilfuss, assignee," gives the court jurisdiction to render a default judgment binding upon "Albert B. Geilfuss, assignee." The differences in the name of the defendant served, and the name of the owner of the judgment liens sought to be affected by the action, are the differences between "Guil" and "Geil," and the omission of the middle initial. The learned trial court, in an exhaustive and able memorandum, reached the conclusion that the names were not *idem sonans* and that the difference was fatal. The question is by no means free from doubt. The trial court's conclusion is largely based upon the pronunciation of "ei" as it appears in German names, and the pronunciation of "ui" as it appears in English words and proper names. It is evident that Geilfuss is a German name, and quite clear that it is pronounced with the long sound of "i." Indeed, an examination of the Century Cyclopedia of names fails to disclose a single proper name beginning with "Gei" that is not pronounced with the long sound of "i." Examples are Geibel, Geierstein, Geiger, Geiler, Geissler, Geisenheim. The name

"Geilfuss" is apparently made up of the two German words "geil" and "fuss." On the other hand, "Guilfuss" is not a compound of two German words, and has no meaning. "Guil" is not German. It is met with frequently in French, Spanish, and Italian names, and is in these languages pronounced "ē" or "wē." In English words, where the syllable ends in a consonant, it is uniformly pronounced "i" as in "guild," "guilt," "guinea." In English proper names it is given the same sound. Examples are "Guilford," "Guilford Courthouse," the London "Guildhall," "Guildenstern," "Guinevere," "Guiteau." We fail to find a single English proper name where "Gui" is pronounced like "guy." It may be true, as counsel for plaintiff says, that the name of Hon. Curtis Guild is pronounced with the sound of long "i," and that an Illinois family of the same name pronounce it in the same way. It is also true that people who have no acquaintance with foreign names pronounce them in many different ways. But, on the whole, we are inclined to agree with the conclusion of the trial court that "Geilfuss" and "Guilfuss" are not *idem sonans*.

This conclusion does not, however, necessarily result in a concurrence in the decision of the trial court that the difference in the names constituted a fatal defect. Where the summons is served by publication, the true test should not be whether the names are strictly *idem sonans*,—sound the same to the ear when pronounced,—but whether they look substantially the same in print. This is the effect of Lane v. Innes, 43 Minn. 143, 45 N. W. 4, and in D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 Ann. Cas. 114, the principle is recognized. It is not easy to see why the similarity in the sound of the names should be the controlling factor when the names are not sounded, but read. In many cases of common names that are strictly *idem sonans*, it could not be well said that the difference in the appearance to the eye in the published summons would be immaterial. If John Olson was sued as John Olsen, James Reid as James Reade, George Taylor as George Tailer, the names would be strictly *idem sonans*, and yet it should not be held that the defendant or his acquaintances could not mistake as to who was intended. So if the names are not strictly *idem sonans*, but look so much alike in print that it can be said that defendant or his acquaintances who saw the published notice could not mistake the person intended, the variation ought not to be held fatal. While the great majority of the cases proceed on the rule of *idem sonans*, we are unable to see on principle why this doctrine is applicable at all when the question arises on the difference in spelling of the true name of defendant and the name as given in the published summons. If the variation is such that the eye does not recognize the names as the same, it is fatal; but if to the eye the name, taken as a whole, looks not materially different from the true name, so that the defendant and his acquaintances would unhesitatingly say that defendant was the person named in the printed summons, then it seems unreasonable to say that the mistake in spelling is fatal. While substituted service by publication is purely statutory and in derogation of the common law, while strict compliance with the statutory provisions is necessary to constitute due process of law, this does not mean that errors in the spelling of proper names are always fatal defects. The inquiry should always be, Was it possible that because of the error defendant failed to receive a notice that would otherwise have reached him? It is true that service by publication is not a certain method of giving defendant notice, even where his name is accurately given. But does the error in the name make it less certain? That must depend on the particular facts in each case. It is not of much assistance to compare the almost numberless authorities. See note to Thornily v. Prentice, 100 Am. St. Rep. 322, with alphabetical lists of names held to be *idem sonans* and held to be not *idem sonans*. When decisions are so numerous, and so variant, it serves to confuse, rather than help. But we find the essence of the rule we have attempted to formulate in many of the cases. On principle, and under Lane v. Innes, supra, it can hardly be doubted that it is the true rule.

In deciding whether the difference between the names in this case was such as might be misleading to persons reading the printed summons, we will assume that the name of the judgment creditor of John McKinley was Albert B. Geilfuss, assignee, as it appeared in the judgment book and judgment roll. The question then is, placing the names "Albert Guilfuss, assignee," and "Albert B. Geilfuss, assignee," in juxtaposition, was there so material a change as to be misleading? Could defendant, or anyone knowing him, on reading the published summons, mistake the person intended? Lane v. Innes, supra. We must compare the names as a whole, including the given name, both syllables of the surname, and the designation attached. The given name is the same, the last syllable of the surname is the same, the designation or discription, "assignee," is the same. The

name as a whole is decidedly unusual. Indeed, it would be a remarkable coincidence if there were two persons in the world, one known as "Albert B. Geilfuss, assignee," the other as "Albert Guilfuss, assignee." The only differences are the absence of the middle initial "B.," and the use of the vowels "ui" in place of "ei.' We have reached the conclusion, considering each name as a whole, that the differences between them are trivial, and not such as could possibly cause defendant, or anyone knowing him, to doubt that he was the person intended to be named.

This leads to the conclusion that the judgment lien of Albert B. Geilfuss, assignee, on the McKinley interest, was cut out by the sale in the partition suit, and that defendant Grannis is not the owner of that interest, unless we can sustain the point that the court was without jurisdiction to decree a sale in that suit. This contention of defendant will be considered on the appeal of defendants Grannis and Dickerman.

2. The appeal of defendants Grannis and Dickerman involves their right to a lien on the Elder interest in the lands, by virtue of the sale of that interest on execution under a judgment against Elder entered after the partition sale. If the court in the partition action had jurisdiction to decree a sale, admittedly Elder's interest was cut off by that sale, and defendants have no lien. They contend, however, that the court in the partition suit was wholly without jurisdiction to decree a sale of the lands or to confirm such sale, and that its judgment in that respect is void and can be attacked collaterally.

This contention is founded upon the statutes of this state in force at the time of the partition action. Gen. Stat. 1894, § 5781, provides: "If it is alleged in the complaint and established by evidence that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court, except as provided in the next section, may order a sale thereof," etc. The next section provides that when there are liens on the property amounting to more than the value thereof as stated in the complaint, or when it appears probable that the property will not sell for a sum equal to the amount of the liens, "no sale shall be made." Section 5787 provides for proof of the amount of any liens on the property of which partition is sought, and that, if said liens do not amount to the value of the premises as admitted or proved, a sale may be ordered. Payment of the liens is to be made out of the proceeds of the sale before division of the residue among the owners of the property.

The Elder interest in the property was subject to judgment liens in excess of $50,000, the McKinley interest to judgment liens in excess of $350,000, and the interest of the Mesaba Land Company was subject to a mortgage for over $11,000. In the partition suit it was alleged in the complaint and adjudged that the lands involved were of the value of $1,200. They were sold at the partition sale for $6,700. It appears, therefore, that there were liens on three of the five undivided interests far in excess of the value of the entire property as alleged in the complaint. The claim is that, by reason of the existence of these liens and the provisions of § 5782 that "no sale shall be made," when the liens amount to more than the value of the property, the court had no jurisdiction to order a sale, and that its judgment was absolutely void and subject to attack collaterally.

We are clear that this claim cannot be sustained. It may have been error to decree a sale under the facts alleged and proved; but the court had jurisdiction of the subject-matter and of the parties, and the error in ordering a sale was at the most an error that might have been taken advantage of on appeal. The court had jurisdiction to order a sale in a proper case. If the pleadings or proof showed that it was improper to do so, it was error; but the order was not in excess of the court's jurisdiction, and not void. There is no doubt that, though a court have jurisdiction of the subject-matter and the parties, if it exceeds its jurisdiction, makes a judgment or order which in no case it had jurisdiction to make, such judgment or order is void. But where the judgment attacked is one which the court could rightfully enter, if the pleadings and proof warranted it, it cannot be said to be an excess of jurisdiction, if it be shown that, under the pleadings or proof, the judgment ought not to have been rendered. There is nothing in Sache v. Wallace, 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348, that is in the least inconsistent with this statement. The law is so well settled that we consider further discussion or the citation of authorities unnecessary. Whether the statute applies to a case like this, where the undivided interest in the land of one of the owners thereof is free from all liens, we do not decide; but, even assuming that it does, we hold that the court in the partition action did not exceed its jurisdiction in adjudging a sale of the property or in confirming that sale. It follows that Elder's undivided interest passed by the partition sale, and that he owned no interest at the time the judgment owned by defendants was rendered. They there-

fore acquired no lien by the attempted levy and sale of that interest on execution.

The judgment is reversed on plaintiffs' appeal, with directions to the trial court to amend its conclusions of law and grant judgment for plaintiffs in accordance with this opinion.

Affirmed on appeal of defendants Grannis and Dickerman.

A petition for rehearing having been filed, the following **Per Curiam** response was handed down on July 5, 1912:

In a petition for reargument filed by defendant Grannis, it is suggested that the necessary effect of the decision of this court is to deprive him of his property without due process of law, contrary to the provisions of article 14 of the Amendments to the Constitution of the United States, though the question was not specifically decided. We necessarily hold against this contention of defendant, and so interpret the decision.

The petition for reargument is denied.

Affirmed by the Supreme Court of the United States, June 8, 1914, 234 U. S. 385, 58 L. ed. 1363, 34 Sup. Ct. Rep. 779.

KENTUCKY COURT OF APPEALS.

FIDELITY TRUST COMPANY, Admr., etc., of Bettie Buckner, Deceased,
v.
GARNETT B. MARTIN et al.

(158 Ky. 522, 165 S. W. 665.)

Will — bequest for education — forfeiture.

1. The marriage of a young woman, and her delay for a period of five years to apply for the benefit of a bequest of a sum by her mother for the completion of her education, do not forfeit her right to the fund.

Same — bequest — cancelation of debt.

2. A debt by a mother to two of her children as guardian for a fund which she collected for them is not canceled by a bequest in their favor in her will of an amount greatly in excess of the amount due, so that, unless the debt is canceled, they will receive a much larger portion of the estate than the other children of testatrix, where the bequest is placed in trust for future payment, and may be defeated by their dying without issue.

(April 23, 1914.)

APPEAL by the administrator from a judgment of the Circuit Court for McCracken County in defendants' favor in a suit for the settlement of the estate of Bettie Buckner, deceased. Affirmed.

The facts are stated in the opinion.

Mr. **J. D. Mocquot**, for appellant:

The devises to Garnett Martin and Frank Buckner were meant to be in satisfaction of their claims against their mother's estate.

Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397; Thackston v. Watson, 84 Ky. 206, 1 S. W. 398; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742; Smith v. Park, 27 Ky. L. Rep. 14, 84 S. W. 304; 40 Cyc. 1885.

The defendant Garnett Buckner Martin took no interest in the fund for education, under the clause of the will devising $4,000 for the education of herself and Frank Buckner.

Maupin v. Goodloe, 6 T. B. Mon. 409.

Messrs. **Campbell & Campbell**, for appellee Martin:

The devise of $4,000 to complete the education of Garnett B. Martin and Frank Buckner is a specific devise, which the court will uphold unless impossible of performance.

Griffith v. Coleman, 5 J. J. Marsh. 600; Shaver v. Ewald, 142 Ky. 472, 134 S. W. 906; Hayman v. Morgan, 148 Ky. 230, 146 S. W. 722; 40 Cyc. 1388; Reuling v. Reuling, 137 Ky. 637, 126 S. W. 151; Penn v. Penn, 120 Ky. 557, 87 S. W. 306; Cornwall v. Hill, 135 Ky. 641, 117 S. W. 311; Breidenbach v. Walter, — Ky. —, 119 S. W. 204.

Messrs. **Wheeler & Hughes** and **W. A. Berry** for other appellees.

Note. — Presumption of satisfaction of debt by legacy or devise to creditor.

I. Introduction, 1157.
II. Rule in general, 1157.
III. Rule as affected by relationship of legatee or devisee to testator, 1160.
IV. Rule as affected by sufficiency or insufficiency of assets, 1161.
V. Rule as affected by equality or inequality of distribution, 1162.
VI. Reasons for and dissatisfaction with rule, 1163.
VII. Exceptions to and application of rule.
a. Difference in nature or interest in general, 1164.
b. Where purpose of legacy is expressed.
1. In general, 1167.
2. Express declaration as to one of several legacies or devises, 1169.
c. Direction for payment of debts, 1169.
d. Unliquidated indebtedness, 1172.

Carroll, J., delivered the opinion of the court:

In May, 1907, Mrs. Bettie Buckner wrote her will, in which she devised to her daughter Garnett Buckner a building in Paducah, Kentucky, with the provision that if she died without living issue, the building should be sold and the proceeds divided equally among her other chhildren. To her son Frank she devised a house in Paducah, with the direction that if he died without issue, the property should be sold and the proceeds divided between her other children. To her sons Paul and James she devised other property. And in reference to certain lien notes held by her she directed, that when the notes were collected, "that the Fidelity Trust Company of Louisville be paid out of such proceeds a note for $2,000 which I owe them and I further direct that the sum of $4,000 out of said proceeds realized upon the collection of said lien notes, shall be held by the said Fidelity Trust Company for the education of my two children, Garnett and Frank. Should one or both of them die before their education is completed, then I desire whatever remains of the above $4,000 to be divided between my daughters, Mrs. Flournoy, Mrs. Nettleroth, and Mrs. Burnes." After making certain other special devises, she directed that the remainder of her estate be divided equally between her children. She further provided that the Fidelity Trust Company of Louisville should have charge of the estate of her two younger children, Garnett

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VII.—continued.
- e. Indebtedness contracted after making of will, 1173.
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- h. Contingent legacy or debt, 1174.
- i. Indebtedness based on negotiable instrument, 1174.
- j. Trust debts, 1175.
- k. Difference in time of payment, 1175.
- l. Specific legacies, 1176.
- m. Devise of land, 1176.
- n. Legacy to third party, 1177.
- o. Miscellaneous, 1177.

VIII. Admissibility of parol evidence to create or rebut presumption, 1178.

IX. Miscellaneous, 1179.

I. Introduction.

This note does not include cases where there was an agreement or understanding that the debt should be satisfied by a provision in the debtor's will. Cases are also excluded which merely construe the language of the will, as, for example, where the testator expressly declared that the provision in the will should be in satisfaction of certain debts, and the question was as to what debts were included.

The question under consideration pertains to the construction of the will, and as the purpose of construing a will is to ascertain the intention of the testator as expressed therein (40 Cyc. 1382), it follows that the intention of the testator as gathered from the will is the ultimate criterion to be applied in determining whether or not a legacy or devise is to be deemed a satisfaction of an indebtedness due from the testator to the legatee or devisee. Hence, the rules on the subject are at best prima facie, yielding readily to indications in the will of an actual intention contrary to that which they ascribe to the testator.

The question of satisfaction of portions to a child by a legacy from the parent is not considered, as it appears that the same principles do not necessarily apply in such cases as in the ordinary case of debt or obligation of the testator to the devisee or legatee. Indeed, because of the reluctance of courts to allow double portions, some of the cases have expressly excluded from consideration, in applying the doctrine of satisfaction of a portion by a legacy, those cases where the question was between debtor and creditor in the ordinary sense. A case clearly stating the distinction is Thynne v. Glengall, 2 H. L. Cas. 131, where a father, on the marriage of his daughter, agreed to give her a certain portion, and afterward left her a legacy, which it was claimed was intended to be in fulfilment of the marriage settlement. The court said: "Before I consider the authorities as applicable to the facts of this case, I think it expedient to throw out of consideration all the cases which have been cited, in which questions have arisen as to legacies being or not being held to be in satisfaction of debt; for, however similar the two cases may at first sight appear to be, the rules of equity as applicable to each are absolutely opposed, the one to the other. Equity leans against legacies being taken in satisfaction of debt, but leans in favor of a provision by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, to the prejudice generally, as in the present case, of other children. In the case of debt, therefore, small circumstances of difference between the debt and the legacy are held to negative any presumption of satisfaction; whereas in the case of portions, small circumstances are disregarded. So, in the case of debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions it may be satisfaction *pro tanto*." Among possible other cases in this country recognizing this distinction is Bowen v. Bowen, 34 Ohio St. 164.

II. Rule in general.

In a large number of cases the general

and Frank, until they became of age. About September 1, 1908, Mrs. Buckner died suddenly, and on the day of her mother's death, Garnett Buckner, who was then about eighteen years of age, married G. D. Martin. In 1911 the Fidelity Trust Company, administrator with the will annexed of Mrs. Buckner, filed this suit in the McCracken circuit court for a settlement of her estate. To this suit Mrs. Martin and Frank Buckner, yet an infant, filed separate answers, in which they set up that Mrs. Buckner as their guardian had received $4,500, the proceeds of an insurance policy, to which they were entitled, and that she had never accounted to them for any part of said sum, and they asserted the same as a charge against her estate. In resisting this charge the administrator admitted that Mrs. Buckner collected the insurance money as guardian, and that she had never made any settlement of her accounts as guardian, but it averred that she had invested the insurance money in property owned by her at her death, and which was devised by her will to her children. It was further averred that the testatrix devised to Mrs. Martin and Frank Buckner property double the value of that devised to her other children, and that she intended to, and did by these large bequests to them in excess of what was given to the other children, satisfy her indebtedness to them on account of the money in her hands as guardian. Another averment was that if they were allowed to take the estate given to them by the will and

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rule has been laid down that a legacy to a creditor equal to or greater in amount than the debt will be presumed, in the absence of anything to indicate a contrary intention, to be intended as a satisfaction of the debt. The cases generally in the note recognize the existence of the rule, and yet so numerous have become the exceptions that in comparatively few cases has the rule been applied. The following cases, however, apply the general rule above indicated: Chaplin v. Leapley, 35 Ind. App. 511, 74 N. E. 546; Allen v. Merwin, 121 Mass. 378 (legacy corresponding in amount and time of payment with debt); Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534; Adams v. Adams, 55 N. J. Eq. 42, 35 Atl. 827; Re Seeley, 67 Misc. 358, 124 N. Y. Supp. 831; Ward v. Coffield, 16 N. C. (1 Dev. Eq.) 108; Wesco's Appeal, 52 Pa. 195; Re Thompson, 25 Pittsb. L. J. N. S. 120 (the court saying that the intent to give the legacy in satisfaction of the debt was plainly apparent from the facts that the will followed shortly the date of the loan, that the amount of the loan and the legacy were identical, and that the whole estate was specifically disposed of by the will); Pulliam v. Pulliam, 10 Fed. 53; Montague v. Maxwell, 4 Bro. P. C. 598 (legacy to wife held satisfaction of breach of covenant in marriage settlement); Re Fletcher, L. R. 38 Ch. Div. 373, 57 L. J. Ch. N. S. 1032, 59 L. T. N. S. 313, 36 Week. Rep. 841 (legacy to wife of £625 held intended as satisfaction of debt by testator to her of like amount, owing when will was made); Edmunds v. Low, 3 Kay & J. 318, 3 Jur. N. S. 508, 26 L. J. Ch. N. S. 432, 5 Week. Rep. 444; Fourdrin v. Gowdey, 3 Myl. & K. 383, 3 L. J. Ch. N. S. 171 (the court saying, however, that the question here was one of performance rather than satisfaction, the testator having an option to pay the obligation during his life or to direct his executor to do so, and by will having directed payment by the latter of a larger sum); Corus v. Farmer, 2 Eq. Cas. Abr. 34 (legacy by husband to wife held satisfaction of his obligation under marriage settlement); Plume v. Plume, 7 Ves. Jr. 258; Brown v. Dawson, 2 Vern. 498, Prec. in Ch. 240; Ray v. Grant [1906] 1 Ch. 667, 75 L. J. Ch. N. S. 304, 54 Week. Rep. 311, 94 L. T. N. S. 475, 22 Times L. R. 249, 4 Ann. Cas. 457; Talbott v. Shrewsbury, Prec. in Ch. 394, Gilb. Eq. Rep. 89; Wathen v. Smith, 4 Madd. Ch. 325, 20 Revised Rep. 302; Fowler v. Fowler, 3 P. Wms. 353 (holding legacy of £500 by husband to wife a satisfaction of arrears of £200 under marriage settlement); Gaynon v. Wood, 1 Dick. 331; Atkinson v. Littlewood, L. R. 18 Eq. 595, 31 L. T. N. S. 225; Graham v. Graham, 1 Ves. Sr. 262. See also Mathews v. Mathews, 2 Ves. Sr. 635, under VII. b, 1, infra.

In the recent case of Re Sutherland, 84 L. J. Ch. N. S. 126, the general rule of satisfaction of a debt by a legacy to the creditor larger in amount than the debt was recognized as still existing in England.

The fact that the creditor was appointed executrix was held in Ray v. Grant [1906] 1 Ch. 667, 75 L. J. Ch. N. S. 304, 54 Week. Rep. 311, 94 L. T. N. S. 475, 22 Times L. R. 249, 4 Ann. Cas. 457, not to prevent the application of the general rule, so as to cancel the debt by a larger legacy to the creditor.

And the fact that the will directed that immediately after the testator's death certain real property should be sold, and out of the proceeds his widow should be paid one half of the legacy, was held in Wesco's Appeal, 52 Pa. 195, not to take the case out of the general rule.

In Atkinson v. Littlewood, L. R. 18 Eq. 595, 31 L. T. N. S. 225, a legacy by a husband to his wife of an annuity of £52, payable in four equal amounts on certain days named, out of property devised in trust for that purpose, was held to be a satisfaction of a covenant in a separation deed for payment by him to her of an annuity of the same amount payable on the same dates. The court regarded the question as controlled by precedent, but said that if it were at liberty to act upon what it believed to be the testator's intention, it would certainly come to the conclusion that he intended to give the wife an addi-

have in addition thereto this money, it would give them an estate largely in excess of what was intended by the testatrix, and largely in excess of what she gave to her other children, although she expressed the purpose in the will, after certain specific devises had been satisfied, to make her children equal. Mrs. Martin, in another pleading, set out the provision in her mother's will, devising to her one half of $4,000, to be expended in her education, and averred that she had never received any part of the $2,000 so directed to be expended, and "that she is now living with her relatives, and has no immediate means of income or support except through the kindness of her relatives and friends; that she is still a young woman, being just twenty-three years of age, and has not completed her education, and that she contemplates applying to the Fidelity Trust Company to provide such a portion of such special devise as may be adjudged to be used for that purpose, to provide an education for her, for she states that she has not completed her education, but desires to do so." For answer to this the administrator set up that when Mrs. Martin married, she voluntarily surrendered her right to draw on this fund for educational purposes, and that, having abandoned her opportunity to get an education with the aid of this fund, it was too late to ask that any part of it be devoted to her education after she had been married for about five years. Pending the suit, the case was referred to the commissioner to report

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tional annuity, and not merely to satisfy the debt.

The general rule that a legacy to a creditor greater in amount than the debt will be considered a satisfaction thereof was applied in Graham v. Graham, 1 Ves. Sr. 262, so as to cancel an annuity of £6 given by bond, by a bequest to the annuitant by the debtor of £10 per annum charged generally on his real and personal estate, although the testator also owed the same party another annuity of £10 which had been given on condition that she maintained her son, and which was charged on a particular estate. The court was inclined to the view that if the testator had been a general debtor for both annuities, which combined would have amounted to £16 the bequest of £10 would not have satisfied either annuity; but as he was only a general debtor for the £6 annuity, the annuity of £10 being charged on a particular estate, the smaller annuity was satisfied by the larger bequest.

And the rule was applied in Brown v. Dawson, 2 Vern. 498, Prec. in Ch. 240, to a case where a husband, upon his wife's joining in a sale of part of her jointure, gave her a note for £7, 10s. annually during her life, and on a later sale of another part of her jointure gave her a bond for £6, 10s. annually during her life, and afterward by will, without taking notice of the bond or note, bequeathed to her £14 annually during her life, it being held that the bequest should be taken as a satisfaction of the bond and note.

Where, at the time of the testatrix' death, part of the purchase money of land bought by her remained unpaid, and she had devised the land to the vendor, it was held that the acceptance of the devise canceled the debt. Salvation Army v. Penfield, 139 Mo. App. 518, 123 S. W. 539.

And in Ring v. Woolley, 155 App. Div. 817, 140 N. Y. Supp. 648, where one tenant in common, being desirous of mortgaging his half of the property to obtain a loan, secured the consent of his cotenant to a mortgage on the entire property, and gave the latter a bond conditioned for payment of the mortgage, it was held that the obligee's acceptance of a devise of the obligor's half canceled the bond, the devise amounting to more than the mortgage.

Where a testator was bound by contract to support an apprentice until she was eighteen years of age, but died when the latter was seven years old, and in his will, after bequeathing to her certain personal property, directed the executors to place $1,000 at interest and appropriate the income to her support, it was held that the provision in the will, if adequate, must be considered as a satisfaction of the testator's obligation. Petrie v. Voorhees, 18 N. J. Eq. 285.

The facts that a daughter who had deposited money with her father afterward married, and that the debt became payable to her husband during the father's lifetime, have been held not to preclude satisfaction of the debt, under the general rule, by a legacy from the father to the daughter after the marriage, where the legacy was not for the daughter's separate use, and was not large enough to entitle her by virtue of her equity to a settlement. Edmunds v. Low, 3 Kay & J. 318, 3 Jur. (N.S.) 508, 26 L. J. Ch. N. S. 432, 5 Week. Rep. 444. The legacy was said to be payable to the husband and the debt was treated as a debt to the husband.

Where a testator devised an estate in trust, to raise and pay £950 to his sister, "owing (as he said) by him" to her, it was held that a charge of £200 on the land in favor of the sister was satisfied. Shadbolt v. Vanderplank, 29 Beav. 405.

In several cases the decision seems against the following of the general rule altogether. In some of them the facts would bring the case within one or more of the exceptions noted below, but the ground of the decision was not apparently that the case was within the exceptions to the rule, but that the rule itself should not be followed. Cases which seem to be of this kind are the following: Cranmer's Case, 2 Salk. 508 (the court saying that when the testator said he gave a legacy, it could not contradict him and say he paid a debt); Crompton v. Sale, 2 P. Wms. 553; ——— v. Powell, 10 Mod. 398.

the assets in the hands of the administrator and the value and amount of the various bequests and devises, and his report shows that, excluding the amount set apart for their education and the amount in the hands of Mrs. Buckner as their guardian, Mrs. Martin and Frank Buckner had, or would receive under the will, property worth about twice as much as either of the other children. The case having been submitted for hearing on the pleadings, the court adjudged that the administrator should pay to Mrs. Martin and to the guardian of Frank Buckner $2,250 each, this being the amount of the funds to which they were entitled in the hands of Mrs. Buckner as their guardian when she died. It was further adjudged that "$2,000, or such portion thereof as may be necessary for that purpose, of said $4,000 devise, may be used by the trustee to complete the education of Garnett B. Martin, and to pay her expenses in the way of board, lodging, clothing, and tuition while being educated, if she should be educated; and, if said $2,000, or any portion thereof, is not consumed for the purposes indicated, or the said Garnett B. Martin fails to use same for her education, then any residue thereof may be used for the purpose of paying for the education of Frank Buckner, if necessary." It was further adjudged "that $2,000, or such portion thereof as may be necessary for that purpose, of said $4,000 devise, may be used by the Fidelity Trust Company to complete the education of Frank Buckner, and to pay his

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See also Sprenkle's Appeal, 1 Monaghan (Pa.) 402, 15 Atl. 773 (holding that a legacy of $1,000 to a servant should not be deemed a satisfaction of a claim for services rendered by the legatee to the testator during the year preceding the execution of the will, the services being worth $5 per month), and Rorer's Estate, 19 Phila. 5.

In Sheldon v. Sheldon, 133 N. Y. 1, 30 N. E. 730, a debt by a husband to his wife arising from the sale of her separate property was held not to be satisfied by a legacy of a much larger amount to the wife in the husband's will. It was said that the will contained no words from which an intent could be inferred to extinguish a pre-existing debt by means of the legacy, and that a legacy to a creditor is not to be deemed in satisfaction of the debt unless so intended by the testator.

"All the cases agree," it was said in Strong v. Williams, 12 Mass. 390, 7 Am. Dec. 81, "that the intention of the testator ought to prevail; and that, prima facie at least, whatever is given in a will is to be intended as a bounty. But, by later cases, the courts have not been disposed to understand the testator as meaning to pay a debt when he declares that he makes a gift, unless the circumstances of the case should lead to a different conclusion."

And in Re Dailey, 43 Misc. 552, 89 N. Y. Supp. 538, the court said: "The law seems well settled that a bequest or a devise to a creditor is not to be regarded as payment of an indebtedness unless the will expressly declares, or the surrounding circumstances clearly indicate, such an intent on the part of the testatrix."

Also, in Re Morey, 16 N. Y. S. R. 776, 1 N. Y. Supp. 687, the rule was declared to be, as laid down by the decisions in that state, that a legacy to a creditor is not to be deemed a satisfaction of his claim unless so intended by the testator.

And in Smith v. Smith, 1 Allen, 129, it was said that the modern rule of construction is that a bequest is to be regarded as a bounty, and not as a payment of a debt, unless a contrary intention is expressed.

The exceptions to the general rule of satisfaction of a debt by a legacy to the creditor were said in Alerding v. Allison, 31 Ind. App. 397, 68 N. E. 185, to be so numerous as practically to make the rule an exception to the exceptions.

In German v. German, 7 Coldw. 180, the court dismissed the contention that a debt to a legatee from the testator was extinguished by the acceptance of the legacy by saying: "We do not so understand the law, except in case it is clearly apparent from the will that the testator intended the legacy as a payment, instead of a bounty; and it is not pretended any such intention is apparent upon the face of the will."

III. Rule as affected by relationship of legatee or devisee to testator.

It has been held that so far as the rule is concerned in regard to satisfaction of a debt by a legacy to the creditor, no distinction should be made in favor of a wife so as to prefer her to any other legatee, where the legacy to her from the husband would otherwise be regarded as a satisfaction of a debt from the testator to the legatee. Fowler v. Fowler, 3 P. Wms. 353, holding that a legacy of £500 by the husband to the wife was a satisfaction of arrears of £200 owing by him to her under a marriage settlement.

And in Fetrow v. Krause, 61 Ill. App. 238, the court said that there was no difference in the general rule (that a legacy to a creditor equal to or greater in amount than the debt should be deemed a satisfaction thereof) whether the debt was due to a stranger or to a child.

"All the text-books state," it was said in Re Watson, 5 Ont. Week. Rep. 354, "that a legacy given by the will of a parent to a child is not upon any different footing from that of a legacy by any other person as a satisfaction of a debt."

And in Tolson v. Collins, 4 Ves. Jr. 483, the rule was laid down that a legacy by a father to a child is not to be deemed a satisfaction of a debt due from him to the child, where the legacy would not be a satisfaction of the debt if it were owing to

expenses in the way of board, lodging, clothing, and tuition while being educated, if he should be educated; and if said $2,000, or any portion thereof, is not consumed for the purposes above indicated, or the said Frank Buckner fails to use same for his education, then any residue may be used for the purpose of paying for the education of Garnett B. Martin, if necessary." From so much of this judgment as allowed the claim of Mrs. Martin and Frank Buckner for $4,500, the money in the hands of Mrs. Buckner at her death as guardian, and from so much of the judgment as directed the expenditure of $2,000, or such part thereof as might be necessary for the education of Mrs. Martin, the administrator appeals.

Taking up first that part of the judgment that directed the administrator to pay Mrs. Martin for educational purposes $2,000, or so much thereof as might be necessary for that purpose, the argument is made on behalf of the administrator that the testatrix, in setting apart this sum of $2,000 for the education of Mrs. Martin, intended that so much of this amount as might be necessary should be expended for the purpose of her education while she was a young girl or woman, unmarried and attending school, as young ladies usually do; that when Mrs. Martin married and assumed the obligations of a married woman, she by this act indicated a purpose not to devote any more time to securing an education, and thereby forfeited her right to use any part of the bequest for the purpose of defraying the ex-

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a stranger. It was admitted in this case that, had the legacy been from one not standing in the place of a parent to the legatee, it would not have been a satisfaction of the debt, and the court said that a debt between a parent and a child is no more satisfied by such a legacy than a debt between strangers.

Also, in Richardson v. Greese, 3 Atk. 65, it was said that the distinctions which courts have made to take cases out of the general rule of presumption of satisfaction of a debt by a legacy to the creditor are not to be taken from particular circumstances of the legatee *dehors* the will, such as relationship, affection, services, etc., unless they are to be found in the will itself.

But in Re Sherman, 24 Misc. 65, 53 N. Y. Supp. 376, the court said that an unconditional legacy to a child of the testator, who is also a creditor, should not be presumed to be in payment of the debt; but that the presumption is that the legacy is a bounty, unless the will itself shows that such was not the intention, either by its terms or by the identity of the amounts. The inference it was said would be that the bequest was made by the testator as parent rather than as debtor of the legatee.

And in holding that a devise of land was not intended as a satisfaction of a claim by the devisee against the testatrix for services while living with her as a part of her family, the court in Re Dailey, 43 Misc. 552, 89 N. Y. Supp. 538, said: "In relation to the objection that the provision of the will in favor of the claimant should be regarded as full payment of her claim, if the evidence failed to disclose any conditions rendering the claimant a reasonable subject of the testatrix' bounty, then the devise to her of the life estate in the farm might with some force be urged as a payment of the testatrix' indebtedness to the claimant; but it will be remembered that the testatrix had no relatives; aside from the claimant, she was alone in the world; no one else had any claim upon her bounty; there was, however, existing between her and the claimant the regard and solicitude incident to the relationship of parent and child; they had always resided together from the early infancy of the claimant; they had each striven for the comfort and welfare of the other; there were the same reasons existing why the claimant might expect to participate in the testamentary benefactions of the testatrix as usually exist between parent and child. Under such circumstances, it would be a strained and unreasonable conclusion to hold that the beneficial provisions of the will in favor of the claimant were prompted solely by a desire on the part of the testatrix of liquidating an arbitrary indebtedness."

In Caldwell v. Kinkead, 1 B. Mon. 228, where a devisee of land which was charged with certain legacies to relatives bequeathed to the latter legacies larger than those charged on the land, it was held that there was no presumptive satisfaction, the court saying that the will distributed the estate among the testator's collateral kindred in such a manner as to indicate that each bequest was made as a bounty on account of relationship, and not as a debt to a stranger.

See also Pitts v. Van Orden, — Tex. Civ. App. —, 158 S. W. 1043, where the facts that the testator and creditor were cousins and as children had grown up together, and that he made bequests to other persons to whom he was neither related nor indebted, were regarded as tending to negative any presumption of satisfaction of the debt by a legacy to the creditor.

IV. Rule as affected by sufficiency or insufficiency of assets.

In Eastwood v. Vinke, 2 P. Wms. 613, it was said that a devise by a husband to the wife of land of the yearly value of £88 might go toward satisfaction of a bond given by him on marriage to settle lands of the yearly value of £100 on her for life, if there was not enough to answer the rest of the charges laid on the land, because otherwise the testator's will would be disappointed.

As indicating that a legacy to a creditor was not intended as a satisfaction of the debt, the court in Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81, called attention

penses of an education, and that it is too late for her, after an interruption of five years, to now insist that any part of this bequest be set apart to enable her to obtain or complete her education. It seems entirely probable that, when Mrs. Buckner set apart this sum for the purpose of educating her daughter, that she contemplated that so much of it as might be necessary would be expended in securing an education before she assumed the duties of a wife, and that it did not occur to her that her daughter, who at the time the will was written was a girl about seventeen, doubtless attending school, would marry as soon as she did and abandon her school course. But the prominent purpose in the mind of the testatrix in making this provision was that so much of the sum set apart might be used as was necessary for the purpose of educating her daughter. She did not fix any time within which her daughter should receive the education to be provided by this fund, nor did she place any limitation whatever upon the character of education her daughter should receive, or when or where she should go to receive it. There is no intimation that she desired her daughter to continue without interruption her school or college course, or expression indicating that lack of continuity in attending school, or failure to pursue her studies in the regular or customary way, would forfeit her right to this bequest. The large purpose in the mind of the testatrix that her daughter should have this amount for the purpose of affording her

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to the fact that there was a sufficiency of assets to pay both the legacy and the debt.

And the fact that there was a sufficiency of assets to pay both the legacies and the debts of the testator was said in Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641, to be a circumstance of weight in reaching the conclusion that a legacy to the testator's son was not intended to satisfy a debt to him from the testator.

Also, in Wade v. Dean, 19 Ky. L. Rep. 1426, 43 S. W. 441, in holding that by a legacy to his brother, a creditor, the testator did not intend to satisfy the debt, the court said: "The testator seems to have had sufficient estate to enable him to be both just and generous; and as the language of the will does not import an intention that the legacy is to be a payment of the debt which he owed his brother, . . . it must be regarded as a donation to him."

In Cuthbert v. Peacock, 2 Vern. 593, where a testator who was indebted to a niece for £100 bequeathed to her £300, and to two other nieces £200 each, it was held that, there being sufficient assets to pay debts and legacies, and some proof of the testator's greater kindness to this niece than to the other nieces, the legacy should not be deemed a satisfaction of the debt.

See also Chancey's Case, 1 P. Wms. 408, 10 Mod. 399; Dey v. Williams, 22 N. C. (2 Dev. & B. Eq.) 66, and Pitts v. Van Orden, — Tex. Civ. App. —, 158 S. W. 1043, where the sufficiency or insufficiency of the assets was regarded as a circumstance tending to negative or support the doctrine of presumptive satisfaction of a debt by a legacy to the creditor. Also Gibbons v. Woodward, under VII. h, infra.

V. Rule as affected by equality or inequality of distribution.

In Meredith v. Wynn, Prec. in Ch. 312, Gilb. Eq. Rep. 70, where a father had a power to charge land with £2,000 for such uses as he should think fit, and by a will charge the land with £2,000 to his two daughters, directing that after his death they should be paid £1,000 each, it was held that a debt by the father to one of the daughters would not be deemed canceled by the legacy, because the testator apparently intended to give the £2,000 to his daughters equally.

And the fact that by construing a legacy as a satisfaction of the debt, the legatee, a niece of the testator, would receive less than her sister, the will providing for a division of the proceeds of the sale of property between the testator's sister and her daughters share and share alike, was regarded in Mulheran v. Gillespie, 12 Wend. 349, as tending to render such a construction untenable.

So, the fact that the testator was unmarried, and that his nephews and nieces were naturally the objects of his bounty, also that he gave a nephew the same amount as the nieces, and could not have intended the legacy to the nephew to cancel a debt to him, as it was contracted after the date of the will, was given consideration in Crouch v. Davis, 23 Gratt. 62, in determining that the legacy to the nieces was not intended as a satisfaction of the testator's debt to them.

In Cuthbert v. Peacock, 2 Vern. 593, the fact that if a legacy were regarded as a satisfaction of a debt to the legatee, the latter, who it was shown was the testator's favorite niece, would receive less of the testator's bounty than her sisters, was held to show that the legacy was not intended as a satisfaction of the debt.

But in regard to the contention that unless a legacy to the testatrix' son should be considered as a satisfaction of a bond for the payment of money given by her to his guardian, the son's proportion of her estate would be much larger than that received by the other children, the court in Deichman v. Arndt, 49 N. J. Eq. 106, 22 Atl. 799, said: "This would be an important consideration if it were the duty of courts to construe wills so as to make an equal disposition of the estate disposed of thereby among legatees and devisees, irrespective of the directions of the will. There is nothing in this will to give any certain assur-

such an education she might desire should not be curtailed by any narrow construction that would defeat the object of the testatrix. As we look at it, when there is expended for the beneficiary of this bequest the sum set apart by the testatrix, and for the purpose intended, her desire will be more fully carried out than it would be by saying that because Mrs. Martin did not pursue her studies in the ordinary and systematic way that young ladies usually do, or because her opportunities to obtain such an education as she desired were interrupted for a time by a change in her condition in life, she should be deprived of the sum the testatrix set apart for this specific purpose.

Of course, there might be a state of case in which the beneficiary of a fund like this would forfeit his right to it by a failure to avail himself within a reasonable time of the advantages afforded by the gift, and cases might arise in which the situation of the beneficiary and the circumstances surrounding him would be such as to indicate an abandonment of any purpose to avail himself of the benefits conferred by the fund. But the case we have does not fall within these exceptions. Mrs. Martin is yet a young woman. Indeed she has just reached an age when the fund set apart for her education can be expended by her to more advantage than it would have been if used earlier in life. She has now reached the years of sober discretion and judgment that will enable her to take up such studies

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ance to the court that the testatrix intended to make an equal disposition of her estate amongst her children. If there be any inequality in the value of the gifts, the testatrix may have had very good reason therefor; but whether she had or not, she had a lawful right to make any distinction she chose."

VI. Reasons for and dissatisfaction with rule.

The rule that a legacy to a creditor equal to or greater in amount than the debt will be deemed a satisfaction thereof is founded on the presumption that such was the intention of the testator. Van Riper v. Van Riper, 2 N. J. Eq. 1.

"If a man gives a legacy to his creditor to the amount of his debt, this has been construed as payment or satisfaction of the debt, because a man must be supposed to be just before he is bountiful." Jeffs v. Wood, 2 P. Wms. 128. To a similar effect is Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641. But see Cuthbert v. Peacock, 1 Salk. 155, and Chancey's Case, 1 P. Wms. 408, 10 Mod. 399, where it is intimated that if the estate is sufficient it is good equity to regard the testator as intending to be both just and bountiful.

In Crompton v. Sale, 1 Eq. Cas. Abr. 205, the court said that the rule that a legacy to a creditor equal to or greater than the debt is presumed to be in satisfaction thereof had been carried too far, and would not be extended, and that, "though it is true a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, when it is the same sum or more than he owes him, yet why may he not be both just and bountiful when there are assets to answer both."

The rule that a legacy to a creditor of equal or greater amount than the debt is to be deemed to be a satisfaction thereof was said in Re Horlock [1895] 1 Ch. 516, 64 L. J. Ch. N. S. 325, 72 L. T. N. S. 223, 13 Reports, 356, 43 Week. Rep. 410, to have been established early in the 18th century; "but no sooner was it established than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it."

After stating the general rule as to satisfaction of a debt by a legacy, the court in Crouch v. Davis, 23 Gratt. 62, said: "There is no doubt this rule still nominally exists; but the tendency of the more recent decisions is to consider the bequest a bounty, and not the discharge of an obligation. And the courts now lay hold of any circumstances, however trifling, for the purpose of repelling the presumption that the legacy was intended as a satisfaction of the debt."

"The rule itself is not founded in reason, and often tends to defeat the bounty of testators, and able chancellors have thought it more agreeable to equity to construe a testator to be both just and generous, where the interests of third persons are not affected. And courts of justice will now lay hold of slight circumstances to get rid of the rule." Byrne v. Byrne, supra.

"Length of time will not suffer it [the rule that a legacy to a creditor, equal to or greater than the debt, will be presumed to be in satisfaction thereof] to be shaken now, as it is become the fixed rule of property, and yet the maxim, *Debitor non præsumitur donare*, would not hold if it was to be reconsidered, for the court have always shown some dissatisfaction at the rule, and endeavor, if there is any room to do it, to distinguish cases out of it. They have said, indeed, they would not break the rule, but at the same time have said they would not go one jot further, and have been fond of distinguishing cases since, if possible." Richardson v. Greese, 3 Atk. 65.

"The court will lay hold of any circumstance, although slight and minute, whereupon to ground an exception to the rule." Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. 342.

"The least circumstance indicative of a contrary intention, or not consistent in point of justice with an intention of satisfaction, has been laid hold of to take a case out of the rule. The exceptions are now as

and acquire an education along such lines as will better fit her to discharge whatever duties she may be called on to perform, and we perceive no reason why she should be denied the right to use this fund for the very purpose to which it was dedicated.

From inferences that may be drawn from the record we may assume that Mrs. Martin is dependent on her own resources for a livelihood, and if, with the assistance of this bequest, she can acquire an education that will assist her in making a livelihood, it may safely be said that the fund, which is yet in the hands of the administrator, will be devoted to a more helpful and beneficial purpose than the testatrix had in mind when she made the bequest. Under the circumstances of this case we feel sure that the judgment permitting Mrs. Martin to expend this fund in executing the purpose for which it was intended is correct.

The other question is presented by that part of the judgment giving Mrs. Martin and Frank Buckner a recovery of the amount in the hands of the testatrix as their guardian when she died. It is urged with much force that when Mrs. Buckner with her own hands wrote her will, she had in mind the fact that this fund was in her possession as guardian, and, for the purpose of accounting for it to her children who were entitled to it, she gave them, without expressing any other reason therefor, property largely in excess of what she had given to each of her other children, and in excess of what they would have received

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well established as the original principle; so that that principle itself cannot be as properly stated in any way as by modifying it at once by the enumerations of the circumstances which control it." Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488.

"The rule of equity that where a debtor bequeaths to his creditor a legacy *simpliciter*, equal to or exceeding the amount of his debt, and of the same nature, it is presumed, in the absence of any intimation of a contrary intention, that the legacy was meant as a satisfaction of the debt, is not a satisfactory one. It would be far more in accordance with the principles of sound construction to hold that the legacy was intended as a bounty, and not as a satisfaction of indebtedness, unless there appears to be an intimation that it was intended as payment, and not as a gift. But under the rule very slight circumstances are sufficient to repel the presumption." Rogers v. Hand, 39 N. J. Eq. 270. See also as to negativing of the presumption by slight circumstances, Spencer v. Spencer, 4 Md. Ch. 456; Fetrow v. Krause, 61 Ill. App. 238; Mitchell v. Vest, 157 Iowa, 336, 136 N. W. 1054; Heisler v. Sharp, 44 N. J. Eq. 167, 14 Atl. 624; Crocker v. Beale, 1 Low. Dec. 416, Fed. Cas. No. 3,396; Mathews v. Mathews, 2 Ves. Sr. 635.

"This rule [that a legacy given by a debtor to his creditor equal to or greater than the debt should be considered as a satisfaction thereof] is admitted by all the cases, though all the courts seem to express great dissatisfaction with it and endeavor to distinguish cases out of it, upon slight circumstances indicating an intention of the testator that the legatee shall have both the debt and the legacy; as where the will contains the words, 'after debts and legacies are paid, then I give,' and words of similar import. . . . If the legacy be less than the debt; it is contingent; if the debt be unliquidated, etc.; if it be contracted after the legacy given,—it is no satisfaction. The truth is, there are so many exceptions that the rule on this subject seems to be that a legacy shall not be deemed a satisfaction of a pre-existing debt, unless it appears to have been the intention of the testator that it should so operate. These cases, therefore, depend on their own circumstances; and when a legacy has been decreed to go in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption, that the testator did so intend it." Williams v. Crary, 4 Wend. 443. See also earlier proceedings in this case in 5 Cow. 368, and Mulheran v. Gillespie, 12 Wend. 349.

"Dissatisfaction with this rule is frequently expressed, and slight circumstances have been eagerly seized upon to make an exception in its application. . . . The rule is a mere presumption, but, as a presumption, we do not understand that it has been abandoned." Re Arnton, 106 App. Div. 326, 94 N. Y. Supp. 471.

VII. Exceptions to and application of rule.

a. Difference in nature or interest in general.

"It is a general rule of satisfactions, that the thing to be considered as a satisfaction should be exactly of the same nature, and equally certain." Barret v. Beckford, 1 Ves. Sr. 519, holding that a legacy of a moiety for life of the residue of the personal estate was not a satisfaction of an annuity of £300.

And in Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. 342, the general rule of satisfaction was said not to be applicable where the debt and legacy are of different natures with reference to the subject-matter or extent of interest, as where the legacy to the creditor is an interest or income for life. In this case a bequest to the testator's wife for life was held not to be a satisfaction of a mortgage given by him on land before his marriage.

Where the debt and legacy were payable out of different funds, it was held that the one was not a satisfaction of the other; as where an annuity of £10 was charged

had she provided for the payment of this sum to them, and then made them equal with her other children in the distribution of her estate. It may further be observed that this view is also strengthened by the fact that in her will she did not provide for the payment of her debts generally, or apparently recognize that she owed any debts except the note for $2,000 to the Fidelity Trust Company, which she directed to be paid. It is further said that to allow these two children this fund in addition to the property given them by the will would operate to defeat the expressed purpose of the testatrix that her estate, after setting apart specific devises and bequests, should be divided equally between her children. Resting on these facts and plausible inferences, it is strongly contended that the testatrix intended, by the large bequests and devises to these children, to satisfy her indebtedness to them, and, believing that in this way she had done so, did not think it necessary to make any provision for the payment of the fund in her hands to which they were entitled. It will thus be seen that the argument against the allowance of this claim as a debt is necessarily put upon what it is conceived was the intention of the testatrix in not making provision in her will for the payment of all of her debts or this debt, and in giving to these two children more than she gave to her other children. It is of course a well-known rule in the construction of wills that the courts will endeavor to carry out the intention of

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on a particular estate, and a bequest of £10 per annum was charged generally on the real and personal property of the testator. Graham v. Graham, 1 Ves. Sr. 262.

And where the indebtedness was joint and several, a legacy by one of the two debtors to the creditor has been held not to be within the rule that a legacy to a creditor equal to or greater in amount than the debt will be presumed to be in satisfaction thereof. Gibbons v. Woodward, 3 Walk. (Pa.) 303.

In Huston v. Huston, 37 Iowa, 668, it was held that a debt represented by two notes for $100 each was not satisfied by a devise to the payee by the maker of certain lands and personal property, including a judgment in the testator's favor for $125, the court saying that there was neither equality in amount or similarity in character between the devise and legacies and the debt; that the modern doctrine appears to be that the presumption of satisfaction of a debt by a legacy is not to be extended, and that the presumption was never applied except where the legacy was at least of an equal amount and of the same character as the debt.

A legacy of £700 to be paid in articles of the estate at inventory price, to be set out by distributors, was held in Smith v. Marshall, 1 Root, 159, not to be intended, in the absence of other evidence, as a satisfaction of a note for the same amount previously given by the testator to the legatee.

And a bequest to the testator's son of the use and occupancy of real estate for a period of ten years from the date of the testator's death was held in Derr's Estate, 13 Phila. 224, not to be a satisfaction of a debt owing by the father to the son for wages.

Where the testator agreed with his son-in-law, in order to encourage him to purchase land, that if the latter would make the purchase, he (the testator) would make the last payment out of a certain debt owing to him, it was held that the testator's obligation was not satisfied by a legacy to the wife of the son-in-law of slaves for life with remainder to her children. Scott v. Osborne, 2 Munf. 413. The ground of the decision appears to be the difference in nature and interest between the legacy and the debt.

A devise of land and slaves, though of much larger value, was held in Guignard v. Mayrant, 4 Desauss, Eq. 614, not to be a satisfaction of a debt for payment of money.

And in Coates v. Coates [1898] 1 I. R. 258, a legacy of the use for life of a house and furniture was held not to be a satisfaction of a covenant in a separation deed to pay the legatee a certain number of shillings per week during her life.

On account of the difference in the nature and value of a devise in trust, it was held in Waters v. Howard, 1 Md. Ch. 112, not to be a satisfaction of a contract obligation from the testator to the beneficiary to purchase and stock a farm and pay the debts of the latter at the time of his marriage, and to furnish him support for one year thereafter.

The principle that a debt is not canceled by a legacy to the creditor of a different nature than the debt was applied in Forsight v. Grant, 1 Ves. Jr. 298, 3 Bro. Ch. 242, to a case where the husband on marriage gave a bond for payment of £2,000 in trust for his wife for life, then to their children, or, if none, to her absolutely, and by his will gave all the real and personal estate which he then had or of which he might die possessed, on trust to pay the rents and interests to his wife for life, then to their children, or over, if no issue. There being no children, the widow under the marriage settlement was entitled to the principal sum absolutely, while under the will she was entitled only to the rents and interests for life. And the fact that the will also provided that all former settlements were revoked was held not to affect the result, nor was it affected by the fact that the rents and interests were on all the testator's property which he then had or of which he might die possessed, as showing an intention that the £2,000 was not

the testator. But we do not understand that this rule in its full force has ever been applied to a state of case in which it is attempted to discharge a subsisting indebtedness by a legacy or devise. Of course, many cases can be found in which it has been ruled that a legacy to a creditor was intended to and did satisfy his debt against the testator, but this principle is looked upon with such disfavor, and is subject to so many exceptions, that the courts will only apply it when it appears to have been plainly intended that the legacy should go to discharge the debt. Generally speaking, it is based on the presumption that when a debtor owes his creditor an ordinary debt, and gives to the creditor a money legacy or property that amounts in value to more than the debt, in the absence of any circumstances showing a contrary intention, the legacy or property was intended as a satisfaction of the debt, this presumption being allowed to give effect to what it may be reasonably supposed was the intention of the testator in making the gift. We do not think, however, that it can be said in this case that the testatrix intended that the bequest to these children should be a satisfaction of the debt she owed them as guardian, or that it should be so treated. In arriving at her intention we do not attach controlling importance to the fact that she specified only the particular debt that she owed the Fidelity Trust Company. This debt, as the testatrix knew and so declared in her will, was evidenced by a note,

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to be taken out of his estate after his death.

And where one owning leasehold property subject to a yearly sum of £12 to be paid for the separate use of B, a married woman, during her life, on the 27th of January and of July each year, devised all his lands, including the leasehold property, to a third party, subject to a charge of £12 per annum to B, it was held that, although the latter annuity was payable on the same dates as the former, it was not a satisfaction thereof, but that B was entitled to both. Bartlett v. Gillard, 6 L. J. Ch. 19, 3 Russ. Ch. 149, 27 Revised Rep. 45. The grounds relied upon in the decision were that the second annuity was charged upon the freehold as well as the leasehold property, and was payable to the wife generally, and not to her separate use, as was the case with the first annuity.

So, where the husband, with the wife's consent, received property which had been bequeathed to her for her separate use, the fact that a legacy from him to her was not declared to be for her separate use was regarded in Rowe v. Rowe, 2 De G. & S. 294, 17 L. J. Ch. N. S. 357, 12 Jur. 909, as material in reaching the conclusion that the legacy was not a satisfaction of the wife's claim against the husband. The court followed Bartlett v. Gillard, supra, and said that, although in that case the legatee was not the wife of the testator, while in this case she was, and therefore at the instant of his death would become an unmarried woman, it was not such a distinction as would support a variance between the two cases.

Also, in Fourdrin v. Gowdey, 3 Myl. & K. 383, 3 L. J. Ch. N. S. 171, where the testator under his wife's will was bound to pay £100 to her daughter-in-law, a married woman, for her separate use, it was held that a legacy by the husband to the daughter-in-law of £100, without any limitation, being of a different character, was not in satisfaction of the obligation.

A legacy of £2,200 upon trust, to apply the dividends and a certain part of the principal, if necessary, to the maintenance of the legatee until twenty-five years of age, and then to apply a certain part of the principal toward establishing him in business, the dividends of the residue to be paid to him during life, has been held not to be a satisfaction of a debt of £100 which the testator owed as trustee to apply the interest and such part of the principal as he should think fit to the use of the legatee during his minority, and then to pay him the residue if any. Re Clare, 7 Jur. N. S. 769, 4 L. T. N. S. 789.

In Jobson v. Pelly, 9 Mod. 437, it was held that an annuity of £40 given to the wife by the husband's will was not a satisfaction of a marriage bond for £1,000 to trustees for her use.

Where the husband by marriage articles covenanted to pay the wife if she should survive him, £200 as a jointure, and £50 to provide herself a house yearly during her life, it was held that the obligation was not satisfied by a legacy from him to her of an annuity of £100, commencing and payable at different times from the sums in the marriage articles, and a devise to her of an estate worth more than £100 per annum. Richardson v. Elphinstone, 2 Ves. Jr. 463.

A covenant by the husband on marriage to purchase and settle an annuity of £20 on the wife, and if he died before such purchase or settlement to leave her out of his personal estate £300 for her better livelihood and maintenance, was held in Perry v. Perry, 2 Vern. 505, not to be satisfied by a legacy to her in his will, the husband having died without making a settlement, of £330 for her life, with power to dispose of £30 thereof at her death, the residue of the £330 upon her death being devised over to other relations.

Unconditional legacies of £1,000 and £500 to the testator's two sisters respectively, to be paid out of the proceeds of the sale of real estate, were held in Fairer v. Park, L. R. 3 Ch. Div. 309, 45 L. J. Ch. N. S. 760, 35 L. T. N. S. 27, not to be a satisfaction of debts of like amounts to the legatees owed by the testator as trustee under his father's will, which

and evidently she had well in mind the existence of this debt when writing her will; but whether she had in mind the sum of money that she owed her children as guardian is another question. In writing her will she may not have thought of this obligation, or may not have regarded it as a debt, or may not have considered it necessary to make mention of it in her will, or may not have known what her duty and liability as guardian was. So that the mere fact that she did not mention this indebtedness is not, under the circumstances, sufficient to create the presumption that the legacy or bequest was intended as a satisfaction of this indebtedness. Indeed it seems more probable that if, when she came to write her will, she had this liability as guardian in mind, or intended that the legacy should be treated as a satisfaction of it, that she would in some way have given expression to what her purpose was with reference to this liability; and her silence on this subject rather creates the impression that it was not her intention that the bequest to these children should be deemed a satisfaction of it. If the debt due by the testatrix to these children had been an ordinary debt, or a debt evidenced by a note or other written obligation executed by her to them, the presumption that the bequest was intended as a satisfaction of it would be much stronger than it is under the existing circumstances.

The general rule adopted by the courts on the subject of a legacy being treated as

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bequeathed these amounts in trust to each of the sisters respectively for her separate use during life, and then upon trust for her children.

In Smith v. Lyne, 2 Younge & C. Ch. Cas. 345, the difference in the nature of the testator's obligation and the legacy was apparently the ground of holding that the doctrine of satisfaction did not apply, the annuity and other provisions in the will for the testator's two sons and their mother being dissimilar to the provisions for them under a trust deed.

The rule was laid down in Harris v. Rhode Island Hospital Trust Co. 10 R. I. 313, that an annuity given to a creditor, though it may be greater in value than the debt, will not be deemed a satisfaction thereof.

See also FIDELITY TRUST CO. v. MARTIN; and particular phases of this exception in the subdivisions following.

b. Where purpose of legacy is expressed.

1. In general.

Where the purpose of the legacy is expressly stated in the will, the presumption does not obtain that it was intended to satisfy some other purpose, as payment of a debt to the legatee. Thus, where the will states that the legacy is in lieu and bar of dower, it is not deemed a satisfaction of a debt from the testator to his wife. Guignard v. Mayrant, 4 Desauss. Eq. 614; Harris v. Rhode Island Hospital Trust Co. 10 R. I. 313; see also McLean v. Muller, 5 Ohio N. P. (N.S.) 68, 17 Ohio S. & C. P. Dec. 628.

As tending to show the extent of the principle that an express declaration of the testator's intent will exclude an implied intention to satisfy a debt by a legacy, attention is called to the fact that in Harris v. Rhode Island Hospital Trust Co. supra, the legacy, which it was held did not satisfy the debt from the testator to the wife, was of shares of stock in five different corporations exactly corresponding in number of shares in each corporation with the number of shares held in trust by the husband for the wife, and that in one of these corporations the husband owned no other shares. In the other four instances, however, the number of shares held by the testator was sufficient to satisfy the trust obligation as well as the legacy. It was said: "Had there been no expression of his intent by the testator, it might well have been urged in support of the legal presumption under the rule, that the stocks given were stocks in the same corporations, of the same amount, as those held in trust, and that in five corporations; and that in one of the banks the testator had no stock in his own name, except that held in trust, and thence to argue that the testator intended to restore to his wife all the specific property in trust and no more. But it is of no force against the expressed intention of the testator that the gifts were for another purpose." The fact that the debt was a trust debt was not regarded as affecting the result.

A statement in the will that a legacy to the testator's wife is in lieu "of all dower or other interest in my property and estate" has been held not to show an intention by the testator to cancel a debt owed by him to his wife arising from the management of her separate estate. Adams v. Olin, 61 Hun, 318, 16 N. Y. Supp. 132, for later appeal, not, however, discussing the point of presumptive satisfaction, see 140 N. Y. 150, 35 N. E. 448.

But in Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534, a statement in a will that a legacy to the testator's wife should be in lieu and bar of her right of dower, "or any other claim that she may have against my estate," was held to show an intention by the testator to cancel by the legacy a debt which he owed her for money received from her separate estate.

A legacy of £100 a year from a husband to a wife, which was stated in the will to be a provision for her "in full satisfaction of all her dower, freebench, and thirds" upon his property, and "as an addition to her own property," was held in Glover v.

a satisfaction of a debt is thus stated by Story in his Equity Jurisprudence, vol. 2, § 1122: "But although the rule as to a legacy being an ademption of a debt is now well established in equity, yet it is deemed to have so little of a solid foundation, either in general reasoning or as a just interpretation of the intention of the testator, that slight circumstances have been laid hold of to escape from it, and to create exceptions to it." After stating a number of exceptions, this learned writer proceeds to say: "On the other hand, where a creditor leaves a legacy to his debtor, and either takes no notice of the debt, or leaves his intention doubtful, courts of equity will not deem the legacy as either necessarily or prima facie evidence of an intention to release or extinguish the debt; but they will require some evidence, either on the face of the will, or *aliunde*, to establish such an intention."

In Pomeroy's Equity Jurisprudence, 3d ed. vol. 2, §§ 527, 528, in speaking of this subject, the author says: "This general rule, being based upon artificial reasoning, has been distinctly condemned by able judges. It is not favored by courts of equity; on the contrary, they lean strongly against the presumption, will apply it only in cases which fall exactly within the rule, and will never enlarge its operation. In consequence of this strong leaning against the presumption, it is well settled that courts of equity will take hold of very slight circumstances connected with any particular case, and will regard them as sufficient to remove the case

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Hartcup, 34 Beav. 74, not to be a satisfaction of a covenant in his marriage settlement to pay her, if she survived him, £100 a year during her life.

So, a bequest by a testator to his wife of the income from certain property during her natural life, followed by the words, "The foregoing provisions for my wife are in lieu of her dower in my real estate or of any other right which by law she may be entitled to in my estate, real or personal," was held not to cancel a mortgage given by the testator to the legatee before their marriage. The provision was construed as including only such rights in his property as were given to her by law as his widow, and not to include debts due from him to her. Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. 342.

And a legacy of the same amount as a claim against the testatrix by the legatee was held in Re Cole, 85 Misc. 630, 148 N. Y. Supp. 1099, not to be a satisfaction of the debt where the will recited that the legacy should be received in lieu of any dower or exemptions that the legatee might be entitled to in the personal property of the testatrix.

In Vandevort v. Vandevort, 17 N. Y. S. R. 507, 1 N. Y. Supp. 736, where the testator, after reciting in the will that he was indebted to his wife in the sum of $1,700, bequeathed to her $5,000, "which sum I desire her to accept and receive in payment of my indebtedness to her, and I further will and direct that said sum of $5,000 shall be received by my said wife in lieu of dower in my real estate; but I attach no conditions whatever to the other provisions in her favor in this clause contained. Should she accept said sum of $5,000 in payment of my indebtedness and in lieu of dower, as above provided," the legacy should be paid before other bequests; it was held that the wife could not accept the bequest in lieu of dower only, but that if it was accepted, the indebtedness mentioned in the will was canceled.

Where the testator declares that a legacy to a creditor is to be accepted in lieu of all claims by the legatee against him, the intention of the testator must govern, and if the legatee accepts the legacy he must renounce the debt. Re Morey, 16 N. Y. S. R. 776, 1 N. Y. Supp. 687.

A legacy of $5,000 to a theological seminary, for the expressed purpose of educating needy students, was held in Thum's Estate, 5 Pa. Dist. R. 739, not to be intended as a satisfaction of a subscription of $5,000 by the testator to the seminary for the endowment of a certain professorship therein.

In Newel v. Keith, 11 Vt. 214, it was held that a claim for services rendered the testator was not presumptively satisfied by a legacy to the claimant which was stated to be as "a token of friendship."

Where the will stated that a legacy was given in consideration of the long and faithful services of the legatee in the testator's family, it was held that it would not be presumed that a bond given by the testator to the legatee for payment of a certain sum on her marriage or within six months after the testator's death was satisfied. Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81. It could not be presumed, it was said, that the bond was given for the same services.

And a statement in the will that "in making this will I consider I am doing my duty and trying to repay those who have been good and kind to me during my long and tedious illness" was held in Re Arnton, 106 App. Div. 326, 94 N. Y. Supp. 471, to rebut the presumption that a legacy of a greater amount than a debt due the legatee was intended to cancel the debt.

It has been said that the rule as to satisfaction of a debt by a legacy should not be made to answer a double purpose; so that where the testator, who was indebted to his son in the sum of £50 per annum, bequeathed to the latter £700 per annum on certain conditions, among which was that the son should settle the family estate so as to secure payment of £100 annually to a third party for life, it was held that the debt was not satisfied by the legacy. Mathews v. Mathews, 2 Ves. Sr. 635.

However, in Mathews v. Mathews, supra,

from the operation of the general rule, and to prevent the presumption of a satisfaction from arising." This general statement is followed in succeeding sections by a number of exceptions to the rule that have been universally adopted. Among the instances in which it will be presumed that the bequest was not intended as a satisfaction of a debt are those in which the legacy is payable at a different time from the debt. For example, as where the debt is payable at the testator's death, and the legacy is payable at a specified time thereafter. Another instance is when the legacy is contingent. And yet another where the legacy is given for a different interest, or is of a different nature from the debt.

In 40 Cyc. p. 1885, abundant authorities are cited showing the disfavor with which the rule is regarded and the disinclination of the courts to enforce it.

In the leading Kentucky Case of Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397, Mrs. Cloud, who had resided with and rendered services for Clinkinbeard, sought, after his death, to recover the value of the services so rendered. As a defense to this claim the executors showed that Clinkinbeard in his will had given to Mrs. Cloud $500, payable in twelve months after his will should be recorded, and also all of his household furniture. In holding that the indebtedness of Mrs. Cloud was not satisfied by these bequests, the court said: "But the rule is not allowed to prevail where the legacy is of less amount than the

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the debt was held satisfied by the legacy, where by a subsequent deed the testator rendered the conditions expressed in the will of no effect because impossible of performance.

In Richardson v. Greese, 3 Atk. 65, it was held that a bond debt to a servant for £260 was not satisfied by a legacy from the debtor to the servant of £500, where in another part of the will the testator gave £5 each to the rest of his servants and expressly stated that he did not give £5 to the one in question because he had done very well for her before; the court saying that the latter expression seemed to be a declaration that what the testator had given her before was intended as a bounty merely, and not as a satisfaction.

Where the testator bequeathed a certain sum in full satisfaction of all money he owed the legatee, and subjected his real estate to the payment of his debts, but the debt to the legatee was in reality a larger sum and was barred by the statute of limitations, it was held in Gofton v. Mill, 2 Vern. 141, Prec. in Ch. 9, that the court would suppose the testator was mistaken in his computation as to the amount of the debt, and that the whole amount thereof should be paid and the sum bequeathed should go only in part payment.

2. Express declaration as to one of several legacies or devises.

The fact that the testator declared that a devise to his wife was intended to be in satisfaction of every claim for dower was regarded in Eaton v. Benton, 2 Hill, 576, as evidence that another devise to a creditor unconditionally was not intended as a satisfaction of his debt.

And in Atkinson v. Webb, Prec. in Ch. 236, 2 Vern. 478, the fact that the testator expressly stated in the will that certain legacies were in satisfaction of obligations for like amounts which he owed to the legatees was regarded as tending to show that another legacy, as to which there was no express declaration of intention, was not given in satisfaction of a debt to the legatee. To a similar effect, see Jeacock v. Falkener, 1 Bro. Ch. 295, and Hales v. Darell, 3 Beav. 324, 10 L. J. Ch. N. S. 10.

So, in Edelen v. Dent, 2 Gill. & J. 185, as evidence that the testator did not intend that a legacy to his sister, a creditor, should operate as a satisfaction of the debt, the court called attention to the fact that in making other bequests the testator had expressly released the debts due by the legatees to him, which, it was said, tended to show his general intention that the different legacies should be enjoyed as clear bounty by those to whom they were given, unaffected by any debts owing to or by him or them.

Where the testator bequeathed to one servant a certain amount over and above all he owed him for wages, and followed the bequest immediately by a bequest to another servant of a stated amount, it was held in Wallace v. Pomfret, 11 Ves. Jr. 543, 8 Revised Rep. 241, that the latter bequest would be presumed to be in satisfaction of a claim of the legatee for wages.

c. Direction for payment of debts.

One of the well-established exceptions to the general rule of presumption of satisfaction of a debt by a legacy to the creditor equal to or larger in amount than the debt is found in the direction in the will for payment of debts or for payment of debts and legacies. Where there is such a direction, the general rule of satisfaction of a debt by a legacy to the creditor does not apply, the provision for payment of debts being regarded as including the debt to the legatee. Fetrow v. Krause, 61 Ill. App. 238; Mitchell v. Vest, 157 Iowa, 336, 136 N. W. 1054; Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742; Wade v. Dean, 19 Ky. L. Rep. 1426, 43 S. W. 441; Smith v. Park, 27 Ky. L. Rep. 12, 84 S. W. 304, rehearing denied in 27 Ky. L. Rep. 351, 84 S. W. 1167; Edelen v. Dent, 2 Gill & J. 185; Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Gilliam v. Brown, 43 Miss. 641; Van Riper v. Van Riper, 2 N. J. Eq.

debt, even as a satisfaction *pro tanto;* nor where there is a difference in the times of payment of the debt and of the legacy; nor where they are of a different nature as to the subject-matter; nor where there is an express direction in the will for the payment of debts. . . . The legacy of the household furniture to the plaintiff, Mrs. Cloud, being a legacy of specific chattels, and the plaintiff's demand being for money, and its amount unliquidated, the debt and the legacy are of a different nature, and the presumption of satisfaction does not arise, this legacy not being embraced by the rule which allows a legacy to operate as a satisfaction of a debt. . . . Neither is the other legacy of $500 embraced by this rule. It is payable twelve months after the testator's will should be recorded. The plaintiff's demand, if Mrs. Cloud had a right to compensation for her services, was due when the testator died; indeed it was a debt that accrued yearly, if at all, whilst the services were being rendered. There being then a difference in the times of payment, no presumption of satisfaction arises."

In Van Riper v. Van Riper, 2 N. J. Eq. 1, Philip Van Riper had in his hands, as administrator, when he died, certain funds due to James and Philip Van Riper. Philip Van Riper in his will devised certain property to the beneficiaries of this fund, and when they brought suit to recover the fund, the executors of Philip Van Riper asserted that their claims were satisfied by the bequest. In holding that this defense was

1; Rogers v. Hand, 39 N. J. Eq. 270; Russell v. Minton, 42 N. J. Eq. 123, 7 Atl. 342; Heisler v. Sharp, 44 N. J. Eq. 167, 14 Atl. 624; Deichman v. Arndt, 49 N. J. Eq. 106, 22 Atl. 799; Fort v. Gooding, 9 Barb. 371; Eaton v. Benton, 2 Hill, 576; Boughton v. Flint, 74 N. Y. 476; Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555; Re Cole, 85 Misc. 630, 148 N. Y. Supp. 1099 (legacy and claim of creditor for exactly same amount); Re Dailey, 43 Misc. 552, 89 N. Y. Supp. 538; Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488; Bowen v. Bowen, 34 Ohio St. 164; McLean v. Miller, 5 Ohio N. P. (N.S.) 68, 17 Ohio S. & C. P. Dec. 628; Gibbons v. Woodward, 3 Walk. (Pa.) 303 (see, however, Wesco's Appeal, 52 Pa. 195, where, without discussion of this point, the general rule was applied, although the will contained a provision for payment of debts); Harris v. Rhode Island Hospital Trust Co. 10 R. I. 313; Owens v. Simpson, 5 Rich. Eq. 405; Richardson v. Greese, 3 Atk. 65; Jefferies v. Mitchell, 20 Beav. 15; Cole v. Willard, 25 Beav. 568, 4 Jur. N. S. 988, 6 Week. Rep. 712; Pinchin v. Simms, 30 Beav. 119; Charlton v. West, 30 Beav. 124; Glover v. Hartcup, 34 Beav. 74; Horlock v. Wiggins, L. R. 39 Ch. Div. 142, 58 L. J. Ch. N. S. 46, 59 L. T. N. S. 710; Rowe v. Rowe, 2 De G. & S. 294, 17 L. J. Ch. N. S. 357, 12 Jur. 909; Field v. Mostin, 2 Dick. 543; Wood v. Wood, 7 Beav. 183 (possibly one ground of the decision, the reasons for which are not stated); Hassell v. Hawkins, 4 Drew. 468; Re Huish. L. R. 43 Ch. Div. 260, 59 L. J. Ch. N. S. 135, 62 L. T. N. S. 52, 38 Week. Rep. 199; Hales v. Darell, 3 Beav. 324, 10 L. J. Ch. N. S. 10; Adams v. Lavender, M'Clel. & Y. 41; Chancey's Case, 1 P. Wms. 408, 10 Mod. 399 (express direction in will that all debts and legacies should be paid held to take the case out of the general rule of presumption, although the legacy to a servant of £500 was stated to be given for her long and faithful services, and the debt of £100, represented by a bond, was also for services); see also Cole v. Cole, 5 U. C. Q. B. O. S. 744; Devese v. Pontet, 1 Cox, Ch. Cas. 188, 1 Revised Rep. 15, and Re Sutherland, L.R.A.1915B. 84 L. J. Ch. N. S. 126, which recognized this exception.

It should be noted that in many, if not most, of the above cases, there were also additional grounds for regarding the debt as not satisfied by the legacy.

The exception to the general rule, where there is a direction in the will for the payment of debts, has been held, however, not necessarily to apply where the direction is to pay "all my just debts, if any I have." Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534.

In Ward v. Coffield, 16 N. C. (1 Dev. Eq.) 108, a provision in a will which was made in North Carolina, that the executors should sell such of the property in that state as was necessary to pay the testator's debts therein, was regarded as strengthening the presumption that a devise to the testator's son of real and personal property in Tennessee, of much greater value than a debt owing from the testator to the son, was intended as a satisfaction of the debt, the court saying that the provision for the payment of debts in North Carolina, and not for payment of the only debt the testator owed out of that state, namely that to his son, was probably due to the belief that he was paying the son's debt by the legacy.

It was held in Edmunds v. Low, 3 Kay & J. 318, 3 Jur. N. S. 508, 26 L. J. Ch. N. S. 432, 5 Week. Rep. 444, that while a direction to pay debts and legacies would rebut the presumption of satisfaction of a debt by a legacy to the creditor greater in amount, a mere direction to pay debts would not have that effect.

But in Re Huish, L. R. 43 Ch. Div. 260, the rule laid down in Edmunds v. Low, supra, was disapproved, and the law declared to be that a direction only for payment of debts, without a direction for payment of debts and legacies, was sufficient to rebut the presumption of satisfaction of a debt by a legacy to the creditor greater in amount than the debt. It was said: "Now, what difference is there between a direction to pay debts and legacies and a direction to pay debts only? There is none,

not available, the court said: "In the first place, the testator in express words directs his executors to pay all his just debts. In the second place, in the devise to the complainants of the lands, the will directs the division to be made between them when Philip should arrive at age, when he was to take possession of his share; and in like manner with James, when he should arrive at age; and in the meantime the executors to receive the rents, and out of his estate generally to give them a good common education and trades. The $500 was not to be paid to them till they severally arrived at age. All the cases agree that a present debt can never be satisfied by a contingent legacy. Nor can there be any reasonable presumption that this testator ever intended to pay a demand due at the time, by legacies to be payable at a future day. The debt may also be considered in this case in a measure as unliquidated; he had never settled his accounts as administrator. They are all open to this day, and it seems from the answer of these defendants that they have considerable difficulty in ascertaining how much the balance due is. This case is, in my judgment, made stronger from the fact that the debt due by the testator was not in his own personal right, but as the representative of another man's estate. From all these circumstances, it would be going too far, and pressing the rule beyond its proper limits, to consider the provisions made in this will in the light of a satisfaction to the complainants."

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because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore, all that is material is that there should be a direction that debts should be paid. If, after giving a legacy to his creditor, a testator says, 'I direct my debts to be paid,' that means, 'Although I have given a legacy to my creditor, I direct that my debt to him be paid also.' It seems to me to make no difference whether the testator directs that his legacies, as well as his debts shall be paid. . . . It is not necessary in a will to give any direction to pay debts at all. If such a direction is inserted, it may be assumed to be there for some purpose. It is very likely, if the testatrix knew anything about the law, as I am bound to presume that she did, that she desired in this way to prevent the suggestion of the satisfaction of the debt which she owed by the legacy." And it was said that the same judge who decided the Edmunds Case in a later decision (Dawson v. Dawson, L. R. 4 Eq. 504) seemed to have come to the conclusion that a direction to pay debts only was sufficient to rebut the presumption of satisfaction.

And in Cole v. Willard, 25 Beav. 568, it was said that a charge of debts, whether standing alone or accompanied by a charge of legacies, was of equal force on the question of rebutting the presumption of satisfaction, there being in this case a direction only for payment of debts.

In Bowen v. Bowen, 34 Ohio St. 164, the court said: "All the cases, I believe, agree that a direction to pay debts and legacies will suffice to prevent a satisfaction; while others, perhaps more numerous, hold that a direction to pay debts alone will have that effect. . . . But this case is stronger, for here the direction is that all my just debts of every kind be first paid. . . . But we need not turn the case on this point alone, as all the authorities agree that a simple direction to pay debts is an ingredient to be considered with other circumstances in determining the intention of the testator."

The cases in general in this country have made no distinction between a direction in the will for payment of debts and a direction for payment of debts and legacies, so far as affects the question here considered, the usual provision in the cases cited above being only for payment of debts. And in Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488, the rule was laid down that to rebut the presumption that the legacy to a creditor was intended as a satisfaction of the debt, it is not necessary that the direction be for the payment of debts and legacies, it being sufficient if it be for payment of debts.

In Wathen v. Smith, 4 Madd. Ch. 325, 20 Revised Rep. 302, it was held that an obligation by the husband under a marriage settlement to pay £1,000 within a certain time after his death for the benefit of his wife was not a debt, so as to bring the case within the exception that a direction for payment of debts negatives the presumption of satisfaction of a debt by a legacy to the creditor. In this case, although the will contained a direction for payment of the testator's just debts and the legacies given by the will, it was held that the obligation under the marriage settlement was satisfied by a legacy to the wife of £1,000.

The decision in the above case is not, however, in accord with the other English cases generally under this subdivision, which for the most part assume that an obligation by the husband under a marriage settlement to pay money for the use of the wife is a debt so far as concerns the doctrine of satisfaction of debts by legacies. And in Cole v. Willard, supra, the view taken in Wathen v. Smith, supra, was expressly disapproved; and it was held in the later case that an obligation of the husband to pay money to the wife under a marriage settlement was not satisfied by a legacy to the wife where there was a direction in the will for a payment of debts.

Where a father made certain devises and bequests to a son on condition that he should pay one half of the father's debts, his brother to pay the other half, it was held in Smith v. Smith, 1 Allen, 129, that a debt from the testator to the son was not satisfied by the provisions of the will, but

Other cases illustrating the disposition of the courts not to treat a legacy as a satisfaction of the debt, unless all the facts and circumstances clearly show that such was the intention of the testator are: Strong v. Williams, 12 Mass. 390, 7 Am. Dec. 81; Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555; Gilliam v. Chancellor, 43 Miss. 437, 5 Am. Rep. 498; Glover v. Patten, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742; Mulheran v. Gillespie, 12 Wend. 349.

Applying to the facts of this case the principles of law announced in the authorities cited, we think the bequests to these children should not be treated as a satisfaction of the indebtedness of the testatrix to them as guardian. The facts of the case bring it well within three recognized exceptions to the rule: First. The debt due by Mrs. Buckner was a debt due by her as trustee, and not individually, and this made it a preferred debt against her estate, as provided in § 3868 of the Kentucky Statutes. It was not in the category of ordinary debts, and was of a different nature from the bequests. Second. The debt due by her as guardian does not appear to have been fixed by any settlement made by her, and was in a sense unliquidated, and it was due immediately upon her death, while the property devised was by the terms of the will placed in the custody of the Fidelity Trust Company, with directions to take charge of and retain it until these children became of age. Third. The debt due by Mrs. Buckner was due directly to these children. It did not depend on any contingency or the happening of any event, while the bequest to them only invested them with a defeasible fee in the principal part of the property, as the will provided that if either of them died without issue, the estate so bequeathed should be divided equally among her other children.

For the reasons indicated, the judgment is affirmed.

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that the brother was liable for half of the debt, he having received other property under the will.

In Re Watson, 5 Ont. Week. Rep. 354, it was said that the absence of any direction in the will to pay debts and legacies furnished an argument in favor of the contention that a legacy to the testator's sister was intended as a satisfaction of a claim against him by her for a smaller amount.

d. Unliquidated indebtedness.

It is also well established that where the debt is unliquidated, or is owing on an open or running account between the parties, a legacy by the debtor to the creditor will not be deemed a satisfaction of the debt. FIDELITY TRUST CO. v. MARTIN; Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397; Addison v. Bowie, 2 Bland, Ch. 606; Gilliam v. Brown, 43 Miss. 641; Dahmann v. Schreiner, 4 Mo. App. 588 (holding that a legacy to a nephew of $1,000 would not be presumed to be a satisfaction of a debt on an open account from the testatrix to the nephew, although larger than legacies to other nephews); Van Riper v. Van Riper, 2 N. J. Eq. 1; Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534 (*obiter*); Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555; Re Sherman, 24 Misc. 65, 53 N. Y. Supp. 376; Horner v. McGaughy, 62 Pa. 189; Glover v. Patten, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411 (at least where the bequest to the testatrix' children, to whom she was indebted, is general, as a share of her property, and it appears that she considered the debt to one of the children unsatisfied, and, by giving effect to the presumption of satisfaction, one of the children of the testatrix would be preferred to the others); Le Sage v. Coussmaker, 1 Esp. L.R.A.1915B. 187; Rawlins v. Powel, 1 P. Wms. 297; Buckley v. Buckley, Ir. L. R. 19 Eq. 544 (legacy of £250 to testator's son held not a satisfaction of a debt of £92 owed the son at the time of the testator's death on a running account between the parties, the court saying that the reason was the testator could not be presumed to know how the account would stand at his death, and therefore could not be deemed to have intended the legacy in satisfaction of it).

In Rawlins v. Powel, 1 P. Wms. 297, where it was contended that the debt was on an open and running account between the parties, the court said that if this were true the testator could not intend the legacy as a satisfaction of a debt which he did not know that he owed.

"It would be as unreasonable a presumption that a debt was satisfied [by a legacy to the creditor] the amount of which was not known, as it would be to apply the principle to a case where the existence of it altogether was unknown." Horner v. McGaughy, 62 Pa. 189.

And in Williams v. Crary, 5 Cow. 368, it was said that the rule that a legacy given by a debtor to a creditor equal to or greater than the debt should be considered as a satisfaction thereof had never been applied to the case of a debt on an open and unliquidated account; because the testator, in such a case, is not supposed to know how the balance stands, and whether the legatee is his creditor or not.

In Edmunds v. Low, 3 Kay & J. 318, 3 Jur. N. S. 508, 26 L. J. Ch. N. S. 432, 5 Week. Rep. 444, it was held that while a debt upon an open and running account by which the testator might become the creditor might not be satisfied by a legacy, as the testator might not know whether he owed money or not, and could not therefore intend the legacy to be in satisfaction of a

debt, this principle did not apply in the case of a legacy to a daughter who had deposited money with her father, receiving back from him, from time to time, sums on account of the money deposited, since in this course of dealing it could not happen that anything would become due from the daughter to the father.

e. Indebtedness contracted after making of will.

The following cases support the proposition that a legacy is not to be deemed a satisfaction of an indebtedness contracted with the legatee after the making of the will: Addison v. Bowie, 2 Bland, Ch. 606; Rogers v. Hand, 39 N. J. Eq. 270; Heisler v. Sharp, 44 N. J. Eq. 167, 14 Atl. 624; Adams v. Olin, 61 Hun, 318, 16 N. Y. Supp. 132; Re Enos, 61 Misc. 594, 115 N. Y. Supp. 863; Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488 (*obiter*); Benkert's Estate, 18 Pa. Co. Ct. 603; Re Walter, 24 Pittsb. L. J. 49, cited in 49 Century Dig. 2629 (legatee who had obtained judgment for services rendered after the execution of the will held entitled to the legacy in addition to the judgment, although the legacy was given "in full compensation due her [the legatee] from me for labor and services rendered while living in my family"); Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701; Crouch v. Davis, 23 Gratt. 62; Le Sage v. Coussmaker, 1 Esp. 187; Rawlins v. Powel, 1 P. Wms. 297; Thomas v. Bennet, 2 P. Wms. 341; Fowler v. Fowler, 3 P. Wms. 353; Cranmer's Case, 2 Salk. 508.

f. Legacy less beneficial than debt — in general.

It is also well settled that unless the legacy to the creditor is at least as beneficial as the debt, it will not be deemed a satisfaction thereof. Mitchell v. Vest, 157 Iowa, 336, 136 N. W. 1054; Smith v. Park, 27 Ky. L. Rep. 12, 84 S. W. 304, rehearing denied in 27 Ky. L. Rep. 351, 84 S. W. 1167 (legacy in trust to be paid to creditor as he needed it); Rogers v. Hand, 39 N. J. Eq. 270 (legacy of interest on $8,000 for life held not a satisfaction of a claim by the legatee for services to the amount of $3,000); Fort v. Gooding, 9 Barb. 371 (legacy less beneficial than debt as to time of payment and amount, only the interest on a sum less than the debt being bequeathed).

A debt owed by the testator to his mother of a certain sum annually was held in Cole v. Cole, 5 U. C. Q. B. O. S. 744, not to be satisfied by a devise of land to a third party on the express condition that he should pay a like sum annually to her during her life, as the legacy was payable only out of the land, and not the personal estate, and therefore was not as beneficial as the debt.

And the fact that the testator's obligation is a first charge on his estate, while the legacy to the creditor is subject to prior charges, tends to negative any presumption of satisfaction of the debt by the legacy. Hales v. Darell, 3 Beav. 324.

Because less advantageous, a legacy of £20 per annum payable half yearly and chargeable on land, was held in Atkinson v. Webb, Prec. in Ch. 236, 2 Vern. 478, not to be a satisfaction of a bond given by the testator to the legatee for payment of £20 per annum during the latter's life, payable quarterly free from all deductions. Being payable out of land, it was said the legacy would be liable to taxes.

That an annuity will not be deemed a satisfaction of a debt for a specific sum, see Stanway v. Styles, 2 Eq. Cas. Abr. 355, ¶ 2.

See also Waters v. Howard (devise in trust) and Perry v. Perry, under VII. a, supra; also cases under VII. g, infra, and VII. k, infra.

g. Legacy smaller in amount than debt.

1. Generally.

The following cases also those under the next subdivision support the proposition that where the legacy is smaller in amount than the debt, it will not be deemed a satisfaction thereof: Mitchell v. Vest, 157 Iowa, 336, 136 N. W. 1054; Tompson v. Wilson, 82 Ill. App. 29; Morton v. Dougherty, 4 Ky. L. Rep. 983 (abstract); Smith v. Park, 27 Ky. L. Rep. 12, 84 S. W. 304, rehearing denied in 27 Ky. L. Rep. 351, 84 S. W. 1167; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742; Owings v. Owings, 1 Harr. & G. 484; Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Parker v. Coburn, 10 Allen, 82; Rogers v. Hand, 39 N. J. Eq. 270; Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534 (*obiter*); Re Sherman, 24 Miss. 65, 53 N. Y. Supp. 376; Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555; Kendrick's Estate, 3 Pa. Dist. R. 402; Schoenberg's Estate, 17 Pa. Co. Ct. 488 (legacy of $3,000 not a satisfaction of a debt from testator to legatee of same amount plus accrued interest); Egan's Estate, 30 Pittsb. L. J. N. S. 261; Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641; Owens v. Simpson, 5 Rich. Eq. 405; Newel v. Keith, 11 Vt. 214; Graham v. Graham, 1 Ves. Sr. 262; Stanway v. Styles, 2 Eq. Cas. Abr. 355, ¶ 2; Roberts v. Parry, 50 Week. Rep. 469 (legacy of £80 not satisfaction of note for same amount which bore interest, where legacy was not payable until four years after testator's death and did not bear interest).

2. Pro tanto satisfaction.

If the legacy to the creditor is smaller in amount than the debt, it will not be presumed that the testator intended the legacy to satisfy the debt *pro tanto*. Fetrow v. Krause, 61 Ill. App. 238; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742; Parker v. Coburn, 10 Allen, 82; Gilliam v. Brown, 43 Miss. 641; Harris v. Rhode Island Hospital Trust Co. 10 R. I. 313; Minuel v. Sarazine, Mosely, 295; Eastwood v. Vinke, 2 P. Wms. 613 (at least if there is no insufficiency of as-

sets to pay legacies and debts); Gee v. Liddell, 35 Beav. 621; Cantle v. Morris, cited in note to 1 Bro. Ch. 133; Coates v. Coates [1898] 1 I. R. 258 (legacy of 12 s. a week to testator's wife held not a *pro tanto* satisfaction of a covenant in a separation deed for payment to her during her life of 15 s. a week, even though another legacy to her of the use for life of a house and furniture amounted to more in value than the deficiency); Cole v. Cole, 5 U. C. Q. B. O. S. 744 (this exception, among others, being said to be fully established.

Where, however, it appeared from a writing in evidence that the testatrix intended a legacy to a creditor as part payment of the debt, and that that intention had been communicated to the creditor, and not objected to by him, it was held that the legacy should be a satisfaction *pro tanto*. Hammond v. Smith, 33 Beav. 452, 10 Jur. N. S. 117, 9 L. T. N. S. 746, 12 Week. Rep. 328.

See also Eastwood v. Vinke, under IV. supra, and Broughton v. Errington, under VII. m, infra.

h. Contingent legacy or debt.

The following cases support the proposition that a contingent legacy to a creditor will not be presumed to be intended as a satisfaction of a certain debt; Van Riper v. Van Riper, 2 N. J. Eq. 1 (the court saying that all the cases agree that a present debt can never be satisfied by a contingent legacy); Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488 (legacy of notes "that may be remaining" after payment of other legacies); Dey v. Williams, 22 N. C. (2 Dev. & B. Eq.) 66 (legacy of share of general residuary estate); Gibbons v. Woodward, 3 Walk. (Pa.) 303 (residuary legacy); Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641 (residuary legacy); Stewart v. Conrad, 100 Va. 128, 40 S. E. 624 (residuary legacy); Nicholls v. Judson, 2 Atk. 300 (legacies charged on land and payable within one and two years after testator's death held not satisfaction of debt to legatee, because the trustees, being directed to pay the legacies within a certain time, were not obliged to do so sooner, and if the legatee had died before the time of payment, the legacies would have sunk in the land); Pullen v. Cresy, 3 Anstr. 830 (legacy payable only on condition of legatee's arrival at twenty-one years of age); Devese v. Pontet, 1 Cox, Ch. Cas. 188, 1 Revised Rep. 15 (legacy of moiety of unliquidated residue after payment of debts not a satisfaction of debt to the legatee, even though the legacy should finally prove greater in value than the debt); Sandford v. Irby, 4 L. J. Ch. 23 (legacy which was, at time of testator's death, uncertain as to whether it would ever vest held not a satisfaction of debt then due); Mathews v. Mathews, 2 Ves. Sr. 636 (legacy upon legatee's becoming twenty-five years of age or upon marriage held not a satisfaction of an obligation from the testator to the legatee, the legacy being twenty times greater than the debt); Talbott v. Shrewsbury, Prec. in Ch. 394, Gilb. Eq. Rep. 89; Crompton v. Sale, 2 P. Wms. 553 (legacy of annuity of £5, contingent on legatee's survival of her mother, not satisfaction of absolute obligation to pay legatee annuity of £5); Cranmer's Case, 2 Salk. 508 (*obiter*); Re Keogh, Ir. L. R. 23 Eq. 257 (residuary legacy); Barret v. Beckford, 1 Ves. Sr. 519 (annuity of £300 not satisfied by a moiety for life of the residue of the testator's personal estate); Cole v. Cole, 5 U. C. Q. B. O. S. 744 (the court saying that this exception, among others, was fully established.)

"But there are exceptions to the rule [as to presumption of satisfaction by a legacy to a creditor equal to or greater than the debt] as well established as the rule itself. One of these exceptions is that the presumption of satisfaction does not arise where the legacy is contingent, as it is in the case of residuary legatees, for it may possibly turn out that, after all the claims against the testator's estate are satisfied, the bequest of the whole, or part, of his residuary estate, may not be equal to the amount of the legatee's debt." Stewart v. Conrad, 100 Va. 128, 40 S. E. 624.

Although the contingency on which a legacy to a creditor is given happens, and the legacy thereby becomes due, the legacy nevertheless is not a satisfaction of the debt, "because a debt which is certain shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not." Talbott v. Shrewsbury, Prec. in Ch. 394. To the same effect is Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641.

The rule that a legacy to a creditor, to be paid out of the residue of the estate, is not a satisfaction of the debt, because it is contingent and uncertain, depending on the amount of the debts and the estate, is not affected by the fact that there is no contest in regard to the sufficiency of the assets of the estate to pay the debts and the legacy. Gibbons v. Woodward, 3 Walk. (Pa.) 303.

Where the debt is contingent, the testator being administrator of an estate and his liability to the distributees on settlement not being determined when the will was made, a legacy to them will not be deemed a satisfaction of the contingent indebtedness. Perry v. Maxwell 17 N. C. (2 Dev. Eq.) 488.

i. Indebtedness based on negotiable instrument.

Where the indebtedness is based on a negotiable instrument, it has been held that a legacy to the creditor is not a satisfaction of the debt, since it is uncertain to whom the debt may be owing at the time of the testator's death. Addison v. Bowie, 2 Bland, Ch. 606; Schoenberg's Estate, 17 Pa. Co. Ct. 488; Carr v. Eastabrooke, 3 Ves. Jr. 561; Roberts v. Parry, 50 Week. Rep. 469.

However, in Adams v. Adams, 55 N. J. Eq. 42, 35 Atl. 827, the rule that a legacy to a creditor equal to or greater in amount than the debt is to be deemed a satisfaction thereof was applied to a case where a note was given for the debt, the court saying that there were no expressions in the will to prevent the application of the general rule, and not considering the exception herein indicated.

j. Trust debts.

Where the debt is owed by the testator in a trust or representative capacity, it has been held that a legacy to the creditor should not be deemed a satisfaction of the debt. Fetrow v. Krause, 61 Ill. App. 238 (debt owing by the testator as the executor of the estate of the legatee's father); Tompson v. Wilson, 82 Ill. App. 29 (debt owed by a testator as guardian of legatee); FIDELITY TRUST CO. v. MARTIN; Van Riper v. Van Riper, 2 N. J. Eq. 1 (debt due as administrator, the court, in holding there was no satisfaction, saying that this made the case stronger, there being additional grounds for the decision); Taylor v. Taylor, 4 Jur. N. S. 1218 (debt of husband as trustee of wife's separate property not satisfied by legacy to her of a larger amount); Gee v. Liddell, 35 Beav. 621; Stocken v. Stocken, 4 Sim. 152, 2 Myl. & K. 489, 4 L. J. Ch. N. S. 278 (where the testator owed a debt as executor, the point being dismissed, however, with the mere statement that the benefits given by the will were not to be considered as a satisfaction).

The fact that the debt was a trust debt also, perhaps, was one of the reasons for holding against the presumption of satisfaction thereof by a legacy to the creditor in the following cases, this point, however, not being discussed: Rowe v. Rowe, 2 De G. & S. 294, 17 L. J. Ch. N. S. 357, 12 Jur. 909; Lee v. Browne, 4 Ves. Jr. 362, 4 Revised Rep. 208; and Crompton v. Sale, 2 P. Wms. 553.

But in Pitts v. Van Orden, — Tex. Civ. App. —, 158 S. W. 1043, the court refused to follow the exception to the general rule in the case of a trust debt, saying it found no reason why a distinction dependent on the character of the debt due should be made; that the question in every case was as to the intention of the testator; and if the debt was one he could satisfy by a payment directly to the legatee, it saw no reason why the presumption of satisfaction of a debt by a legacy to the creditor should not be indulged without reference to whether the debt was one for trust funds or not. On rehearing, however, it was held that in this case the facts were sufficient to indicate an intention by the testator not to satisfy the debt by the legacy.

And in Harris v. Rhode Island Hospital Trust Co. 10 R. I. 313, it was said that the rule of presumption of satisfaction of a debt by a legacy to the creditor equal to or greater in amount than the debt applied to moneys held in trust which the trustee was bound to pay over; but, although this case was treated as involving a trust debt, it was held on other grounds that the general rule did not apply.

It should be observed also that in several cases the rule of satisfaction of debts by a legacy to the creditor was applied, even though the debt it appears was owed in a representative or trust capacity, this point not being considered. Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534; Wesco's Appeal, 52 Pa. 195; Crouch v. Davis, 23 Gratt. 62.

See also Sheldon v. Sheldon, under II. supra, and Fairer v. Park and Re Clare, under VII. a, supra.

k. Difference in time of payment.

A difference in the time of payment of the debt and the legacy has been held to be evidence that the testator did not intend that the legacy should satisfy the debt, so as to take the case out of the general rule of presumption of satisfaction of a debt by a legacy to the creditor (the debt in these cases, unless otherwise indicated, being payable at or before the time of the testator's death). Fetrow v. Krause, 61 Ill. App. 238 (where the debt was not payable until the legatee became twenty-one years of age, and the legacy was payable on the death of the testator, which occurred several years before the legatee obtained majority); Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397 (legacy payable twelve months after recording of will; Edelen v. Dent, 2 Gill & J. 185 (legacy payable out of proceeds of sale of property of estate, which the will directed should be sold upon a credit of from six to eighteen months); Stone v. Pennock, 31 Mo. App. 544 (legacy of $2,000 payable after the death of testator's wife held not a satisfaction of debt for same amount payable upon his death); Van Riper v. Van Riper, 2 N. J. Eq. 1 (legacy payable when legatee became of age); Eaton v. Benton, 2 Hill, 576 (devise subject to life estate); Phillips v. McCombs, 53 N. Y. 494 (debt of $300 due at date of will, legacy of $300 payable two years after testator's death); Re Sherman, 24 Misc. 65, 53 N. Y. Supp. 376 (payment of legacy postponed until two years after testatrix' death); Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488 (legacy payable when legatee was twenty-one years old or was married); Dey v. Williams, 22 N. C. (2 Dev. & B. Eq.) 66 (legacy to take effect in possession after death of testator's wife) Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007 (devise to take effect after death of testator's wife); Horner v. McGaughy, 62 Pa. 189 (legacy payable within a year after testator's death) Egan's Estate, 30 Pittsb. L. J. N. S. 261 (legacy to take effect after death of creditor's mother); Pullen v. Cresy, 3 Anstr. 830 (legacy payable when legatee became twenty-one years of age); Nicholls v. Judson, 2 Atk. 300 (legacies payable within one and two years after testator's death);

Charlton v. West, 30 Beav. 124 (annuity of £100 which a testator on the marriage of his son covenanted to pay to his daughter-in-law, to begin on the death of the son, held not satisfied by a bequest to her of an annuity of the same amount to begin on the decease of the supervisor of himself, his widow, and the son); Haynes v. Mico, 1 Bro. Ch. 129 (legacy payable within six months after testator's death held not a satisfaction of a debt payable in a month after his death); Adams v. Lavender, M'Clel. & Y. 41 (legacy payable within six months after testator's death held not a satisfaction of debt payable in his lifetime or immediately after his death); Roberts v. Parry, 50 Week. Rep. 469 (legacy payable four years after testator's death); Hales v. Darell, 3 Beav. 324, 10 L. J. Ch. N. S. 10; Wood v. Wood, 7 Beav. 183 (the point not, however, being discussed). See also Lee v. Brown, 4 Ves. Jr. 362, 4 Revised Rep. 208, and Richardson v. Elphinstone, under VII. a, supra.

In the above cases the legacy was payable by the terms of the will at a different time than the debt. And the same rule has been applied even where no time of payment of the legacy is fixed by the will, and by law it is not therefore payable until a later date than the debt. Thus, in Dowse v. Glass, 50 L. J. Ch. N. S. 285, an obligation by a testator to pay an annuity of £10 on certain half-yearly dates was held not satisfied by a legacy to the annuitant of £10 a year, which by law, and not by direction in the will, was payable only at the end of a year after the testator's death.

Following Dowse v. Glass, supra, it was held in Re Horlock [1895] 1 Ch. 516, 64 L. J. Ch. N. S. 325, 72 L. T. N. S. 223, 43 Week. Rep. 410, 13 Reports, 356, that a legacy of £400 for which no time of payment was fixed by the will was not a satisfaction of a debt to the legatee of £300 payable in three months after the testator's death.

And in Re Watson, 5 Ont. Week. Rep. 354, the fact that a legacy to the testator's sister was not payable for a year after his death, no time of payment being named in the will, was held to take the case out of the general rule of presumptive satisfaction of a debt by a legacy to the creditor, so that a present claim by the legatee against the testator was not satisfied by the bequest.

But in Ray v. Grant [1906] 1 Ch. 667, 75 L. J. Ch. N. S. 304, 54 Week. Rep. 311, 94 L. T. N. S. 475, 24 Times L. R. 249, 4 Ann. Cas. 457, a legacy of £400 as to which no time of payment was fixed was held to be a satisfaction of a debt from the testatrix to the legatee payable on demand and contracted before the will was made. Apparently, therefore, the case of Dowse v. Glass, supra, is no longer an authority on the point here considered, unless it be in regard to the satisfaction of debts by annuities.

Although payment of the legacy is delayed only for an inconsiderable time, as where the will directs its payment in a month after the testator's death, it will not be deemed a satisfaction of a debt to the legatee due immediately on the testator's death. Clark v. Sewell, 3 Atk. 96.

In Mathews v. Mathews, 2 Ves. Sr. 635, the court recalled a case "where an old lady indebted to a servant for wages by will gave ten times as much as she owed, or was likely to owe; yet, because made payable in a month after her own death, so that the servant might not outlive the month, although great odds the other way, the court laid hold of that" to take the case out of the general rule as a satisfaction of a debt by a legacy.

A devise of land in fee to a creditor, subject to a life estate, was held in Eaton v. Benton, 2 Hill, 576, not to satisfy the debt, because even if the rule as to satisfaction of debts by a legacy applied in cases of this kind, the estate taken by the creditor in this instance was only one in expectancy. And the fact that the life estate was terminated by the death of the life tenant within one or two days after the decease of the testator was held not to affect the result.

Without consideration of the exception herein indicated, the court in Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534, held that a legacy to the testator's wife of $2,000, payable one year after his death, with interest, was a satisfaction of a debt from him to her for money received from her separate estate which was owing at the time the will was made, and also at the time of the husband's death.

l. Specific legacies.

The following cases support the proposition that a legacy of specific chattels will not be deemed a satisfaction of an obligation to pay money: Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397; Strong v. Williams, 12 Mass. 391, 7 Am. Dec. 81; Deichman v. Arndt, 49 N. J. Eq. 106, 22 Atl. 799 (legacy of personal property not satisfaction of bond debt); Perry v. Maxwell, 17 N. C. (2 Dev. Eq.) 488 (legacy of notes and slaves), Dey v. Williams, 22 N. C. (2 Dev. & B. Eq.) 66 (legacy of slave and household furniture not satisfaction of money debt, at least where there is no deficiency of assets to pay both debts and legacy); Stanway v. Styles, 2 Eq. Cas. Abr. 355, ¶ 2.

m. Devise of land.

A devise of land to a creditor will not be deemed a satisfaction of an obligation to pay money. Fetrow v. Krause, 61 Ill. App. 238; Lisle v. Tribble, 92 Ky. 304, 17 S. W. 742 (devise of land for life not satisfaction of indebtedness represented by note); Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534 (*obiter*); Deichman v. Arndt, 49 N. J. Eq. 106, 22 Atl. 799 (devise of land to be held in trust for the devisee until he was twenty-one years old held not a satisfaction of an obligation to pay bond debt, even though the bond was secured by mortgage on the land devised, on account of difference in

nature of devise and debt); Eaton v. Benton, 2 Hill, 576 (the court intimating that this was the rule, though not necessarily deciding the point); Baptist Female University v. Borden, 132 N. C. 476, 44 S. E. 47, 1007 (devise of land to a university to which the testator had subscribed a sum of money, the case possibly supporting this exception, though falling also within other exceptions); Re Hershey, 5 Lanc. Bar, Nov. 29, 1873, cited in 49 Century Dig. 2627; see also Zehender's Estate, 15 Phila. 566; Bryant v. Hunter, 3 Wash. C. C. 48, Fed. Cas. No. 2,068 (the court saying that the general rule is that a devise of land is not a satisfaction of an agreement to pay money, but holding that in this case there was by the devise a performance of a covenant in the testator's marriage settlement to convey to trustees real and personal property sufficient to secure the payment of a certain sum to the wife if she survived, or to bequeath to her such estate as should equal the intended provision; decision on this point affirmed in 2 Wheat. 32, 4 L. ed. 177, but reversed on other grounds); Garret v. Evers, Mosely, 364 (devise of mortgage as real estate, foreclosure proceedings being in progress); Cranmer's Case, 2 Salk 508 (*obiter*); Eastwood v. Vinke, 2 P. Wms. 613.

"It is well settled that a devise of land is not considered in law a satisfaction of a pecuniary debt." Owings v. Owings, 1 Harr. & G. 484.

A devise of land for life, with remainder to the surviving children of the devisee, was held in Re Dailey, 43 Misc. 552, 89 N. Y. Supp. 538, not to be a satisfaction of a claim by the devisee against the testator for services rendered while residing with, and as a part of, his family. The decision, however, seems based principally on other grounds than the difference in nature of the debt and the devise.

A devise of real estate for life has been held not to be satisfaction of a note of the testator held by the devisee. Graham's Estate, 4 Dauphin Co. Rep. 177.

In Broughton v. Errington, 7 Bro. P. C. 461, a devise of real and personal property was held not to be a satisfaction of an obligation by the testator under a marriage settlement to pay an annuity of £1,000 to the legatee, the grounds of the decision not being stated, but it being one of the contentions of the legatee that the provisions in the will were not of the same kind as the debt, and that a devise of land was not a satisfaction of an obligation to pay money.

n. Legacy to third party.

A legacy to a third party, and not to the creditor, will not be deemed a satisfaction of the debt. Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534 (*obiter*); Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555 (legacy to creditor's daughter); Mulheran v. Gillespie, 12 Wend. 349 (legacy to creditor's wife); Ladson v. Ward, 1 L.R.A.1915B. Desauss Eq. 314 (legacy to the children of a deceased son held not a satisfaction of a debt from testator to the son); Smith v. Smith, 3 Giff. 263, 31 L. J. Ch. N. S. 91, 7 Jur. N. S. 1140, 5 L. T. N. S. 302; Hall v. Hill, 4 Ir. Eq. Rep. 27, 1 Drury & War. 94. 1 Connor & L. 120 (legacy to daughter held not a satisfaction of bond debt to her husband, although the debt was created on her marriage and was in the nature of a portion for the daughter.

o. Miscellaneous.

Where a testator bequeathed to his son "$500, and no more," and was at the time indebted to him in a larger sum, it was held that the addition of the words "no more" did not show an intention to satisfy the debt by the legacy, but meant only that the son should not participate further in the father's bounty. Byrne v. Byrne, 3 Serg. & R. 54, 8 Am. Dec. 641.

Where the legacy in the husband's will covered only one of two contingent provisions in his marriage settlement, it was held that, although the contingency covered was the one which was afterward fulfilled, the legacy was not a satisfaction of the covenant in the settlement. Devese v. Pontet, 1 Cox, Ch. Cas. 188, 1 Revised Rep. 15. In this case the marriage settlement contained a covenant that the executor of the husband, within nine months after his death, in case the wife survived and there was no issue of the marriage, should pay her £800, and if she survived and there were children then living, the executor should pay to the trustee of the settlement £800, on trust to pay the interest to the wife for life and after her death to pay the principal to the children, and it was held that, although there was no issue of the marriage, a legacy to the wife by the husband of a greater amount than she would have received under the marriage settlement was not a satisfaction thereof, the covenant in the settlement not being satisfied *in toto*, because, if a child had been born after the making of the will, the second part of the covenant would not have been satisfied.

In Horlock v. Wiggins, L. R. 39 Ch. Div. 142, 58 L. J. Ch. N. S. 46, 59 L. T. N. S. 710, the fact that the separation deed and the will were executed at almost the same time, the will apparently being executed two days after the deed, was regarded as an important consideration in reaching the conclusion that the legacy was not intended as a satisfaction of the covenant in the deed. It was said that the presumption of satisfaction arises not on the will, but on the circumstances of the case, and the relative positions of the two documents in point of time may be decisive, is often material, and is always relevant. The court, however, stated that it did not say that in no case could a presumption of satisfaction arise where the documents were cotemporaneous.

Where the testatrix bequeathed four annuities to different persons, and two of them could not be deemed a satisfaction

of her obligation to pay annuities of the same amount to the legatees, because the annuities bequeathed were contingent, it was held that, there being no reason to suppose that the testatrix had a different intention as to the other annuities which she bequeathed, they should not be deemed a satisfaction of her obligation to the legatees. Crompton v. Sale, 1 Eq. Cas. Abr. 205.

The fact that other persons than the wife, as the trustees in the marriage settlement and children of the testator which might be born after the making of the will, were interested in a bond debt of the husband under a marriage settlement conditioned for payment of a certain sum in trust for the wife for life and then to their children, or, if none, to her absolutely, was regarded in Adams v. Lavender, M'Clel. & Y. 41, as precluding presumptive satisfaction of the debt by a legacy to the wife, although the testator died without issued.

An entry on the testator's account books expressly recognizing a balance due to a legatee in a will previously executed was said in Adams v. Olin, 61 Hun, 318, 16 N. Y. Supp. 132, to be sufficient to show that there was no intention on the part of the testator that the debt should be discharged by the legacy. For later appeal, not discussing, however, the point of presumptive satisfaction, see 140 N. Y. 150, 35 N. E. 448.

Where a husband, after directing in his will that all his just debts of every kind should be first paid, gave to his wife the use of certain specific personal property and of a sum of money for her support so long as she remained a widow, and, after making other bequests, expressly declared that it was his intent by the will "to give" to the wife the income arising from the said sum of money during her widowhood, it was held that the legacy was not intended as a satisfaction of an obligation under the marriage settlement for payment of a certain sum to the wife in thirty days after the husband's death. Bowen v. Bowen, 34 Ohio St. 164.

VIII. Admissibility of parol evidence to create or rebut presumption.

It appears to be well established, in accord with the general rule that a testator's intention must be determined from the language of his will in the absence of latent ambiguity, that where no presumption arises from the will that a legacy or devise to a creditor is intended as a satisfaction of the debt, parol evidence is inadmissible to create such a presumption. Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397; Phillips v. McCombs, 53 N. Y. 494; Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555; Schoenberg's Estate, 17 Pa. Co. Ct. 488; Thum's Estate, 5 Pa. Dist. R. 739; Owens v. Simpson, 5 Rich. Eq. 405; Hall v. Hill, 4 Ir. Eq. Rep. 27, 1 Drury & War. 94, 1 Connor & L. 120.

"A legacy implies a bounty, and not a payment, and to permit extrinsic evidence of the declaration of the testator to change the material import of the donative words would be to contradict by oral evidence the legal effect of the written instrument, and would violate the policy of the statute of wills." Reynolds v. Robinson, 82 N. Y. 103, 37 Am. Rep. 555.

On the other hand, where, from the will itself, a presumption arises that a legacy to a creditor is intended as a satisfaction of the debt, parol evidence in admissible to repel or rebut the presumption. Wallace v. Pomfret, 11 Ves. Jur. 542, 8 Revised Rep. 241, holding that where there was a presumption that the testator intended a legacy to a servant as a satisfaction of a claim for wages, parol evidence was admissible that the testator intended to pay the debt as well as the legacy. See also Fitch v. Peckham, 16 Vt. 150, citing the above case, and apparently approving the conclusion reached, although in the Peckham Case evidence that the testator did not intend the legacy as a satisfaction of the debt to the legatee was admitted without objection.

The cases first cited under this subdivision also generally recognize and approve the principle that parol evidence is admissible to rebut the presumption of satisfaction.

"Undoubtedly a legacy is presumed to be intended as a payment of a debt of the same or less amount due by the testator to the legatee; and where the existence of such a debt is shown by extrinsic evidence, evidence of this same kind is admissible to repel, or to strengthen, the presumption." Thum's Estate, 5 Pa. Dist. R. 739.

"Inasmuch as the presumption is arbitrary and often in conflict with the real motive and wishes of the testator, and seemingly harsh, the courts have been prompt to seize upon many circumstances to counteract and overcome it. It is doubtless because of a discontent with the rule itself, and to prevent its application (when nothing in the will itself could be seized upon), that the admission of extrinsic testimony, such as the declarations of the testator, contemporaneous with the testamentary paper, and afterwards, were let in to prove that the intent was one way or the other." Gilliam v. Brown, 43 Miss. 641.

But in Fowler v. Fowler, 3 P. Wms. 353, the court was of the opinion that parol evidence should not be admitted to show that the testator intended to give a legacy exclusive of the debt, although in this instance the presumption prevailed that the legacy to the wife, to whom the husband was indebted, was intended as a satisfaction of the debt.

In Gilliam v. Brown, supra, it was held that where no presumption arose from the will itself or from attending circumstances, that the legacy was intended as a satisfaction of a debt to the legatee, parol evidence that the testator did not intend the legacy to be a satisfaction should not have been admitted, as it would only serve the useless purpose of repelling a presumption which

did not arise; but its admission was held not to be prejudicial error.

In Cuthbert v. Peacock, 2 Vern. 593, parol evidence was admitted that the testator did not intend a legacy to be a satisfaction of a debt to the legatee, the court dismissing the point, however, by the statement that the construction of making a gift a satisfaction had in many cases been carried too far, and that it was reasonable in such cases to admit parol proof as to the testator's intention.

That parol evidence as to the intentions of the testator in making a bequest to a creditor is not objectionable on the ground of varying or contradicting the provisions of the will, see Williams v. Crary, 8 Cow. 246.

Parol evidence that the testator owed $500 to his wife, and that provisions in his will for payment by devisees of this amount to her were not intended as a bounty, but simply as a payment of the debt, was held admissible in Chaplin v. Leapley, 35 Ind. App. 511, 74 N. E. 546, to show that no beneficial provision for the wife was made by the will in lieu of her interest in property devised, so as to require her to make an election, even if it should be assumed that such evidence was otherwise inadmissible to show the testator's intention.

Generally, as to competency of scrivener or draftsman to testify as to his own or the testator's intention, see note to Napier v. Little, 38 L.R.A.(N.S.) 91.

IX. Miscellaneous.

It has been held that the doctrine of satisfaction of a debt by a legacy can be applied only in a court of equity, and that a common-law court cannot adjudge a legal claim satisfied by a pecuniary legacy, for the recovery of which no action at law would lie. Cole v. Cole, 5 U. C. Q. B. O. S. 744.

"In cases where the presumption of satisfaction exists, and the legacy operates as an extinguishment of the debt due by the testator to the legatee, it is a mere equitable, and not a legal, presumption, and is only available in a court of equity, and not in a court of law." Cloud v. Clinkinbeard, 8 B. Mon. 397, 48 Am. Dec. 397.

A legacy which has not been paid, and is payable only out of the proceeds of certain property, is not a defense to an action on a debt from the testator to the legatee. Bishop v. Robinson, 12 N. B. 68.

Also in Malony v. Scanlan, 53 Ill. 122, it was held that even if a legacy to a creditor should be regarded as a satisfaction of the debt, the legacy must be paid before it can be set up as a discharge of the debt, and that, where the legacy has not been paid, evidence of the legacy is not admissible to defeat a claim for the debt. After the debt had been allowed and paid, and a demand had been made for the legacy, the question could then it was said be raised whether it was intended as a gift or merely as a satisfaction of the debt.

In Louisiana it is provided by statute that "a legacy made to a creditor shall not be deemed to be in compensation of the debt, nor a legacy made to a servant in compensation of his wages." Jackson's Succession, 47 La. Ann. 1089, 17 So. 598. The word "deemed" as used in the statute was said to mean simply that no interpretation unfavorable to the creditor should be placed upon the will by the fact alone of the legacy to the creditor. The statute was not regarded as precluding satisfaction of a debt by a legacy if the will sufficiently indicated this to be the testator's intention.

An instruction was given in Morris v. Simpson, 3 Houst. (Del.) 568, an action for board and care of the testator brought by a nephew who was a legatee to the amount of $500, that the legacy was not to be deemed a payment either in full or in part of the claim of the plaintiff against the estate, unless it expressly appeared in the will, or by manifest implication from something contained in it, that such was the intention of the testator, the court citing Rev. Code, 305, but not setting forth the statute. The verdict, however, for the plaintiff, was for a much larger sum than the legacy.

It has been held that a legacy in satisfaction of a debt is created by a provision in the will that the testator's mother should "receive the sum of $1,650, being the amount of borrowed money due her; also interest on the same as might appear by the note held by her for the above amount," notes for the amount named having been given. Re Thompson, 5 Dem. 393.

A devise was held to be intended as a satisfaction of an obligation to convey half of a 5-acre tract of land, and not as a bounty of the other half, where the devisee had agreed to erect a mill on the tract, and the testator agreed to convey to the devisee title to one half thereof, but died before doing so, and made provision in his will that "one half of the gristmill with 5 acres of land "laid out so as to include the mill should go to the devisee, and that the section of land containing the 5-acre tract should be given to other parties "with the exception of the one half of the 5 acres." Green v. Green, 49 Ind. 417. R. E. H.

MINNESOTA SUPREME COURT.

D. E. VIRTUE et al., Respts.,
v.
CREAMERY PACKAGE MANUFACTURING COMPANY et al., Appts.

(123 Minn. 17, 142 N. W. 930.)

Unfair trade — false claim of infringment of patent.

1. Defendant Owatonna Manufacturing Company manufactured a combined churn and butter worker. It owned a patent upon

Headnotes by HALLAM, J.

a device known as the "two speed," by the use of which the churn was turned rapidly for making butter and slowly for working it. Plaintiffs used a device upon a combined churn and butter worker manufactured by them that would have been an infringement had defendant's patent been valid; but it was void. Defendants made representations to plaintiffs' customers that plaintiffs' churn was an infringment on their patent, and threatened prosecution for infringement. Such representations and threats were actionable.

Same — misrepresentation — right.

2. The laws of competition do not countenance misrepresentation of the business or goods of a competitor.

Trial — jury — acts within scope of employment.

3. There was evidence for the jury on the question whether the agents making such representations bound defendants, under the rule that a principal is responsible for the torts of his agent, committed in the course of his employment or in the line of his duty, with a view to the furtherance of his master's business, and not for a purpose personal to himself.

Patent — warning against infringement.

4. The owner of a patent may, in good faith, warn against infringement, and give notice of intention to enforce his rights; but if his patent is void, he may not make representations of infringement or threats of prosecution to the injury of another.

Unfair trade — false representations — materiality.

5. These representations were material. The "two speed" principle was essential to any successful combined churn and butter worker. There is evidence that they damaged plaintiffs.

Same — different infringement.

6. Such representations were not rendered harmless by the fact that plaintiffs' churn was afterwards found to infringe a different patent owned by the other defendant.

Malicious prosecution — civil suit — when lies.

7. An action will lie for malicious prosecution of a civil suit, though there is no interference with the person or property of the person sued. To maintain such action, plaintiffs must prove malice and palpable want of probable cause.

Note. — Liability of individual, in the absence of any element of conspiracy, for driving away another's customers.

This note is supplemental to a note on the same subject in 22 L.R.A.(N.S.) 1224.

As to the right of action for damages for inducing breach of contract, see notes in 16 L.R.A.(N.S.) 746 and 28 L.R.A.(N.S.) 615; and see also notes to Schonwald v. Ragains, 39 L.R.A.(N.S.) 854, and Sleeper v. Baker, 39 L.R.A.(N.S.) 864. For various other related questions, see notes referred to in Index to L.R.A. notes, "Monopolies and Combinations."

The question involves the right of one person to interfere with or injure the business of another. As shown in the note first referred to, and as will appear in the cases included herein, the question arises in various forms. Although the cases considering the question have not agreed upon any definite rule to be followed in determining what interference, if any, with the business of another, is wrongful, there is a surprising unanimity among them as to the result reached. The cases are practically agreed in recognizing that the malice of the wrongdoer is not, in all cases, a practical test by which to determine the question of his liability for injuring another's business. It is obvious that courts cannot inquire into the motive actuating persons in the exercise of the ordinary business affairs of life, and attach to such exercise a penalty if found by a court or jury that the motive of the person in the exercise of the particular right was malicious. Such a doctrine would so largely hamper and handicap business that the injury therefrom would be much greater than that sought to be relieved or obviated by the rule.

It is clear that there are rights which may be exercised by an individual, and for any injury arising from the exercise thereof he cannot be held responsible, no matter what his motive may have been. These may properly be characterized as absolute rights. For the distinction between absolute and qualified rights, see note in 29 L.R.A.(N.S.) 869. It is equally clear that many of the rights of an individual in engaging in competing business with other individuals, as well as engaging in the ordinary affairs of life, are qualified rather than absolute, and if, in the exercise thereof, injury results to another, he becomes responsible therefor if he acted maliciously. It is also equally clear that while a person has a right to sell his property at any price he may choose, and the right to advertise his property at such price as he chooses, and may bona fide engage in any legitimate business, yet he cannot, under the guise of exercising these rights, merely pretend to sell property or engage in some business where his purpose is thereby to injure another, and not to sell the property or permanently engage in the business.

In addition to the cases referred to in the note in 22 L.R.A.(N.S.) this doctrine is sustained in Boggs v. Duncan-Schell Furniture Co. post, 1196, holding it an actionable wrong for a merchant engaged in the sale of sewing machines to advertise for sale at a price much less than the ordinary retail price, sewing machines of a kind and description which he does not have on hand to sell, and which he cannot procure, his purpose being to drive out of business a competitor engaged in the sale of such machines. The court here asserts the rule that there is a difference between lawful competition and simulated competition

Same — when action accrues.

8. The right of action does not accrue until such suit is terminated favorably to the defendant therein.

Judgment — interlocutory decree — res judicata.

9. In the patent infringement suit commenced by the Creamery Package Manufacturing Company against these plaintiffs, an interlocutory decree was entered sustaining that company's claims in substantial particulars. This decree is not *res judicata*, but it is decisive that these plaintiffs have not yet prevailed.

Evidence — malicious prosecution — sufficiency.

10. As to the patent suit prosecuted in the name of the Owatonna Manufacturing Company, the evidence is sufficient to require submission to the jury of the question whether the prosecution was malicious, and probable cause is not conclusively proven.

Patent — presumption of validity.

11. A patent is presumed valid until the contrary is proven beyond a reasonable doubt, and its issuance, when fairly procured, justifies suit by the patentee for infringement against one using the same device; but when it is proven that an invention was in use prior to the issuance of the patent, the burden of proof is on the patentee to establish its validity.

Evidence — patents — validity.

12. There is evidence that, after commencement of the suit for infringement of the "two speed" patent, a conference was had, and defendants' attorney showed to the attorney and an officer of the complainants other letters patent which had been issued prior to the complainants'. This evidence was insufficient to show that the complainants thereafter continued such suits with knowledge that their patent was void, in the absence of proof as to the nature of the prior patents which were so produced.

Malicious prosecution — advice of counsel — effect.

13. Advice of counsel is a complete defense to an action for malicious prosecution of a civil action only when it appears that the prosecutor fully and fairly stated all the facts within his knowledge, or which, by reasonable diligence, he might have learned, to a reputable attorney, and that, in bringing the action, he in good faith acted on the advice given him. The question

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carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that business. And it is said that the law will not permit a person to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor, nor will it permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong.

In Dunshee v. Standard Oil Co. 152 Iowa, 618, 36 L.R.A.(N.S.) 263, 132 N. W. 371, it is said that if there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin the plaintiff or drive it out of business, the defendants intending to retire therefrom when this end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business, seeking in good faith the patronage of the same people.

And see the preceding case on a prior appeal, 126 N. W. 342, wherein the note in 62 L.R.A. 727 is quoted to the effect that if a person, with the sole and malicious purpose of injuring another, and without any benefit, interest, or pleasure to himself or others, commits an act which, if done in good faith, is justifiable, he is liable to an action in favor of such other person for the damages he may have sustained therefrom.

Another illustration of what may constitute unlawful and actionable interference by one competitor with the business of another is to be found in VIRTUE v. CREAMERY PACKAGE MFG. CO., holding that the right to give notice of infringement of patent is not privileged where exercised by L.R.A.1915B.

giving notice to a competitor's customers, present and prospective, not for the purpose of protecting the claimant's rights, but to destroy the business of the competitor, where the claimant is unable to sustain the patent in court. For similar cases, see note in 22 L.R.A.(N.S.) 1224.

It constitutes an actionable wrong for an employer of a large number of employees, by threatening their discharge, to coerce them to discontinue trading with a certain merchant, for the malicious purpose of injuring the latter. Wesley v. Native Lumber Co. 97 Miss. 814, 53 So. 346, Ann. Cas. 1912D, 796. As to validity of agreement at common law by which an employer seeks to direct the trade of his employees to the other party, see note to Stewart v. Stearns & C. Lumber Co. 24 L.R.A.(N.S.) 649.

And it is an actionable wrong maliciously to interfere with and prevent the sale of real estate by a broker, although at the time the negotiations had not reached the point of a binding contract. Krigbaum v. Sbarbaro, 23 Cal. App. 427, 138 Pac. 364.

So, it is an actionable wrong to resort to unlawful methods to prevent the execution of a contract between third persons, although the object is to secure the contract for the benefit of the wrongdoer. Lewis v. Bloede, 120 C. C. A. 335, 202 Fed. 7.

And it is an actionable wrong to intimidate a contractor, thereby preventing him from building a house upon the real estate of another, and for so doing the wrongdoers are liable to the owners of the real estate. Day v. Hunnicutt, — Tex. Civ. App. —, 160 S. W. 134.

A good illustration of the exercise of a right which is not actionable, although the right is exercised maliciously to injure an-

whether in this case these defendants acted in good faith, and in reliance on the advice of their counsel, was, under the evidence, for the jury.

Limitation of action — malicious prosecution.

14. A claim for malicious prosecution of a civil action is ruled by Rev. Laws 1905, § 4076, subdiv. 5, allowing six years for commencement of an action for any injury to person or rights not arising on contract, and not by § 4078, limiting actions for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury, to two years.

Judgment — under Federal statute — interference with business.

15. A judgment for defendants in a prior action in the Federal courts to recover treble damages for alleged combination in restraint of trade, in violation of the Sherman anti-trust act (act July 2, 1890), was not *res judicata* of plaintiffs' right to maintain a common-law action for interference with their business by false representations, threats, and malicious prosecution.

Same — gist of action.

16. Combination in restraint of trade was the gist of the action in the Federal court. It is not the gist of the common-law action.

Joint debtor — tort — conspiracy.

17. A joint tort may be committed without the existence of any conspiracy or combination in restraint of trade.

Same — independent acts — joint liability.

18. The false representations charged in this case were all made by officers or agents of the defendant Creamery Package Manufacturing Company. The infringement suit which failed was in the name of the defendant Owatonna Manufacturing Company. There was evidence to go to the jury as to the liability of both defendants, under the rule that all who actively participate in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it, are jointly and severally liable, even though they act independently or without concert of action or common purpose, provided their acts concur in tending to produce one resulting event.

Damages — excessive allowance — prejudice.

19. There was evidence that plaintiffs owned some patents. There was none that their value had been destroyed by the alleged wrongs, or as to the extent to which it had been injured. There was evidence that plaintiffs owned a manufacturing plant, but none as to the amount it had been damaged. There was evidence that plaintiffs expended time and money in the defense of the infringement suit. The evidence is vague as to the necessity thereof, and there is no evidence of the value of plaintiffs' time. Plaintiffs claim damages for injury to their business and its good will. Their total sales from the inception of this business were less than $8,000, and the total profits less than $3,000. Held, a verdict awarding $57,500 was so excessive as to indicate passion and prejudice.

Same — proof — certainty.

20. Damages must be proven with reasonable certainty. To recover damages for injury to property, there must be fair proof of the existence and amount of damage. To recover for expenditure of time and money, there must be evidence of the necessity thereof, and of the value of such time. Upon proper proof there may be a recovery for injury to business, its reputation, standing, and good will. Such damages must not

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other, is to be found in Buck v. Latham, 110 Minn. 523, 126 N. W. 278, holding it not an actionable wrong for one, with the sole purpose of harrassing and oppressing another, and subjecting him to the expenses of a suit, forcing him to dispose of his property at a sacrifice, and injuring his financial standing, to purchase a past-due note against him and sue him thereon for the purpose of enforcing payment thereof. The court points out that it is apparent that the "plaintiff had a perfectly legal right to do that with which he is charged with doing, which was simply this: he bought a past-due negotiable promissory note, paying full value therefor, and brought this action against the defendant to recover the amount due on the note, which the defendant might have paid at any time and avoided the suit."

The keeper of a restaurant, injured in his business by the order of authorities of a college located at the same place, that students must not enter eating houses and places of amusement not controlled by the college, has no cause of action against the authorities for the injury thus inflicted, L.R.A.1915B. since such authorities, in their control of the students and their care, stand in the position of parents, and hence, in matters of the kind referred to, are not responsible to third persons for the manner in which they exercise this control. Gott v. Berea College, 156 Ky. 376, 51 L.R.A.(N.S.) 17, 161 S. W. 204.

A recent case applying the doctrine of nonliability for driving away another's customers through the exercise of an absolute right is Brooks v. Ingram, — Ala. —, 65 So. 138, holding that the owner of real estate, located at the terminus of a proposed excursion, had the right to notify prospective excursionists that they would not be permitted to trespass upon said real estate, and that they would be arrested for trespass if they went thereon, although the effect of such statements and threats was to influence the prospective excursionists to whom it was made to refrain from patronizing the excursion, to the loss of the promoter thereof, and that hence no action could be maintained by the latter for the loss thereby occasioned him. A. G. S.

be speculative and conjectural; yet, where it is certain that damages have accrued to plaintiffs from defendants' wrongful acts, plaintiffs will not be denied a recovery of any damages whatever, solely because of uncertainty as to the amount of damages sustained.

Evidence — contract relation.

21. An exclusive sales contract existing between defendants was admissible to show the relation between them at the time of the acts complained of. The prior contracts between them were immaterial and inadmissible.

Same — profits — intention.

22. Evidence of defendants' prices and profits on churns, and evidence that plaintiffs did not intend to infringe defendants' patents, and believed they were not doing so, was inadmissible.

Same — copy of writing.

23. A copy of a writing, not shown to have emanated from either of the defendants, was inadmissible.

Same — judgment.

24. A judgment of dismissal is not evidence in a subsequent suit between the same parties for the same cause.

Election of remedies — suit on nonexistent cause.

25. A suit on an alleged cause of action that does not in fact exist is not an election of remedies.

Appeal — instruction — both defendants.

26. It was error to instruct the jury that their verdict must be for or against both defendants, and that the only question for them to determine was whether or not there was a conspiracy between them to injure plaintiffs.

Evidence — collateral facts.

27. A trial court may, in its discretion, permit evidence of collateral facts, when of probative value; but it is error to receive such evidence to such an extent as to overshadow the real issues.

New trial — defects in instructions.

28. The court began its charge with instructions on punitive damages, and, after withdrawing from the jury plaintiffs' claim to recover for violation of state and Federal laws relating to contracts in restraint of trade, followed with a long discussion of the proper construction of those laws. The charge was so given as to furnish insufficient guidance as to the facts necessary to warrant a recovery, or as to the measure or elements of damage. There was such failure to charge on vital issues as entitled defendants to a new trial.

On Petition for Rehearing.

Patent — erroneous notice of infringement — liability.

29. Notices of infringement and threats of suit, made by one holding or claiming an interest in a patent, are qualifiedly privileged. If made by one in good faith, and in the honest and reasonable belief that his claims are valid, and in an honest effort to protect them from invasion, he is within his rights, and will not be liable therefor, even though his patent prove invalid; but if the patentee is pursuing a course which is calculated to unnecessarily injure another's business, and with the intention of so doing, his conduct will be deemed malicious, and, if his patent fails, so that his representations are false, they are actionable.

(August 22, 1913.)

SEPARATE APPEALS by defendants from an order of the District Court for Steele County denying defendants' alternative motion for judgment nothwithstanding the verdict in plaintiffs' favor or for new trial in an action brought to recover damages for alleged wrongful and malicious interference with plaintiffs' business. Reversed.

The facts are stated in the opinion.

Messrs. **W. A. Sperry** and **A. C. Paul**, for appellant Owatonna Manufacturing Company:

The contracts of 1897 and 1898 between these defendants were proper and legal, and such as the Owatonna Manufacturing Company was clearly authorized to make.

Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. Rep. 202.

If the Owatonna Manufacturing Company has conducted its business in a legal and proper manner, and has not violated any law, it is clearly immaterial that the other defendant may have violated either a state or a United States law.

Virtue v. Creamery Package Mfg. Co. 102 C. C. A. 413, 179 Fed. 117.

Messrs. **Cohen, Atwater, & Shaw** for appellant Creamery Package Manufacturing Company.

Mr. **Harlan E. Leach**, for respondents:

Defendants were jointly and severally liable.

Ertz v. Produce Exch. 79 Minn. 140, 48 L.R.A. 90, 79 Am. St. Rep. 433, 81 N. W. 737, 82 Minn. 173, 51 L.R.A. 825, 83 Am. St. Rep. 419, 84 N. W. 743; Gray v. Building Trades Council, 91 Minn. 171, 63 L.R.A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118, 1 Ann. Cas. 172; Tuttle v. Buck, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807; Joyce v. Great Northern R. Co. 100 Minn. 225, 8 L.R.A.(N.S.) 756, 110 N. W. 975; Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co. 106 Minn. 51, 18 L.R.A. (N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L.R.A. 828, 87 N. W. 472; Klingel's Pharmacy v. Sharp &

Dohme, 104 Md. 218, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 Ann. Cas. 1184; Gatzow v. Buening, 106 Wis. 1, 49 L.R.A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; Brown v. Jacobs's Pharmacy Co. 115 Ga. 429, 57 L.R.A. 547, 90 Am. St. Rep. 126, 41 S. E. 553; Randall v. Lonstorf, 126 Wis. 147, 3 L.R.A.(N.S.) 470, 105 N. W. 663, 5 Ann. Cas. 371; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 547; Purington v. Hinchliff, 219 Ill. 159, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; Baldwin v. Escanaba Liquor Dealers' Asso. 165 Mich. 98, 130 N. W. 214; Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed in 144 App. Div. 939, 129 N. Y. Supp. 1111; Smith v. Morganton Ice Co. 159 N. C. 151, 74 S. E. 961; National Fireproofing Co. v. Mason Builders' Asso. 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259; Dunshee v. Standard Oil Co. — Iowa, —, 126 N. W. 342, 152 Iowa, 618, 36 L.R.A. (N.S.) 263, 132 N. W. 371; Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Employing Printers Club v. Dr. Blosser Co. 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 Ann. Cas. 694; Jackson v. Stanfield, 137 Ind. 592, 23 L.R.A. 588, 36 N. E. 345, 37 N. E. 14; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Levinson v. Boas, 150 Cal. 185, 12 L.R.A.(N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661; Rourke v. Elk Drug Co. 75 App. Div. 145, 77 N. Y. Supp. 373; Sparks v. McCreary, 156 Ala. 382, 22 L.R.A.(N.S.) 1224, 47 So. 322; Wesley v. Native Lumber Co. 97 Miss. 814, 53 So. 346, Ann. Cas. 1912D, 796; Gebhardt v. Holmes, 149 Wis. 428, 135 N. W. 867; Perry v. Tozer, 90 Minn. 431, 101 Am. St. Rep. 416, 97 N. W. 137; Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279; Meshbesher v. Channellene Oil & Mfg. Co. 107 Minn. 104, 131 Am. St. Rep. 441, 119 N. W. 428; Evans v. Chicago & N. W. R. Co. 109 Minn. 64, 26 L.R.A.(NS.) 278, 122 N. W. 876.

The illegality of the scheme and combination of the Creamery Package Company being established, such illegality must necessarily extend to every act, step, and proceeding of the company which is a part of such scheme and combination, including the contracts entered into between it and the defendant Owatonna Manufacturing Company.

Lowe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; L.R.A.1915B.

Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072; Baldwin v. Escanaba Liquor Dealers' Asso. 165 Mich. 98, 130 N. W. 214; Pearce v. State, 4 Ala. App. 32, 58 So. 996; Holmes v. State, 6 Okla. Crim. Rep. 541, 119 Pac. 430, 120 Pac. 300; Moore v. Fryman, 154 Iowa, 534, 134 N. W. 534.

No title to property can be acquired through a contract which it is a crime to enter into.

Orr v. Sutton, 119 Minn. 193, 42 L.R.A. (N.S.) 146, 137 N. W. 973; Buckley v. Humason, 50 Minn. 195, 16 L.R.A. 423, 36 Am. St. Rep. 637, 52 N. W. 385; Berni v. Boyer, 90 Minn. 469, 97 N. W. 121; Leuthold v. Stickney, 116 Minn. 299, 39 L.R.A. (N.S.) 231, 133 N. W. 856, Ann. Cas. 1913B, 405; Peck v. Heurich, 167 U. S. 624, 42 L. ed. 302, 17 Sup. Ct. Rep. 927; Thomson v. Thomson, 7 Ves. Jr. 470, 6 Revised Rep. 151; Hilton v. Woods, L. R. 4 Eq. 432, 36 L. J. Ch. N. S. 941, 16 L. T. N. S. 736, 15 Week. Rep. 1105, 10 Mor. Min. Rep. 110; Scott v. Brown [1892] 2 Q. B. 724, 61 L. J. Q. B. N. S. 738, 4 Reports, 42, 67 L. T. N. S. 482, 41 Week. Rep. 116, 57 J. P. 213; Clark v. Hagar, 22 Can. S. C. 510; Power v. Phelan, 4 Dorion (Quebec) 57; Little v. Hawkins, 19 Grant, Ch. (U. C.) 267; Colville v. Small, 22 Ont. L. Rep. 426, 19 Ann. Cas. 515; Johnson v. Van Wyck, 4 App. D. C. 294, 41 L.R.A. 520; Gregerson v. Imlay, 4 Blatchf. 503, Fed. Cas. No. 5,795; Pinney v. First Nat. Bank, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 331; Wehmhoff v. Rutherford, 98 Ky. 91, 32 S. W. 288; Gilroy v. Badger, 27 Misc. 640, 58 N. Y. Supp. 392; Gescheidt v. Quirk, 66 How. Pr. 272; Roberts v. Yancey, 94 Ky. 243, 42 Am. St. Rep. 357, 21 S. W. 1047; Miles v. Mutual Reserve Fund Life Asso. 108 Wis. 421, 84 N. W. 159; Brynjolfson v. Dagner, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; Burke v. Scharf, 19 N. D. 227, 124 N. W. 79; Keiper v. Miller, 68 Fed. 627, affirmed in 16 C. C. A. 679, 28 U. S. App. 739, 70 Fed. 128; Stewart v. Welch, 41 Ohio St. 483; Pearce v. Rice, 142 U. S. 28, 35 L. ed. 925, 12 Sup. Ct. Rep. 130; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; 20 Cyc. 937, 938; Holman v. Ringo, 36 Miss. 690; 14 Am. & Eng. Enc. Law, 2d ed. 647, 648; Thomas v. First Nat. Bank, 213 Ill. 261, 72 N. E. 801; Burke v. Buck, 31 Nev. 74, 22 L.R.A.(N.S.) 627, 99 Pac. 1978, 21 Ann. Cas. 625; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724.

It is a tort to prosecute a suit in the name of another without authority.

Hackett v. McMillan, 112 N. C. 513, 21 L.R.A. 862, 17 S. E. 433; Moulton v. Lowe, 32 Me. 466; Foster v. Dow, 29 Me. 442; Smith v. Hyndman, 10 Cush. 554; Streeper v. Firris, 64 Tex. 12; Metcalf v. Alley, 24 N. C. (2 Ired. L.) 38.

The Creamery Package Company in prosecuting this suit, was acting only as a trustee of an illegal trust.

The object and purpose of a trust must be legal.

State v. Creamery Package Mfg. Co. 110 Minn. 415, 437, 136 Am. St. Rep. 514, 126 N. W. 126, 623, 115 Minn. 207, L.R.A. 1915A, 892, 132 N. W. 268, Ann. Cas. 1912D, 820; 28 Am. & Eng. Enc. Law, 2d ed. 866, 867; 30 Cyc. 29; 10 Cyc. 161.

The prosecution of the suits for the ulterior purpose of putting Mr. Virtue out of business was an abuse of process.

Also the excessive claim of damages was an abuse of process in each case, and was a malicious prosecution of the suit brought in the name of the Owatonna Manufacturing Company. That suit had terminated in plaintiffs' favor at the time of the beginning of this action.

Severns v. Brainard, 61 Minn. 265, 63 N. W. 477; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Antcliff v. June, 81 Mich. 477, 10 L.R.A. 621, 21 Am. St. Rep. 533, 45 N. W. 1019; Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207; Bradshaw v. Frazier, 113 Iowa, 579, 55 L.R.A. 258, 86 Am. St. Rep. 394, 85 N. W. 752; Rossiter v. Minnesota Bradner-Smith Paper Co. 37 Minn. 296, 33 N. W. 855; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866; Atlanta Ice & Coal Co. v. Reeves, 136 Ga. 294, 36 L.R.A.(N.S.) 1112, 71 S. E. 421; Ludwick v. Penny, 158 N. C. 104, 73 S. E. 228; French v. Guyot, 30 Colo. 222, 70 Pac. 683; Milling v. Sulphur Timber & Lumber Co. 119 La. 585, 44 So. 307; Smith v. Nippert, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; 32 Cyc. 541, 542.

The conduct of the Creamery Package Company in collecting a large number of patents, so as to eliminate the competition between the different concerns manufacturing under those patents, in order to control the industry, was illegal.

State v. Creamery Package Mfg. Co. 110 Minn. 415, 136 Am. St. Rep. 514, 126 N. W. 126, 623; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. ed. 107, 33 Sup. Ct. Rep. 9; Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. Rep. 202.

There is no legal difficulty in the way of a recovery here from the Creamery Package Company alone.

Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818, Ann. Cas. 1913D, 104; Warren v. Westrup, 44 Minn. 237, 20 Am. St. Rep. 578, 46 N. W. 347; Engstrand v. Kleffman, 86 Minn. 403, 91 Am. St. Rep. 359, 90 N. W. 1054; 1 Cooley, Torts, 213; 6 Am. & Eng. Enc. Law, 2d ed. 872; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Rourke v. Elk Drug Co. 75 App. Div. 145, 77 N. Y. Supp. 373; Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340; Booker v. Puyear, 27 Neb. 346, 43 N. W. 133; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Sparrow v. Bromage, 83 Conn. 27, 27 L.R.A.(N.S.) 209, 74 Atl. 1070, 19 Ann. Cas. 796; Note in 14 Ann. Cas. 1142.

Hallam, J., delivered the opinion of the court:

Plaintiffs recovered a verdict. Defendants appeal separately from an order denying their alternative motion for judgment notwithstanding the verdict or for a new trial. Together they make 334 assignments of error. It is hardly to be expected that we will take all of these seriously. We will accordingly refer mainly to those argued in the briefs of counsel.

The issues in the case are simple. The Owatonna Fanning Mill Company was incorporated in the early 90's, and has since been engaged in the manufacture of fanning mills and some other farm machinery. Plaintiff Virtue has been the principal factor in the company, financially and otherwise. In 1903 or 1904 Virtue and the company, acting together under an agreement, the details of which are not important, commenced the manufacture of a combined churn and butter worker. They claim that these defendants, conspiring together, wrongfully and maliciously interfered with this business, by misrepresentation, threats of litigation, and the malicious prosecution of two patent infringement suits, and by these acts caused substantial damage. This action is brought to recover actual damages, and punitive damages as well. Defendants deny these charges, and for a further defense allege that some of the issues have been determined by previous litigation. These simple issues are presented by pleadings, which, with amendments and exhibits, fill a volume of 526 pages. It is needless to say that such plethora of allegation serves few of the useful purposes of pleadings, which are by statute required, on the part of plaintiff, to make "a plain and concise statement of facts constituting a cause of action, without unnecessary repetition," and on the part of defendant, to consist of "a denial of each allegation of the complaint controverted by the defendant, or an

averment that he has not knowledge or information thereof sufficient to form a belief," and "a statement, in ordinary and concise language, of any new matter constituting . . . a defense."

There is evidence tending to prove the following facts:

In 1903 the defendant Creamery Package Manufacturing Company owned a patent upon a combined churn and butter worker, known as the "Victor." This machine had, as part of the mechanism for working butter, four rolls located in pairs parallel with the drum.

The defendant Owatonna Manufacturing Company was engaged in manufacturing a combined churn and butter worker, known as the "Disbrow," under several patents originally procured by one Disbrow. This defendant owned another patent, known as the Howe, Ames, & La Bare patent, known also as the "two speed" patent. The merit of the device covered by this patent was that it had a "two speed" gear, so that the churn turned rapidly for making butter, and slowly for working butter. This principle was used in the manufacture of the Disbrow churn.

These defendants were at this time operating under a contract by the terms of which the Creamery Package Manufacturing Company was to handle, as sole agent, the combined churns and butter workers manufactured by the Owatonna Manufacturing Company; the Creamery Package Manufacturing Company was not to manufacture the Disbrow churn, but might manufacture and sell others; and the Owatonna Manufacturing Company was entitled to furnish 55 per cent in value of the churns and butter workers sold by the Creamery Package Manufacturing Company. Together these two companies practically controlled the business of the country in this line.

In 1903 plaintiffs commenced the manufacture of a combined churn and butter worker which they named the "Owatonna." This machine embodied the "two speed" principle which was covered by the Howe, Ames, & La Bare patent. Instead of four rolls in two pairs, as in the Victor machine, it had three rolls, one on each side of the axis of the churn, and one in the center, coincident with the axis and operated with each of the others.

Plaintiffs established some agencies for the sale of these churns and sold some direct to creameries. They did very little advertising, except to print circulars and send them through the mail to jobbing houses, hardware men, or anybody that they thought might handle their product. Plaintiffs sold 22 machines before July 16, 1904, and 40 during the next 2½ years, at an average price of $126.50, and an average profit of $46.50 each. Plaintiff Virtue testified that in 1903 and 1904 the business was well known for a business that had been run only so long. There was a good market for combined churns and butter workers, extending over the dairy and creamery districts of the United States.

Plaintiffs claim that defendants set out to destroy their business. There is evidence tending to prove this, as follows:

In 1901, one Martin Deeg went to Chicago to confer with the officers of the defendant Creamery Package Manufacturing Company in regard to a contract originally made between Virtue and Deeg, on the one hand, and the Cornish, Curtis, & Greene Manufacturing Company on the other; defendant Creamery Package Manufacturing Company having taken over the business of this latter concern. Deeg testified that, in the course of the negotiations, he said, "If they don't want to fulfil their contract, why we will go to work and build our churns ourselves;" that Mr. Gates, the president of the Creamery Package Manufacturing Company, then said, "Why, if Mr. Virtue goes to work and builds a churn, they will put him against the wall, and then we will make anybody trouble, whoever goes into the churn business; if you go to work and build a churn, you will have a lawsuit on your hands, and you ain't got the money to fight a lawsuit;" that Mr. Higgs, who was vice president and general manager of the Creamery Package Manufacturing Company, said, "We don't want to buy any more patents; we own the Victor patent, and we own the Disbrow patent, and we cannot use any more; we would soooner fight them, take it into court, and spend the money, as to pay any more for a patent."

In May or June, 1904, C. P. Cooper, representing the defendant Creamery Package Manufacturing Company, called upon plaintiff Virtue and said he wanted plaintiffs to handle the Disbrow churn and their creamery supplies in the territory tributary to Owatonna. Mr. Cooper had with him a contract which contained prices at which the goods were to be sold. These prices were higher than the prices at which plaintiff was then selling. In the course of the conversation Mr. Cooper said, "You had better take the Disbrow churn and make this contract; we think we own the creamery supply business around here."

In March, 1904, the Pratt Creamery Association was considering the buying of a churn from plaintiffs. Mr. Rice, representing the Creamery Package Manufacturing Company, came before its board of direct-

ors and told them that they were liable to be sued if they bought that churn. The association accordingly bought the Disbrow churn.

At about this time the Columbus Cooperative Creamery Company, of Elgin, Minnesota, installed one of plaintiffs' churns. Soon thereafter Mr. Stone, representing the Creamery Package Manufacturing Company, came along and wanted to put in a Disbrow churn, and said he thought they would have to put in one before long, because it might be that the creamery would be held liable for using a Virtue churn on account of an infringement on the Disbrow churn; that plaintiffs' churn was then taken out, and the Disbrow churn put in.

On July 16, 1904, two suits were commenced against plaintiffs for patent infringements, one on behalf of the Creamery Package Manufacturing Company for infringement on the patents embodied in the Victor churn, and one on behalf of the Owatonna Manufacturing Company for infringement upon the Howe, Ames, & La Bare, or the "two speed," patent. Both suits were commenced at the same time, and the same attorneys represented both plaintiffs. Plaintiffs claim that both of these actions were prosecuted maliciously and without probable cause.

Thereafter, and in the latter part of July, 1904, the Coon River Creamery Company, at Newell, Iowa, purchased one of plaintiffs' churns from W. H. Monroe, representing a creamery supply house at Cedar Rapids, Iowa. Soon thereafter Mr. Woodring, representing the Creamery Package Manufacturing Company, endeavored to induce the company to take out the plaintiffs' churn and install a Disbrow. He stated that the Creamery Package Manufacturing Company was about to sue the Owatonna Fanning Mill Company for infringement of the Disbrow patents, and that if the creamery company used this churn they would be sued for infringement, and he further stated that plaintiffs' churn was an infringement on the Disbrow patent. Mr. Monroe testified that after this incident he did not push plaintiffs' churn any more; that he did not want to be bothered with that kind of a fight; that he got another churn to handle, principally because he deemed it more than the churn was worth to keep it in a creamery when he got it there, because competitors "laid down" on him too hard.

In 1905, John W. Ladd, of Saginaw, Michigan, engaged in the creamery supply business, sold five of plaintiffs' churns. He received a letter from Paul & Paul, attorneys for the Creamery Package Manufacturing Company, stating that defendants were suing the Owatonna Fanning Mill Company for the infringement on their patents; and in answer to a letter asking what their claims were, they wrote him that plaintiffs' churn infringed upon the "two speed" gear.

At about the same time Paul & Paul wrote to the Wacousta Creamery Company, to whom Mr. Ladd had sold one of plaintiffs' churns, a letter very similar to the one written to Ladd.

February 2, 1906, defendant Creamery Package Manufacturing Company wrote to Ludwig L. Johnson, of Brookpark, Minnesota, stating that the churn and butter worker made by the Owatonna Fanning Mill Company was an infringement on the Disbrow patents.

In 1905 L. A. Disbrow had a conversation with Mr. Higgs. Disbrow details this as follows: "I told Mr. Higgs that I thought it would have been very much better for the churn business if they had settled this suit with Mr. Virtue, instead of having these lawsuits. . . . He said . . . he generally found it easier to law people awhile, and then he could buy them out cheaper. He said he didn't see where Mr. Virtue was getting his money to law with. He wanted to know of me how much he was worth and where he got his money from. He says: 'While it doesn't make any difference whether this suit is won by us or lost, Mr. Virtue hasn't the money to follow the cases. We are behind these suits with all our money.'"

There is also evidence of declarations of officers of the Owatonna Manufacturing Company as follows:

Shortly before the date when the patent infringement suits were commenced, Frank La Bare, who was president and director of the defendant Owatonna Manufacturing Company, was at the depot at Owatonna, when one G. W. Taylor, a drayman, brought to the depot one of plaintiffs' churns. Mr. La Bare said to Mr. Taylor that he "would not have many more churns to haul for Mr. Virtue, as they were about ready to close in on him."

Soon after the infringement suits were commenced, Frank La Bare said to Martin Deeg, "I don't see why you use so much time in trying to build a churn; you know you cannot get in on the market; we would not let you put it on the market;" that Deeg said, "I will try to get a good machine, and maybe I can sell it to the Creamery Package Manufacturing Company;" that La Bare answered that they had commenced a suit against Mr. Virtue for infringing, and that if Deeg kept on they would sue him, too.

At about the same time Mr. T. J. Howe,

treasurer and general manager of the Owatonna Manufacturing Company, called on Mr. Deeg and said, "We have sued Mr. Virtue; you know we will sue you the same way, if you keep on building churns;" that Mr. Deeg said, "Mr. Howe, I am afraid you will lose the suit against Mr. Virtue." Mr. Howe said, "We don't care; we will make him spend all the money he has got anyway. . . . We can keep going; that is, the Creamery Package Manufacturing Company can fight a suit for years; they have the money and they can do it; they can throw it from one court into another, and tire the courts out; why, after we get through with him, he won't have money enough left to build a churn."

Later, and in 1905, Mr. La Bare said to Reuben Disbrow that Mr. Virtue was very foolish to answer and fight the suit, because he couldn't win; that he didn't have money enough to fight it; that the Creamery Package Manufacturing Company was back of it with all their money, and Mr. Virtue was very foolish in trying to fight, because it would break him up in business; and he said, "I guess he is pretty nearly broke up in business now."

On January 25, 1907, a decree was entered in the infringement suit commenced by the Owatonna Manufacturing Company adjudging the Howe, Ames, & La Bare patent to be void "for lack of invention, in view of the prior art, as to all the claims thereof counted on by the complainant in this cause."

On January 26, 1907, an interlocutory decree was entered in the action instituted by the Creamery Package Manufacturing Company, adjudging that plaintiffs' churn was an infringement upon the patents of said Creamery Package Manufacturing Company in certain particulars, principally in that the three-roll device used by plaintiffs was an infringement upon the four-roll device used in the Victor churn, and an accounting was ordered. Thereafter the defendant Creamery Package Manufacturing Company assigned to the Owatonna Manufacturing Company the costs to be taxed in this suit, and the judgment for costs to be entered therein.

Plaintiff Virtue testified that plaintiffs commenced losing their agencies in 1905, that they lost them all as early as 1907, and that they did but little business by January, 1907. It would appear that the last sale was made November 19, 1906. Some time thereafter plaintiffs quit the churn business entirely.

There was evidence that on February 24, 1898, defendant Creamery Package Manufacturing Company and a large number of its competitors entered into a contract in restraint of trade, to control and monopolize the manufacture and sale of combined churns and butter workers. Defendant Owatonna Manufacturing Company was not a party to this combination, but it was claimed that by a series of other contracts between these defendants it became party to the unlawful project.

Plaintiffs claim that the foregoing facts established a right to recover damages of both defendants on principles of the common law and also under § 5168, Rev. Laws 1905, of Minnesota, which forbids combinations, in restraint of trade, to control or limit the production of any article, or to prevent or limit competition in the purchase and sale thereof.

Defendants claim that plaintiffs have failed to make a case entitling them to any recovery at all; that there can be no recovery under this statute, because no combination, within the meaning of the statute, has been shown; but, even if such combination has been proven, there is no causal connection between such combination and the damages proven; that in a former action between these same parties in the Federal courts there was an adjudication as to these matters; that therefore, if plaintiffs have any cause of action here, it is for malicious prosecution of either or both of the infringement suits, and for damages, if any there be, from the warnings of these suits; that an action for malicious prosecution of the Creamery Package Manufacturing Company's infringement suit will not lie, because the suit has not terminated in favor of these plaintiffs; that an action for malicious prosecution of the Owatonna Manufacturing Company's suit will not lie, because there is no evidence of malice in its prosecution, and the evidence is conclusive that there was probable cause therefor; that the patent itself, on which the suit was brought, though void, was conclusive evidence of the existence of probable cause, and that any such action is barred by the statute of limitations; that the alleged misrepresentations were only warnings, given in good faith, of the rights claimed in the infringement suits, and were not actionable; that, if any cause of action does exist, there were reversible errors in the conduct of the case, in the admission of evidence, and in the charge of the court, which require the granting of a new trial.

The court charged the jury that they were not to concern themselves with the question whether there were any contracts entered into between these parties which were in restraint of trade, nor whether there was any combination to control the business of this country. This in substance meant that plaintiffs had no cause of action under the statute, and the court in fact only sub-

mitted the question of common-law liability of defendants.

We are of the opinion that there is evidence from which a jury might find sufficient facts to constitute a cause of action, but that by reason of errors, which will be specifically pointed out, a new trial must be granted. The facts proven made a case for the jury.

1. The evidence shows several instances of representations that plaintiffs' churn was an infringement upon the "Disbrow" patents and upon the "two speed" patent, and threats to customers and prospective customers of plaintiffs of prosecution for infringement of those patents in the event they should use plaintiffs' churn. If the representations that plaintiffs were infringing upon the "Disbrow" patents be taken literally, they are palpably false, since there was no real claim of that sort made by defendants, either in the patent litigation or otherwise. If they be taken as representations of infringement upon the "two speed" patent, which was in fact used upon the "Disbrow" churn, defendants are in no better position; for, though plaintiffs' churn would have been an infringement upon this patent had the patent been valid, the fact is the patent was void, and a void patent affords no protection against positive representations of this character. A statement made as a positive representation of an existing fact is actionable if it is false, even though the person making it had ground for belief that it was true. Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360; Shull v. Raymond, 23 Minn. 66.

2. Unquestionably a trader renders himself liable where he misrepresents his competitor in some material matter and thereby causes damage to his competitor's business. The laws of competition do not countenance misrepresentation. Evenson v. Spaulding, 9 L.R.A.(N.S.) 904, 32 C. C. A. 263, 150 Fed. 517; Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Murray v. McGarigle, 69 Wis. 483, 34 N. W. 522; Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co. 142 Mich. 417, 105 N. W. 858; Van Horn v. Van Horn, 56 N. J. L. 318, 28 Atl. 669; Addison, Torts, 8th ed. 9; Moran v. Dunphy, 177 Mass. 485, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; Allen v. Flood [1898] A. C. 1, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Hollenbeck v. Ristine, 114 Iowa, 358, 86 N. W. 377; Cook, Combinations, p. 12.

The language of the Massachusetts court in Martell v. White, 185 Mass. 255, 260, 64 L.R.A. 260, 263, 102 Am. St. Rep. 341, 346, 69 N. E. 1085, 1087 (1904), is applicable here. Hammond, J., said: "The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws. . . . But . . . the weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation."

3. It is contended that the evidence is insufficient to show that the persons making these statements could bind the corporations by which they were respectively employed. The evidence was sufficient to raise a question for the jury under the rule applicable in such cases, which is as follows: The principal is responsible for the torts of his agent, committed within the scope of his agency; that is, in the course of his employment or in the line of his duty, with a view to the furtherance of the master's business, and not for a purpose personal to himself. Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Sina v. Carlson, 120 Minn. 283, 139 N. W. 601.

4. It is contended that these statements were merely notices or warnings in good faith to those who were believed to be infringers, and that they were accordingly not actionable. It is true that the owner of a patent may lawfully warn others against infringement, and give notice of his intention to enforce his rights, if done in good faith. Adriance, P. & Co. v. National Harrow Co. 58 C. C. A. 163, 121 Fed. 827; Warren Featherbone Co. v. Landauer (C. C.) 151 Fed. 130; Mitchell v. International Tailoring Co. (C. C.) 169 Fed. 145. But if his patent be void, so that he has, in fact, no patent at all, he will not be permitted to make representations of infringement to the injury of another.

5. These representations were material. The "two speed" principle was essential to the manufacture of any successful combined churn and butter worker. There is evidence that these representations in fact caused damage to plaintiffs, in preventing sales, in inducing customers who had made purchases to discontinue use of plaintiffs' churn, and in discouraging agents, so that they discontinued handling plaintiffs' product.

6. It is true plaintiffs were at this time infringing upon the "Victor" patent held by the defendant Creamery Package Manufacturing Company. But this was not a defense to an action for falsely representing that they were infringing upon the "two speed" patent. It might lessen the damages, but it was not a bar.

This brings us to a consideration of the liability of the defendants on account of the prosecution of the patent infringement suits. This is not technically an action for malicious prosecution. The claim is that these suits were prosecuted maliciously and without probable cause as part of a general purpose to injure the business of plaintiffs.

7. An action will lie in a proper case for malicious prosecution of a civil suit, even though there is no interference with the person or property of the defendant. McPherson v. Runyon, 41 Minn. 524, 16 Am. St. Rep. 727, 43 N. W. 392; Severns v. Brainard, 61 Minn. 265, 63 N. W. 477; Eickhoff v. Fidelity & C. Co. 74 Minn. 139, 76 N. W. 1030. The plaintiff must prove both malice and want of probable cause for the prosecution, and the want of probable cause must be very palpable. "A greater latitude in the doctrine of reasonable cause must be exercised in such cases than would be permissible in an action for maliciously prosecuting a criminal case. Before a party can justly be held liable for maliciously prosecuting a civil action, where there was no interference with the person or property of the defendant, want of probable cause must be very clearly proven. . . . Any other rule would make litigation interminable." Eickhoff v. Fidelity & C. Co. 74 Minn. 139, 142, 76 N. W. 1030, 1031; Cooley, Torts, *220.

8. A right of action for malicious prosecution never arises until the litigation complained of has terminated favorably to the party alleging malicious prosecution. Pixley v. Reed, 26 Minn. 80, 1 N. W. 800; Rossiter v. Minnesota Bradner-Smith Paper Co. 37 Minn. 296, 33 N. W. 855; McPherson v. Runyon, 41 Minn. 524, 16 Am. St. Rep. 727, 43 N. W. 392.

9. It is clear, therefore, that there can be no right of action for the prosecution of the patent infringement suit commenced by the Creamery Package Manufacturing Company, because that suit has not terminated favorably to these plaintiffs. It has proceeded to an interlocutory decree. That decree was favorable to the Creamery Package Manufacturing Company. It determined that the three-roll device used by these plaintiffs was an infringement on the four-roll device used in the Victor churn, and ordered an accounting. This interlocutory decree is not final or *res judicata*. L.R.A.1915B. Harmon v. Struthers (C. C.) 48 Fed. 260; Australian Knitting Co. v. Gormly (C. C.) 138 Fed. 92; Hills v. Hoover (C. C.) 142 Fed. 904. But it is conclusive that these plaintiffs have not yet prevailed in the litigation.

It is true the interlocutory decree determined the case adversely to the Creamery Package Manufacturing Company as to many of its claims of infringement. It is contended that it is a determination of the litigation as to all such claims, and that the matters in which these plaintiffs failed are so trifling, as compared with all the other matters involved in the case, that an action for malicious prosecution will lie. We cannot so hold. The matters as to which these plaintiffs have failed to secure a decree are not of a trifling character. They are substantial. The case differs from Severns v. Brainard, 61 Minn. 265, 63 N. W. 477, cited by plaintiffs. In that case the plaintiff in the basic action recovered nothing except what the defendant all the time stood ready to pay. The suit prosecuted in the name of the Creamery Package Manufacturing Company cannot be considered in this case. It was error to submit it to the jury.

10. Next, as to the patent infringement suit prosecuted in the name of the Owatonna Manufacturing Company. We are of the opinion that under the evidence above detailed the question whether that suit was prosecuted maliciously was for the jury. We are also of the opinion that it does not conclusively appear that there was probable cause for its prosecution.

11. It is contended that the fact of issuance of the "two speed" patent, on which the suit was based, was conclusive evidence of such probable cause. We have no hesitation in holding that, as a general proposition, a patent issued by the United States government, and fairly procured, is a justification for a suit for infringement by the patentee against one using the same device. A patent is presumed valid until the contrary is proven beyond a reasonable doubt. Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat 'Em All Barbed Wire Co.) 143 U. S. 275, 450, 36 L. ed. 154, 12 Sup. Ct. Rep. 443; Deering v. Winona Harvester Works, 155 U. S. 286, 301, 39 L. ed. 153, 159, 15 Sup. Ct. Rep. 118. But there are cases where the rule that a patent is a justification for an infringement suit cannot apply. It clearly should not apply if the patent was procured with knowledge of facts that render it invalid, as where the applicant had knowledge that he was not the first inventor. We think it equally clear that if, after the patent is obtained, it is shown to the patentee that, by reason

of prior invention, the patent cannot be sustained, then the patent furnishes no probable cause for an infringement suit; for the rule is, when it is proven that the invention was in use prior to the issuance of the patent, then the situation changes, and the burden of proof is upon the patentee to establish the validity of his patent. Clark Thread Co. v. Willimantic Linen Co. 140 U. S. 481, 35 L. ed. 521, 11 Sup. Ct. Rep. 846; Michigan C. R. Co. v. Consolidated Car-Heating Co. 14 C. C. A. 232, 31 U. S. App. 462, 67 Fed. 121; Caverly v. Deere (C. C.) 52 Fed. 758; Cleveland Foundry Co. v. Kaufmann Bros. (C. C.) 126 Fed. 658; American Soda Fountain Co. v. Sample, 64 C. C. A. 497, 130 Fed. 145.

12. Now apply these principles to this case. This "two speed" patent purported on its face to be a valid patent. Unless impeached, it gave probable cause for the prosecution of the infringement suit. But the patent was in fact void by reason of prior invention. Plaintiffs claim that at the outset of the patent litigation these defendants were fully advised of the invalidity of their patent, and that the patent accordingly afforded no probable cause for the prosecution of that litigation. The evidence on this subject is that after the infringement suits were brought, and before these plaintiffs answered therein, their attorney, Mr. Williamson, entered into negotiations with Mr. Paul, representing the plaintiffs in those suits; that in these negotiations Mr. Williamson showed to Mr. Paul other letters patent which had been issued prior to the "two speed" patent; that T. J. Howe, treasurer and manager of the Owatonna Manufacturing Company, also came to Mr. Williamson's office and asked to see what he had found relating to the suit, and Williamson showed him these prior patents and explained them to him; that Mr. Williamson then asked whether he would go on with the suits, and Howe said he would have to consult with "the others," and that Mr. Paul would let him know; that Mr. Paul said he would have to go to Chicago to consult with the Creamery Package Manufacturing Company. He later wired Williamson from Chicago: "Will proceed with both suits."

The trouble with this evidence is that it furnishes no facts as to the nature of the alleged prior patents exhibited to Mr. Paul, and there is accordingly nothing to enable a court or jury to determine whether or not it was made to appear that the "two speed" patent was void. Such facts may be supplied on a new trial; but unless there is evidence that it was made to appear to these defendants, beyond a reasonable doubt, that their patent was void, it must be held as a matter of law that there was probable cause for the prosecution of the Owatonna Manufacturing Company's infringement suit.

13. It is contended that there can be no right of action on account of that suit, because it was commenced under advice of counsel. The rule is that "advice of counsel is a complete defense to an action for the malicious prosecution of either a civil action or a criminal charge, when it is made to appear that the prosecutor fully and fairly stated all the facts within his knowledge, or which by reasonable diligence he might have learned, to a reputable attorney, and that in bringing the action or instituting the criminal prosecution he honestly and in good faith relied and acted upon the advice given him. . . . The protection springs from the advice, founded upon a full statement of facts, and good-faith reliance thereon. . . . Where the evidence is undisputed, and it clearly appears that all the facts were fully submitted to the attorney, as well as the good-faith reliance upon his advice, the question resolves itself into one of law for the court. . . . But, where the facts are in dispute, the question goes to the jury." Nelson v. International Harvester Co. 117 Minn. 298, 304, 135 N. W. 808, 811. We think it does not conclusively appear that the defendants were acting in good faith, in reliance on the advice of their counsel. That question was for the jury. It is also to be observed that there is no evidence that, after receiving from Mr. Williamson the information above mentioned, the advice of counsel was ever obtained or sought.

14. Defendants contend that this claim of malicious prosecution is outlawed. We are of the opinion that it is not. This action was commenced a little less than six years after the commencement of the infringement suit. Defendants contend that the claim is governed by Rev. Laws 1905, § 4078, which provides that actions for "libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury," shall be commenced within two years. Plaintiffs contend that it is governed by § 4076, subdiv. 5, which allows six years for commencement of an action "for any . . . injury to the person or rights of another, not arising on contract, and not hereinafter enumerated." We agree with plaintiffs' contention. We shall not take time here to go into the history of this legislation. It is sufficient to say that the provision of subdivision 5 of § 4076 is the general provision applicable to torts, both against person and property. The provision of subdivision 1 of § 4078 is special, and relates only to the particular class of

personal torts that are there particularly mentioned, and other torts of the same nature and kind "resulting in personal injury." Brown v. Heron Lake, 67 Minn. 146, 69 N. W. 710, 1 Am. Neg. Rep. 100. It has been held that the action for malicious prosecution of a criminal charge is within this class. Bryant v. American Surety Co. 69 Minn. 30, 71 N. W. 826. At first blush it might seem that malicious prosecution of a civil suit should be within the same class, but clearly it is not. The Bryant Case was decided on the ground that the malicious prosecution of a criminal action is a personal wrong of the class that dies with the person, and is accordingly of the same class as libel, slander, and false imprisonment. The malicious prosecution of a civil action, on the other hand, is in no sense an injury to the person. We regard this as settled by the decision of this court in Hansen Mercantile Co. v. Wyman, P. & Co. 105 Minn. 491, 21 L.R.A.(N.S.) 727, 117 N. W. 926. In that case it was held that an action for maliciously procuring and levying an attachment was an action for an injury, not to the person, but to property; that a cause of action for injuries resulting from the attachment, consisting of the destruction of the business and of the credit, reputation, and standing of the defendant, and the driving away of customers, was not a personal tort, but a property tort, and that it was assignable. True, there was in that case a seizure of property; but that does not change the principle. No excessive levy or unnecessarily harsh use of the writ is charged. The action was accordingly not one for abuse of legal process. The wrong was in procuring the attachment to issue. The action was therefore to all intents and purposes an action for malicious prosecution of a civil action, and was governed by the same rules. Pixley v. Reed, 26 Minn. 80, 1 N. W. 800. It is also true that in the Hansen Case attention was called to the fact that the plaintiff was a corporation, which, "in the nature of things, . . . cannot bring an action *ex delicto* for a purely personal tort, nor be awarded purely personal damages." So is one of the plaintiffs here a corporation. But it appears to us that this action assumes the same aspect, whether it be considered from the standpoint of the corporation plaintiff or the individual plaintiff. In either case the injury is one to business and property, and not to the person. It follows that the claim for malicious prosecution was not barred.

15. It is contended that this action is barred by the reason of a prior action brought by these plaintiffs against these same defendants in the United States circuit court. 102 C. C. A. 413, 179 Fed. 115; 227 U. S. 8, 57 L. ed. 393, 33 Sup. Ct. Rep. 202. In this prior action many of the foregoing matters were alleged and proved. At the close of the testimony the circuit court directed a verdict in favor of defendants. This ruling was sustained on appeal by the circuit court of appeals and the Supreme Court of the United States. It is urged by defendants that the judgment in that case is *res judicata*, but that, whether conclusive as an adjudication or not, the decision of the Federal court should be followed here.

We agree that that decision should be followed so far as it is applicable here, and we shall follow it as to all legal questions which were there determined; but we do not agree that the judgment in the case is *res judicata*. We are clear that the issues were so different that many of the essential questions at issue here were not there determined and were not before the court. The character of that action is made clear by the language used by the Supreme Court. In deciding the case, McKenna, J., said [227 U. S. 38]: "This is not an action for malicious prosecution. It is an action under the Sherman anti-trust act for the violation of the provisions of that act, seeking treble damages. . . . The foundation of the complaint is that the defendants entered into a contract or combination in restraint of trade, which caused damage to plaintiff. . . . It was in this aspect that the case was tried," and [at page 24] "To justify recovery, . . . injury must result from something forbidden or made unlawful by the act. . . . The circuit court and the circuit court of appeals both decided that the damages which plaintiffs alleged they sustained were not a consequence of a violation by defendants of the provisions of the Sherman anti-trust act (act July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200). Both courts assumed for the purpose of their decision that the contract of February 24, 1898, between the Creamery Package Manufacturing Company and the other manufacturers and sellers of churns and butter workers, was a combination in restraint of trade; but both courts held that the Owatonna Company was not a party to it, nor became associated subsequently in its scheme."

There is not in the case at bar any claim of violation of the Sherman act. There is in the pleadings a claim of violation of the anti-trust act of this state, which is somewhat similar to the Sherman act; but, as we have already seen, this claim was eliminated by the trial court.

16. There is still undetermined the question of common-law liability for malicious

interference with the business of plaintiffs by misrepresentation, threats, and malicious prosecution. This is a distinct and separate cause of action. The gist of the cause of action tried in the Federal courts under the Federal act was "that the defendants entered into a contract or combination in restraint of trade, which caused damage to plaintiffs." 227 U. S. 8, 32, 57 L. ed. 393, 404, 33 Sup. Ct. Rep. 202. Combination in restraint of trade is not the gist of the common-law action of interference with business or of malicious prosecution.

Conspiracy and combination in restraint of trade are here alleged, but this allegation is of no importance so far as respects the common-law causes and ground of action. Where an action in tort is brought against two or more, it is necessary, in order to recover against all of them, to prove concurrent acts of all. For this purpose it may be important to establish the allegation of conspiracy or combination. But this is no part of the cause of action. If it turn out on the trial that only one was concerned, the plaintiff may still recover the same as if such one had been sued alone. The conspiracy or combination is nothing, so far as sustaining the action goes; the foundation of it being the actual damage done to the party. Hutchins v. Hutchins, 7 Hill, 104. See also Cressy v. Republic Creosoting Co. 108 Minn. 349, 122 N. W. 484; Martin v. Leslie, 93 Ill. App. 56.

17. A joint tort is here alleged; but it seems hardly necessary to say that there may be a joint tort of this sort without the existence of any conspiracy or combination in restraint of trade. Flaherty v. Minneapolis & St. L. R. Co. 39 Minn. 328, 1 L.R.A. 680, 12 Am. St. Rep. 654, 40 N. W. 160; Fortmeyer v. National Biscuit Co. 116 Minn. 158, 37 L.R.A.(N.S.) 569, 133 N. W. 461; Cooley, Torts,** 145, 156, 166; Mack v. Kelsey, 61 Vt. 399, 17 Atl. 780; Bath v. Metcalf, 145 Mass. 274, 1 Am. St. Rep. 455, 14 N. E. 133; Drake v. Stewart, 22 C. C. A. 104, 40 U. S. App. 173, 76 Fed. 140.

18. It will, of course, be observed that the false representations, which in part form the basis of this action, were all made by officers or agents of the Creamery Package Manufacturing Company, and that the malicious prosecution, which in part forms the basis of the action, was in a suit to which the Owatonna Manufacturing Company alone was a party. We are of the opinion that the evidence which we have above detailed, together with other circumstances of less importance disclosed by the evidence, is sufficient to go to the jury upon the question of liability of both defendants for both classes of acts, under the rule, which is well recognized, that all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done, are jointly and severally liable therefor (Cooley, Torts, *166; Mack v. Kelsey, 61 Vt. 399, 401, 402, 17 Atl. 780), even though they act independently and without concert of action or common purpose, provided their several acts concur in tending to produce one resulting event (Flaherty v. Minneapolis & St. L. R. Co. 39 Minn. 328, 1 L.R.A. 680, 12 Am. St. Rep. 654, 40 N. W. 160; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Fortmeyer v. National Biscuit Co. 116 Minn. 158, 37 L.R.A. (N.S.) 569, 133 N. W. 461). See also Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451.

We have already indicated that there must be a new trial because of submission of the claim of malicious prosecution of the infringement suit instituted in the name of the Creamery Package Manufacturing Company, and because the evidence is insufficient as to want of probable cause for prosecution of the suit instituted in the name of the Owatonna Manufacturing Company. There were other substantial errors in the case.

19. The jury assessed plaintiffs' damages in the sum of $57,500. The damages are, under the evidence in the case, grossly excessive. They cannot be sustained under any possible theory of the evidence.

These plaintiffs owned some patents; but there is no evidence that their commercial value has been destroyed, or as to the extent to which they have been injured.

Plaintiffs owned a valuable plant, in which they started to manufacture these machines; but there is no evidence as to the extent to which it was devoted to this purpose, and none as to the amount this property was damaged by the alleged interference with the business of manufacturing churns.

There is evidence that plaintiff Virtue expended considerable time in connection with the defense of the patent infringement suit. The evidence is very vague and unsatisfactory as to the necessity of such expenditure of time, and there is no evidence as to the value of his time.

There is evidence that plaintiffs expended considerable sums of money in defending that suit. The evidence is very vague and unsatisfactory as to the necessity of many of these expenditures.

There is evidence that the business of plaintiffs was injured; but the total sales of that business from beginning to end were less than $8,000, and the total profits less

than $3,000. The damages for injury to this business naturally could not be large. Plaintiffs make no claim on account of special damage for loss of profits from prospective sales. They claim general damages for injury to the business, its reputation, standing, and good will.

Damages must be proven with reasonable certainty. They cannot be based on speculation or conjecture.

In order to recover damages for injury to real or personal property, there must be fair proof that such damage has occurred, and of the amount thereof, and that it was caused by the wrong of defendants.

In order to recover for expenditure of time, there must be proof of the necessity of such expenditure of time, and of the value thereof. Forster v. Columbia Nat. Bank, 77 Minn. 119, 79 N. W. 605. In order to recover for expenditure of money, there must be proof of the necessity of such expenditure.

Damages for injury to plaintiffs' business, its reputation, standing, and good will, may, upon proper proof, be recovered. Hansen Mercantile Co. v. Wyman, P. & Co. 105 Minn. 491, 495, 21 L.R.A.(N.S.) 727, 117 N. W. 926; Johnson v. Wild Rice Boom Co. 118 Minn. 24, 136 N. W. 262; 13 Cyc. 57. In such a case the jury should always be cautioned against allowance of damages that are speculative and conjectural. At the same time, if it is certain that damages have been caused by the wrongful act of another, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever. Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Burckhardt v. Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842; Emerson v. Pacific Coast & N. Packing Co. 96 Minn. 1, 8, 1 L.R.A.(N.S.) 445, 113 Am. St. Rep. 603, 104 N. W. 573, 6 Ann. Cas. 973. The jury may in such case give such temperate damages for injury to business as they believe to be reasonable compensation for the injury which must necessarily result from the act of the defendant. Peabody v. Citizens' State Bank, 98 Minn. 302, 310, 108 N. W. 272.

20. The evidence on most of the points mentioned is so vague and uncertain that it furnishes no satisfactory basis for the assessment of any large amount of compensatory damages. Taking these facts into account, and making due allowance for the discretionary power of the jury to assess punitive damages, it must still be held that the damages in this case were so excessive as to make it appear that they were given under the influence of passion or prejudice. See Peterson v. Western U. Teleg. Co. 65 L.R.A.1915B. Minn. 18, 33 L.R.A. 302, 67 N. W. 646; Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950.

A number of exceptions were taken to rulings upon evidence.

21. Plaintiffs introduced in evidence, over objection, a series of contracts between defendants, the first one April 19, 1897, and the last June 4, 1898. In the Federal court it was distinctly held that none of these contracts, nor all of them together, furnished any basis for an action. It was proper to receive the last contract of June 4, 1898, for the purpose of showing the relation between these defendants at the time of the transaction complained of herein; but no useful purpose can be subserved by encumbering the record with the earlier ones, and they should be excluded.

22. The evidence as to the prices at which Disbrow and Victor churns were sold, and the profits made from them, was inadmissible. It had no bearing on any aspect of the case. The same is true as to testimony that plaintiffs did not intend to infringe on any patent of defendants, and believed they were not doing so.

23. Plaintiffs' Exhibit "HH" was not admissible in evidence. It was a copy made of a writing that was not shown to have emanated in any manner from either of defendants. For manifest reasons it should have been rejected.

24. The record of a former suit for malicious prosecution against the defendant Owatonna Manufacturing Company was properly excluded. That action was dismissed. The record was accordingly not an adjudication. This proposition has long since been settled. Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Andrews v. School Dist. 35 Minn. 70, 27 N. W. 303.

25. The record in the Federal suit was properly excluded. It was a litigation upon a different cause of action, and the record was not, therefore, an estoppel. It is contended that the bringing of that suit was an election of remedies as between that course of action and the course pursued here, and that this suit cannot therefore be maintained. There can be no election between causes of action, unless two causes of action exist, and they are inconsistent. Re Van Norman, 41 Minn. 494, 43 N. W. 334. Here the alleged cause of action sued on in the Federal courts did not exist at all.

Exception is taken to some portions of the charge.

26. The court instructed the jury: "If your verdict is against the defendants, it is a verdict against both of them; . . . there can be no separation of the case of joint tort feasors, where an action is brought against them, . . . so your ver-

dict in this case will be for the plaintiffs against both of them jointly, or your verdict will be in favor of both of them." This was error. The principle that, where two persons are sued jointly in tort, the plaintiff may prevail against one, though he fails to prove a joint tort, is so well settled that citation of authority is not necessary. See Hutchins v. Hutchins, 7 Hill, 104, supra.

The court further instructed the jury: "The only question for you to determine is whether or not there was a conspiracy or combination between these two defendants to injure these plaintiffs." This was error, for reasons which we have above endeavored to make clear. Ibid.

27. A mass of evidence was received, devoted to proof in much detail of the methods pursued by the Creamery Package Manufacturing Company in ridding itself of other competitors. The trial was begun with the introduction of hundreds of pages of evidence of this sort. All of this evidence was collateral to the issues in this case. This court will exercise great liberality in sustaining a trial court in its exercise of discretion in receiving evidence of collateral facts. Very often such facts are of great probative value. Glassberg v. Olson, 89 Minn. 195, 94 N. W. 554; Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826; Humphrey v. Monida & Y. Stage Co. 115 Minn. 18, 131 N. W. 498. But the reception of such evidence must not be carried to such an extent as to overshadow the real issue in the case, and we believe this was just the result accomplished here. Kanne v. Kanne, 119 Minn. 265, 270, 138 N. W. 25; Bemis v. Temple, 162 Mass. 342, 26 L.R.A. 254, 38 N. E. 970. A brief reference to these matters might have been permitted, within the discretion of the trial court, to show the situation of the parties, and to shed light on the controversies in the case. The fact that the defendant Creamery Package Manufacturing Company was a combination, that it pursued, generally in its business, methods not justified by the laws of fair competition, but calculated only to ruin competitors, as by bidding at ruinous prices when competition appeared, may throw some light on the probable truth of the testimony as to the conduct of this defendant toward plaintiffs; but we are convinced that the greater part of this collateral evidence, such as the mass of details as to the property of competitors taken over, the amount of the inventories, the price allowed, the details of defendant's method of operating its business, such as the use of names of its former competitors, and keeping up a semblance of competition, and many other items of evidence still more remote, which fill the record, could only tend to confuse the issues of the case, and should have been excluded. In justice to the trial court, it should be said that a great deal of this evidence was received without objection, but much of it was received over objection.

28. It is contended that the charge of the court as a whole gave the jury no sufficient guidance in deliberating on a complex case, and failed to define or outline the issues of fact which the jury were called upon to decide. We deem this contention well taken. The charge begins with instructions on the subject of punitive damages. The court withdrew from the jury plaintiffs' claim of recovery by reason of alleged violation of the state and Federal laws relating to contracts in restraint of trade; but still there follows a long discussion of the proper construction of those laws. The charge furnished little guidance as to the facts necessary to warrant a recovery, or as to the measure or the elements of damages. The issues are easily defined. If defendants, or either of them, by false representations as to infringement of a patent which was in fact void, or by threats of ungrounded prosecution for infringement, or by malicious prosecution of a suit for infringement, caused injury to plaintiffs, they are liable therefore. The facts necessary to be proved to establish malicious prosecution of such infringement suit, and the proof that is necessary to sustain a recovery of the various items of damages claimed, are hereinbefore fully stated. The charge omitted so many essential things that we feel bound to hold that it is subject to the rule of Greengard v. Burton, 88 Minn. 252, 92 N. W. 931.

For reasons above stated, the order denying a new trial should be reversed and a new trial granted.

A petition for rehearing having been filed, the following **Per Curiam** response was handed down on October 31, 1913 (123 Minn. 45, 142 N. W. 1136):

It is urged on motion by defendant Creamery Package Manufacturing Company for reargument that the rule stated in the opinion, that "a void patent affords no protection against positive representations" of infringement (¶ 1), and that "if his patent be void, so that he has in fact no patent at all, he will not be permitted to make representations of infringement to the injury of another" (¶ 4), are incorrect; that, so far as such matters are concerned, this action is in substance an action for slander of title, and that "a person interested in property is privileged to assert his rights at any time, even though it transpires afterwards that his claims are unfounded."

The principles applicable to slander of title do apply, and malice is essential to a cause of action based on such statements. "If the publication is false, and is made by one having no interest in the subject-matter, malice may be presumed." Swan v. Tappan, 5 Cush. 104; Andrew v. Deshler, 45 N. J. L. 107. But if the publication be an assertion of right or interest by one who, in good faith, claims such right or interest, then it is privileged, and the presumption of malice is overcome. The law applicable to such communications when privileged was not discussed in the original opinion. The view of the majority of the court is as follows:

Such communications, when privileged at all, are only qualifiedly privileged. Swan v. Tappan and Andrew v. Deshler, supra; John W. Lovell Co. v. Houghton, 116 N. Y. 520, 6 L.R.A. 363, 22 N. E. 1066. Absolute privilege exists only where the public service or the due administration of justice requires that a person should speak his mind freely. 25 Cyc. 376; Young v. Lindstrom, 115 Ill. App. 239.

The rules governing communications qualifiedly privileged are the same in slander of title as in ordinary libel and slander. John W. Lovell Co. v. Houghton, 116 N. Y. 520, 6 L.R.A. 363, 22 N. E. 1066. The law is that "a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself. . . . Actual malice must be proved." Hebner v. Great Northern R. Co. 78 Minn. 289, 292, 79 Am. St. Rep. 387, 80 N. W. 1128, 1129. The occasion loses its privilege if the statement is in fact false, and knowledge of the falsity is brought home to the person making it, or if the statement is made without knowledge of its falsity, but is made with malice and for an ulterior purpose. Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542; Hebner v. Great Northern R. Co. 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; Andrew v. Deshler and Swan v. Tappan, supra; Gattis v. Kilgo, 128 N. C. 402, 405, 38 S. E. 931; Hill v. Ward, 13 Ala. 310.

These rules apply to representations made by a person claiming under a patent. Halsey v. Brotherhood, L. R. 19 Ch. Div. 386, 389, 51 L. J. Ch. N. S. 233, 45 L. T. N. S. 640, 30 Week. Rep. 279; John W. Lovell Co. v. Houghton, supra.

"Undoubtedly the owner of a patent is acting within his rights in notifying infringers of his claims, and threatening them with litigation, . . . if he does so in good faith, believing his claims to be valid, and in an honest effort to protect them from invasion." Adriance, P. & Co. v. National Harrow Co. 58 C. C. A. 163, 121 Fed. 827. And he will not be liable therefor, even though his patent fails. But if the intent be not to protect and maintain his own rights, but, under color and pretense of that object, to destroy the complainant's business, in advance of any adjudication of the question of right, a very different case is presented. Lewin v. Welsbach Light Co. (C. C.) 81 Fed. 904, 906. If it be made to appear that the patentee is "pursuing a course which is calculated to unnecessarily injure another's business, and with the plain intention of so doing, his conduct will be deemed malicious," and if his patent fails, so that his representations are false, they are actionable. Kohlsaat, J., in Racine Paper Goods Co. v. Dittgen, 96 C. C. A. 433, 435, 171 Fed. 631, 633; followed by Geiger, J., in United Electric Co. v. Creamery Package Mfg. Co. (D. C.) 203 Fed. 53. See also A. B. Farquhar Co. v. National Harrow Co. 42 C. C. A. 600, 49 L.R.A. 755, 102 Fed. 714.

The evidence produced on another trial should be considered in the light of the views here expressed.

Motion for reargument denied.

IOWA SUPREME COURT.

C. C. BOGGS
v.
DUNCAN-SCHELL FURNITURE COMPANY et al., Appts.

(— Iowa, —, 143 N. W. 482.)

Case — malicious advertisement — injury to business.

A merchant who, upon losing the agency for a particular sewing machine, for the purpose of ruining the business of his successor, procures some secondhand machines and advertises them as new, of latest pattern, with all improvements, at one half the price charged by his successor for new machines, is liable to him in damages for the injury thereby caused.

(October 23, 1913.)

APPEAL by defendants from a judgment of the District Court for Lee County in plaintiff's favor in an action brought to recover damages for alleged malicious in-

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Note. — The question as to the actionable character of the act of a person, company, or corporation, in interfering with or driving away another's patrons or customers, is discussed in a note appended to Virtue v. Creamery Package Mfg. Co. ante, 1179.

terference with plaintiff's business. Affirmed.

Statement by **Gaynor, J.**:

Action to recover damages for injury claimed to business. It appears that plaintiff was a sewing machine agent and defendant a retail merchant in the same city, and defendant, for the purpose of injuring plaintiff in his business, wrongfully and maliciously advertised to the public it would sell the same machines handled by the plaintiff at half the price for which the plaintiff was offering them for sale; that the sole purpose of the defendant in so doing was to ruin plaintiff in his business. Cause tried to a jury. Verdict and judgment for the plaintiff. Defendants appeal.

Messrs. D. F. Miller and W. J. Roberts, for appellants:

One is not liable for damages resulting from the exercise of a legal right, though accompanied by malice. The conflict in cases arises out of differences as to whether the defendant was in the exercise of a legal right.

Cooley, Torts, 3d ed. pp. 1503, 1505, et seq.; Bonnell v. Smith, 53 Iowa, 281, 5 N. W. 128; Slatten v. Des Moines Valley R. Co. 29 Iowa, 148, 4 Am. Rep. 205; Candy v. Chicago & N. W. R. Co. 30 Iowa, 420, 6 Am. Rep. 682; Kelly v. Chicago, M. & St. P. R. Co. 93 Iowa, 436, 61 N. W. 957; Metzger v. Hochrein, 107 Wis. 267, 50 L.R.A. 305, 81 Am. St. Rep. 841, 83 N. W. 308; Loehr v. Dickson, 141 Wis. 332, 30 L.R.A.(N.S.) 495, 124 N. W. 293; Estey v. Smith, 45 Mich. 402, 8 N. W. 477; Bohn Mfg. Co. v. Hollis (Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.) 54 Minn. 223, 21 L.R.A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Pickard v. Collins, 23 Barb. 444; Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; Guethler v. Altman, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L.R.A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; Bordeaux v. Greene, 22 Mont. 254, 74 Am. St. Rep. 600, 56 Pac. 218; Guest v. Reynolds, 68 Ill. 478, 18 Am. Rep. 570; Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390; Fisher v. Feige, 137 Cal. 39, 59 L.R.A. 333, 92 Am. St. Rep. 77, 69 Pac. 618; Orr v. Home Mut. Ins. Co. 12 La. Ann. 255, 68 Am. Dec. 770; Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; Lancaster v. Hamburger, 70 Ohio St. 156, 65 L.R.A. 856, 71 N. E. 289, 1 Ann. Cas. 248; McCune v. Norwich City Gas Co. 30 Conn. 521, 79 Am. Dec. 278; Hunt v. Simonds, 19 Mo. 583; Judd v. Ballard, 66 Vt. 668, 30 Atl. 96; Allen v. Flood [1898] A. C. 92, 67 L. J. Q. B. N. S. 119, 77 L. T. N. S. 717, 46 Week. Rep. 258, 17 Eng. Rul. Cas. 285; Quinn v. Leathem [1901] A. C. 506, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 17 Times L. R. 749, 50 Week. Rep. 139, 85 L. T. N. S. 289; Perrault v. Gauthier, 28 Can. S. C. 241; Chambers v. Baldwin, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 165, 15 S. W. 57; Bourlier Bros. v. Macauley, 91 Ky. 135, 11 L.R.A. 550, 34 Am. St. Rep. 171, 15 S. W. 60; Jenkins v. Fowler, 24 Pa. 308; Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492; Spalding v. Vilas, 161 U. S. 483, 484, 40 L. ed. 780, 781, 16 Sup. Ct. Rep. 631; Letts v. Kessler, 54 Ohio St. 73, 40 L.R.A. 177, 42 N. E. 765; Humphrey v. Douglass, 11 Vt. 22, 34 Am. Dec. 668; Falloon v. Schilling, 29 Kan. 292, 44 Am. Rep. 642; Sparks v. McCreary, 156 Ala. 382, 22 L.R.A. (N.S.) 1224, 47 So. 332; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 21 L.R.A.(N.S.) 550, 98 Pac. 1027, 16 Ann. Cas. 1165; Jones v. Jones, 119 La. 677, 44 So. 429; Arnold v. Moffitt, 30 R. I. 310, 75 Atl. 502; Eggers v. Newark, 77 N. J. L. 198, 71 Atl. 665; Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163, 181 U. S. 617, 45 L. ed. 1029, 21 Sup. Ct. Rep. 922; Ajello v. Worsley [1898] 1 Ch. 274, 77 L. T. N. S. 783, 67 L. J. Ch. N. S. 172, 14 Times L. R. 168, 46 Week. Rep. 245.

The right to offer property for sale, and to fix the price at which it may be bought, being undoubted, and the offer in itself lawful, it cannot be converted into an actionable wrong by an allegation that it was made with the intent and for the purpose of injuring another owner of similar property by depreciating its market value.

Brantly, Personal Property, 1891, § 1; Passaic Print Works v. Ely & W. Dry Goods Co. 62 L.R.A. 673, 44 C. C. A. 426, 105 Fed. 163, 181 U. S. 617, 45 L. ed. 1029, 21 Sup. Ct. Rep. 922.

Messrs. **Hughes & McCold** for appellee.

Gaynor, J., delivered the opinion of the court:

Plaintiff claims that on the 1st day of February, 1910, he was the exclusive agent for the sale of the New Improved White sewing machine in Lee county and adjoining counties; that the defendant Duncan-Schell Furniture Company, prior to that time, had been selling the same machines for profit, or as agents for the said sewing machine company; that, after plaintiff had secured the sole and exclusive agency for

said machine, and while he was selling the same as agent, the defendants, for the purpose of destroying plaintiff's business, and breaking him up financially, and putting him out of business, maliciously and wilfully procured various old styles of said White sewing machine, and advertised the same at a price of $24.75, and published that they were selling the latest improved drop-head White sewing machine for that price, the same kind of machine which the plaintiff was handling, and was selling for $45; that the selling price of the sewing machines, and the price at which the defendants sold the machine during the time the defendant company was the agent, was $45; that defendants further advertised and published that they had just received new White sewing machines, both rotary and vibrator, which they would sell at $24.75; that they did not have any such machines, and the statement that they had just received them was untrue; that the defendants had not received, at any time, any new White sewing machines of the rotary type; that they further falsely said that the machines just received by them were of the latest pattern of said machine. The usual market price of the latest improved White sewing machine was $45, and the defendants knew this at the time. Plaintiff says all the foregoing acts were committed by the defendants wilfully and maliciously, and for the sole purpose of driving the plaintiff out of business in the sale of his machines, and for the purpose of falsely putting the plaintiff in the light of a dishonest dealer, and unworthy of patronage, in that he was attempting to sell a $25 machine for $45. Defendants' answer to plaintiff's claim is a general denial. Upon the issues thus tendered, the cause was tried to a jury, and verdict and judgment for the plaintiff.

It appears from the evidence that the defendant Duncan inserted in one of the daily papers issued in Keokuk on or about March 2d the following:

Duncan-Schell Furniture Co. March Sale Special.

[Followed by a cut of a White Sewing Machine.]

Automatic Drop Lift White Sewing Machine, both Vibratory and Rotary, Latest Pattern $24.75

And again:

March Sale Prices on Sewing Machines.

More White Machines just received.

March Sale Price on White Sewing Machines, the latest patterns, both Vibratory and Rotary $24.75

Again:

March Sale on Special Sewing Machines.

[With cut of White Machine in advertisement.]

More White Sewing Machines just received.

March Sale Special.

White Sewing Machines in latest patterns, both vibratory and rotary..$24.75

Again, with the same heading:

The March Sale of Drop Head White Sewing Machines of the latest pattern $25

Again, with the same caption:

$25 buys the latest improved 6 Drawer Drop Head White Sewing Machine, with Automatic Lift and best set of attachments.

Again, the same caption, with cut of White Sewing Machine:

The best machine at any price $25

Your money back in 365 days if you are not convinced you have the best on earth. White Sewing Machine with White Sewing Machine Co.'s guaranty $25

Then in September appeared the following advertisement:

Duncan-Schell Furniture Co.'s Annual September Sale.

$25 buys the latest improved 6 Drawer, Drop Head White Sewing Machine, with Automatic Lift and best set of attachments.

Then follows practically the same advertisement that appeared in March.

It appears that, at the time these advertisements were made, the plaintiff was the sole and exclusive agent for the sale of the machines so advertised by the defendants. The plaintiff testifies that on or about the 1st of February the defendant Duncan called him into his store, and said: "Boggs, I understand that you are going to take the agency for the White sewing machine. You know you have no money, and you cannot get the machines, and, if you do get them, I will run you out of business with the same machine." One Leach, who was the state agent in Iowa for the White sewing machines, testified: "At the time I talked with Duncan, before we changed agents, he talked considerably about Boggs. He told me that, if we gave the agency to Boggs, he could not run, because he had no money, and they would run him out of business in less than six months. This conversation was about the 1st of February."

The plaintiff further testified that, after these advertisements came out in March, stating that the defendants had received another shipment of machines to be sold at $24.75, he went to Mr. Duncan, and asked him if he had any new machines, and he said he had secondhand ones. "Then, turning to me, he said: 'Boggs, have we starved you out yet? If you are not starved out yet, we will soon see that you are starved out.' He said he had a right to put in the advertisements in the paper, because he had old machines that he wanted to sell." Leach further testified that Duncan and the Duncan-Schell Furniture Company did not buy any White sewing machines of the White Sewing Machine Company during 1910, or any time since that; that in September or October, after these advertisements were put out by the defendants, he went to the defendants to buy these sewing machines they had on hand. "I told him I came in to buy the White sewing machines he had, and he said he didn't want to sell them. I told him that they were advertising them, and that what they were doing was hurting Mr. Boggs and the White Sewing Machine Company, and I wanted to buy them. Duncan said he would not sell them. I told him I came to buy them at his price, and he said he did not want to sell them at all; that he wanted to keep them as souvenirs. When I told him that he was hurting Boggs by his advertisements, he said he didn't care for that. He advertised as he pleased." These conversations, alleged to have been had with Duncan, were all denied by Duncan. This left it a question of fact for the jury to determine.

It appears from the evidence that, at the time Boggs took this agency for the White Sewing Machine Company, the defendants were engaged in a general mercantile business, handling sewing machines, carpets, rugs, furniture, stoves, washing machines, and other like articles; that they handled four makes of sewing machines, the New Home, Standard, the Duncan-Schell Special, and the White; that the exclusive agency for the White was given by the White Sewing Machine Company from and after the 1st of February to the plaintiff, Boggs.

It appears that the Duncan-Schell Furniture Company, prior to the time Boggs became the sole agent, had handled these White sewing machines, and sold them at retail, and had done so for a number of years; that Boggs was in the service of the defendant company as its agent in disposing of those machines; that, at the time Boggs quit, the company had 12 White machines on hand, eight in its Keokuk store, and four in its Carthage store; the latter were brought to Keokuk in March, 1910; that they had bought these machines outright from the White Sewing Machine Company. There is evidence that these machines were not the latest improved pattern of the White machine, and did not have the latest improvements, and did not have the attachments advertised; that they had not just received them, as stated in the advertisement, and that they were not furnished with the improvements advertised; that the machines handled by the plaintiff were of that character and kind, and had the latest improvements.

So it is apparent that, upon the issues tendered by the plaintiff, there was evidence upon which the jury might well find all the material facts, upon which plaintiff bases his right to recover, established, both as to what the defendants did, and as to the motive by which they were actuated in the doing. We do not understand that the defendants seriously questioned this, but contend that, conceding the facts to be established as alleged, and as established by the evidence, still the plaintiff has no right to recover: (1) Because the defendants had an absolute right to publish the advertisements complained of, and their motive in so doing cannot be questioned. (2) That, inasmuch as the advertisements complained of made no attack upon the plaintiff, or upon the machines kept for sale by the plaintiff, no legal right of Boggs was assailed by the defendants, and whether they thought good or ill of him when they published these articles is immaterial. (3) That public policy forbids that the motive of established trader, in publishing a legal advertisement of his own wares, shall be inquired into or questioned.

Defendants' contention resolves itself into the proposition that malicious motives in the doing of an act may make the act worse, where the act is wrongful or unlawful, yet it cannot make that wrong or unlawful which is, in itself, not unlawful or wrongful; or, in other words, that an action cannot be predicated upon the doing of an act which does not, in itself, amount to a legal wrong, because the party doing the act was moved to it by a wicked or malevolent heart. Therefore the defendant contends that, as it had in its possession certain White sewing machines, and had the same for sale, the fact that they wrongfully or purposely deceived the public as to the character or the quality of the articles for sale would not entitle one engaged in the same business to complain, though the defendant, in the doing of the act, had the purpose and intent to injure his competitor, and was, in fact, actuated by malice towards his competitor, and though the competitor

lost his business by reason of the defendants' conduct.

This would seem like a simple proposition, and, abstractly considered, would appeal to any mind, possessing legal acumen, as sound. No one could seriously question the proposition that, if one does that only which he has a right to do under the law, and does it in a legal way, he ought not to be called to account for his conduct, no matter what his motive might be, and there are many authorities to support the abstract proposition that a lawful act cannot be made the foundation of an action because it was done with an evil motive, and some cases have held that the motive with which an act is done is not an element of a civil wrong. It may go to enhance the damages, but is not an element of the wrong itself.

In Guethler v. Altman, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355, an action in which a merchant sought to recover damages of the members of the school board and a teacher in the school, on the ground that they had wilfully and maliciously prevented their students, by threats and intimidations, from trading at plaintiff's store, alleging that they had talked to the pupils, advising them to stay away from plaintiff's place of business, and to purchase their supplies elsewhere, and threatening that, if they did not do so, they would be suspended, and that, as a result of the wrongful act of the defendants, plaintiff was injured in his business, plaintiff alleged that, when high school pupils started to enter his store, they would discover they were being watched by the defendant Crull, and they would turn away and not enter; that Crull wrote letters to the parents of the pupils containing threats that, if the pupils visited plaintiff's store, they would be suspended, and that it was all done with the systematic purpose and intent of injuring plaintiff in his business; that Crull was following the instructions of the other defendants in what he did; and that plaintiff was thereby injured in his business. The case was disposed of on demurrer. In the opinion delivered by the supreme court, it says: "It was not an unlawful act for Crull to advise or persuade the pupils not to visit appellant's store. The fact that he acted maliciously does not change the rule. An act which is lawful in itself, and which violates no right, cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which, in its own essence, is lawful, and cites, in support of that rule, Chatfield v. Wilson, 28 Vt. 49; Jenkins v. Fowler, 24 Pa. 308; Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599; Frazier v. Brown, 12 Ohio St. 294; Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Cooley, Torts, 2d ed. p. 832; Boyson v. Thorn, 98 Cal. 578, 21 L.R.A. 233, 33 Pac. 492." Many other cases might be cited in support of this abstract proposition.

These cases present, as strongly as any, the application of the abstract rule contended for by appellant. They present the general rule to concrete cases that, what a man has a lawful right to do, he may do, no matter what his motive may be, no matter what injuries may result from it, and yet not be called to answer for his conduct.

It is not so difficult to know what the law is as to know what is a just and fair and right application of the law to a given state of facts. As civilization advances, and the social and business conditions become more involved and complicated, when even legitimate competition has become so strong that even honest men are tempted to force their way beyond the limits of legitimate competition, the law—which is a rule of civil conduct for the government of men in their social and business relationships—ought to keep pace with the new conditions. The integrity of the social order, the stability of business itself, requires, and the law should require, that every man conduct himself in full recognition of the fact that he is a member of that social order; that he not only has rights, but has corresponding duties; and that the performance of those duties is as binding upon him as a member of the social order as are the rights given to him. Men, as members of organized society, under the law, have the right to do certain things; but that right is restricted and limited by the duty imposed upon them not to exercise those rights wantonly and wilfully to the injury of another. In the exercise of the law-given right, the well-being of the social order requires that each person should exercise his right consistently with the fact that he is a member of the social order out of which his rights grew. While a person has the right to pursue his avocations and his business for his own pleasure and profit, he has no right, directly or indirectly, to wilfully and maliciously injure another in his lawful business or occupation. Men have the right to engage in lawful competition, and, though the competition may have the effect of driving another out of business, if the competition is lawful, no action arises, though injury resulted from the competition. Where there is lawful competition for gain, for supremacy in business, for the legitimate

control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business.

The case before us does not present a case of lawful competition, but a case of simulated or pretended competition, designed and carried out with malice for the purpose of injury to the plaintiff in his business. At least the jury might have so found from the evidence.

It is the purpose and intent of the law to deal with things as they are, and not as they seem, "Seems, Madam, no; it is. I know not seems."

Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor. The law will not permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong.

It is said that a man cannot be called to answer for doing that which he has a right to do, no matter what the effect of the doing may be upon others, and no evil motive can make an act wrong, the doing of which is within the rights granted by law. But the question still stands, Is he within his legal right when he simulates honest competition, not to advance himself or his own interest, but for the sole purpose of inflicting injury upon his neighbors? It is said the law deals only with externals; but the law ought not to be blinded by the lion's skin. It may be that expressed malice in the doing does not, of itself, make the wrong; but malice is implied in the very act of doing, and therefore the act itself is wrong.

In Tuttle v. Buck, 107 Minn. 145, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 119 N. W. 946, 16 Ann. Cas. 807, we find this language: "When a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery."

In Doremus v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, the supreme court of Illinois, after recognizing the rule of lawful competition, carried on in a lawful way, says: "An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done, to the detriment of the right of another, it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

This court recognizes that "every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong; and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong."

The same doctrine is recognized in Panton v. Holland, 17 Johns. 92, 8 Am. Dec. 369, and in Van Horn v. Van Horn, 52 N. J. L. 284, 10 L.R.A. 184, 20 Atl. 485, and finally, in Dunshee v. Standard Oil Co. 152 Iowa, 618, 36 L.R.A.(N.S.) 263, 132 N. W. 371. In this case the question here under consideration is fully discussed, and the authorities collated. It presents fully and fairly the features which distinguish honest competition, for personal gain or advancement, from pretended competition, for the sole purpose of injuring another, and we think the doctrine therein expressed, and the law as therein exemplified, meet all the conditions of the case at bar.

Other questions are discussed by counsel; but they are all crystallized in the question herein discussed.

We find no error in the record, and the case is affirmed.

Weaver, Ch. J., and **Deemer** and **Withrow**, J.J., concur.

Petition for rehearing denied.

MISSISSIPPI SUPREME COURT.

JOHN W. ARMSTRONG, Appt.,
v.
PULLMAN COMPANY.

(— Miss. —, 66 So. 283.)

Carrier — loss of sleeping-car ticket — refusal to permit occupation of berth.

To hold a sleeping-car company liable in damages for refusing to permit a passenger to occupy, even on payment of fare, a berth for which he claims to have purchased a ticket which he does not produce, the refusal must be shown to be unreasonable, where the conductor's diagram shows that all berths of the class claimed are sold, even though the passenger's claim is corroborated by another passenger.

(November 2, 1914.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hinds County in defendant's favor in an action brought to recover damages for refusal of defendant to permit plaintiff to occupy a berth for which he claimed to have purchased a ticket. Affirmed.

The facts are stated in the opinion.

Messrs. **Flowers, Brown, & Davis** for appellant.

Messrs. **R. H. Thompson** and **J. H. Thompson**, for appellee:

A sleeping-car conductor is not bound, as a matter of law, to accept the statement of a person assuming to be a passenger, to the effect that he had purchased and lost a berth ticket, when, without other proof, the statement is affirmed to be true by two of such person's companions.

Mitchell v. Southern R. Co. 77 Miss. 917, 27 So. 834; Fetter, Carr. Pass. § 279, p. 719; Hutchinson, Carr. §§ 1036–1040; Elliott, Railroads, § 1594.

Reed, J., delivered the opinion of the court:

During the afternoon of March 7, 1911, in the city of St. Louis, appellant purchased a ticket which entitled him to occupy lower berth No. 6, car No. 103, from St. Louis to Memphis, on the train of the Illinois Central Railroad Company, leaving at 11:20 P. M. of that day. He boarded the train shortly before it departed. He was unable to produce his ticket. He had left it in the pocket of a coat which he was wearing when he purchased it, and which he afterwards took off and packed in his trunk. He explained this to the Pullman conductor, and went to the baggage car in an effort to reach his trunk and obtain the ticket, but he was unable to locate the trunk. The conductor refused to permit him to occupy a lower berth in the car, because there was an outstanding ticket for every lower berth. Appellant offered to pay for the berth which he claimed. The conductor refused to accept the amount, on the ground that all lower berths had been disposed of. He offered to sell appellant an upper berth, but this was declined. Appellant thereupon went into a day coach and rode therein to Memphis.

Appellant was corroborated in his testimony that he had purchased the ticket by the testimony of a companion, Mr. Harris, who was with him at the time. It seems that two tickets were purchased, one for appellant and one for Mr. Harris. Appellant's testimony that he explained to the conductor that he had so purchased the

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Note. — Liability for failure to furnish passenger with sleeping-car accommodations.

The earlier cases on this question have been collected in a note to Patterson v. Old Dominion S. S. Co. 5 L.R.A.(N.S.) 1012, and the supplement thereto to the case of Speaks v. Southern R. Co. 38 L.R.A.(N.S.) 258. See also note to Mann-Boudoir Car Co. v. Dupre, 21 L.R.A. 289, on "Liabilities as to passengers on sleeping cars."

As to the liability of sleeping-car companies for baggage or other effects of its passengers, see note to Pullman Co. v. Schaffner, 9 L.R.A.(N.S.) 407, and the subsequent case of Bacon v. Pullman Co. 16 L.R.A.(N.S.) 578.

See also Calhoun v. Pullman Co. 16 L.R.A.(N.S.) 575; Thompkins v. Missouri, K. & T. R. Co. 52 L.R.A.(N.S.) 791.

The Pullman Company is liable for a breach of contract in failing to furnish the accommodation agreed to be furnished. Thus, where it had contracted with a passenger to furnish sleeping-car accommodations on a certain train, between two stated points, and required the passenger to leave the train and go across intervening tracks to get a sleeper upon another track, there was a breach of the contract for which it was liable. Where, however, it is not agreed to furnish accommodations in any particular car, or to furnish such accommodations between stated points without change, it may require a change from one car to another. Pullman Co. v. Riley, 5 Ala. App. 561, 59 So. 761.

A railroad company which, as agent of the Pullman Company, has sold Pullman accommodations between certain points on the route covered by the passenger's ticket, which the company had in its possession and which is subject to its inspection, when the sleeper in which the berth is sold does not go by the same line that the railroad ticket calls for, is liable to such passenger for her expulsion from the sleeper. Nashville, C. & St. L. R. Co. v. Price, 125 Tenn. 646, 148 S. W. 219. W. A. E.

L.R.A.1915B.

ticket, and that it was for lower berth No. 6, was also corroborated by the testimony of Mr. Harris, and that of another traveling friend, Mr. Thurman. But there is a clear conflict in the evidence as to this. The conductor testified that appellant never told him that he had purchased a ticket to lower 6, but claimed that he purchased ticket for either lower berth No. 7 or 8, both of which berths his diagram showed had been sold and were subject to be occupied.

Appellant filed his suit against appellee, claiming therein that he "was put to very great inconvenience and mental and physical discomfort and trouble" by having to sit up all night in a crowded day coach at a time when he had only recently recovered from a spell of sickness, and was not then well, and demanded damages in the sum of $2,000. The plea of general issue was interposed by appellee, and the case was submitted to the jury on the question of actual or compensatory damages. The jury returned a verdict in favor of the defendant.

Appellant, in this appeal, complains that the trial court erred in granting the defendant the following instruction:

"The court instructs the jury that, unless they believe from a preponderance of the evidence that Conductor Hunt unreasonably refused to respect plaintiff's assertion of a right to a berth, they will find for defendant, although they may believe from the evidence that the conductor might have given plaintiff a berth as a matter of courtesy."

Appellant cites to sustain his position the cases of Kansas City, M. & B. R. Co. v. Riley, 68 Miss. 765, 13 L.R.A. 38, 24 Am. St. Rep. 309, 9 So. 443, 8 Am. Neg. Cas. 443, and Alabama & V. R. Co. v. Holmes, 75 Miss. 371, 23 So. 187. In both of these cases there was evidence other than the verbal statement to corroborate the explanation of the passenger. In the Riley Case the outgoing conductor had by mistake taken up the wrong end of the round-trip ticket. The passenger had in his possession the other end of the ticket, which he actually showed to the conductor on his return trip. The court decided that this was corroboration of his statement to the extent that it was made thereby a reasonable explanation not to be ignored by the conductor.

In the Holmes Case the court held that the conductor should not have ignored and refused to receive the explanation of a passenger of an error in her ticket, where her statement was substantiated by her baggage check and the waybill for its transportation, it being the rule of the railroad to check baggage only upon a proper ticket. L.R.A.1915B. In that case the agent of the railroad company, instead of issuing a ticket to Meridian, as requested, through error, issued it to Vicksburg.

It will be noted that in both of these cases the errors were made by the agents of the railroad companies; the passengers were not at fault. In this case the fault or failure, which resulted in appellant being unable to present his ticket upon demand, was not that of appellee, the Pullman Company, but was that of appellant. Appellee was in no way to blame for appellant's inability to produce his ticket.

In the case of Mitchell v. Southern R. Co. 77 Miss. 917, 27 So. 834, it was held that a passenger, upon his refusal to pay his fare, could be ejected from the cars, after the expiration of his ticket over a route including several connecting carriers, the ticket showing upon its face the exact date of expiration, giving ample time to make the journey. It was further held in that case that a conductor is not required to accept the uncorroborated statement of a person claiming to ride upon a defective, expired, or lost ticket.

In delivering the opinion in the Mitchell Case, Judge Calhoon referred to the Riley and Holmes Cases, and stated that those cases "have carried the doctrine as far as it can be pressed without crossing the danger line of injustice to railroad corporations." We approve both of those cases, because in each of them the passenger had and exhibited to the conductor evidence showing reasonably the statement to be true. Here there is nothing to support the oral statement but the mere production of the ticket absolutely void on its face.

In this case we have the mere statement of the passenger. A repetition of the statement of the same fact by another passenger, under circumstances shown herein, where the statement is uncorroborated by other evidence, and the integrity thereof is questioned by the conductor, will not require him to accept the statement as a satisfactory explanation.

We find in the case of Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232, cited by counsel for appellee, that there was other evidence besides the statement by the passenger of the loss of the ticket. He had a slip of paper from the ticket agent to the conductor, identifying him as the purchaser of the ticket, and he had shown his ticket to the porter upon entering the car and was shown to his berth. He lost it after entering the car. We quote from the opinion in that case as follows: "It is well-recognized law that carriers of passengers may lawfully require those seeking to be carried to purchase tickets, when convenient

facilities to that end are afforded by the carrier, to exhibit them to persons designated by the carrier for that purpose, and surrender them, after securing their seats in the car or other vehicle used, for transportation, when required by the person in immediate charge of the transportation. Such requirements cause but little, if any, inconvenience to the public, and may be indispensable to enable the carrier to protect itself against loss through the knavery of dishonest employees. It was in evidence that appellant's rules required the conductor to take from persons desiring berths only tickets, passes, or money, and the reasonableness of these rules is not and cannot be questioned."

There is a difference betwen the right of a passenger purchasing an ordinary railroad ticket, and the right which he obtains in buying a sleeping-car ticket. The railroad ticket entitles him to ride on a train of the company. A sleeping-car ticket secures for him a designated place in a certain car, which is reserved for his occupancy. If a railroad ticket should be lost, another ticket could be sold in its place or cash fare accepted, and no interference would result with the right of another passenger. This will not be so where a sleeping car ticket is lost. A third person may have rights to be considered. The sleeping-car ticket is not simply evidence of the passenger's right to ride on the train or in any car of the train, but it reserves for his use a designated part of the car known as a berth.

The ticket filed as an exhibit with appellant's testimony shows that a part thereof is to be held by the passenger to designate the very berth which he has purchased. This part contains the following words: "To be retained by passenger to identify accommodations indicated on the accompanying ticket." All these things must be borne in mind when we are considering the question of the duty of a sleeping-car conductor to require a reasonably sufficient proof by the passenger of his right to oocupy a certain berth. It rested upon appellant, as plaintiff in the trial of his case, to show by a preponderance of the evidence that the conductor was unreasonable in refusing to respect appellant's assertion of a right to a berth.

The instruction will not be condemned by the reference therein to the conductor giving appellant a berth as a matter of courtesy. This reference will not affect the statement of the proof required of appellant to sustain his case. The reasonableness of the conductor's action in refusing to accept appellant's explanation of his failure to produce his ticket was properly presented to the jury for their decision. By their verdict they decided that he was not unreasonable in refusing.

We do not see any error in the trial court's refusing to grant appellant an instruction on punitive damages under the facts and circumstances of this case. Pullman Palace Car Co. v. Reed, supra.

Affirmed.

Smith, Ch. J., concurring:

I do not think that the conductor of a Pullman car is called upon to accept the statement of a would-be passenger thereon, even though supported by the statement of other passengers, that he had purchased a ticket and had lost it, and am therefore of the opinion that the appellee was entitled to the peremptory instruction requested. This being true, it follows, of course, that I concur in the result reached.

NORTH CAROLINA SUPREME COURT.

FINCH BROTHERS, Appts.,
v.
J. L. MICHAEL.

(— N. C. —, 83 S. E. 458.)

Covenant — not to engage in business — lending money to rival.

A covenant by one selling a business not to conduct the same kind of business in the same town for a specified time is not broken by lending money to a new firm entering such business, with no interest in the business other than as creditor, or by the transfer of the telephone number used in the business to the new concern.

(November 18, 1914.)

APPEAL by plaintiffs from a judgment of the Superior Court for Davidson County in defendant's favor in an action brought to recover damages for an alleged

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Note. — Lending money to competitor of covenantee as breach of covenant not to engage in business.

Generally as to sale of business and good will as a limitation upon right of vendor to engage in competing business, see note to Gordon v. Knott, 19 L.R.A.(N.S.) 762.

As to validity of covenants in restraint of trade, see notes cited in Index to L.R.A. Notes, "Contracts," §§ 107–109.

As to entering another's employment as breach of covenant not to engage in rival business, see notes in 20 L.R.A.(N.S.) 769, and 40 L.R.A.(N.S.) 1191.

In line with FINCH BROS. v. MICHAEL, it is held in Gallup Electric Light Co. v.

breach of a written contract not to engage in business. Affirmed.

The facts are stated in the opinion.

Messrs. **Phillips & Bower** and **E. E. Raper** for appellants.

Messrs. **Walser & Walser** and **McCrary & McCrary** for appellee.

Walker, J., delivered the opinion of the court:

This action was brought to recover damages for an alleged breach of a contract, by which defendant sold to the plaintiffs his retail grocery business in Lexington, with the fixtures and good will belonging thereto, at cost for the goods, wares, and merchandise, and $1,000 for the fixtures and good will, plaintiffs paying $200 as a bonus, and defendant agreeing not to conduct the same kind of business in said town for 1½ years thereafter. The breach alleged was that plaintiffs loaned money to Michael & Parker, a new grocery firm, and that the telephone number which had been used by the defendant in the old store had been changed and the old number transferred to the phone of the new firm. There were some other minor complaints made against defendant, but we think they are not sufficient to show any breach of the contract. Even if defendant committed the small offenses imputed to him, and they were calculated to cause injury to plaintiff, the damages claimed are entirely too speculative and conjectural to form the basis of a recovery, and besides, the causal connection between the imputed wrongs, if the latter are of sufficient consequence to be noticed by the law (*de minimis non curat lex*), and the alleged injury, is not shown with any semblance of accuracy. We cannot jump to a conclusion, but the proof must be of such a character as to show with at least some degree of certainty that the alleged wrongs produced an injury, or resulted in a violation of plaintiff's rights. Both wrong and damage must be shown, and it must appear that the latter was the effect and the former the cause. Byrd v. Southern Exp. Co. 139 N. C. 273, 51 S. E. 851; Winston Cigarette Mach. Co. v. Wells Whitehead Tobacco Co. 141 N. C. 284, 8 L.R.A.(N.S.) 255, 53 S. E. 885. The defendant had no interest in the partnership of Michael & Parker, and he had a perfect right to lend them money. The principle is well stated by Justice Burwell in Reeves v. Sprague, 114 N. C. 647, 19 S. E. 707. It appeared there that Sprague sold part of his stock in trade and the good will of his business to Reeves, with a stipulation that he would not engage in the same business in Waynesville, North Carolina, and afterwards Sprague sold the balance of the stock to one J. R. Davis, who started and conducted the same kind of business in said town in competition with Reeves. At the time he bought the remnant of the stock, Davis gave Sprague his note for the price, secured by a mortgage, and thereafter took possession and prosecuted the business of a druggist. With reference to these facts, the court said: "It cannot be seriously contended that Sprague is violating a contract not to engage in the business of a druggist in Waynesville merely because he has a lien on a stock of drugs at that place. We find in the evidence adduced no substantial foundation for the plaintiffs' allegation that the mortgage made by Davis to Sprague is

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Pacific Improv. Co. 16 N. M. 86, 113 Pac. 848, that under a contract not to engage in business in competition with the purchaser of property, the party bound is not precluded from loaning money to others, even though they may use it to embark in business in competition with the purchaser.

So, the court, in Harkinson's Appeal, 78 Pa. 196, 21 Am. Rep. 9, doubted whether a contract by a mother not to engage in business in a certain district was breached by setting her son up in the same business, and advancing him his supposed share in her estate, where she did not furnish the establishment with any intention that she would engage in the business, or be in any manner interested therein. In furtherance of her plans for aiding her children, said the court, she had substantially advanced to him his supposed share in her estate. It was invested in that particular for his benefit, and not hers. The effect was the same as if she had given or loaned to him money, with a knowledge that he intended to so use it. In denying an injunction to restrain the mother from permitting the premises to be used in carrying on the business in which her son was engaged, the court stated that "the complaint here rests on an alleged violation of a contract. The fact of a violation is not free from doubt. The appellee has not sustained nor has he reason to fear any substantial injury to his property. Under all the circumstances it is not a case that now calls for the exercise of the high power invoked."

So, it is held in Bird v. Lake, 1 Hem. & M. 338, 6 Eng. Rul. Cas. 545, that a covenant against engaging in the trade or business of eating-house keeper, or in any matter pertaining thereto, within a certain district, is not violated by loaning money to one engaged in such business, the loan being secured by mortgage on the business premises, even though the covenantor may know that the mortgagor's only means of repaying the money is out of the profits of the business.

The case of Kramer v. Old, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813, is sufficiently set out in the opinion of FINCH BROS. v. MICHAEL. J. D. C.

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a sham, and that Davis is merely the agent of Sprague. If, in fact, he is such agent, the injunction against the defendant Sprague and his agents is sufficient for the plaintiffs' purposes. They produce no proof whatever, as it seems to us, that the appellant is Sprague's agent—only facts that might raise a suspicion that he is. To stop his lawful business upon the evidence now before us seems unreasonable."

The same was also held to be the law in Kramer v. Old, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813, but the evidence tended to show that the seller afterwards attempted to enter into competition with his buyer by becoming a member of a corporation which carried on the same business within the territory prohibited to him by the agreement, and it was properly held that this was a breach of the contract; but the court thus referred to our point: "While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it (Reeves v. Sprague, supra), a different rule must prevail when it appears that the prohibited party attempts not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock, in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold, and which is protected by their own agreement against their own competition, and equity will not allow them, with the price in their pockets, to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals."

But in this case the defendant has no pecuniary interest in the firm of Michael & Parker, either directly or indirectly, as member, manager, agent, or otherwise, for he is only a creditor of the partnership, which is a very different thing from conducting the business or being interested therein. In a sense, he may be considered as having some concern for its success as its creditor, but this is all, and is not sufficient to constitute a breach of his contract, either under the sale of the good will or the restrictive covenant. We said in Faust v. Rohr, 166 N. C. 187, 81 S. E. 1096, referring specially to Scudder v. Kilfoil, 57 N. J. Eq. 171, 40 Atl. 602: "The negative covenant entered into by the petitioner, by which he bound himself not to engage in the same business within the borough, was of much more consequence than a mere sale of the good will of the business to Mr. Scudder. The sale of the good will would have only precluded the vendor from soliciting trade from the old customers of the firm, but would not have prevented him from setting up a rival business in Princeton or anywhere else" (and citing further the following cases: Labouchere v. Dawson, L. R. 13 Eq. 322, 41 L. J. Ch. N. S. 427, 25 L. T. N. S. 894, 20 Week. Rep. 309; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 932; Althen v. Vreeland, — N. J. Eq. —, 36 Atl. 479).

It has been stated, as a general rule, that good will exists in a professional as well as in a commercial business, subject to the distinction that it is not so much fixed or as localized as the good will of a trade, but attaches to the person of a professional man or woman, as a result of confidence in his or her skill and ability. "Consequently, in enforcing the agreement, where there has been nothing more than a mere sale of 'good will,' the courts at most have only held that the vendor of the good will is precluded by his contract from soliciting the former customers of the old partnership to deal with himself or not to deal with his vendee." 14 Am. & Eng. Enc. Law, 2d ed. 1091.

The difficulty which plaintiff encounters in this case is that he offers no tangible proof of a breach of the contract. There is, perhaps, something from which we may suppose or conjecture that there was a slight interference with the quiet and reasonable enjoyment by plaintiff of the good will which he had purchased, but this will not do, and the evidence must be more definite. We thus expressed ourselves in Crenshaw v. Asheville & B. Street R. & Transp. Co. 144 N. C. at page 320, 56 S. E. 946: "The kind of proof which must be forthcoming, in order to establish the issues in favor of the plaintiff, was considered recently by us in Byrd v. Southern Exp. Co. 139 N. C. 273, 51 S. E. 851, where we said: 'There must be legal evidence of the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further, and offer at least some evidence which reasonably tends to prove every fact essential to his success.'"

And in Campbell v. Everhart, 139 N. C. at page 516, 52 S. E. 206: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the

burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury" (citing Lewis v. Clyde S. S. Co. 132 N. C. 904, 44 S. E. 666; Byrd v. Southern Exp. Co. supra; Wheeler v. Schroeder, 4 R. I. 383; Offutt v. Worlds' Columbian Exposition, 175 Ill. 472, 51 N. E. 651, 5 Am. Neg. Rep. 16; Day v. Boston & M. R. Co. 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771, 12 Am. Neg. Rep. 452; Catlett v. St. Louis, I. M. & S. R. Co. 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062; Philadelphia, W. & B. R. Co. v. Stebbing, 62 Md. 504).

The defendant may not have acted with due propriety, nor with perfect good faith, but we cannot see that he has committed any legal wrong. The telephone was entirely under the control of the telephone company, and Michael & Parker had the right to it if the company consented that they might use it, or did not object thereto, after notice of their doing so. It promised to restore it to the plaintiff, but, it seems, did not do so, for some reason, we suppose, satisfactory to itself.

It may be added, that defendant was not required by his contract to see that plaintiff retained all the customers of the old business. He could not do this, as they were at liberty to trade where they pleased, nor does it sufficiently appear how many, if any of them, were lost by plaintiff, whether by any action of defendant or not. We are therefore left suspended in the realm of conjecture, without any appreciable thing, either definite or certain, being proved, and the damages more uncertain than anything else, if there was any wrong.

The case, in its final analysis, seems to have been reduced to the very attenuated matter of a few eggs and a small quantity of butter sold by W. N. Shoaf, a former customer of defendant, to Michael & Parker, but Shoaf testified: "I had several places to trade and went everywhere, for that purpose, that I pleased," or words to that effect. Taking all the evidence together, it does not measure up to the standard fixed by the law.

The court nonsuited plaintiff at the close of his evidence, and we see no error in its doing so.

Affirmed.

L.R.A.1915B.

OHIO SUPREME COURT.

TOLEDO DISPOSAL COMPANY, Plff. in Err.,
v.
STATE OF OHIO.

(89 Ohio St. 230, 106 N. E. 6.)

Police power — scope.

1. In the exercise of the police power, the state and municipal authorities may make all such provisions as are reasonable, necessary, and appropriate for the protection of the public health and comfort, and when any such provision has a real and substantial relation to that object, and does not interfere with the enjoyment of private rights beyond the necessities of the situation, every intendment is to be made in favor of its lawfulness.

Criminal law — common-law crime — existence.

2. No criminal prosecution can be sustained in Ohio except for an act done in violation of a statute or ordinance legally passed; and the courts will not construe that to be a crime punishable under one statute which was done under authority especially granted by another statute.

Nuisance — public — legalizing.

3. A "public nuisance" arises out of the violation of public rights or the doing of unlawful acts; and if the legislature, by a

Headnotes by the COURT.

Note. — Legislative authority as defense to a public nuisance.

I. Introductory, 1207.
II. General rules, 1208.
III. Limitations upon legislative authority as a defense.
a. Act must be within the grant of power, 1210.
b. Act must be the natural and necessary result of the grant, 1211.
c. Effect of negligence, 1213.
d. Necessity of reasonableness of use, 1213.
e. Power to authorize, 1213.

I. Introductory.

Cases which are decided upon the theory that the thing authorized is no nuisance, apart from the effect the authorization may have, are not included.

As to effect of legislative authority upon liability for private nuisance, see note to Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49.

That statutory authority to commit nuisance will not be presumed, see note to Missouri, K. & T. R. Co. v. Mott, 70 L.R.A. 579.

See note to Terrell v. Chesapeake & O. R. Co. 32 L.R.A.(N.S.) 371, as to the liability of a railroad for creating a nuisance.

See note to Tidewater R. Co. v. Shartzer,

law passed within its legislative power, authorizes an act to be done which, in the absence of the statute, would be a public nuisance, such act ceases to be legally a nuisance so far as the public is concerned.

Same — municipal authority — effect.

4. The state cannot maintain a criminal prosecution against a defendant for conducting a plant and business located, constructed, and operated under an express contract with a municipality, made under legislative authority, where the plant is conducted under municipal control and regulation, with care and skill, and in such manner as to produce the least possible annoyance, and where it is all done for the purpose of conserving the health and safety of the public.

(January 13, 1914.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas, convicting defendant of maintaining a public nuisance. Reversed.

Statement by **Johnson**, J.:

Plaintiff in error was indicted by the grand jury of Lucas under § 12,646, General Code for maintaining a public nuisance. The indictment charged that the defendant corporation did unlawfully and purposely use and maintain a certain building for the purpose of carrying on the business of reducing garbage and manufacturing fertilizer of and from garbage and from the entrails, offal, and bones of beasts, etc., which occasioned noisome and offensive smells,

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17 L.R.A.(N.S.) 1054, as to the right, under a constitutional provision against damaging private property for public use without compensation, to compensation for consequential damages to property, no part of which is taken, from smoke, noise, dust, etc., incident to ordinary operation of a railroad.

II. General rules.

A distinction exists between the effect of legislative authority upon public and its effect upon private nuisances. As shown in the note to Louisville & N. Terminal Co. v. Lellyett, 1 L.R.A.(N.S.) 49, legislative authority is not a defense to an action for a private nuisance. But when it relates to a public nuisance, legislative authority to do a certain thing relieves the one authorized from the charge of maintaining a public nuisance from the mere doing of the act, although, in the absence of such authority, the act authorized might be regarded as such a nuisance. Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75, 86 Am. Dec. 252 (*dictum*); Harris v. Thompson, 9 Barb. 350; Clark v. Syracuse, 13 Barb. 32 (*dictum*); Zimmerman v. Gritzmacher, 53 Or. 206, 21 L.R.A.(N.S.) 299, 98 Pac. 875, 1135; Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661; Danville, H. & W. R. Co. v. Com. 73 Pa. 29; State v. Elk Island Boom Co. 41 W. Va. 796, 24 S. E. 590; Stoughton v. State, 5 Wis. 291.

It is stated in State v. Erie R. Co. 84 N. J. L. 661, 46 L.R.A.(N.S.) 117, 87 Atl. 141, that where the doing of a thing that would otherwise be a public nuisance is authorized by the legislature, the doing of that thing by the person so authorized, in the manner and for the purpose authorized, cannot constitute a public nuisance in the absence of negligence, and such negligence must consist of something more than the mere doing of the authorized act.

Thus, authority from the legislature to erect a dam in the manner and at the place designated is a defense to an indictment for maintaining a nuisance resulting from the dam. Stoughton v. State, supra.

A provision in a liquor tax law that where all conditions of the law were complied with, no proceedings should be sustained against the liquor seller nor against any premises as a public nuisance on account of the sale of liquor thereon, was held in Campbell v. Jackman, 14 Iowa, 475, 27 L.R.A.(N.S.) 288, 118 N. W. 755, to make the place immune against injunction as a public nuisance.

Authority granted by the legislature to a canal company to locate canal feeders, feeder dams, side cuts, and reservoirs, as may be necessary to supply its canal with water, prevents the maintenance of an indictment for a nuisance in erecting its works in pursuance of such act, where no act of wantonness is shown in their erection. Butler v. State, 6 Ind. 165.

It is stated in Valparaiso v. Hagen, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062, an action against the city for an injunction precluding it from discharging sewage into a creek, that what the law grants will not constitute a nuisance *per se*, public or private. While that statement is apparently opposed to the weight of authority so far as a private nuisance is concerned (see note in 1 L.R.A.(N.S.) 49), it accords with the prevailing view as to public nuisances.

The question arises frequently in connection with the operation of railroads. The rule as above stated has been uniformly applied.

A railroad company authorized by its charter to use steam engines upon its road is not subject to indictment for maintaining a nuisance in the emission and throwing out of sparks and fire from such engines, in the absence of negligence. Morris & E. R. Co. v. State, 36 N. J. L. 553.

A railroad company authorized to use soft coal cannot be indicted for a nuisance resulting from the use of such coal, in the absence of negligence. State v. Erie R. Co. supra.

It is stated in People v. Transit Development Co. 131 App. Div. 174, 115 N. Y. Supp. 297, that when the legislature authorized the organization of a corporation

and which became and were injurious to the health and comfort of the public and of persons residing in said county, to the common nuisance of all the people of the state of Ohio there living and abiding. On the trial in common pleas defendant was found guilty. The trial court imposed a fine of $300 and ordered the nuisance abated. This judgment was affirmed by the circuit court, and these proceedings are brought to reverse the judgments of the courts below.

Mr. **Ben W. Johnson**, for plaintiff in error:

An act authorized by law cannot be a public nuisance, and the state cannot prosecute as a nuisance that which it has authorized.

Joyce, Nuisances, § 67; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Masterson v. Short, 33 How. Pr. 481; Com. v. Reed, 34 Pa. 275, 75 Am. Dec. 661; People ex rel. Chope v. Detroit & H. Pl. Road Co. 37 Mich. 195, 26 Am. Rep. 512; Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75, 86 Am. Dec. 252; State v. Louisville, N. A. & C. R. Co. 86 Ind. 114; People v. New York Gaslight Co. 64 Barb. 55; Stoughton v. State, 5 Wis. 291; Milburn v. Cedar Rapids, 12 Iowa, 246; Chicago General R. Co. v. Chicago City R. Co. 87 Ill. App. 17; Mull v. Indianapolis & C. Traction Co. 169 Ind. 214, 81 N. E. 657; Sopher v. State, 169 Ind. 177, 14 L.R.A. (N.S.) 172, 81 N. E. 913, 14 Ann. Cas. 27; Zimmerman v. Gritzmacher, 53 Or. 206, 21

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to construct and operate electric roads in cities, it contemplated the construction of power plants which would have to be located where possible annoyance or discomfort to private persons might be caused; and that this authorization prevented the thing authorized from being a public nuisance.

An act of Parliament authorizing the construction of a railroad upon a certain defined line, from which it was not to deviate more than a hundred yards, and not into the grounds of persons not mentioned in the book of reference, and a subsequent act authorizing the company to use locomotive engines on the road, is a defense to an indictment for a nuisance resulting from the proximity of the railroad to a public highway. Rex v. Pease, 4 Barn. & Ad. 30, 1 Nev. & M. 690, 2 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71. It is stated by the court that the legislature, having defined the line of the railroad, must be presumed to have known that it would be adjacent to a public highway, and consequently that travelers upon the highway would be in all probability incommoded by the passage of engines along the road. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public using the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy traveling and conveyance of merchandise along the new railroad.

See discussion of negligence, infra, III. c.

But a general act has been held to be no defense. Luning v. State, 2 Pinney (Wis.) 215, 1 Chand. (Wis.) 178, 52 Am. Dec. 153. This, however, is based rather upon the theory that the nuisance was not within the grant, than upon the broad ground that legislative authority is no defense.

A statute enacted after the location of a railroad encroaching upon a public highway, which confirms the location of the railroad, but does not make the former location and the proceedings under it justifiable *ab initio*, does not exonerate the railroad company from all liability for acts done while it had no authority to do them. It has the effect of preventing the encroachment on the highway from being thereafter deemed a common nuisance, but does not prevent its being deemed a nuisance theretofore. Com. v. Old Colony & F. River R. Co. 14 Gray, 93.

Authorization granted to a railroad company to maintain power plants in a city cannot be devolved upon another corporation, although the capital stock of the other corporation is entirely owned by the railroad company, and the railroad company is its only customer. People v. Transit Development Co. supra.

In State v. Leighton, 83 Me. 419, 22 Atl. 380 (a prosecution of an individual for destroying a bridge which he claimed was a public nuisance), a conviction was sustained. The construction of the bridge was authorized by the legislature; and while the court does not discuss the effect of such authority upon the existence of the public nuisance, it concludes that the bridge was constructed, maintained, and used by legal authority as a part of the public highway, and that the defendant had no justification in destroying it

A milldam erected by leave of a county court is not a public nuisance. Watts v. Norfolk & W. R. Co. 39 W. Va. 198, 23 L.R.A. 674, 45 Am. St. Rep. 894, 19 S. E. 521.

One maintaining a dam in a river, under legislative authority, in the condition in which it was placed by commissioners created for that purpose, upon a previous indictment for maintaining it in an unlawful condition, cannot be subjected to a subsequent indictment so long as this condition is maintained. Ensworth v. Com. 52 Pa. 320.

It is stated frequently in actions for damages or injunction by private individuals that that which is authorized by law cannot be a public nuisance. Crofford v. Atlanta, B. & A. R. Co. 158 Ala. 288, 48 So. 366 (municipal ordinance); Blanc v. Murray, 36 La. Ann. 164, 51 Am. Rep. 7; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186 (municipal ordinance); Pickens v. Coal

L.R.A.(N.S.) 299, 98 Pac. 875, 1135; Crofford v. Atlanta, B. & A. R. Co. 158 Ala. 288, 48 So. 366; Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S. E. 844; Pickens v. Coal River Boom & Timber Co. 66 W. Va. 10, 24 L.R.A.(N.S.) 354, 65 S. E. 865; Sadlier v. New York, 40 Misc. 78, 81 N. Y. Supp. 308; Vaughan v. Taff Vale R. Co. 5 Hurlst. & N. 679, 29 L. J. Exch. N. S. 247, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 8 Week. Rep. 549, 1 Eng. Rul. Cas. 296; Rex v. Pease, 4 Barn. & Ad. 30, 1 Nev. & M. 690, 2 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71; National Teleph. Co. v. Baker, 68 L. T. N. S. 283, 62 L. J. Ch. N. S. 699, [1893] 2 Ch. 186, 3 Reports, 318, 57 J. P. 373; Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; Bacon v. Boston, 154 Mass. 100, 28 N. E. 9; Bellinger v. New York C. R. Co. 23 N. Y. 47.

The legislature may, within constitutional limitations, permit or require that which, without statute, would be deemed a nuisance; and where an act is made lawful by legislative sanction, annoyances must be borne, subject to the qualification that the act must be done without negligence or unnecessary disturbance.

Pittsburgh, C. & St. L. R. Co. v. Brown, 67 Ind. 45, 33 Am. Rep. 73; Taylor v. Baltimore & O. R. Co. 33 W. Va. 39, 10 S. E. 29; Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; Watson v. Fairmont & Suburban R. Co. 49 W. Va. 528, 39 S. E. 193; New Albany & S. R. Co. v. Higman, 18 Ind. 77; Daniels

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River Boom & Timber Co. 66 W. Va. 10, 24 L.R.A.(N.S.) 354, 65 S. E. 865. See Valparaiso v. Hagen, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062.

III. Limitations upon legislative authority as a defense.

a. Act must be within the grant of power.

Legislation authorizing what would otherwise be a nuisance will be strictly construed. Garrett v. State, 49 N. J. L. 94, 60 Am. Rep. 592, 7 Atl. 29, 7 Am. Crim. Rep. 469, affirmed in 49 N. J. L. 693. The thing done must be within the grant of power. Rex v. Pease, 4 Barn. & Ad. 30, 1 Nev. & M. 690, 22 L. J. Mag. Cas. N. S. 26, 22 Eng. Rul. Cas. 71, approved in Atty. Gen. ex rel. Easton v. New York & L. B. R. Co. 24 N. J. Eq. 49.

The act being within the grant of power, legislative authority prevents it being a nuisance. Thus, a statute granting a toll-road company the right to erect gates on their road according to their reasonable discretion, but subject to the condition that none should be placed in a city at a terminus of the road, prevents the prosecution of the company for maintaining a nuisance in maintaining a tollgate within the limits of the city as extended after the erection of the gate. People ex rel. Chope v. Detroit & H. Pl. Road Co. 37 Mich. 195, 26 Am. Rep. 512. It is stated that the company originally chose the location of the tollgate in the exercise of the discretion conferred by the state. This discretion did not seem to have been improperly used, and therefore the gate ought to be regarded, for the purposes of the case, as though the site had been directly designated by the state.

See State v. Leighton, 83 Me. 419, 22 Atl. 380, supra, subd. II.

If the thing done is not within the authorization, such authorization is no defense. Renwick v. Morris, 3 Hill, 621, affirmed in 7 Hill, 574.

A charter of a corporation authorizing it to erect a dam "between the foot of Rose's or Treat's falls in Bangor, and McMahon's falls in Eddington," does not authorize the corporation to erect a dam above the latter fall, and the charter authority is no defense to a prosecution for a nuisance. State v. Godfrey, 12 Me. 361.

A railroad company which has been licensed by the selectmen to construct its road across a public highway, with a sufficient draw in the bridge to accommodate public travel, cannot defend an indictment for a nuisance for obstructing the highway, by reason of the license, where they have failed to construct the draw as required by the selectmen. Com. v. Nashua & L. R. Corp. 2 Gray, 54.

A statute authorizing the storing, manufacturing, or refining of petroleum under certain conditions, which was intended to protect the public against the dangers arising from the explosive and inflammable nature of the petroleum, is no defense to an indictment for a nuisance arising from the spread of an unwholesome and offensive odor in the course of the manufacture. Com. v. Kidder, 107 Mass. 188. It is stated that if this statute were a defense to an indictment under such conditions, the result would be that no limit would be put to the manufacture of petroleum in the most crowded and populous portions of any town or city; that the reasonable, if not the necessary, inference from the statute, is that the legislature intended to establish no new rule in this regard, but to leave the question whether the manufacture is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law.

A license granted by a territory and county to sell intoxicating liquors and operate a theater at a designated place does not justify the licensees in conducting such business in a manner offensive to decency and morals, so that it amounts to a nuisance. Reaves v. Territory, 13 Okla. 396, 74 Pac. 951.

A statute authorizing the construction of dams to furnish water power for driving

v. Keokuk Waterworks, 61 Iowa, 549, 16 N. W. 705; Coleman v. New York, 70 App. Div. 218, 75 N. Y. Supp. 342, affirmed in 173 N. Y. 612, 66 N. E. 1106; Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co. 3 Hun, 523; Fisher v. American Reduction Co. 189 Pa. 419, 42 Atl. 36; State v. Knoxville, 12 Lea, 146, 47 Am. Rep. 331; 29 Cyc. 1174–1280; Darcantel v. People's Slaughter House & Refrigerating Co. 44 La. Ann. 632, 11 So. 239; Murtha v. Lovewell, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347; Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Lorain v. Rolling, 3 Ohio C. C. N. S. 663, 24 Ohio C. C. 82; Cincinnati v. Renner, 13 Ohio C. C. N. S. 409, affirmed in 86 Ohio St. 342, 99 N. E. 1132.

Messrs. **Holland C. Webster, Charles M. Milroy,** and **George P. Greenhalgh** for the State.

Johnson, J., delivered the opinion of the court:

The Toledo Disposal Company is a corporation organized to operate a reduction plant. In 1910 it entered into a contract with the city of Toledo, under specifications prepared by the city, for the disposal of its garbage waste by a process of reduction. Thereupon the company constructed a plant at an expense of about $150,000. On the trial the company offered evidence showing that the plant was built and equipped with approved machinery, which was made upon modern, sanitary, and scientific lines; that

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machinery is no defense to an indictment for a nuisance in maintaining a dam to furnish a pool to hold logs used for sawing in a steam mill erected near by. Com. v. Church, 1 Pa. St. 105, 44 Am. Dec. 112.

A company owning a railroad constructed through the streets of a city on a route other than that authorized is not protected from the charge of maintaining a nuisance by such authorization. Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471.

A statute authorizing the laying of wagonways upon certain highways, and requiring the one laying the wagonway to keep the road for 20 yards on each side of it in good and effectual repair, is no defense to an indictment for a nuisance of one who had laid such a wagonway on a road which was not 20 yards on each side of the wagonway, since the statute does not allow a wagonway to be made on such a narrow road. Rex v. Morris, 1 Barn. & Ad. 441, 9 L. J. K. B. 55.

In Com. v. New Bedford Bridge, 2 Gray, 339, it is held that a corporation which has erected over a river a bridge which is required to have "two suitable draws which shall be at least 30 feet wide" may be liable to prosecution for failure to keep the draws suitable for the convenient navigation of the river as determined by subsequent conditions of navigation, and that whether or not the draws are suitable to such subsequent conditions is a question of fact.

An authorization from the state to a railroad company to build a bridge across a navigable stream does not prevent the bridge from being a public nuisance where no draw was constructed therein, as required by the act. State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5.

Although a variation in some detail may not be fatal. Com. v. Wilkes-Barre & K. Street R. Co. 127 Pa. 278, 17 Atl. 996.

Thus, it is stated in State ex rel. Howard v. Hartford Street R. Co. 76 Conn. 174, 56 Atl. 506, in an application by a private individual for a writ of mandamus requiring a street railway company to remove a cross-over switch, that a street railroad authorized by the legislature, approved in its location and mode of construction by the municipal council, and built in substantial accord with that approval, cannot be a public nuisance merely because in some detail of construction there is a departure from the approved plan. The departure from the plan in this case was the building of a cross-over switch at some distance from its location as fixed by the plan.

b. Act must be the natural and necessary result of the grant.

The rule is sometimes stated that if the legislature authorizes or directs something to be done, it will be presumed that no nuisance was intended unless such be the natural and necessary result of the work. State v. Concordia, 78 Kan. 250, 20 L.R.A.(N.S.) 1050, 96 Pac. 487. There is *dictum* of like effect in State ex rel. Horskottle v. Board of Health, 16 Mo. App. 8, and State v. Woodbury, 67 Vt. 602, 32 Atl. 495. An opinion in accord with this is expressed in Atty. Gen. v. Metropolitan Bd. of Works, 1 Hem. & M. 320, 2 New Reports, 312, 9 L. T. N. S. 139, 11 Week. Rep. 820.

It has been stated that if the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if it authorizes an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197. This is cited with approval in Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445.

Under a general statute conferring upon cities authority to lay sewer pipes and drains, and connect the same with any creek, ravine, or river at any point within 5 miles of the corporate limits of said city, a city is liable to be enjoined at the suit of the state from maintaining a public nuisance resulting from the discharge of its sewage in the channel of a river, which, after the construc-

the location, construction, and operation were prescribed, supervised, and regulated by the city of Toledo; and that the plant was operated carefully and skilfully. The director of public service as a witness in the case expressed his approval of the manner in which the work was conducted, and his opinion that its conduct did not constitute a nuisance. The contract expressly stipulated that the disposal of the garbage should be under the control of the director of public service. The contract and the ordinance and resolutions under which it was made were offered in evidence by defendant and rejected by the trial court, as was also the testimony that the plant was operated with care and skill.

Counsel for defendant in error concede in their brief, for the sake of the argument, that the "plaintiff in error could show that its plant and business were located, constructed, and conducted so as to produce the least possible annoyance."

The trial court refused the request of defendant to charge the jury that "the defendant was, during the time laid in the indictment, expressly authorized to conduct the business in which it was then engaged. It cannot, therefore, be prosecuted or punished merely for conducting said business, and if the jury find by a preponderance of the evidence that the defendant conducted said business at the best available location, by the use of the best available machinery, equipment, and appliances, and in a skilful and careful manner, with reference to

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tion of the sewer, had been abandoned by the river at its ordinary stage. State v. Concordia, 78 Kan. 250, 20 L.R.A.(N.S.) 1050, 96 Pac. 487.

The general statute involved in State v. Concordia, left a discretion in the city, so that, in planning and maintaining a sewer system, the city must make provisions for changes which naturally and reasonably may be anticipated. It is stated that a city has no right arbitrarily to select a point of outlet for its sewers regardless of the public health and comfort; that it may take its sewers to the river, but it must not be indifferent to the very interests to be subserved in building sewers.

Legislative authority to erect a dam does not furnish a defense to an action to enjoin the owners thereof from so operating it as to create a public nuisance. Pine City v. Munch, supra.

A license from a board of health to carry on the business of extracting fats from dead animals, and converting the rest into fertilizer, is no defense to a prosecution for the maintenance of a nuisance arising from odors and smells which corrupt the air to the inconvenience of the public, in the absence of a showing that these were the necessary consequence of such manufacture. Garrett v. State, 49 N. J. L. 94, 60 Am. Rep. 592, 7 Atl. 29, 7 Am. Crim. Rep. 469, affirmed in 49 N. J. L. 693.

A bridge built by a municipality under authority of a general statute over a navigable or floatable stream, in such a manner as to unreasonably interfere with navigation or the use of the stream for floating logs and timber, is *per se* a common nuisance. Marion v. Tuell, 111 Me. 566, 51 L.R.A. (N.S.) 1172, 90 Atl. 484.

See State v. Leighton, 83 Me. 419, 22 Atl. 380, supra, subd. II.

Without stating how far a statute authorizing the erection of milldams across streams not navigable would protect one who had erected such a dam, it is stated that such a statute does not grant a license to create and continue a nuisance, and that if he thereby creates a public nuisance, he is liable to an indictment in that regard as if no such statute were in existence. Luning v. State, 2 Pinney (Wis.) 215, 1 Chand. (Wis.) 178, 52 Am. Dec. 153.

A preliminary injunction was allowed in Thompson v. Paterson & H. River R. Co. 9 N. J. Eq. 526, to restrain the railroad company from constructing a bridge across a river in a certain way. The statute in this case authorized the construction of the bridge "so as to do the least possible injury to the navigation" of the river, and the dispute was as to whether the bridge about to be so constructed was such as would produce the least possible injury.

In Reg. v. Bradford Nav. Co. 6 Best. & S. 631, the lessees of a canal were authorized to take water from a certain place and apply it for the purposes of the canal. The source of this supply was made foul, not by the lessees, but by others, who discharged foul and filthy water into it, and the foul water in the canal became a nuisance. In holding the lessees liable to indictment, Cockburn, Ch. J., states: "Here the thing done was not within the intention of the legislature. They made it lawful for the canal company or their lessees to take the water and use it for the purposes of their canal; but it was contemplated that the water should be taken in its then state of comparative purity; and my notion of the law is, that when statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impossible without causing one, and so contravening the law of the land, the persons exercising them are liable to indictment. Here the nuisance caused in the exercise of the statutory powers arises from an altered state of circumstances. The water is no longer pure, but fouled by the discharge into it of filthy matter before it is taken and used by the company or their lessees, so that they cannot use it without creating a nuisance. It follows that they cannot legally use it at all." Crompton, Judge, states that it was not found that it was necessary for the purposes of the canal that the lessees should make this nuisance, or that they should

preventing the escape of odors, and if you find that the conduct of said business created no more odors than were necessarily incident to such conduct of said business, your verdict must be for the defendant."

The court charged the jury that "if the smells indicated did emanate from this building, and if they were offensive to the general public, it is immaterial for your consideration how the business was conducted and what kind of machinery was used by defendant in the conduct of its plant."

The refusal to charge as requested and the quoted part of the general charge given to the jury indicate the views of the courts below on the important matter under consideration.

The contract referred to was made by the city under express legislative authority. Section 3649, General Code, authorizes municipal corporations to establish, maintain, and regulate plants for the disposal of sewage, garbage, and similar refuse matter. Section 3677 provides that municipal corporations shall have special power to appropriate and hold real estate within their corporate limits for many purposes, among which are specified "sewage and garbage disposal plants and farms." Section 3678 enacts that in the appropriation of property for any of the purposes named in the preceding section the corporation may, when reasonably necessary, acquire property outside the limits of the corporation. Section 3809 authorizes a city to make a

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take the water from the particular source authorized.

See also the cases discussed above, subd. III. a.

c. Effect of negligence.

Or if the licensee is guilty of negligence in doing the thing authorized, he is liable.

Thus, a statute authorizing a corporation to collect, treat, and dispose of sewage is no defense to a prosecution for maintaining a nuisance caused by the emission of offensive odors, where this resulted from a faulty construction and careless operation of the plant. State v. Collingswood Sewerage Co. 85 N. J. L. 567, 89 Atl. 525. The fact that the plant was constructed under the direction of the state board of health does not relieve the company from prosecution for the nuisance, nor does the fact that it was constructed under plans approved by the state sewage commission absolve it from liability for maintaining the nuisance.

And a railroad corporation having the special privilege of constructing, maintaining, and operating its railroad in the streets of a city does not thereby acquire the right to maintain a nuisance resulting from tracks and rails which have become old, defective, worn, and uneven so as to constitute an obstruction in the street from which accidents are likely to happen to persons using the streets. New York v. Montague, 145 App. Div. 172, 129 N. Y. Supp. 1084. The action in this case was one by the municipality to enjoin the maintenance of the nuisance.

On the other hand, if the licensee is free from negligence, the authority is a defense. Thus, a gas company which has been authorized by the legislature to manufacture gas is not liable to indictment for creating a nuisance by unwholesome smells, smokes, and stenches, where it is conceded that the buildings and processes of the company are the best and their service careful, and that they have used due care and diligence in the business. People v. New York Gaslight Co. 64 Barb. 55.

See also Morris & E. R. Co. v. State, 36 L.R.A.1915B. N. J. L. 553; State v. Erie R. Co. 84 N. J. L. 661, 46 L.R.A.(N.S.) 117, 87 Atl. 141, supra.

d. Necessity of reasonableness of use.

The test of the reasonableness of the use was applied in State v. Louisville, N. A & C. R. Co. 86 Ind. 114. Here a railroad company which had acquired possession of turnpike roads abandoned by the state, and under its act of incorporation acquired title thereto for the purposes of a railroad which it afterwards built, was held not to have created or maintained a public nuisance in obstructing the public streets of the town through which the railroad ran, where it did not unreasonably or unnecessarily obstruct the streets, but did no more than make a reasonable and proper use of the right acquired under the grant from the state and county.

See also State v. Concordia, 78 Kan. 250, 20 L.R.A.(N.S.) 1050, 96 Pac. 487; Marion v. Tuell, 111 Me. 566, 51 L.R.A.(N.S.) 1172, 90 Atl. 484, supra.

e. Power to authorize.

A limitation has sometimes been placed upon governmental authority as a defense to a public nuisance by holding that it is only a defense in so far as the authority granting it has not exceeded its power. Thus, in Sopher v. State, 169 Ind. 177, 14 L.R.A.(N.S.) 173, 81 N. E. 913, 14 Ann. Cas. 27, it is stated that if the legislature of a state, by a statute, authorizes an act or acts to be done, which, in the absence of such a statute, would constitute a public nuisance, such act or acts are thereby made lawful, and cannot be considered or regarded in a legal sense as a nuisance so far as the public is concerned, unless the legislature, in enacting the statute, exceeded its power.

Where a municipality has title to the streets within its limits, an act of the legislature granting the right to use the streets for the purposes of a railroad, without making any provision for compensation, is no defense to an indictment for a nui-

contract with any person, firm, or company for the collection and disposal of garbage in such corporation. Construing the sections above referred to *in pari materia*, it is manifest that the legislature intended to provide for the disposal of garbage that should gather and be collected in the corporations, but not to restrict the place of disposal.

The question is therefore clearly presented whether the state can maintain a criminal prosecution against a defendant for conducting a plant and business located, constructed, and operated under an express contract with a municipality, made under legislative authority, when the plant is conducted under municipal control and regulation, with care and skill, and in such manner as to produce the least possible annoyance; such authority having been given and such contract having been made for the purpose of conserving the health and comfort of the public.

The inception, the creation, and the maintenance of this business was a public undertaking in the interest of the public health and the general welfare. Any benefit that defendant company may have received from the operation of the plant was purely secondary and incidental. The compensation it received from the city, $5,800 per year, was paid as the contract price is paid for any other public work done under legislative authority. Every essential connected with the enterprise that is related to the public health and comfort rested in the control of the city. In addition, the contract secured to the city the right at any time after two years, when permitted by law, to take over the plant at a valuation to be determined in a manner provided for.

An order which abates the unavoidable incidents of a business when conducted with all possible care and skill operates to prohibit the business itself, and in this case denies to the city of Toledo the right to avail itself of the provisions of the wholesome and beneficent statutes touching the subject. Nothing is more firmly established than that the state and municipal authorities, in the exercise of the police power, may make all such provisions as may be reasonable, necessary, and appropriate for the protection of the public health and comfort.

In California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, Justice Harlan says: "This court has said that 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.'"

It is further said: "'Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety.'"

The mode of disposing of garbage and refuse matter is one of the difficult questions involved in municipal sanitation. Its great importance is not doubted. It is true that there has not yet been complete agreement as to the best and most appropriate method for the disposal of garbage and refuse material; but the testimony tendered and rejected shows that the city of Toledo made every effort to proceed on the most modern and scientific plan. The city, in the discharge of its duty to safeguard the health of its people, pursued the course pointed out by the state. There is no ground to question the good faith of all concerned. The entire enterprise has a "real and substantial relation" to the very

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sance in constructing the railroad. Donnaher v. State, 8 Smedes & M. 649.

In Belton v. Baylor Female College, — Tex. Civ. App. —, 33 S. W. 680, an action to abate a nuisance in which the defense was an authorization by a municipality to construct a sewer from which the nuisance resulted, it is stated that if the matters complained of created a nuisance, the defendant cannot justify under a pretended authority from the officers of the city, since the city itself cannot create a nuisance that affects the health of its inhabitants, and if such is the case, it cannot authorize another to do what the law prohibits it from doing.

The authority which was pleaded in defense of an indictment for maintaining a nuisance in State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076, was a lease of the premises upon which the business was carried on, granted the defendant by town commissioners. It is stated that no power short of an act of the legislature for the purpose can legalize the maintenance of a nuisance, and unless an act incorporating a town gives the authorities there, either expressly or by necessary inference, the power to authorize a nuisance, such power is lacking.

A municipality has no power to license acts which are prohibited by general laws, and which are both *mala in se* and *mala prohibita*, and therefore such a license constitutes no defense to an action for abatement of a nuisance created thereby (bawdyhouse). Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

A bridge over an inlet of the sea was held a nuisance in Com. v. Charleston, 1 Pick. 180, 11 Am. Dec. 161, although authorized by the court of sessions, since the order was void, as beyond the authority of the court.

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proper object for which it was instituted; and under the rule stated every intendment is to be made in favor of its lawfulness. There are no common-law crimes in Ohio. No act can be punished criminally except in pursuance of a statute or ordinance lawfully enacted. Mitchell v. State, 42 Ohio St. 383, and cases there cited.

It would seem to be incontrovertible that the court would not construe that to be a crime, punishable under one statute, which was done in the exercise of powers specifically granted by another statute. Such a holding would be contrary to established rules of construction. It would in effect attribute to the legislature a disregard of wise public policy.

In Joyce on Nuisances, vol. 1, § 67, the rule is stated: "It is a general rule that an act which has been authorized by law cannot be a public nuisance, and that the state cannot prosecute as a nuisance that which it has authorized. So, it has been decided that works of internal improvement which have been erected by the state for the benefit of its citizens do not become a public nuisance from the fact that the neighborhood is thereby rendered unhealthy by the obstruction of running water and consequent overflowing of adjoining lands, and that the character of such works is not changed by the fact that they are transferred to a private corporation, which is required to maintain the same for the purposes of their creation."

This rule is also declared in Sopher v. State, 169 Ind. 177, 14 L.R.A.(N.S.) 172, 81 N. E. 913, 14 Ann. Cas. 27; Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648; Stoughton v. State, 5 Wis. 291.

The proposition stated does not involve the conclusion that a person injured specially and in a different way than the public would not be entitled to recover damages in a civil suit, if the work is done in an improper manner, or so as to cause unnecessary disturbance or discomfort to such person.

The doctrine is stated in Blanc v. Murray, 36 La. Ann. 164, 51 Am. Rep. 7, as follows: "That which is authorized by the legislature, within the strict scope of its constitutional power, cannot be a public nuisance, but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom."

The distinction here pointed out is also stated in Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719, and in Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246.

At § 69 of his work, Joyce says: "It is a general rule that, where an act is made lawful by legislative sanction, annoyances in connection therewith must be borne by the individual, subject to this qualification, that the act must be done without negligence or unnecessary disturbance, by the one doing it, of the rights of others."

There is a distinction between a case in which the thing complained of is done under a general act of the legislature and one in which it is done under a special law of the state, or under a special contract made under sanction of the state, in which the particular thing done and the manner of doing it is defined. In the former case the general law will not justify the doing of the thing in such a way as to produce a nuisance or cause injury, while in the latter it is held that the governmental authority had in view the consequences which were to follow from the doing of the particular thing, and that the state cannot sustain a criminal proceeding for the doing of the thing specifically authorized. Stoughton v. State, supra; 29 Cyc. 1198.

A majority of the learned circuit court were of the opinion that the case of Garrett v. State, 49 N. J. L. 94, 693, 60 Am. Rep. 592, 7 Atl. 29, 7 Am. Crim. Rep. 469, declared the principles that rule the case at bar. In that case defendant was indicted for creating a public nuisance in operating a factory for the manufacture of fertilizers from dead animals and filth, which produced a public nuisance. The defendant claimed that he had been licensed by the board of health of the county to carry on the business, and that the license was a defense to an indictment for nuisance during its continuance. The trial court refused the request of defendant to so charge, and that ruling was affirmed. The court says: "The defendants invoke in their behalf a recognized principle that a public nuisance must be occasioned by acts done in violation of law, and that any business or pursuit which is authorized by law cannot be such nuisance. It is not denied that the legislature have the power to make lawful, so far as the public is concerned, a work or business which, by the common law, would otherwise be a public nuisance."

The court further says: "What he asks the court to declare to the jury as a legal rule for their guidance is that the license of this board to carry on a particular business is, under any and all circumstances, a protection against an indictment for nuisance growing out of such business. It left no room for the consideration of unnecessary or even reckless injury to the public in the mode of manufacture. This is the plain meaning of this request, and had it been put to the jury as asked, no

matter how wilful or extensive the offense to the public may have been, it demanded, in virtue of the licenses, the acquittal of the plaintiffs in error."

The business licensed in the Garrett Case was a purely private business for private profit, not in the interest of the public health or for the public welfare. It at once appears, therefore, that the decision in the Garrett Case rests upon a different state of facts entirely from those involved in the case we have in hand, and did not involve the application of the same principles.

In this case the primary object in the establishment of the disposal plant was purely a public object in the interest of the public. This was the sole purpose which called forth the exercise by the legislature of its police power. The concession that the plant and business were located, constructed, and conducted so as to produce the least possible annoyance compels the conclusion that in the whole enterprise there has been careful regard for every interest. Under the judgment and order in this case it would doubtless be impossible to operate the plant.

For obvious reasons the legislature has enacted laws to prevent the pollution of streams, and this court has enforced common-law and statutory rules looking to the same end.

In view of this situation, if the action of the trial court in the rejection of the evidence referred to and in the refusal to charge as requested, as well as in the charge itself, is sustained, it is difficult to see how our cities can avail themselves of the wise and necessary provisions which the state has made to assist in the effort to prevent nuisances and preserve the health of its people.

The judgments of the courts below will be reversed and defendant discharged.

Nichols, Ch. J., and **Shauck** and **Wilkin**, JJ., concur.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

SOLEN BRACKEN et al., Plffs. in Err.,
v.
FIDELITY TRUST COMPANY.

(— Okla. —, 141 Pac. 6.)

Bills and notes — increased interest after maturity — negotiability.

1. Under §§ 3592, 3593, Wilson's Rev. & Anno. Stat. 1903, of Oklahoma, a note dated January 12, 1906, containing the following provision: "With interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid; interest payable with note,"—was a non-negotiable note, and, though in the hands of a purchaser before maturity, was subject to every legal defense which could have been interposed against it in the hands of the original payee.

Sale — horse — warranty — option.

2. The seller of a horse gave the following guaranty: "If the above-named stallion does not get 60 per cent of the producing mares with foal with proper care and handling, we agree to replace him with another stallion of the same price and quality upon delivery to us of said stallion in as sound and good condition as he is at present." Held, by the terms of this warranty, the purchasers did not obligate themselves to accept another horse in case of breach of such warranty, but, upon a breach of same, they had the option to either accept another or retain the horse and sue for damages sustained by the breach, or to return him and rescind the contract.

(May 12, 1914.)

ERROR to the District Court for Kiowa County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. **O. B. Riegel** and **Hays, Carpenter, Hughes, & Terral**, for plaintiffs in error:

The note sued is non-negotiable.

National Bank v. Feeney, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186; Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331; Iron City Nat. Bank v. McCord, 139 Pa. 52, 11 L.R.A. 559, 23 Am. St. Rep. 166, 21 Atl. 143; Altman v. Rittershofer, 68 Mich. 287, 13 Am. St. Rep. 341, 36 N. W. 74; Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; Cotton v. John Deere Plow Co. 14 Okla. 605, 78 Pac. 321; Dickerson v. Higgins, 15 Okla. 588, 82 Pac. 649; Clevenger v. Lewis, 20 Okla. 843, 16 L.R.A.(N.S.) 410, 95 Pac.

Note. — Bills and notes: negotiability of note providing for interest after maturity.

Generally as to negotiability as affected by certainty as to time and amount, see Index to L.R.A. Notes, Bills and Notes, §§ 21, 22.

As to effect on negotiability of promissory note of provision permitting extension of time, see notes to Anniston Loan & T. Co. v. Stickney, 31 L.R.A. 234; First Nat. Bank v. Buttery, 16 L.R.A.(N.S.) 878; Rossville State Bank v. Heslet, 33 L.R.A.(N.S.) 738;

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230, 16 Ann. Cas. 56; Farmers' Nat. Bank v. McCall, 25 Okla. 600, 26 L.R.A.(N.S.) 217, 106 Pac. 866; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Adams v. Seaman, 82 Cal. 636, 7 L.R.A. 224, 23 Pac. 53.

Upon a breach of guaranty, warranting the stallion to be a 60 per cent foal getter, the defendants were entitled to rescind the contract of sale by returning the stallion to the seller, McLaughlin Brothers, and defend against the note for want of, and failure of, consideration.

Augusto v. Romano, 42 Pa. Super. Ct. 19; Heathcote v. Fairbanks, M. & Co. 60 Fla. 97, 53 So. 950; Anthony v. Cody, 135 Ga. 329, 69 S. E. 491; Tygart v. Sutton, 8 Ga. App. 20, 68 S. E. 488; Tainter v. Wentworth, 107 Me. 439, 78 Atl. 572; Pratt v. Johnson, 100 Me. 443, 62 Atl. 242; Crouch v. Morgan, 135 Mo. App. 611, 116 S. W. 475; Main v. Eldorado Dry Goods Co. 83 Ark. 15, 102 S. W. 681.

The defense of breach of warranty was available to the defendants even if they had not returned the stallion.

Obenchain v. Roff, 29 Okla. 211, 116 Pac. 782; Wasatch Orchard Co. v. Morgan Canning Co. 12 L.R.A.(N.S.) 540, note, 32 Utah, 229, 89 Pac. 1009.

Messrs. **Morse & Standeven** and **W. A. Phelps** for defendant in error.

Harrison, C., filed the following opinion:

This was an action by the Fidelity Trust Company against Solon Bracken et

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and State Bank v. Bilstad, 49 L.R.A.(N.S.) 132.

It is required, both at common law and under the negotiable instrument acts, that a note to be negotiable must be certain as to amount and also as to the time of payment. The question whether this rule is violated by provisions for the payment of interest after the maturity of a note depends largely upon the wording of the provision.

In Bunting v. Mick, 5 Ind. App. 289, 31 N. E. 378, 1053, an instrument for the payment of a specified sum "with 8 per cent interest after maturity until paid" was held a negotiable instrument under § 5501, Rev. Stat. 1881, but the effect of the provision for the payment of interest after maturity was not discussed.

And in the following cases, where the notes provided for an increased rate of interest after maturity, the instruments were held negotiable, and not rendered indefinite and uncertain as to amount by reason of such provisions: De Hass v. Roberts, 59 Fed. 853, affirmed on this point 30 L.R.A. 189, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227 (where an instrument for the payment of a certain sum with interest at 8 per cent, among other things, provided for 12 per cent after maturity); Towne v. Rice, 122 Mass. 67 (providing for additional rate of interest if not paid at maturity); Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89 (providing for specified increase in interest after maturity).

And in Citizens' Sav. Bank v. Landis, 37 Okla. 530, 132 Pac. 1101, an instrument providing for the payment of an increased rate of interest after maturity was held not to be thereby rendered non-negotiable under Comp. Laws 1907, §§ 4626, 4627, defining a negotiable instrument as a written promise or request for the payment of a certain sum of money to order or bearer, and providing that it must be payable without any condition not certain of fulfilment.

And in Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958, a note for the payment of a certain sum with 7 per cent interest, and providing that "if any part of the principal is not paid at maturity it shall bear interest at the rate of 12 per cent per annum," was held not uncertain as to amount by reason of such provision, and negotiable. The decision in Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331, infra, was distinguished on the ground that in that case the note was inherently uncertain as to the rate of interest that would be paid for the use of the money, and that there was nothing from which it could be determined with certainty the amount that the payee or purchaser would realize on his loan, or the rate of interest, until by reason of its dishonor it had lost every element of negotiability, but this was held not true of the note before the court.

In Kendall v. Selby, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178, a provision that if the note was not paid when due, either by maturity or by reason of failure to comply with the terms of a mortgage securing it, it should bear interest at an increased named rate, was held a penalty and not enforceable, so that it did not render the note non-negotiable.

In Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, however, a note bearing interest at 6 per cent, which contained a provision that it should draw interest at 12 per cent after maturity, was held non-negotiable because of uncertainty, under provisions that "a negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this acticle," and that "a negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment." The court in this case stated that in their opinion the decisions in Merrill v. Hurley and Hegeler v. Comstock, supra, were not, on principle, distinguishable.

In Davis v. Brady, 17 S. D. 511, 97 N. W. 719, under a provision that a promissory note is an instrument negotiable in form whereby the signer promises to pay

al. to recover on a promissory note. The note in question was executed by the makers as a part payment for a certain Percheron stallion, which the makers of the note had purchased from McLaughlin Brothers at an agreed price of $3,600; the note being as follows:

$1,200

Mountain Park, O. T.,
Jan. 12, 1906.

Oct. 1, 1908, after date, for value received, we jointly and severally promise to pay McLoughlin Bros., or order, twelve hundred dollars at the Citizens' Bank, Mountain Park, O. T., with interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid; interest payable with note.

Plaintiff alleged that before maturity of the note it purchased same from McLaughlin Brothers for a valuable consideration, and that it was then the owner and holder thereof, and that defendants had refused payment.

Defendants answered, pleading a failure of consideration, in that the stallion was worthless as a breeder, that he did not come up to the guaranty which McLaughlin Brothers had made to them, and that therefore the note was without consideration. They further alleged that the horse had been returned to McLaughlin Brother, at Kansas City, Missouri, in as good condition as when received by them. The guaranty in question, which was made a part of the bill of sale, and which defendants alleged the horse did not come up to, is as follows:

Guaranty: If the above-named stallion does not get 60 per cent of the producing mares with foal with proper care and handling, we agree to replace him with another stallion of the same price and quality upon delivery to us of said stallion in as sound and good condition as he is at present. Mares bred with impregnator properly used, the percentage is the same as stallion.

In the event of the above-named stallion's death any time before the end of four breeding seasons, upon our being notified, we agree to replace him with another stallion of the same price for the sum of one thousand dollars ($1,000) cash, we to pay the freight.

This is the only contract, representation, or guaranty given by us, and it is not to be changed or varied by any promise or representation of the agent.

McLaughlin Brothers,
by H. H. Wilson, Agent.
R. L. Roberts.

The cause was tried by the court, and judgment rendered in favor of plaintiff, to reverse which defendants appeal to this court.

Two propositions are urged for reversal: First. That the note was non-negotiable,

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a specified sum of money, a note for the payment of a certain sum "with interest from date until fully paid, at the rate of 10 per cent per annum, payable annually on principal and all overdue unpaid interest, and providing that "if the said interest is not paid when due it becomes part of the principal and draws interest at 12 per cent per annum until paid," was held uncertain as to the amount and non-negotiable. The court said: "It cannot be determined with any degree of accuracy whether overdue interest draws 10 per cent per annum, payable annually, or 12 per cent per year until paid. It is also a doubtful question whether the amount for which the note was given and the upaid interest draws interest annually at 10 per cent per annum; or whether the principal augmented by the first and all subsequent instalments of overdue and unpaid interest, draws interest at 12 per cent until the entire amount is paid."

And in Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963, an instrument for the payment of a certain amount with 7 per cent interest from date, and 8 per cent after due and 5 per cent attorneys' fees, was held not a negotiable promissory note. The decision in this case apparently rested principally on the provision as to attorneys' fees.

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Provisions for payment of interest from date if not paid at maturity.

In Parker v. Plymell, 23 Kan. 402, a note containing a promise to pay interest at 12 per cent after maturity, followed by the words, "If this note is not paid at maturity, the same shall bear 12 per cent interest from date," was held not rendered non-negotiable by these words, such words not leaving the time or the amount of payment uncertain, and not becoming operative until after the note was dishonored and had ceased to be negotiable.

And an instrument dated, and promising to pay a stated sum without interest thereon if paid at maturity, if not paid at maturity to bear 10 per cent interest from date, has been held a negotiable instrument, the amount being definite and certain. Hope v. Barker, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567.

And a like result was reached in Clark v. Skeen, 61 Kan. 526, 49 L.R.A. 190, 78 Am. St. Rep. 337, 60 Pac. 327, where a note providing for the payment of 6 per cent interest stipulated that it should draw interest from date at 12 per cent if either principal or interest renamed unpaid for ten days after due.

And in Crump v. Berdan, 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559, it was

and therefore subject to all the legal defenses in the hands of a purchaser before maturity that it might have been subject to in the hands of the original payee. Second. That, upon a breach of the warranty that the stallion was a 60 per cent foal getter, the defendants were entitled to rescind the contract of sale by returning the stallion to McLaughlin Brothers, and to defend against the non-negotiable note for failure of consideration.

The two propositions are interlaced, that is, dependent upon each other, and should be considered in conjunction with each other in determining defendant's right of defense against the note in the hands of the purchaser before maturity. There is no dispute but that the horse was not up to the warranty. The record discloses that, for the year 1906, eleven colts were obtained from sixty four mares, and, for the season of 1907, twelve colts from fifty one mares. The gist of defendants' right of defense, therefore, lies in the question of non-negotiability of the note and their option to rescind the contract upon breach of warranty. The note provides: ". . . With interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid: interest payable with note."

It must be observed that in this clause no definite time is fixed for payment. It is true October 1, 1908, was fixed as the date of maturity of the note, and but for the latter clause would definitely fix the date on which the makers were jointly and severally obligated to pay same. But the latter clause leaves it optional with the makers whether they pay in on date of maturity or continue it indefinitely thereafter, at the rate of 10 per cent per annum. The time for payment being thus indefinite, it follows that, at the time it was purchased, the amount to be paid thereon was not only inaccurate of ascertainment, but impossible of ascertainment. This note, let it be observed, was made January 12, 1906. At that time chapter 54, Wilson's Rev. & Anno. Stat. (Okla.) were in force. Sections 3592, 3593, are as follows:

"(3592) A negotiable instrument is a written promise to request for the payment of a certain sum of money, to order or bearer.

"(3593) A negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment."

In Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946, the court held: "Under the Code of this territory a note in the following language: '$275. Enid, O. T. May 15, 1894. Thirty days after date I promise to pay to the order of J. H. Thomas two hundred and seventy-five ($275) dollars, with interest at the rate of 12 per cent from date if not paid at maturity . . . ,'—is not a negotiable instrument, and is subject to the same defenses it would be in the hands of the original payee."

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held that a note providing for the payment of a certain sum with interest at 7 per cent was not rendered non-negotiable on the ground that it was uncertain as to amount, by a provision that if not paid when due, 10 per cent interest from date, until paid, should be paid.

And in Christian County Bank v. Goode, 44 Mo. App. 129, it was held that a provision in a note for the payment of a certain rate of interest from the date of the instrument if not paid when due did not render it non-negotiable on the ground of uncertainty. The court remarked that precision as to amount applies rather to the principal amount than to the additions of interest.

And a note for the payment of a certain sum with interest at 10 per cent per annum, from date until paid; 7, if paid when due,—was held a negotiable promissory note in Smith v. Crane, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633, the decision being upon the ground that the provision as to the increase of interest was a penalty and invalid, so that it would draw the same rate before as after maturity, and was therefore certain.

See also Randolph v. Hudson, set out by the court in BRACKEN v. FIDELITY TRUST Co.

But in Hegeler v. Comstock, 1 S. D. 138. L.R.A.1915B. 8 L.R.A. 393, 45 N. W. 331, a note providing for the payment of a certain sum, "with interest from date until paid at the rate of 10 per cent per annum, 8 per cent if paid when due," was held to be non-negotiable on the ground of uncertainty as to the rate of interest, under a code provision defining a negotiable instrument to be a written promise for the payment of a certain sum of money, payable without any condition not certain of fulfilment.

It has been held that an instrument payable on or before two years, with 10 per cent interest, is rendered uncertain as to amount by another provision that if paid within one year it shall not draw interest; and that it is not therefore a negotiable promissory note. Lamb v. Story, 45 Mich. 488, 8 N. W. 87, subsequent appeal in 52 Mich. 525, 18 N. W. 248.

In Cayuga County Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93, an instrument which provided for the payment of a certain rate of interest if paid when due, but if not then paid for an increased rate named from the date, was held non-negotiable. There were in this case, however, also agreements for the payment of exchange and expenses of collection, and the court did not decide whether the provision relating to interest would of itself destroy the negotiable character of the instrument. J. T. W.

In Cotton v. John Deere Plow Co. 14 Okla. 605, 78 Pac. 321, it was held: "A promissory note which contains the following stipulation in relation to attorney's fees, to wit: 'It is stipulated by the parties to this note that, in event the same is collected by an attorney, or by any proceedings at law, an attorney's fee consisting of $10 and 10 per cent of the amount so collected shall be paid by the makers hereof to the holder of the same,'—destroys the negotiable character of the instrument, and thereby makes it non-negotiable."

In Clevenger v. Lewis, 20 Okla. 843, 16 L.R.A.(N.S.) 410, 95 Pac. 232, 16 Ann. Cas. 56, this court, in an opinion by Williams, Ch. J., said: "The note upon which this action is based, containing a provision for a reasonable attorney's fee, if collected by suit, is not negotiable," citing Randolph v. Hudson and Cotton v. John Deere Plow Co. supra.

Again in Farmers' Nat. Bank v. McCall, 25 Okla. 600, 602, 26 L.R.A.(N.S.) 217, 106 Pac. 866, this court, in another opinion by Mr. Justice Williams, citing Randolph v. Hudson; Cotton v. John Deere Plow Co. and Clevenger v. Lewis;—supra, said: "It was uniformly held by the supreme court of the territory of Oklahoma that a note containing a stipulation for the payment of an attorney's fee is not negotiable. . . . This rule has been adhered to by this court." Clevenger v. Lewis, 20 Okla. 837, 16 L.R.A.(N.S.) 410, 95 Pac. 230, 16 Ann. Cas. 56, supra.

See also Hegeler v. Comstock, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; National Bank v. Feeney, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186,—decisions based upon statutes identical with ours, supra. In all of the foregoing decisions the ground upon which they were based is that the notes in controversy contain provisions not certain of fulfilment.

In Cornish v. Woolverton, supra, the note in question was held to be non-negotiable because it contained the identical provision contained in the note herein, except that it provided for 6 per cent until maturity, and 12 per cent thereafter.

We must hold, therefore, that the note in controversy here, at the time it was purchased by plaintiff, was so indefinite as to the amount to be paid and so uncertain as to fulfilment as to render it non-negotiable.

As to the second proposition, let it be observed that under the conditions of the guaranty the defendants did not bind themselves to accept another horse in case the one they had proved unsatisfactory, or did not come up to the warranty, but clearly implies an option on their part to accept or not another horse.

In Kemp v. Freeman, 42 Ill. App. 500, the identical question of the right of option involved in the case at bar was before the Illinois court of appeals, and on the following provision in the warranty, to wit:

"We warrant the animal to be sound and healthy and in every respect an average breeder, and, in case he fails to be an average breeder, we agree to take him back and replace him with another horse of equal value and merits,"—the court said: "A contract 'no doubt might have been so framed as to deprive the appellee of his legal right to an action for damages in case of a breach, and to require him in lieu thereof to return the horse and accept another that would satisfy the warranty. The contract under consideration does not, however, even purport so to do, but, on the contrary, by it the sellers warrant the horse to be an average breeder, and in addition to such warranty upon which the buyer may recover damages, if there be a breach, the sellers agree that they will accept a return of the horse and replace him with another of merit and value equal to the warranty. Clearly the buyer has the option of an action on the breach for damages, or to return the horse and receive another in his stead.'"

This quotation from the foregoing opinion of the Illinois court is quoted with approval by this court in Obenchain v. Roff, 29 Okla. 211, 116 Pac. 782.

It is clear, therefore, that the purchasers of the horse had the option to return the horse and take chances on another, or to keep him and sue for damages; and, if they had the right of action for damages for breach of the warranty, they certainly had the right to rescind for such breach. And having elected to exercise such right, and the note in question being non-negotiable, and subject to all defenses which might have been interposed against it in the hands of the original payee, and which it is not seriously denied was without consideration, it follows, therefore, that the defendants were deprived of their legal rights in the premises, and that the trial court erred in so doing.

The judgment is reversed, and the cause remanded.

Per Curiam:
Adopted in whole.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT.
(Division No. 2.)

M. S. SIMPSON, Plff. in Err.,
v.
TOOTLE, WHEELER, & MOTTER MERCANTILE COMPANY.

(— Okla. —, 141 Pac. 448.)

Limitation of action — effect of bankruptcy proceeding.

1. An adjudication in bankruptcy, under act July 1, 1898, chap. 541, 30 Stat. at L. 544, as amended, does not suspend the running of the general state statute of limitations as to provable claims, for the reason that such adjudication does not put the creditor under a "legal disability," within the meaning of § 4658, Rev. Laws 1910, and does not relieve him from filing his suit before the statute operates as a bar.

Same — claim for goods sold.

2. On November 25, 1904, T. W. M. Co. sold S. a bill of merchandise; a month later S. was adjudicated a bankrupt. T. W. M. Co. filed their claim, and it was allowed and participated in dividends from the bankrupt estate. In September, 1909, while the application of the bankrupt for a discharge was pending, suit was filed in the state court on the original claim for goods sold. By agreement this suit was continued until 1910, until the court of bankruptcy acted on, and refused a discharge. Held, that the claim was barred by the three-year statute of limitations.

Headnotes by BREWER, C.

Note. — Limitation of actions: suspension by bankruptcy proceedings.

But few cases have passed upon the question whether the institution of a bankruptcy proceeding pursuant to the provisions of the act of 1898 suspends the statute of limitations as to claims against the bankrupt. This of course refers to the running of the statute of limitations against an independent action upon a claim against the bankrupt, and not to a claim in the bankruptcy proceeding, that being a different question. Upon the latter point, see Collier on Bankruptcy, 8th ed. p. 722.

However, the conclusion reached in SIMPSON v. TOOTLE W. & M. MERCANTILE CO. namely, that the statute of limitations is not suspended by the filing of a petition in bankruptcy, in view of the phraseology of the applicable provisions of the act, seems justified and in fact is supported by authority.

Thus, the decision in that case is fully supported, both as to reasoning and as to conclusion, by the case of Nonotuck Silk Co. v. Pritzker, 143 Ill. App. 644, wherein it was held that under the bankruptcy act of 1898, the filing of a petition in bankruptcy not only does not prevent a creditor of the bankrupt from instituting action upon his claim, but does not suspend the running of the statute of limitations against such claim. In this case the claim was upon an open account, and after the filing of the petition the petitioner was adjudged a bankrupt, but no further proceedings were taken in the case, the petitioner never having petitioned to be discharged and no discharge ever having been entered. In reaching the above-stated conclusion the court said: "The first contention of the plaintiff is that the filing of the petition in bankruptcy suspended the running of the statute of limitations. . . . We do not think this contention can be sustained. The plaintiff bases it on the langage of the limitation statute of Illinois: 'When the commencement of an action is stayed by injunction, order of a judge, or court or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the actions.' It is claimed that the proper construction of the national bankruptcy act makes the present case fall within this provision, and that there is in the national bankruptcy, act 'a statutory prohibition' of the maintenance of a suit during the pendency of the bankruptcy proceedings, at least until an unreasonable delay has taken place in asking for and procuring a discharge. But there does not appear that there is any such prohibition against beginning or maintaining a suit in the bankruptcy act of 1898. There was one in the act of 1867, which applied only, however, to creditors proving their debts or claims in bankruptcy. . . . That act provided that a creditor proving his debt 'should not be allowed to maintain any suit at law or in equity therefor against the bankrupt.' The cases cited by the plaintiff which arose under that law are not applicable under the present act, for that has omitted any provision which can be properly construed to forbid the bringing of a suit after the bankruptcy proceedings are begun. It is provided by § 11, a, that a suit pending at the time the petition is filed shall be stayed until after an adjudication or dismissal, and may be further stayed until twelve months after the adjudication, or until a pending application for discharge is determined. But this refers only to suits pending when the petition is filed, . . . and we cannot assent to the theory of the plaintiff that, by recognizing certain rights of the plaintiff in pending suits, the statute prohibits the bringing of other suits. Such an implication is altogether too wide. . . . It is conceded, however, that under the provisions of § 2. clause 15, of the act of 1898, the district court of the United States can stay the prosecution of suits begun after the petition is filed, and as we understand the plaintiff's argument, it insists that this power to stay the suit is equivalent to an 'injunction or order of court' staying it. This plainly is not sound, nor would the staying of the prosecution of a suit be equivalent to 'staying the commencement of

Same — dividends as payments.

3. The payment to a creditor by a trustee of a bankrupt debtor of dividends ordered paid by a court of bankruptcy is not such a voluntary part payment by the debtor, as will establish a new point from which the statute of limitations will run, under § 4663, Rev. Laws 1910.

(June 9, 1914.)

ERROR to the District Court for Comanche County to review a judgment in plaintiff's favor in an action brought to recover a balance alleged to be due, on account, for goods sold and delivered by plaintiff to defendant. Reversed.

The facts are stated in the commissioner's opinion.

Messrs. **J. E. Michalson and R. J. Ray**, for plaintiff in error:

The statute of limitations began to run at the time the last item was furnished.

State v. Ellis, 22 Wash. 129, 60 Pac. 136; Benjamin v. Eldridge, 50 Cal. 612; Hambrick v. Jones, 64 Miss. 240, 8 So. 176: Mestas v. Diamond Coal & Coke Co. 12 Wyo. 414, 76 Pac. 567.

The payment of dividends out of the bankrupt estate does not toll the statute.

It appearing upon the face of the record that the trial court rendered judgment for the plaintiff when, under the law, it should have been rendered for the defendant, the judgment must be reversed.

Territory ex rel. Taylor v. Caffrey, 8 Okla. 197, 57 Pac. 204.

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a suit.' Bringing the suit within the period of limitation would have suspended the operation of the statute; that it might have been stayed after it was commenced does not excuse the plaintiff from so instituting it, and it should have followed the course which the court commended in Re McBryde [set out infra] that is, been 'vigilant and unwilling to trust a theory when there was a way certain.' The court in that case expresses a doubt whether the 'theory' may not have been sound, but we cannot hold it so in this case. We think it entirely within the discretion of the bankruptcy court to stay or refuse to stay the prosecution of an action, against a bankrupt which was commenced after the filing of the petition, . . . and that, in the absence of such a stay by the Federal court or the state court, the action may proceed, and that in no event can the commencement of such an action, which will in itself save the bar of the statute, be prevented. Therefore this first contention of the plaintiff we must reject."

And some support is afforded SIMPSON v. TOOTLE, W. & M. MERCANTILE Co. by Re McBryde, 99 Fed. 686, 3 Am. Bankr. Rep. 729, wherein, in holding that the obtaining by a creditor of a judgment against the maker of a promissory note not barred at the date of the latter's adjudication in bankruptcy, after such adjudication and before the bar became complete, stopped the running of the statute, the court said: "This [the judgment] established the debt and stopped the running of the statute of limitations. The filing of the petition might have done this, but the creditor was vigilant, and not willing to trust to a theory when there was a way certain. He obtained a judgment, as he had a legal right to do, which as to his debt gave him all the rights under the state law,—established his debt, stopped the running of the statute,—except the right to interfere with the bankruptcy proceedings by a levy or to establish a priority." Thus, it will be seen that this decision clearly supports the construction of the bankruptcy act of 1898 adopted in the SIMPSON CASE, notwithstanding the suggested possibility that the filing of the petition might stop the running of the statute. And this latter suggestion is itself significant as indicating a change in the law when notice is taken that the possibility of the statute being suspended by the filing of the petition was characterized as "a theory," whereas under the bankruptcy act of 1867 it finally was fairly well settled that the adjudication in bankruptcy did not work a suspension of the statute.

Seemingly the only decision since the enactment of the bankruptcy act of 1898 which possibly militates against the conclusion reached in or supported by the foregoing cases was announced in Horton v. Haralson, 130 La. 1003, 58 So. 858, wherein it was held, without discussion and without statement of reasons for the conclusion or citation of any authority, that bankruptcy proceedings suspended the statute of limitations as to the claims of all parties properly in such proceeding, the court merely saying that "prescription cannot continue to run, despite the fact that the affairs of the bankrupts are being administered and settled in the bankruptcy courts."

In view of the material changes in the phraseology of the pertinent provisions of the bankruptcy act of 1898 from that employed in the act of 1867, the decisions under the earlier act are of no practical value or aid in determining the effect of a proceeding under the present bankruptcy act upon the running of the statute of limitations, and for this reason have not been included herein. The majority of such cases, however, are set out in the note to Re St. Paul German Ins. Co. 26 L.R.A. 737.

For a further discussion and analysis of the significance of, and the differences between, the provisions of the act of 1867 and the present law, as well as the proper construction to be accorded the latter, see Collier on Bankruptcy, 8th ed. pp. 207–212.

G. J. C.

L.R.A.1915B.

Messrs. **Stevens & Myers**, for defendant in error:

Where there is a provable claim in bankruptcy, and proof is made of the claim as alleged in the reply, the effect of the adjudication in bankruptcy under the bankruptcy act is to suspend the operation of the statute of limitations as to all such provable claims, from which the bankrupt would be freed by a discharge in bankruptcy.

Banning, Limitations of Actions, p. 250; 25 Cyc. 1281; Loveland, Bankruptcy, § 129; Collier, Bankruptcy, 8th ed. 208–211; McDonald v. Davis, 105 N. Y. 508, 12 N. E. 40; Hoff v. Funkenstein, 54 Cal. 233; Re McKinney, 15 Fed. 912; Greenwald v. Appell, 5 McCrary, 339, 17 Fed. 140; Hall v. Greenbaum, 33 Fed. 22; Re Waties, 39 Fed. 264; Wood v. Hazen, 10 Hun, 363; Rosenthal v. Plumb, 25 Hun, 336.

If the Kansas rule is to be adopted and followed, the claim that the bar is removed by payments is well grounded and the payments made may well be held to avoid the bar of the limitation.

Letson v. Kenyon, 31 Kan. 301, 1 Pac. 562.

Brewer, C., filed the following opinion:

This is a suit on an open account for goods sold Simpson. The last item of the account is dated November 25, 1904. In December, 1904, Simpson was adjudged a bankrupt on his voluntary petition. This claim was filed and allowed in the bankruptcy court, and dividends were paid thereon out of the estate. On September 16, 1908, this suit was filed. On application of defendant it was continued pending the hearing of the defendant's application for a discharge in bankruptcy. On the ———, 1910, the discharge was denied, and the order became final. The defendant pleaded the statute of limitations as a bar to the action. This plea was denied by the court, and judgment rendered for the plaintiff, the present defendant in error. More than three years elapsed between the furnishing of the goods and the filing of the suit.

The controlling question in this case is: Does an adjudication in bankruptcy suspend the running of the state statute of limitations, during the pendency of the proceedings? In the former opinion in this case it was held that it did. This view was based on the bankruptcy act of 1867 (act March 2, 1867, chap. 176, 14 Stat. at L. 517), as amended, and the decisions construing it. But on rehearing it is pointed out that the present bankruptcy act (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585) is very dissimilar from the old one. And we are confronted with the fact that neither counsel nor the court has found a case directly in point under the present law. It is admitted that there is no provision of the bankruptcy statute that suspends the operation of the general statute of limitations. The state statute (Snyder's Comp. Laws, 1909, § 5550) follows:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: . . . Second. Within three years: An action upon a contract not in writing, express or implied."

Section 5551 provides:

"If a person entitled to bring an action other than for the recovery of real property, except for a penalty or a forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed."

Section 5556, Comp. Laws 1909, provides that a part payment, or acknowledgment of, or promise to pay, the debt in a writing signed by the debtor, shall form a new starting point for the running of the statute.

Section 11 of the act of 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9585), which relates to suits by and against bankrupts, is as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

"(b) The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

"(c) A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

"(d) Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

Section 21 of the Federal bankruptcy act March 2, 1867, chap. 176, 14 Stat. at L. 517, as amended by act June 22, 1874, chap. 390, 18 Stat. at L. 179, prohibits creditors from maintaining suits either in law or equity against the bankrupt, and declares that such creditor shall be deemed to have

waived all rights of action and suit, etc. The amendment confined the waiver to cases wherein a discharge was finally granted. This section also provided:

"And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined."

Under that law it was very generally held that proceedings in bankruptcy suspended the running of statutes of limitation. But § 11 of the present law, supra, contains no such provisions, and the authorities, based on the old statute, are not in point under the present law. The above section (11) is analyzed and discussed in Collier on Bankruptcy, 8th ed. pp. 206 et seq., and, from a study of the text and many of the cases cited, we think the most that can be said is that a suit brought against a bankrupt after his adjudication may be stayed. That whether it will be or not is a matter of discretion. If it is not, it may proceed to judgment. This being true, it does not seem that a creditor can be said to be resting under any legal disability, which would prevent his assertion of his claim by filing a suit thereon, before the general statute has operated to bar his right.

2. The debt in suit was allowed in the bankruptcy court, and dividends were paid on it by the trustee. Did these payments create a new promise to pay by the bankrupt, thus creating a new point from which the statute would run? The very great weight of authority is that they did not. Angell, Limitations, 6th ed. § 233; Kelly, Code Stat. Limitations, § 161; Wood, Limitations, 3d ed. § 99; 25 Cyc. 1382, and cases cited; 19 Am. & Eng. Enc. Law, 2d ed. 313. and cases cited; Holmquist v. Gilbert, 14 L.R.A.(N.S.) 479, with note citing cases (41 Colo. 113, 92 Pac. 232).

The cause must be reversed and remanded for further proceeding not inconsistent with this opinion.

Per Curiam:
Adopted in whole.

Second petition for rehearing denied.

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APPEAL AND ERROR.

Transfer of cause.

1. A husband need not pay instalments of permanent alimony to his wife as required by a final decree therefor in the court of chancery, pending an appeal from such decree, where the right of the wife to compel the husband to support her is the subject of the litigation. Robinson v. Robinson (N. J. Err. & App.) **L.R.A.1915B, 1071,** 92 Atl. 94, — N. J. —. (Annotated)

2. Where two proceedings in the same succession, between the same parties, involving a common issue, were consolidated by consent of counsel, and submitted together for decision in chambers, and a judgment was rendered in each proceeding, and an appeal was taken from the "judgment" disposing of the issues in both proceedings, and but one bond was given, the appeal will not be dismissed on the ground that two appeals should have been taken and two appeal bonds furnished. Re Housknecht, **L.R.A.1915B, 396,** 66 So. 233, — La. —.

3. The notice of plaintiffs' appeal from the order granting their motion for a new trial does not in terms embrace an appeal from the court's orders on the demurrers interposed, even if such orders were appealable. Bjorgo v. First Nat. Bank, **L.R.A. 1915B,** 287, 149 N. W. 3, 127 Minn. 105.

Briefs.

4. Where plaintiff in error has, in compliance with the rules of the court, served and filed his brief, but the defendant in error has neither filed, nor offered excuse for failure to file, a brief, the court is not required to search the record to find a theory upon which the judgment may be sustained, but may reverse the case in accordance with the prayer of the plaintiff in error if the brief filed appears to reasonably sustain such action. Rutherford v. Holbert, **L.R.A.1915B, 221,** 142 Pac. 1099, — Okla. —.

Objections and exceptions; raising questions in lower court.

5. A general exception to a charge of the court, containing a great many distinct instructions, some of which are unobjectionable, is not sufficient to present to the appellate court the error complained of. Cummings v. Lobsitz, **L.R.A.1915B, 415,** 142 Pac. 993, — Okla. —.

Who may complain.

6. A party whose motion for a new trial has been granted is not aggrieved by the order, so that the rulings adverse to him on the trial may be reviewed on his cross appeal. Bjorgo v. First Nat. Bank, **L.R.A.1915B, 287,** 149 N. W. 3, 127 Minn. 105.

Discretionary matters.

7. A trial court may, in its discretion, permit evidence of collateral facts, when of probative value; but it is error to receive such evidence to such an extent as to overshadow the real issues. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

8. The awarding of a new trial by the trial court several years after the trial upon a motion filed promptly but not then heard, upon the ground that "the court cannot find anything in the record as to what the evidence was before the jury," is erroneous and will be reversed upon writ of error where nothing appears as to the character, extent, or manner of the loss of the evidence, or what effort, if any, was made by

either party to preserve or restore it. Sanders v. Wise, **L.R.A.1915B, 353,** 83 S. E. 77, — W. Va. —. (Annotated)

Review of facts.

9. A verdict founded on evidence to support it is conclusive on appeal. Colorado Mortg. & Invest. Co. v. Giacomini, **L.R.A.1915B, 364,** 136 Pac. 1039, 55 Colo. 540.

10. A conflict between the evidence and the special findings of the jury is sufficient to require a verdict based on such findings to be set aside. Falk v. Burke, **L.R.A.1915B, 279,** 143 Pac. 498, 93 Kan. 93.

11. The judgment of a district court awarding the custody of children, made after hearing the parties and talking with the children, will not be interfered with except for very grave errors. Mylius v. Cargill, **L.R.A.1915B, 154,** 142 Pac. 918, — N. M. —.

12. No error can be predicated upon the form of a verdict directed by the court in an equity case in which questions of fact were submitted to the jury. Escamilla v. Pingree, **L.R.A.1915B, 475,** 141 Pac. 103, — Utah, —.

Grounds for reversal.

13. A conviction will not be reversed because notice of the designation of the term of court at which the trial was had was not published as required by law, if no rights of accused were prejudiced thereby. People v. Duffy, **L.R.A.1915B, 103,** 105 N. E. 839, 212 N. Y. 57.

14. A judgment will not be reversed because a portion of the answer was stricken if the court permitted the broadest inquiry into the rights of the parties, so that the merits of the case were fairly tried and determined. Barkey v. Barkey, **L.R.A.1915B, 678,** 106 N. E. 609, — Ind. —.

15. Overruling a motion in arrest of judgment after verdict of guilty on an information that fails to state facts constituting the offense charged requires a reversal of the conviction. Korab v. State, **L.R.A. 1915B, 83,** 139 N. W. 717, 93 Neb. 66.

16. A conviction and sentence in a criminal prosecution by a judge sitting without a jury will not be set aside, because, in order to relieve the state of the imputation of negligence, the prosecuting officer is permitted to show that witnesses have been brought in other cases from the home, in another state, of the principal witness for the state, in order to sustain his general reputation in the community in which he lived for veracity; no effort having been made to show what such witnesses would have testified to if they had been held for the case on trial and put on the stand, and there being nothing to warrant the belief that the trial judge indulged in any assumptions in that respect. State v. Cunningham, **L.R.A.1915B, 389,** 58 So. 558, 130 La. 749.

17. The admission in an action to hold a carrier liable for loss of hand baggage of evidence of remarks made by the porter to whom it was delivered, when the loss was discovered, that he saw someone who might have taken it, and would see if he could see him, and upon his return after searching for the man, that he could not find him, is harmless, since the evidence is immaterial. Union P. R. Co. v. Grace, **L.R.A. 1915B, 608,** 143 Pac. 353, — Wyo. —.

18. Where the pleadings and the evidence present an issue of fact in respect to whether a writing was delivered upon a condition precedent to its effectiveness, it is error for the court to so instruct the jury as to take such issue from them. Rutherford v. Holbert, **L.R.A.1915B, 221,** 142 Pac. 1099, — Okla. —.

Judgment.

19. An application to enforce a final decree for permanent alimony pending an appeal is not an application for "alimony *pendente lite*," which may be awarded in the appellate court, or the parties remitted to the court of chancery to make application there. Robinson v. Robinson (N. J. Err. & App.) **L.R.A.1915B, 1071,** 92 Atl. 94, — N. J. —.

20. A new trial will be granted where the trial court failed to define or outline the issue of fact which the jury are called upon to decide, and furnish them with sufficient guidance in deliberating on the case. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

21. When the sentence imposed upon conviction of a criminal offense is below the minimum fixed by law, the case will be sent back for proper sentence. Jones v. State, **L.R.A.1915B, 71,** 59 So. 892, 64 Fla. 92.

22. Where the trial court has erroneously granted a new trial on the ground of lost or destroyed evidence, the appellate court, upon reversing the judgment, will direct a judgment for the party prevailing in the trial court, as the trial court should have done. Sanders v. Wise, **L.R.A.1915B, 353,** 83 S. E. 77, — W. Va. —.

23. The costs of an appeal should not be taxed against appellee because of a modification of the decree by the appellate court which is immaterial. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.

24. A modification by an appellate court of a decree requiring notes belonging to an employee, which had already been delivered to him by his employer, indorsed by another employee whose authority to do so was disputed, to be delivered to the employee without any requirement as to indorsement, so as to require their delivery with an indorsement without recourse, is immaterial. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.

APPEARANCE.

Necessity to validate judgment, see Judgment, 1, 2.

APPOINTMENT.

Of officers, see Officers, 1.

APPORTIONMENT.
Of loss between insurers, see Insurance, 10–12.

ARREST.
Civil liability for making, see False Imprisonment.
Of leaders of insurrection by officers of militia called out to suppress insurrection, see Militia, 1.
Question for jury as to whether officer had warrant when making arrest, see Trial, 6.

ARREST OF JUDGMENT.
Error in overruling motion for, see Appeal and Error, 15.

ASSAULT AND BATTERY.
With intent to rape, see Rape.

ASSIGNMENT.
Constitutionality of statute forbidding assignment of future wages, see Constitutional Law, 12.
Of lease, see Landlord and Tenant, 2.

ASSUMPTION OF RISKS.
By servant, see Master and Servant, 4.

ATTESTATION.
Of will, see Wills, 1.

ATTORNEYS.
Stipulation in contract for attorneys' fees, see Attorneys' Fees.
Right of client to recover from third person for services rendered by attorney which benefit both, see Contribution and Indemnity, 1.
Advice of counsel as defense to action for malicious prosecution, see Trial.

ATTORNEYS' FEES.
Allowance for attorneys' fees as element of costs or damages without any contract stipulation therefor, see Costs and Fees, 2.

1. The fact that the negotiable instruments law makes negotiable instruments containing a provision as to collection and attorneys' fees does not legalize such contracts, where they are condemned and declared void by the statutes of the state, or forbidden by the policy of the laws. Raleigh County Bank v. Poteet, **L.R.A.1915B, 928,** 82 S. E. 332, — W. Va. —.

2. A stipulation in a negotiable promissory note for the payment of "5 per cent collection fees" on the principal thereof, and in addition thereto "$10, attorney's fee in addition to the attorney's fee taxed or allowed by law," is, in this state, forbidden by the policy of the law, and void and unenforceable. Raleigh County Bank v. Poteet, **L.R.A.1915B, 928,** 82 S. E. 332, — W. Va. —.

AUCTION.
Delegation of power to license auctioneers, see Constitutional Law, 3.
Discrimination in grant of license to auctioneers, see Constitutional Law, 8.

AUTHORITY.
Question for jury as to, see Trial, 1.

AUTOMOBILES.
Automobile distribution contract, see Contracts, 1, 2; Pleading, 3.
Provision for liquidated damages in contract for automobile agency, see Damages, 3.
Insurance against loss by theft, see Insurance, 13.
Contributory negligence of driver running into unguarded excavation, see Negligence, 3.
Imputing negligence of driver to guest, see Negligence, 4.

BAGGAGE.
See carriers, 9–13.

BAILMENT.
Liability of bank for failure of cashier to deliver stock of goods which he permitted to be stored in bank, see Banks, 5.

1. An undertaking by one hiring a mule for work to return it in as good condition as when he received it does not render him liable for its accidental destruction by fire, in the absence of anything to show fault or negligence on his part. Sawyer v. Wilkinson, **L.R.A.1915B, 295,** 82 S. E. 840, 166 N. C. 497. (Annotated)

2. The cashier of a bank who has agreed with two contracting parties that a stock of shoes may be stored in the back end of the bank, and guarantees to such parties that the same will be delivered to the proper party upon compliance with certain stipulations entered into between the parties, may be held personally liable as bailee for a breach of his guaranty to deliver the goods. American Nat. Bank v. E. W. Adams Co. **L.R.A.1915B, 542,** 143 Pac. 508, — Okla. —.

BANKRUPTCY.
Right to interest on allowed claims, see Interest, 1.
Effect of adjudication in bankruptcy to interrupt running of limitations, see Limitations of Actions, 7.
Effect of payment by trustee in bankruptcy under order of court to interrupt running of limitations, see Limitation of Actions, 8.

1. A chattel mortgagee whose mortgage is invalid as a preference under the bankruptcy act, but who, had not the bankruptcy proceedings intervened, would have had a lien superior to that of an earlier unrecorded mortgage, is not for that reason entitled to priority of payment over the earlier mortgagee, who has proved his claim as a general creditor. Rouse v. Ottenwess, **L.R.A.1915B, 148,** 208 Fed. 881, 126 C. C. A. 90. (Annotated)

2. One purchasing a draft by a domestic

upon a foreign banker, with knowledge of a custom that such drafts were against deposits and securities, and upon assurance that the drafts were drawn pursuant to an agreement with the foreign banker, that collateral should be deposited for their payment, which was to be at the exclusive disposal of the drawee, has a lien upon the collateral as against the drawer's receiver in bankruptcy, upon refusal of the drawee to pay the draft because of such bankruptcy. Hollins v. Everett, **L.R.A.1915B, 438,** 215 Fed. 41, — C. C. A. —.
(Annotated)

BANKS.

Lien on assets of bankrupt banker, see Bankruptcy, 2.

Bank as bona fide holder of bill or note, see Bills and Notes, 6.

As bona fide holders of checks, see Checks, 3, 4.

Duress by, see Duress, 1.

Effect of renewal of certificate of deposit to work a novation, see Novation, 1.

Effect of failure specifically to exempt national banks from state income tax law, see Taxes, 5.

Stockholders.

1. The renewal of bank deposits certificates does not operate as a novation of the original indebtedness so as to relieve from liability therefor one who was a stockholder at the time the indebtedness was incurred, but who transferred his stock prior to the renewal of the certificates. Dunn v. Bank of Union, **L.R.A.1915B, 168,** 82 S. E. 758, — W. Va. —.
(Annotated)

2. Under constitutional and statutory provisions that stockholders in banks shall be personally liable to creditors thereof, over and above the amount of stock held by them, to an amount equal to their respective shares, for all liabilities accruing while they are stockholders, an assignor of bank stock remains liable, after the transfer thereof, to the extent prescribed by such provisions, for an indebtedness incurred while he was owner of the shares, notwithstanding another statutory provision that the transferee of stock in a banking company shall succeed to all the rights and liabilities of the prior holder of the stock. Dunn v. Bank of Union, **L.R.A.1915B, 168,** 82 S. E. 758, — W. Va. —.

Officers and agents.

Liability as bailee of cashier of bank who has agreed that shoes may be stored in the bank, see Bailment, 2.

Imputing to bank officer's knowledge of his own wrong, see Notice, 2.

Estoppel to deny authority of, see Notice, 2.

3. A creditor of a bank official who receives from him a draft or certificate of deposit bearing his signature, to be satisfied out of bank funds, in satisfaction of the claim, is liable to refund the amount received in case the act proves to be a misappropriation of the bank's funds, and the act was not authorized or ratified by the bank. Debaca v. Higgins, **L.R.A.1915B, 1091,** 143 Pac. 832, — Colo. —.

4. A national bank is not bound by the acts of its cashier, when such cashier has acted beyond the scope of his authority as such officer. American Nat. Bank v. E. W. Adams & Co. **L.R.A.1915B, 542,** 143 Pac. 508, — Okla. —.

5. A national bank is not bound for the failure of its cashier to deliver a stock of shoes according to his guaranty entered into with two contracting parties, that the stock might be stored in the back end of the bank, and that it would be delivered to the proper party upon compliance with certain stipulations entered into between them. American Nat. Bank v. E. W. Adams & Co. **L.R.A.1915B, 542,** 143 Pac. 508, — Okla. —.
(Annotated)

Deposits generally.

Gift of bank deposit, see Gift.

Acknowledgment of gift of deposit, see Acknowledgment.

6. A bank is not the agent of a corporate depositor to pass upon the validity of checks drawn by an officer to his own order and deposited by him to his own credit in another bank, so that payment of the check will relieve the latter bank of liability to return the deposit as a trust fund. Havana C. R. Co. v. Central Trust Co. **L.R.A.1915B, 715,** 204 Fed. 546, 123 C. C. A. 72.

7. A bank to which is presented for deposit a check payable to the order of the one presenting it may properly regard it as his property. Havana C. R. Co. v. Knickerbocker Trust Co. **L.R.A.1915B, 720,** 92 N. E. 12, 198 N. Y. 422.

8. The payment by a bank of checks drawn upon the account of corporation by its treasurer to his own order, to a bank in which he had deposited them, is sufficient evidence as between the corporation and the depositary of his authority to draw the checks in that form, to entitle it to hold the proceeds as his property and honor his checks therefor, although the treasurer in fact exceeded his authority so that, as between himself and the corporation, the checks were invalid. Havana C. R. Co. v. Knickerbocker Trust Co. **L.R.A.1915B, 720,** 92 N. E. 12, 198 N. Y. 422.

9. The bank with which one opens an account has the power to determine whether or not a check drawn upon the account conforms to the contract between itself and the customer, and a holder of the check performs his duty if he makes inquiry of the drawee as to the validity of the check which purports to be drawn on such account. Havana C. R. Co. v. Knickerbocker Trust Co. **L.R.A.1915B, 720,** 92 N. E. 12, 198 N. Y. 422.

10. Allowing a stock of shoes in which a bank has no interest to be stored in the back end of the bank is not a transaction coming within the general line of banking business, and is not within the general scope and meaning of the term "special deposit." American Nat. Bank v. E. W. Adams & Co. **L.R.A.1915B, 542,** 143 Pac. 508, — Okla. —.

11. A national bank may receive special deposits, such as notes, stocks, bonds, securities, bills of exchange, etc., the handling of which in their very nature comes within the regular line of banking business, and the acts of the cashier in reciving such deposits are binding on the bank. American Nat. Bank v. E. W. Adams & Co. **L.R.A. 1915B, 542,** 143 Pac. 508, — Okla. —.

Payment of checks; forgeries.

12. A bank having the deposit account of a corporation is not charged with notice of misappropriation of funds by the fact that an officer having authority to draw checks on the account draws one to his own order and indorses it himself, if it does not know what use is made of it by him. Havana C. R. Co. v. Central Trust Co. **L.R.A. 1915B, 715,** 204 Fed. 546, 123 C. C. A. 72.

(Annotated)

13. A bank is not chargeable with notice of a by-law of a corporate depositor requiring two signatures to checks upon the deposit account, if it has not been the custom to comply with the by-law. Havana C. R. Co. v. Central Trust Co. **L.R.A.1915B, 715,** 204 Fed. 546, 123 C. C. A. 72.

14. Payment by a bank of money of a depositor, upon a forged indorsement, is at the peril of the bank making it, unless it can claim protection upon some principle of estoppel or negligence chargeable to the depositor. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

15. A bank paying a check sent by the grand lodge of a fraternal order to an officer of a local lodge of such order, for delivery to the beneficiary of a certificate held by a member of the local lodge who was fraudulently reported dead by the local officer, upon the indorsement of such beneficiary forged by the local officer and without inquiry as to such indorsement, is liable to the grand lodge for the money thus paid, since the forgery of the indorsement of the name of the payee is not within the scope of the employment or duty of the local officer to whom the check was intrusted for delivery only to the payee. Grand Lodge A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

16. A bank which has paid the check of a depositor on which the indorsement of the payee is forged, on the faith of prior indorsements, may, without resorting to the liability of such indorsers, have the protection of any defense the bank in which the check was deposited by the forger might have made, and is subject to the same responsibility. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

17. The grand lodge of a fraternal order is not charged with notice of forgeries committed by the officer of a local lodge on checks sent to him in payment of beneficiaries' certificates, by the return to it of its pass book by its bank of deposit and the canceled checks, so as to relieve the bank for payment of a subsequent check upon a forged indorsement of such officer, where there is nothing to show that the grand lodge knew the signatures of the payees of the checks, and it had no information of any irregularity. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

18. The entry in the ledger of a local lodge of a fraternal beneficial society, of payments by men reported dead, is not of itself notice to the grand lodge that the men were still living, so as to charge it with notice of the forgeries of an officer of the local lodge in obtaining payment of the beneficial certificates of the men thus reported dead, as against the bank upon which checks sent in payment of subsequent certificates were drawn and by it paid upon the forged indorsement of the local officer. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

BENEFITS.

Estoppel by receiving, see Estoppel, 5.

BENEVOLENT SOCIETIES.

Payment by bank of check of fraternal order on forged indorsement, see Banks, 15, 17, 18.

Right of benevolent association to restrain use by similar order of colors of the order and titles of its officers, see Injunction, 5.

Injunction against unfair and misleading use of corporate name, see Injunction, 3, 4.

Insurance by, see Insurance.

Imputing to society officer's knowledge of his own wrong, see Notice, 1.

BERTH.

Duty to provide passenger with, see Carriers, 4.

BILLS AND NOTES.

Validity of provision for attorneys' fees, see Attorneys' Fees.

Special deposit of, see Banks, 11.

Presumption and burden of proof as to, see Evidence, 19.

By married woman, see Husband and Wife.

By intoxicated person.

1. The defense of intoxication is not open to the maker of a promissory note for a valid pre-existing debt, who, for at least five years after full knowledge of the transaction, recognized the note as valid, and repeatedly promised to pay it. Matz v. Martinson, **L.R.A.1915B, 1121,** 149 N. W. 370, 127 Minn. 262.

Consideration.

2. Where two parties, in settlement of a controversy wherein one contended that he owed the other a small sum, while the other contended that there was due to him a much larger amount, compromise and fairly agree upon the amount due, and the

debtor then executes a promissory note therefor, the promise will be binding upon the parties and the note valid. Kiler v. Wohletz, **L.R.A.1915B, 11,** 101 Pac. 474, 79 Kan. 716. (Annotated)

Negotiability.

3. A note payable at a time certain and purporting to be secured by collateral is not rendered non-negotiable by the fact that when the note is executed the paper contains an agreement, not part of the note proper, that if the collateral depreciates in value more will be delivered or the note mature at once, and that on the maker's default collateral may be sold at public or private sale, although this agreement is written beside the signature to the note. Kennedy v. Broderick, **L.R.A.1915B, 472,** 216 Fed. 137, — C. C. A. —. (Annotated)

4. Under §§ 3592, 3593, Wilson's Rev. & Ann. Stat. 1903, of Oklahoma, defining a negotiable instrument as a written promise for the payment of a certain sum of money, and requiring it to be made payable in money only, without any condition not certain of fulfilment, a note containing the following provision: "With interest at 6 per cent per annum before maturity, and thereafter with interest at 10 per cent per annum until paid; interest payable with note," is a non-negotiable note, and though in the hands of a purchaser before maturity, in subject to every legal defense which could have been interposed against it in the hands of the original payee. Bracken v. Fidelity Trust Co. **L.R.A.1915B, 1216,** 141 Pac. 6, — Okla. —. (Annotated)

Who are bona fide purchasers.

Of checks, see Checks, 3, 4.

5. The payee named in a promissory note who purchases it complete in form before maturity, in good faith and without notice of any infirmity in title or otherwise, may enforce it under the negotiable instruments law as one to whom it was negotiated as a holder in due course, against an indorser whose instructions as to a coindorser and as to the amount to be filled in the blank left for that purpose were not followed by the one to whom it was intrusted for delivery; and he is not within the section of the act providing that as between immediate parties the delivery, to be effectual, must be by or under authority of the party making, drawing, accepting, or indorsing as the case may be. Liberty Trust Co. v. Tilton, **L.R.A.1915B, 144,** 105 N. E. 605, 217 Mass. 462. (Annotated)

6. The fact that a bank draft issued by a small village bank was made payable to the order of the defendant bank is sufficient to put the defendant bank on inquiry as to the ownership of the proceeds before paying the same to the person presenting the draft. Bjorgo v. First Nat. Bank, **L.R.A.1915B, 287,** 149 N. W. 3, 127 Minn. 105. (Annotated)

BISHOP.

Liability of, for acts of priest, see Religious Societies.

L.R.A.1915B.

BLANKS.

Effect on rights of innocent holder, of unauthorized filling of blanks in note, see Bills and Notes, 5.

BONA FIDE HOLDER.

Of note, see Bills and Notes, 5, 6.
Of checks, see Checks, 3, 4.

BONDS.

On appeal, see Appeal and Error, 2.
Special deposit of, see Banks, 11.
Discharge of surety on, see Principal and Surety.
Issue of bonds by municipality for cost of tunnel to be used by railroad company with option to purchase it, see Public Moneys.

The liability of a surety on a bond given to guarantee the faithful performance of a building contract is, in case of conflict, determined by the terms of the bond, and not by those of the contract. Morgan v. Salmon, **L.R.A.1915B, 407,** 135 Pac. 553, — N. M. —.

BREACH.

Of contract, see Contracts, 12.

BREACH OF PROMISE.

1. An omission to marry upon a particular day is not necessarily a breach of a promise of marriage, since the contract necessarily continues in force until the one or the other of the parties, by conduct or words, manifests an unwillingness to proceed to carry it out. Falk v. Burke, **L.R.A. 1915B, 279,** 143 Pac. 498, 93 Kan. 93. (Annotated)

2. The failure of one to carry out a contract of marriage at the appointed time does not terminate the contract, unless there is an unequivocal election on the part of the other to consider the contract as terminated; and if, following such failure to carry out the contract at the designated time, negotiations are entered upon for the purpose of arranging a subsequent date for the marriage, such negotiations in law constitute a waiver of whatever rights may have accrued by the failure to be married at the designated time. Falk v. Burke, **L.R.A. 1915B, 279,** 143 Pac. 498, 93 Kan. 93.

3. A bona fide offer to marry is a defense to an action for breach of promise to marry, where it is made before the plaintiff has signified her intention to end the matter, although the defendant may have been guilty of conduct that would warrant the plaintiff in considering the engagement at an end. Falk v. Burke, **L.R.A.1915B, 279,** 143 Pac. 498, 93 Kan. 93.

BRIBERY.

Evidence of other crimes in prosecution for, see Evidence, 28-30.

BRIDGES.

Duty of railroad company to enlarge span of bridge to accommodate water turned into stream, see Railroads, 1.

Requiring railroad company to widen span of bridge as a taking of property without compensation, see Eminent Domain.

BRIEFS.
On appeal, see Appeal and Error, 4.

BROKERS.
Money brokers, see Money Lenders.

BUILDINGS.
Liability of landlord for injuries by defects in, see Landlord and Tenant, 4–7, 10.

BURDEN OF PROOF.
In general, see Evidence, 2–16.

BURIAL INSURANCE.
See Estoppel, 3; Insurance, 1–3; Statute, 12.

BUSINESS.
Right of action for injuries to, see Case.
What constitutes breach of covenant by one selling business not to conduct same kind of business for specified time, see Contracts, 12.
Right of corporation to engage in, see Corporations, 3.

BY-LAWS.
Of insurance company, see Insurance, 6.

CARRIERS.
Damages in action against, see Damages, 1.
Passing of title on delivery to carrier, see Sale, 2.

Duty to operate road.

1. Persons living along an interurban electric road cannot compel its continued operation to preserve competition, if a parallel road furnishes adequate service and the public service commission law requires all rates to be just and reasonable and service adequate and sufficient. Day v. Tacoma R. & Power Co. **L.R.A.1915B, 547,** 141 Pac. 347, 80 Wash. 161.

2. A resident along the line of an interurban electric railway cannot maintain an action to prevent abandonment of the line; on the theory that he is dependent on it for service, if another line closely parallel to it affords him service, although it may be less convenient. Day v. Tacoma R. & Power Co. **L.R.A.1915B, 547,** 141 Pac. 347, 80 Wash. 161.

3. Authority to county commissioners to grant permission for the construction, maintenance, and operation of electric railways upon public roads, and prescribe the terms and conditions on which these privileges may be enjoyed, does not include power to consent to the discontinuance of a railway which has been put into operation. Day v. Tacoma R. & Power Co. **L.R.A. 1915B, 547,** 141 Pac. 347, 80 Wash. 161.

Duty to provide passenger with berth.

4. To hold a sleeping car company liable in damages for refusing to permit a passenger to occupy, even on payment of fare, a berth for which he claims to have purchased a ticket which he does not produce, the refusal must be shown to be unreasonable, where the conductor's diagram shows that all berths of the class claimed are sold, even though the passenger's claim is corroborated by another passenger. Armstrong v. Pullman Co. **L.R.A.1915B, 1202,** 66 So. 283, — Miss. —. (Annotated)

Duty to transport; detoured train.

5. A rule of a railroad company not to carry local passengers on detoured trains is reasonable even when applied to a physician whose business requires him to reach his destination as soon as possible, and who will be delayed nearly two hours by the lateness of the local train if he is not carried on one which has been detoured. Southern R. Co. v. McNabb, **L.R.A.1915B, 761,** 169 S. W. 757, — Tenn. —. (Annotated)

Who are passengers.

6. One is not accepted as a passenger by being told by the conductor of a detoured train upon which local passengers are not entitled to ride under the rules of the company to get aboard, under the mistaken belief that he had a ticket for that train. Southern R. Co. v. McNabb, **L.R.A.1915B, 761,** 169 S. W. 757, — Tenn. —.

Measure of care required; negligence generally.

7. A railroad company which, having reason to anticipate the condition, starts an overcrowded train from a terminal without notice to passengers that some one will have to stand, is liable in damages to a passenger made ill by exposure in being compelled to ride on the platform, and insulted by the conductor when he asked for a seat. Cave v. Seaboard A. L. R. Co. **L.R.A.1915B, 915,** 77 S. E. 1017, 94 S. C. 282. (Annotated)

Contributory negligence of passenger.

8. A fifteen-year old boy is negligent as matter of law in riding on the lower steps of a rapidly moving railroad car and engaging in exercises which cause his body to project beyond the side of the car. Rose v. Northern P. R. Co. **L.R.A.1915B, 166,** 143 Pac. 145, — Wash. —. (Annotated)

Baggage or property of passenger.

Error in admission of evidence in action for loss of baggage, see Appeal and Error, 17.
Presumption and burden of proof as to negligence, see Evidence, 10.

9. A railway carrier receiving a passenger's baggage for interstate transportation is not required to give any other receipt than the customary baggage check by the provision of the act to regulate commerce of February 4, 1887, § 20, as amended by the act of June 29, 1906, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor. Boston & M. R. Co. v. Hooker, **L.R.A.1915B, 450,**

58 L. ed. 868, 34 Sup. Ct. Rep. 526, 233 U. S. 97.

10. No negligence sufficient to hold a railroad company liable for loss of hand baggage of a passenger is shown by the fact that the porter took it, with that of other passengers, to remove it from the car at destination, and placed it in the vestibule, and that when the owner, who was among the last to leave the car, reached the vestibule, it was gone. Union P. R. Co. v. Grace, **L.R.A.1915B, 608,** 143 Pac. 353, — Wyo. —. (Annotated)

11. To avoid liability for a theft of a passenger's property while he is asleep at night, a sleeping car company must keep a constant and active watch in the aisle of the car. Robinson v. Southern R. Co. **L.R.A. 1915B, 621,** 40 App. D. C. 549. (Annotated)

12. A railroad company carrying upon its train the cars of a sleeping car company is under the same liability as the latter company for the loss of property of passengers in the sleeping car by theft. Robinson v. Southern R. Co. **L.R.A.1915B, 621,** 40 App. D. C. 549.

13. A regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its baggage liability to $100 unless a greater value is declared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss of the baggage through the carrier's negligence, regardless of the passenger's lack of knowledge of or assent to such regulation, and regardless of the carrier's failure to inquire as to the value of the baggage, or of its outward appearance as indicating greater value, any state law or policy to the contrary having been superseded when Congress, by the amendment of June 29, 1906, to the act to regulate commerce of February 4, 1887, took possession of the subject of the interstate railway transportation of property. Boston & M. R. Co. v. Hooker, **L.R.A.1915B, 450,** 58 L. ed. 868, 34 Sup. Ct. Rep. 526, 233 U. S. 97.

Discrimination between transfer companies.

14. A railway company is not prohibited from granting to a local transfer company, in good faith and for public convenience, the exclusive privilege of occupying a portion of a station platform and ground for the purpose of soliciting patronage in the business of transferring through passengers and baggage arriving on its trains to the station of another railway company, by any rule or principle of the common law, nor by §§ 7, 8, and 9, chap. 9, Acts 1913, West Virginia Code, chap. 15o, §§ 642–644, relating to the duties of connecting lines of railroad and the subject of changing rates, fares, and charges of public service corporations, and providing that it shall be unlawful for any public service corporation to make or give any undue or unreasonable preference or advantage to any particular company, or to subject any particular company, traffic, or service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Rose v. Public Service Commission, **L.R.A.1915B, 358,** 83 S. E. 85, — W. Va. —.

15. The rights of a competing transfer company are not violated by the grant by a railway company to a local transfer company, in good faith and for public convenience, of the exclusive privilege of occupying a portion of its station platform and ground for the purpose of soliciting patronage in the business of transferring through passengers and baggage arriving on its trains to the station of another railway company. Rose v. Public Service Commission, **L.R.A.1915B, 358,** 83 S. E. 85, — W. Va. —. (Annotated)

Rates; filing.

16. A limitation as to the baggage liability of an interstate carrier, based upon the requirement to declare its value when more than $100, and pay an excess charge, is a regulation determinative of the rate to be charged and affecting the service to be rendered to the passenger within the meaning of the act to regulate commerce of February 4, 1887, § 6, as amended by the act of June 29, 1906, which requires regulations of that character to be filed and posted in accordance with its provisions as a part of the carrier's tariff schedules. Boston & M. R. Co. v. Hooker, **L.R.A.1915B, 450,** 58 L. ed. 868, 34 Sup. Ct. Rep. 526, 233 U. S. 97.

CASE.

Injury to business.

Joint liability for, see Joint Creditors and Debtors, 3.

Conclusiveness in common-law action for interference with business of judgment in action between same parties under Sherman anti-trust act, see Judgment, 4.

Question for jury as to whether acts of agent were within scope of authority, see Trial, 1.

1. A merchant who, upon losing the agency for a particular sewing machine, for the purpose of ruining the business of his successor, procures some secondhand machines and advertises them as new, of latest pattern, with all improvements, at one half the price charged by his successor for new machines, is liable to him in damages for the injury thereby caused. Boggs v. Duncan-Schell Furniture Co. **L.R.A.1915B, 1196,** 143 N. W. 482, — Iowa, —.

2. A trader who misrepresents his competitor in some material matter, thereby causing damage to his competitor's business, renders himself liable in damages. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17. (Annotated)

3. Notices of infringement and threats of suit made by one in good faith and in the honest and reasonable belief that his claims are valid, and in an honest effort to protect them from invasion, are not action-

able even though his patent proves invalid; but if the patentee is pursuing a course which is calculated unnecessarily to injure another's business, and with the intention of so doing, his conduct will be deemed malicious; and if his patent fails, so that his representations are false, they are actionable. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B,1179,** 142 N. W. 930, 123 Minn. 17.

4. Representations by the manufacturer of a patented article that an article manufactured by a competitor is an infringement are material, so as to render the one making them liable for resulting injury to the competitor if they are false where the principle claimed to be infringed is essential to the manufacture of any successful article such as that in question, and where there is evidence that the representations and threats cause damage to the competitor. Virtue v. Creamery Package Mfg. Co. **L.R.A. 1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

CASHIER.
Authority of, see Banks, 4, 5.

CATTLE GUARDS.
Duty of railroads as to, see Railroads, 6.

CAUSE.
Of loss, death or injury, see Insurance, 7, 8.

CEMENT.
Implied warranty of fitness on sale of, see Sale, 7.
Breach of warranty on sale of, see Sale, 8, 9.

CERTIFICATE.
Of deposit, see Banks, 1, 3.

CHANGE OF LOCATION.
Of insured property, see Insurance, 5.

CHANGE OF POSITION.
By one setting up estoppel, see Estoppel, 3.

CHATTEL MORTGAGE.
Right of holder to priority of payment out of bankrupt's estate, see Bankruptcy, 1, 2.

CHECKS.
As to duties and liability of bank, with respect to, see Banks.
Sufficiency of pleading as to lack of authority of corporate officer to draw checks to his own order, see Pleading, 2.
Effect of delay by one issuing check, to assert his rights, see Estoppel, 4.

1. An instrument sent by the grand lodge of a fraternal society in payment of a death claim, directing the bank on which it is drawn to "pay to the order of A (beneficiary) of B, deceased, late member of C Lodge . . . located at D" and payable out of the beneficiary fund, is in legal effect and ordinary bank check. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

2. A check payable to the order of the treasurer of a town in legal effect stands upon the same footing as if payable to the town. Quincy Mut. F. Ins. Co. v. International Trust Co. **L.R.A.1915B, 725,** 104 N. E. 845, 217 Mass. 370.

3. The rule that where one of two innocent persons must suffer by the fraud of a third, the loss must rest where it falls, does not apply in favor of a bank which collects for another bank as its property a check payable to the treasurer of a town, and indorsed by him, which was issued in payment of a forged town note, so as to throw the loss on the drawer of the check, since the collecting bank was charged with notice that the check was the property of the town, and could not be indorsed for circulation. Quincy Mut. F. Ins. Co. v. International Trust Co. **L.R.A.1915B, 725,** 104 N. E. 845, 217 Mass. 370.

4. A bank which collects a check payable to the treasurer of a town, and credits the proceeds to its correspondent, another bank, as the property of the latter, to which it had been fraudulently transferred with the indorsement of the treasurer upon it, is liable to account for the proceeds to the maker of the check, who issued it in payment of a forged note of the town. Quincy Mut. F. Ins. Co. v. International Trust Co. **L.R.A.1915B, 725,** 104 N. E. 845, 217 Mass. 370. (Annotated)

CHURCHES.
See Religious Societies.

CITIES.
See Municipal Corporations.

CLAIMS.
Against decedents' estates, see Executors and Administrators.

CLASSIFICATION.
By statute, see Constitutional Law, 5–10.

CLASS LEGISLATION.
See Constitutional Law, 5–10.

COAL.
Mechanic's liens for, see Mechanics' Liens, 2.
Negligence in permitting coal to roll over edge of steep decline, see Negligence, 1, 2.

COAL MINES.
See Mines.

CODEFENDANTS.
Contribution between, see Contribution and Indemnity.

COLLATERAL ATTACK.
On judgment, see Judgment, 3.

COLOR OF TITLE.
See Adverse Possession.

COMMISSION GOVERNMENT.
Validity of provision for preferential voting in election of commissioners, see Elections, 1, 2.

COMMON CARRIERS.
See Carriers.

COMMUTATION.
Of sentence, see Criminal Law, 2.

COMPLAINT.
In criminal prosecution, see Indictment, etc.
Of plaintiff, see Pleading, 2, 3.

COMPROMISE AND SETTLEMENT.
Validity of note given in settlement of controversy as to amount due, see Bills and Notes, 2.
Duress in securing, see Duress, 2.

1. A subsequent agreement between parties who have been doing business under a written agreement, made, upon differences and contingencies arising which were not foreseen and provided for in the original agreement, "in order to avoid complications," is based upon a sufficient consideration although no pecuniary consideration passed. Russell v. Lambert, **L.R.A.1915B, 20,** 94 Pac. 54, 14 Idaho, 284.

2. The settlement of disputes, and fixing a basis on which such settlement shall be made, is a sufficient consideration for an agreement or contract of compromise. Russell v. Lambert, **L.R.A.1915B, 20,** 94 Pac. 54, 14 Idaho, 284. (Annotated)

3. A court cannot go back of a valid compromise to determine who was in the right in the original contention. Kiler v. Wohletz, **L.R.A.1915B, 11,** 101 Pac. 474, 79 Kan. 716.

CONDEMNATION.
Of property, see Eminent Domain.

CONDITION.
To rescission of contract, see Contracts, 13.
Conditions precedent to action to enforce stockholders' liability, see Corporations, 1.
Parol evidence of, see Evidence, 21, 22.
In insurance policy, see Insurance, 4, 5.
Of right to have deed declared to be a mortgage, see Mortgage, 1.

CONFLICT OF LAWS.
As to validity and effect of foreign judgment, see Judgment, 8, 9.

CONSIDERATION.
Of bills and notes, see Bills and Notes, 2.
For compromise and settlement, see Compromise and Settlement, 1, 2.
For contracts, generally, see Contracts, 2.

CONSOLIDATION.
Of appeals, see Appeal and Error, 2.

CONSTITUTIONAL LAW.
Provision against imprisonment for debt, see Imprisonment for Debt.

Delegation of power.

1. There is no delegation of legislative power investing in the state tax commission the power of appointing assessors of incomes and fixing their salaries. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

2. A provision in a statute for the maintenance of washhouses by coal miners, only upon petition of their employees, is not an unconstitutional delegation of legislative power. Booth v. State, **L.R.A.1915B, 420,** 100 N. E. 563, 179 Ind. 405.

3. A statute providing that the county board or auditor "may" license any voter in its county as an auctioneer, and providing a penalty for selling property at auction without such license, is not a delegation of legislative power to such officers. Wright v. May, **L.R.A.1915B,** 151, 149 N. W. 9, 127 Minn. 150.

Separation of powers.
Relation of courts to other departments of government, see Courts, 2, 3.

4. A board of equalization consisting of the county commissioners and county assessors, created for the purpose of equalizing assessments and adjusting individual assessments, may be given judicial powers under a constitutional provision that the judicial power of the state shall be vested in certain courts "and such other courts, commissioners, or boards" as may be established by law. Hopper v. Oklahoma County, **L.R.A.1915B, 875,** 143 Pac. 4, — Okla. —.

Equal protection and privileges.
See also, infra, 11.

5. Providing for increasing the assessment against a nonresident taxpayer without notice does not deprive him of any privileges or immunities guaranteed by the Federal Constitution. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

6. A statute providing that the county board or auditor may license any voter in its county as an auctioneer, and providing a penalty for selling property at auction without such license, thereby excluding nonresidents and aliens from such privilege, does not violate the provision of the Federal Constitution, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction equal protection of the law. Wright v. May, **L.R.A.1915B, 151,** 149 N. W. 9, 127 Minn. 150.

7. A statute providing that the county board or auditor may license any voter in its county as an auctioneer, and providing a penalty for selling property at auction without such license, thereby excluding nonresidents and aliens from such privileges,

is not a violation of the provision of the Federal Constitution, that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Wright v. May, **L.R.A.1915B, 151,** 149 N. W. 9, 127 Minn. 150.

8. A statute providing that the county board or auditor may license any voter in its county as an auctioneer, and providing a penalty for selling property at auction without such license, thereby excluding aliens from such privilege, is not a violation of a constitutional provision that no member of the state shall be deprived of any of the rights or privileges secured to any citizen thereof. Wright v. May, **L.R.A. 1915B, 151,** 149 N. W. 9, 127 Minn. 150.

9. Taxing real estate and also the income therefrom does not deny the owner the equal protection of the laws within the prohibition of the Federal Constitution. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456. (Annotated)

10. Imposing a progressive tax on incomes does not deny taxpayers the equal protection of the laws within the prohibition of the Federal Constitution. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

Due process of law; right to life, liberty, and property.

11. A statute requiring coal miners to maintain washhouses for their employees does not deprive them of their property without due process of law or of the equal protection of the laws. Booth v. State, **L.R.A.1915B, 420,** 100 N. E. 563, 179 Ind. 405. (Annotated)

12. No constitutional right of liberty or property is infringed by a statute forbidding the asignment of wages to be earned. Heller v. Lutz, **L.R.A.1915B, 191,** 164 S. W. 123, 254 Mo. 704.

13. An ordinance imposing a license tax upon the use in a business of trading stamps purchased from another is not unconstitutional as to the latter, on the ground that it deprives him of his property without due process of law, impairs the obligation of his contracts, or operates in restraint of trade. Sperry & Hutchinson Co. v. Tacoma, **L.R.A.1915B, 241,** 122 Pac. 1060, 68 Wash. 254.

14. No constitutional right of liberty is infringed by forbidding the carrying of a red flag in parade. Com. v. Karvonen, **L.R.A.1915B, 706,** 106 N. E. 556, 219 Mass. 30. (Annotated)

15. A person is not deprived of his property without due process of law where a judgment in a previous suit against the person to whose interest he succeeded, based upon constructive service, in which such person, whose true name is "Albert B. Geilfuss, assignee," was named as "Albert Guilfuss, assignee," is sustained as valid against a collateral attack. Ordean v. Grannis, **L.R.A.1915B, 1149,** 136 N. W. 575, 1026, 118 Minn. 117.

Police power.

16. A drainage district organized to redeem land for agricultural purposes is not L.R.A.1915B.

such a governmental agency that it can take private property without compensation in the exercise of the police power for the suppression of disease, although the construction of its system may remove stagnant water which may tend to breed disease. People ex rel. Peeler v. Chicago & E. I. R. Co. **L.R.A.1915B, 486,** 104 N. E. 831, 262 Ill. 492.

17. In the exercise of the police power, the state and municipal authorities may make all such provisions as are reasonable, necessary, and appropriate for the protection of the public health and comfort, and when any such provision has a real and substantial relation to that object, and does not interfere with the enjoyment of private rights beyond the necessities of the situation, every intendment is to be made in favor of its lawfulness. Toledo Disposal Co. v. State, **L.R.A.1915B, 1207,** 106 N. E. 6, 89 Ohio St. 230.

18. The business of keeping a hotel, lodging house, or rooming house is one so far affecting the public health, morals, or welfare that it is competent for the legislature, in the exercise of the police power, to authorize municipal authorities to require persons conducting such a business to obtain a license. Cutsinger v. Atlanta, **L.R.A. 1915B, 1097,** 83 S. E. 263, — Ga. —. (Annotated)

19. An act to prevent holding under herd, or in any inclosure, unaccompanied by their mothers, calves of neat cattle under seven months of age, is not violative of any constitutional provision, but is sustainable under the police power, where such regulation appears reasonably necessary to prevent the larceny of young animals. State v. Brooken, **L.R.A.1915B, 213,** 143 Pac. 479, — N. M. —. (Annotated)

Impairing obligation of contracts.

20. A judgment for damages for a trespass to real estate, where the tort benefited the tort feasor's estate to the full extent of the actual damages recovered by the injured party, is not a judgment upon a tort, pure and simple, but upon a cause of action so far contractual as to bring the judgment within the protection of the provisions of the Federal Constitution against legislation impairing the obligation of a contract. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

21. A legislature which has reserved power to alter every corporate power granted by it may, without unconstitutionally impairing the obligation of the contract, authorize corporations to make their stock assessable, although at the time it was issued both the certificate of incorporation and certificates of stock themselves declared that it should not be assessable. Somerville v. St. Louis Min. & Mill. Co. **L.R.A. 1915B, 811,** 127 Pac. 464, 46 Mont. 268. (Annotated)

22. The right to maintain an action to enforce the liability of a stockholder for a judgment against the corporation upon a tort which benefited the corporation to the extent of the recovery is not affected by sub-

sequent statues changing the remedy against stockholders to a suit by a receiver, and limiting the liability of stockholders, since such laws would impair the obligation of the judgment contract. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720. (Annotated)

CONSTRUCTION.

Of statute, see Statute, 8–13.

CONSTRUCTIVE TRUSTS.

See Trusts.

CONTEMPORANEOUS CONSTRUCTION.

Of insurance laws, see Statute, 12.

CONTEMPT.

1. An information for contempt cannot be filed by a judge of the court against a physician for inciting the institution of an action for damages for an alleged personal injury which has no basis in fact. Melton v. Com. **L.R.A.1915B, 689,** 170 S. W. 37, — Ky. —. (Annotated)

2. One is not punishable for contempt in failing to produce, in response to a subpœna duces tecum, papers which are in possession of his partners at the firm's place of business in a foreign country, and which relate to such business. Munroe v. United States, **L.R.A.1915B, 980,** 216 Fed. 107, — C. C. A. —. (Annotated)

3. When a court is composed of branches, a judge of any branch may punish for contempt committed against any other branch. Melton v. Com. **L.R.A.1915B, 689,** 170 S. W. 37, — Ky. —.

CONTRACTORS.

Bond of, see Bonds.

Discharge of surety on bond of, see Principal and Surety.

Right of contractor of street pavement to remove it on refusal of city to pay therefor, see Public Improvements.

Injunction against interference with removal by contractor of pavement rejected because not complying with contract, see Injunction, 2.

Dissolution of temporary injunction to prevent city from interfering with removal of paving by contractor, see Injunction, 7.

Effect of judgment denying right of contractor to recover for street pavement on his right to remove his material from the street, see Judgment, 5.

Laches of paving contractors in attempting to remove pavement for which they have not been paid, see Limitation of Actions, 3.

Running of limitation against right of contractor to remove pavement for which he has not been paid, see Limitation of Actions, 3.

CONTRACTS.

Impairing obligation of, see Constitutional Law, 20–22.

Contract of indemnity, see Contribution and Indemnity.

Presumption and burden of proof as to, see Evidence, 13.

Parol evidence to vary written contract, see Evidence, 19–22.

Power of married woman to contract, see Husband and Wife.

Novation, see Novation.

Sale of personalty, see Sale.

Instruction in action on, generally, see Trial, 9.

Sale of real property, see Vendor and Purchaser.

Contract for towage service, see Towage.

Implied agreements.

Right of client to recover from third person for services rendered by attorney which benefit both, see Contribution and Indemnity, 1.

1. No implied agreement to return advance payments made by an automobile dealer to a distributing company upon the signing of an agency agreement in which a certain number of cars are ordered, arises upon the failure of the dealer to sell any cars and his consequent failure to take any of the cars ordered. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108. (Annotated)

Consideration.

For bills or notes, see Bills and Notes, 2.

For compromise and settlement, see Compromise and Settlement, 1, 2.

2. An agreement between an automobile dealer and a distributing company whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and an advance payment on each car, which was to be retained by the distributing company in any event, does not fail for lack of consideration so as to entitle the dealer to recover the advance payment where the parties have treated the contract as valid during the entire life thereof but the dealer has been unable to sell any of the cars, consequently none were ordered and none furnished or tendered him by the distributing company. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108.

Mutuality.

3. Whether an agreement between an automobile dealer and a distributing company whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and an advance payment on each car, lacks mutuality and is therefore voidable and unenforceable while wholly executory is not controlling where the parties have acted under it during the entire period of its existence, but under such circumstances it cannot be questioned and must to such extent control and measure

the rights of such respective parties. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108.

Offers and their acceptance or withdrawal.

Mining lease as option, terminable at pleasure, see Mines, 4.

4. The mailing of the notice within the thirty days is not sufficient, but it must be received by the other contracting party under a contract for exchange of property giving one party thirty days to examine the property of the other party, and providing that at the end of thirty days the contract "is to become binding upon said party unless he sooner notifies first party in writing of his intention to abandon" the same. Wheeler v. McStay, **L.R.A.1915B, 181,** 141 N. W. 404, 160 Iowa, 745. (Annotated)

Entirety.

5. A written contract for the sale of several articles of personal property for a sum in gross is indivisible except by subsequent agreement of the parties, and the seller cannot recover the contract price or any part thereof unless he substantially performs, or tenders performance of, all the terms of the contract on his part to be performed. Petersburg Fire, Brick & Tile Co. v. American Clay Mach. Co. **L.R.A.1915B, 536,** 106 N. E. 33, 89 Ohio St. 365.

Validity and effect.

Stipulation for attorneys' fees, see Attorneys' Fees.

Contracts limiting liability of carrier, see Carrier, 13.

Validity of contracts of unauthorized foreign corporation, see Corporations, 3.

Contract by intoxicated person, see Drunkenness.

Duress, see Duress.

Estoppel to set up illegality of contract, see Estoppel, 5.

Limitation of liability by telegraph company, see Telegraphs.

6. Failure of a money lender to give the borrower a memorandum of the transaction, when the securities are executed as required by statute, does not prevent enforcement of the securities if the statute merely subjects him to fine for such failure. Wood v. Krepps, **L.R.A.1915B, 851,** 143 Pac. 691, — Cal. —.

7. That a pawnbroker has not complied with the municipal regulations for the conduct of such business does not affect the validity of a contract made by him as a personal-property broker in lending money on chattel mortgage. Wood v. Krepps, **L.R.A. 1915B, 851,** 143 Pac. 691, — Cal. —.

8. Failure of a money lender to secure a license required by municipal ordinance for revenue purposes under penalty for the transaction of such business does not prevent the enforcement by him of his loan contracts. Wood v. Krepps, **L.R.A.1915B, 851,** 143 Pac. 691, — Cal. —. (Annotated)

9. An agreement by a mortgagor that he will forfeit all interest in the mortgaged property, if he fails to pay the debt secured by a fixed time, will not be enforced, although made after the execution of the mortgage. Holden Land & Live Stock Co. v. Interstate Trading Co. **L.R.A.1915B, 492,** 123 Pac. 733, 87 Kan. 221.

10. A contract by a railroad company in consideration of a grant of a right of way and depot sites to furnish the grantor information as to the points where stations would be located, and permit him to purchase and lay out town sites, the profits of which he is to share with the railroad company is both *ultra vires* and illegal. Minnesota, D. & P. R. Co. v. Way, **L.R.A.1915B, 925,** 148 N. W. 858, — S. D. —.

Performance; sufficiency.

11. Under a contract for the sale of several articles for a sum in gross, the delivery of a part of the property, equal in value to about one-third of the total contract price, is not such a substantial performance of the contract as will entitle the seller to recover the contract price or any part thereof. Petersburg Fire, Brick & Tile Co. v. American Clay Mach. Co. **L.R.A. 1915B, 536,** 106 N. E. 33, 89 Ohio St. 365.

Breach and its effect.

Enjoining breach of contract not to engage in, or aid, competing business, see Injunction, 1.

12. A covenant by one selling a business not to conduct the same kind of business in the same town for a specified time is not broken by lending money to a new firm entering such business, with no interest in the business other than as creditor, or by the transfer of the telephone number used in the business to the new concern. Finch Bros. v. Michael, **L.R.A1915B, 1204,** 83 S. E. 458, — N. C. —. (Annotated)

Change or extinguishment.

13. Disaffirmance is not a prerequisite to a recovery of property a conveyance of which the grantee secured without consideration from a person of known unsound mind. Barkey v. Barkey, **L.R.A.1915B, 678,** 106 N. E. 609, — Ind. —.

CONTRIBUTION AND INDEMNITY.

Between cotenants, see Cotenancy.

Determination of moot question in action for contribution, see Courts, 1.

Lien for amount which cotenant shall contribute for expenses paid by other cotenant, see Liens.

When limitations begin to run against claim for, see Limitation of Actions, 2.

Validity of contract by married woman to indemnify one against liability as surety for a third person, see Husband and Wife.

1. A corporation employing an attorney by the year is not entitled to recover from another corporation for his services in defending a suit brought against both corporations for a judgment *in solido*, without showing that there was some agreement to pay for his services. Louisiana & N. W. R.

Co. v. Athens Lumber Co. **L.R.A. 1915B, 856,** 64 So. 714, 134 La. 788. (Annotated)

2. Where two defendants are condemned *in solido*, one of them cannot obtain a judgment against the other, based on a contract wherein it is agreed that the one free from fault shall be held harmless by the other, until the one claiming the judgment against the other shows that it has paid the judgment in the other suit, or that it has suffered some actual damage by the judgment rendered against it. Louisiana & N. W. R. Co. v. Athens Lumber Co. **L.R.A.1915B, 856,** 64 So. 714, 134 La. 788.

CONTRIBUTORY NEGLIGENCE.

See Negligence, 3, 4.

CONVERSION.

Measure of damages for, see Damages, 5.

COPIES.

As evidence, see Evidence, 18.

CORPORATIONS.

Stockholders in banks, see Banks, 1, 2.
Special deposit of stocks, see Banks, 11.
Notice to bank of by-law of corporate depositor, see Banks, 13.
Notice to bank of intended misappropriation of funds by officer drawing check on corporate deposit, see Banks, 12.
Bank as agent of corporate depositor to pass on validity of checks drawn by officer, see Banks, 6, 8.
Reserved power to alter or amend charters, see Constitutional Law, 21.
Statute making paid-up stock assessable as impairment of obligation of contract, see Constitutional Law, 21.
Statute changing remedy against stockholders to a suit by receiver as impairing obligation of contract, see Constitutional Law, 22.
As to *ultra vires* contracts, see also Contracts, 10.
Liability of heirs of deceased stockholder on judgment against company, see Descent and Distribution.
Liability of estate of deceased stockholder, see Executors and Administrators.
Criminal liability of railroad company for obstructing street crossing, see Highways, 1.
Injunction against unfair and misleading use of corporate name, see Injunction, 3, 4.
Dissolution of insurance company, see Insurance, 2, 3.
Removal by corporation of its books and papers from jurisdiction of court to avoid producing them before grand jury, see Obstructing Justice, 1.
Right of corporation to constitutional protection against self-crimination, see Obstructing Justice, 1.
Right of individual to raise question of violation of provision against consolidation of railroads, see Parties, 2.
Sufficiency of pleading as to right of foreign corporation to enforce contract, see Pleading, 4.
Question for jury as to whether acts of officers were within the scope of their authority, see Trial, 1.
Sufficiency of pleading as to lack of authority of treasurer, see Pleading, 2.

1. The revivor of a judgment against a corporation is unnecessary in order to maintain a suit to collect the amount thereof from a stockholder. It is still evidence of the validity, character, and amount of the creditor's claim. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

2. Unissued treasury stock is not to be counted in determining whether or not the necessary two-thirds stock of a corporation has assented to a proposed change of policy. Somerville v. St. Louis Min. & Mill. Co. **L.R.A.1915B, 811,** 127 Pac. 464, 46 Mont. 268.

3. Legislation forbidding under penalty a foreign corporation to do business in the state by branch offices, representatives, or agents without having properly appointed an agent upon whom process may be served does not prevent the enforcement in the courts of the state by a corporation which has not complied with its requirements of payment of the purchase price of the goods sold through its agent in the state and delivered to the purchaser. Model Heating Co. v. Magarity, **L.R.A.1915B, 665,** 81 Atl. 394, 2 Boyce (Del.) 459.

CORPSE.

Who may maintain action for mutilation of, see Parties, 1.

COSTS AND FEES.

On appeal, see Appeal and Error, 23, 24.

1. The costs of taking evidence under a motion may be taxed against the losing party, although there was no jurisdiction to order it to be taken, if it was pertinent to the issues of the case and was considered on the final hearing, and the taking of it under the motion added nothing to the costs of the case. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.

2. Attorneys' fees provided for by Kan. Gen. Stat. 1909, § 7002, in actions for killing or injuring cattle on railroad tracks insufficiently fenced, are not allowable on a recovery based solely on the defendant's negligence in failing to remove snow from cattle guards properly constructed. Martin v. Atchison, T. & S. F. R. Co. **L.R.A. 1915B, 134,** 141 Pac. 599, 92 Kan. 595.

COTENANCY.

Lien for amount which cotenant shall contribute for expenses paid by other cotenant, see Liens.

Computation of interest on amount due by cotenant for taxes and other expenses, see Interest, 2.

When limitation begins to run against claim for contribution towards taxes, see Limitation of Actions, 2.

That a tenant in common is attempting to repudiate the cotenancy and exclude the other tenant from the property at the time he pays taxes and other expenses for the benefit of the property does not destroy his right to contribution from the other tenant to such expenses when the latter's rights are established. Willmon v. Koyer, **L.R.A.1915B, 961,** 143 Pac. 694, — Cal. —. (Annotated)

COUNTIES.

Authority of county commissioners to consent to discontinuance of interurban railroad, see Carriers, 3.

Delegation of power to county boards, see Constitutional Law, 3.

Power of legislature to authorize appeal to courts from county board of equalization, see Courts, 3.

COURTS.

Contempt of, see Contempt.

Real controversy.

1. In an action by one of two defendants against whom a judgment has been obtained in a previous action *in solido*, to obtain a judgment against the other, the court will not undertake to determine whose fault caused the accident that was the basis of the previous suit, where the plaintiff in the suit at bar has not shown that it has suffered any loss by being condemned by the judgment in the former suit. Louisiana & N. W. R. Co. v. Athens Lumber Co. **L.R.A. 1915B, 856,** 64 So. 714, 134 La. 788.

Relation to other departments of government.

Encroachment on judicial power, see Constitutional Law, 4.

2. The court has no supervisory control over the exercise by the governor of his constitutional power to call out the military forces to suppress an insurrection. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

3. The legislature may authorize an appeal to the courts, from the county board of equalization created with power to equalize assessments and adjust individual assessments, where such board is vested with judicial power. Hooper v. Oklahoma County, **L.R.A.1915B, 875,** 143 Pac. 4, — Okla. —. (Annotated)

State courts.

Publication of notice of designation of term of court at which trial was had, see Appeal and Error, 13.

4. Where the power resides in the supreme court, a circuit court cannot entertain a taxpayers' action to enjoin the auditing and disbursing officers of the state from making expenditures for the enforcement of a statute which is alleged to be unconstitutional. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

5. A taxpayer may, under a constitutional provision empowering the supreme court to issue, *inter alia*, writs of injunction and other original and remedial writs, and to hear and determine the same, maintain in that court a suit as relator in the name of the state to enjoin the expenditure of money by state officials in the enforcement of an unconstitutional statute, if he in fact represents the state, and not merely his fellow taxpayers, and the defiance of the constitutional demands is flagrant and patent. State ex rel. Bolens v. Frear, **L.R.A. 1915B, 569,** 134 N. W. 673, 148 Wis. 456.

6. The supreme court may, under its power to issue, *inter alia*, writs of injunction and other original and remedial writs, and to hear and determine the same, entertain a suit by a taxpayer as relator in the name of the state to prevent the putting into force of a new system of taxation which is alleged to be unconstitutional, and which will affect every taxing district in the state. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

7. The supreme court will assume original jurisdiction of a writ of habeas corpus, where the parties involved have joined in consenting to the commencement and determination of the proceedings in that court, and where the case is of importance. State ex rel. Murphy v. Wolfer, **L.R.A.1915B, 95,** 148 N. W. 896, 127 Minn. 102.

8. Under a statute requiring an appellate court to fix on or before December 1st in each year the time and place for holding trial terms, and file the same in the office of the secretary of state, designations of additional terms need not be so filed, so as to come within the operation of another statute requiring publication by such secretary, for a specified time, of appointments filed with him. People v. Duffy, **L.R.A. 1915B, 103,** 105 N. E. 839, 212 N. Y. 57.

Federal courts.

9. A Federal court has no jurisdiction of a suit brought between citizens of the same state to restrain unfair trade. Diederich v. W. Schneider Wholesale Wine & Liquor Co. **L.R.A.1915B, 889,** 195 Fed. 35, 115 C. C. A. 37.

Rules of decision.

10. The courts will not overturn a deliberate decision upon the constitutional power of the legislature under which the highest political rights have been held and exercised without question for many years, regardless of the opinions of the judges upon the bench as to the correctness of the decision. Scown v. Czarnecki, **L.R.A.1915B, 247,** 106 N. E. 276, 264 Ill. 305.

COURTS MARTIAL.

Habeas corpus to release one sentenced to imprisonment by court martial, see Habeas Corpus.

COVENANTS AND CONDITIONS.
In mining lease, see Mines, 1.

CREDIT.
Gift of, acknowledgment, see Acknowledgment.
Loan of, by municipality, see Public Moneys.

CRIMINAL LAW.
Reversible error in criminal case, see Appeal and Error, 13, 15, 16.
Reversal of conviction because sentence is below minimum fixed by law, see Appeal and Error, 21.
Police power as to crimes, see Constitutional Law, 19.
Evidence as to acts and declarations of third persons, generally, see Evidence, 25.
Evidence of other crimes, see Evidence, 28–30.
Relevancy of evidence, generally, see Evidence, 31.
Sufficiency of proof, see Evidence, 36.
Civil liability for false arrest and imprisonment, see False Imprisonment.
Adulteration of food, see Food, 1.
Habeas corpus, see Habeas Corpus.
Criminal liability of railroad company for obstructing street crossing, see Highways, 1.
As to requisites and sufficiency of indictment, information and complaint, see Indictment, etc.
Injunction against criminal proceedings, see Injunction, 6.
Right to trial by jury, see Jury.
Criminal liability for nuisance, see Nuisance, 2, 3.
Right of corporation to constitutional protection against self-crimination, see Obstructing Justice, 1.
As to search and seizure, see Search and Seizure.
Title of statute as to sentence for crime, see Statute, 5.
Plurality of statute as to punishment of crime, see Statute, 7.
Question whether statute as to punishment is an amendment or an independent piece of legislation, see Statute, 14.
Correctness of instruction in criminal cases, generally, see Trial, 10.
Impeachment or discrediting of witnesses, see Witnesses, 2.
Cross-examination of accused, see Witnesses, 1.
See also Abduction and Kidnapping; Homicide; Intoxicating Liquors; Rape.

1. No criminal prosecution can be sustained in Ohio except for an act done in violation of a statute or ordinance legally passed; and the courts will not construe that to be a crime punishable under one statute, which was done under authority especially granted by another statute. Toledo Disposal Co. v. State, **L.R.A.1915B, 1207,** 106 N. E. 6, 89 Ohio St. 230.

2. A prisoner sentenced to the state prison for life, whose sentence is commuted to one for a term of years, is entitled to diminution of that sentence by reason of good conduct commencing on the day of his arrival in prison, and not at the time of the commutation of his sentence. State ex rel. Murphy v. Wolfer, **L.R.A.1915B, 95,** 148 N. W. 896, 127 Minn. 102. (Annotated)

CROSS-EXAMINATION.
Of accused, see Witnesses, 1.

CROWDING.
Of railroad train, see Carriers, 7.

DAMAGES.
Exemplary or punitive.

1. Punitive damages may be awarded against a railroad company which, having needlessly permitted an overcrowded train to start from a terminal without notice to passengers that some would have to stand, insults a passenger who refused to give up his ticket unless provided with a seat, by telling him that a lady will be asked to give up her seat to him, with intent to humiliate him. Cave v. Seaboard A. L. R. Co. **L.R.A.1915B, 915,** 77 S. E. 1017, 94 S. C. 282.

For breach of warranty.

2. The damages for breach of warranty of a machine a part of which breaks down are not necessarily the amount paid for a new part. Fairbanks Steam Shovel Co. v. Holt. **L.R.A.1915B, 477,** 140 Pac. 394, 79 Wash. 361.

Liquidated damages.

3. An advance payment made by an automobile dealer to a distributing company upon the signing of an agency agreement in which a certain number of automobiles are ordered, which it is stipulated in the agreement may be retained by the distributing company as liquidated damages upon the failure of the dealer to take and pay for the cars ordered, cannot be recovered by the dealer upon his failure to take the cars ordered on the theory that the same is a penalty especially where the proof shows that the actual damages suffered by the distributing company on account of the dealer's failure to perform exceeded the amount of the deposit. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108.

Malicious prosecution.

4. An award of $57,500 damages in an action by the patentee of a certain article for malicious prosecution of a suit for alleged infringement is excessive where there is no evidence that the commercial value of the patent has been destroyed, or the extent to which it has been injured, nor the extent of injury to a plant owned by the plaintiff in which the patented article was to be manufactured, nor any necessity shown for the expenditures claimed to have been made by the plaintiff in defending the suit out of which the action for malicious

prosecution grew, and where the total sales of the plaintiff's business were less than $8,000, and the total profits less than $3,000. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

Conversion.

5. The value of the use of the animals during the time of detention cannot be considered in estimating the damages to be awarded the owner of domestic animals in an action for their conversion, the measure of damages being the value of the animals at the time of the conversion and interest. Martinez v. Vigil, **L.R.A.1915B, 291,** 142 Pac. 920, — N. M. —. (Annotated)

Mental anguish.

Who may sue for damages for mental anguish because of mutilation of corpse, see Parties, 1.

6. The proprietor of a theater is not liable in damages for humiliation or injury to reputation to a patron who, when politely requested by the superintendent to be quiet, followed him back to his place in the foyer, and persisted in complaining so loudly as to disturb the audience until the arrival of a policeman sent for by the superintendent, who demanded that he be quiet or leave the theater, whereupon he walked out, even though the superintendent may have been mistaken as to who was guilty of the original disturbance. Russo v. Orpheum Theatre & Realty Co. **L.R.A.1915B, 1119,** 66 So. 385, — La. —. (Annotated)

7. Damages cannot be recovered for mental suffering due to negligent delay in the delivery of a telegram announcing illness, in the absence of any physical injury; and the loss of the amount paid for transmission of the message is not sufficient to sustain such recovery. Corcoran v. Postal Teleg.-Cable Co. **L.R.A.1915B, 552,** 142 Pac. 29, 80 Wash. 570.

DEATH.

Presumption and burden of proof as to, see Evidence, 2–9.

DEBT.

Liability of heirs for debts of ancestors, see Descent and Distribution.
Imprisonment for, see Imprisonment for Debt.

DEBTOR AND CREDITOR.

Liability of heirs for debts of ancestor, see Descent and Distribution.
Duress by creditor, see Duress.
Joint creditors and debtors, see Joint Creditors and Debtors.
Lien of creditor, see Mechanics' Liens.
Effect of bequest in will to cancel debt of testator, see Wills.

DECEDENTS.

Administration of estates of, see Executors and Administrators.

DECLARATIONS.

Evidence of, see Evidence, 25, 26.
In pleading, see Pleading, 2, 3.

DEDUCTIONS.

From sentence, see Criminal Law, 2.
From legacy, see Legacies.

DEEDS.

Unrecorded deed as color of title, see Adverse Possession.
Construing deed as mortgage, see Mortgage, 1, 2.

A deed executed by using the hand of an unconscious person to make his mark on the paper at the place of signature is void. Barkey v. Barkey, **L.R.A.1915B, 678,** 106 N. E. 609, — Ind. —. (Annotated)

DEFENSES.

In general, see Action or Suit.
In proceeding to abate nuisance, see Nuisances, 1, 3.
In prosecution for rape, see Rape.

DELAY.

In issuing execution, see Execution.
In applying for benefit of bequest, see Wills, 3.

DELEGATION OF POWER.

Constitutionality of, see Constitutional Law, 1–3.

DELIVERY.

Of personal property sold, see Sale, 1, 2.

DEPOSIT.

In bank, see Banks.

DEPOTS.

Validity of speculative contract between railroad and individual for laying out of town sites at points where stations will be located, see Contracts, 10.

DEMURRER.

See Pleading, 6–10.

DESCENT AND DISTRIBUTION.

Presumption and burden of proof, see Evidence, 15.
Right of heirs of deceased entryman on public lands, see Public Lands, 1–3.

The heirs at law or devisees of a deceased stockholder are liable in a suit upon a judgment rendered against the company after the stockholder's death, to the extent of the property inherited by or devised to them. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

DETOURED TRAIN.

Duty to receive local passengers on, see Carriers, 5.

DIRECTION OF VERDICT.

See Trial, 7.

DISCHARGE.

Of surety, see Principal and Surety.

DISCOURTESY.
As ground for divorce, see Divorce and Separation.

DISCOVERY AND INSPECTION.
Employees who were to be compensated on the basis of percentage of sales, and to whom customers' notes representing their share of the profits had been turned over, are entitled to itemized statements of the accounts and copies of correspondence relating to their payment or collection. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.

DISCREDITING.
Of witnesses, see Witnesses, 2.

DISCRETION.
Review of, on appeal, see Appeal and Error, 7, 8.
Mandamus to review discretionary action, see Mandamus, 1.

DISCRIMINATION.
By carrier between transfer companies, see Carrier, 14, 15.
Unconstitutionality of, see Constitutional Law, 5–10.

DISMISSAL OR DISCONTINUANCE.
Of appeal, see Appeal and Error, 2.
Record of suit that was dismissed as evidence in subsequent suit, see Evidence, 17.

DISOBEDIENCE.
As contempt, see Contempt, 2.

DISSOLUTION.
Of injunction, see Injunction, 7.
Of partnership, see Partnership.

DISTRIBUTION.
See Descent and Distribution.

DISTRIBUTION CONTRACT.
Automobile distribution contracts, see Contracts, 1–3.
Provision for liquidated damages in automobile distribution contract, see Damages, 3.
Pleading in action on automobile distribution contract, see Pleading, 3.

DIVORCE AND SEPARATION.
Duty to pay instalments of alimony pending appeal from decree, see Appeal and Error, 1.
Review on appeal of decree as to custody of children, see Appeal and Error, 11.
Award of alimony on appeal, see Appeal and Error, 19.
Effect on interest in proceeds of insurance policy, see Insurance, 9.
Enforcing judgment for alimony in other state, see Judgment, 9.
Decree rendered in other state as to custody of child, see Judgment, 8.

1. Uniform and continued discourtesy combined with exclusion of the husband from access to the wife's bed and refusal of sexual intercourse, while the marriage relation remains otherwise unimpaired, is no ground of divorce. Wills v. Wills, **L.R.A.1915B, 770,** 82 S. E. 1092, — W. Va. —. (Annotated)

2. Uniform and continued discourtesy of one spouse to the other, manifested in various ways, such as denial of social intercourse, coolness of manner, disavowal of love, expression of hatred, and refusal of company at church and elsewhere, while both reside together, the husband providing support and the wife performing the ordinary household duties, is not alone ground for divorce. Wills v. Wills, **L.R.A. 1915B, 770,** 82 S. E. 1092, — W. Va. —.

DOCUMENTS.
Production of, see Discovery and Inspection.

DONATION.
See Gift.

DRAINAGE DISTRICTS.
Right of, to take property without compensation in exercise of police power, see Constitutional Law, 16.

DRAINS AND SEWERS.
Drainage districts, see Drainage Districts.

DREDGE.
Breach of warranty on sale of, see Sale, 10.

DRUNKENNESS.
Validity of note by intoxicated person, see Bills and Notes, 1.

1. A contract entered into by person in such a state of intoxication that he is unable to comprehend its terms is voidable, but not void. Matz v. Martinson, **L.R.A. 1915B, 1121,** 149 N. W. 370, 127 Minn. 262. (Annotated)

2. The failure of one who entered into a contract while in such a state of intoxication that he was unable to comprehend its terms, to disaffirm the contract within a reasonable time after having knowledge of and comprehending its terms, amounts to an election to affirm it. Matz v. Martinson, **L.R.A.1915B, 1121,** 149 N. W. 370, 127 Minn. 262.

3. The ratification of a contract by one who entered it while in such a state of intoxication that he was unable to comprehend its terms after having knowledge of and comprehending its terms, makes of it a valid and binding contract. Matz v. Martinson, **L.R.A.1915B, 1121,** 149 N. W. 370, 127 Minn. 262.

DUE PROCESS OF LAW.
See Constitutional Law, 11–15.

DURESS.

1. That a bank holding a long-time loan, payments on which were overdue, was urging payment of the arrearages, and had the right to declare the whole debt due if the arrearages were not paid, does not render its demand of a premium for acceptance of the whole sum and release of the security, so as to permit the debtor to secure a loan elsewhere, such duress as to enable the debtor to recover the premium paid. Hamilton v. Kentucky Title Sav. Bank & T. Co. **L.R.A.1915B, 498,** 167 S. W. 898, 159 Ky. 680. (Annotated)

2. A creditor does not work either a fraud or legal duress sufficient to avoid an otherwise valid compromise by insisting during the negotiations for a settlement that the sum due is much larger than the indebtedness admitted, or by threatening to enforce his claim therefor by a civil action. Kiler v. Wohletz, **L.R.A.1915B, 1,** 101 Pac. 474, 79 Kan. 716.

DYNAMITE.

Lien for, see Mechanics' Liens, 2.

ELECTION.

To ratify contract made while intoxicated, see Drunkenness, 2.
Of remedies, see Election of Remedies.
Of officers, see Officers, 2.

ELECTION OF REMEDIES.

A suit on an alleged cause of action that does not in fact exist is not an election of remedies. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

ELECTIONS.

1. The charter of the city of Duluth adopted December 3, 1912, providing for preferential voting in the selection of city commissioners and requiring the voter to mark as many first choices as there are commissioners to be elected, does not abrogate the provision of the general election law conferring upon the voter the right to vote for persons other than the regularly nominated candidates whose names are printed on the ballot. Farrell v. Hicken, **L.R.A.1915B, 401,** 147 N. W. 815, 125 Minn. 407.

2. A municipal charter providing for a preferential ballot, with the right of the voter to indicate first, second, and additional choices, and containing the provision that no vote shall be counted on the election of commissioners unless the voter marks as many first choices as there are commissioners to be elected, is not in conflict with a constitutional provision giving to every male person belonging to certain classes the right to vote "for all officers that now are or hereafter may be elected by the people." Farrell v. Hicken, **L.R.A. 1915B, 401,** 147 N. W. 815, 125 Minn. 407. (Annotated)

Qualifications of voters.

Partial invalidity of statute conferring suffrage upon women, see Statute, 4.
Statute extending suffrage to women as amendment of existing law, see Statutes, 16.

3. Constitutional provisions defining the qualification of voters apply to persons voting for candidates for office created by the Constitution alone, and do not prevent the legislature from extending to women the privilege of suffrage for other offices. Scown v. Czarnecki, **L.R.A.1915B, 247,** 106 N. E. 276, 264 Ill. 305. (Annotated)

4. A statute attempting to confer upon women the privilege of voting upon all questions or propositions submitted to a vote of the electors of "such municipalities or other political divisions of the state" includes all questions or propositions submitted to the electors of a county. Scown v. Czarnecki, **L.R.A.1915B, 247,** 106 N. E. 276, 264 Ill. 305.

5. The legislature cannot confer upon women the privilege of voting upon propositions, which the Constitution requires to be submitted to the voters, where they are not qualified voters under the Constitution. Scown v. Czarnecki, **L.R.A.1915B, 247, 106** N. E. 276, 264 Ill. 305.

Nominations; filing.

6. No constitutional right of a candidate for a salaried state office is infringed by the exaction of a fee of $100 for the filing of his nomination so that his name will appear on the official ballot. State ex rel. Riggle v. Brodigan, **L.R.A.1915B, 197,** 143 Pac. 238, — Nev. —. (Annotated)

ELECTRICAL USES AND APPLIANCES.

See Electricity.

ELECTRICITY.

Right to carry electric wires over railroad at street crossing, see Railroads, 2.
Implied warranty on sale of wire for electric transmission, see Sale, 4–6.

1. A corporation organized to furnish electricity to the public is not bound to bear the expense of altering the apparatus of consumers, even though purchased from it, upon changing in good faith the character of current supplied so that the old apparatus can no longer be used. Hunt v. Marianna Electric Co. **L.R.A.1915B, 897,** 170 S. W. 96, — Ark. —.

2. An electrical company which tacitly permits a telephone company to attach wires to its pole in a public street owes no duty to employees of the latter to keep its wires in safe condition so as to prevent injury to them in case they go upon the pole to look after the wires of their employers. Heskell v. Auburn Light, Heat, & Power Co. **L.R.A.1915B, 1127,** 102 N. E. 540, 209 N. Y. 86.

ELECTRIC WIRES.

Right to carry electric wires over railroad at street crossing, see Railroads, 2.

Implied warranty on sale of wire for electric transmission, see Sale, 4–6.

ELEVATORS.
Liability of landlord letting building with defective elevator, see Landlord and Tenant, 5, 6.
Proximate cause of injuries, see Proximate Cause, 1.

ELKS.
Injunction to restrain use of corporate name of which the work "Elks" forms a part, see Injunction, 4.

EMBEZZLEMENT.
Existence of trust in property embezzled, see Equity, 1, 2.

EMINENT DOMAIN.
Right to take property without compensation in exercise of police power, see Constitutional Law, 16.

A railroad company which has constructed for railroad purposes a bridge over a stream with sufficient provision for its flow cannot, in view of the constitutional provision against taking property without compensation, be compelled to widen the span to accommodate the water of a river which a drainage district wishes to turn into the channel of the stream by dredging its channel reversing its flow, and constructing an outlet from its head. People ex rel. Peeler v. Chicago & E. I. R. Co. **L.R.A. 1915B, 486,** 104 N. E. 831, 262 Ill. 492.
(Annotated)

ENACTMENT.
Of statute, see Statute, 1.

ENTIRETY.
Of contract, see Contracts, 5.

ENTRY.
On public lands, see Public Lands.

EQUALITY.
In taxation, see Taxes, 5–9.

EQUAL PROTECTION AND PRIVILEGES.
See Constitutional Law, 5–10.

EQUITY.
Review of decision in, see Appeal and Error, 12.
Condition to cancelation of deed, see Contracts, 13.
Relief under prayer, see Pleading, 1.
See also Accounting; Injunction; Maxims.

1. An employee charged with the care and custody of receptacles of gold dust sustains a relation of trust to his employer so as to give equity jurisdiction of a proceeding to reach property into which he has converted gold dust which he feloniously abstracted from the receptacles; at least where the property is *in custodia legis* so as not to be subject to legal process. Pioneer Min. Co. v. Tyberg, **L.R.A.1915B, 442,** 215 Fed. 501, — C. C. A. —.

2. Equity has jurisdiction to enforce a constructive trust in property into which stolen property was converted, although no fiduciary relation existed between the owner and the one who took the property. Pioneer Min. Co. v. Tyberg, **L.R.A.1915B, 442,** 215 Fed. 501, — C. C. A. —.
(Annotated)

3. Employees working for compensation based on a percentage of sales, who are discharged because of the attempted organization of a rival business, are not prevented from seeking an accounting in equity for money already earned, on the theory that they do not come with clean hands. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.
(Annotated)

ESCROW.
Treating deed deposited in escrow as a mortgage, see Mortgage, 2.

ESTOPPEL.
Of insurer, see Insurance, 6.
Of bank to deny authority of president, see Notice.

Of municipality.

1. A municipality furnishing electric power to private consumers, which rendered monthly bills to a consumer for the current supplied, which were duly paid and receipted, but which, through a mistake, were for only one tenth of the amount actually due from the consumer, is not estopped to recover the balance, where the consumer had a convenient opportunity, by the exercise of reasonable diligence, to discover the mistake. Vineland v. Fowler Waste Mfg. Co. (N. J. Err. & App.) **L.R.A. 1915B, 711,** 90 Atl. 1054, — N. J. —.
(Annotated)

2. A municipal corporation is not estopped to claim a duly dedicated highway by permitting it to be inclosed by fences, if the only use made of it is as a corral for horses and a vegetable garden. Booth v. Prineville, **L.R.A.1915B, 1084,** 143 Pac. 994, — Or. —.

Of state.

3. An insurance commissioner cannot, by deciding that the business of issuing certificates guarantying burial is not insurance, estop the state from enforcing the insurance laws against one attempting to issue them. State ex rel. Fishback v. Globe Casket & Undertaking Co. **L.R.A.1915B, 976,** 143 Pac. 878, — Wash. —.

Change of position.

4. Delay by one who issues a check payable to the order of the treasurer of a town, in payment of a forged town note, to assert his right to the proceeds against the bank which collects it on account of another bank, does not release the collecting bank from liability to return the proceeds to him if its position is not different from what it would have been had the maker acted as soon as the check was collected.

Quincy Mut. F. Ins. Co. v. International Trust Co. **L.R.A.1915B, 725,** 104 N. E. 845, 217 Mass. 370.

By receiving benefits.

5. That one has received the benefit of a contract by a railroad company to furnish him information as to location of stations, in consideration of a grant of right of way and depot sites and a share of the profits of town cites which he may locate, does not estop him from setting up the illegality of the contract in defense of an action by the railroad company to recover damages for its breach. Minnesota, D. & P. R. Co. v. Way, **L.R.A.1915B, 925,** 148 N. W. 858, — S. D. —.

EVIDENCE.

Prejudicial error as to, see Appeal and Error, 16, 17.

Cost of procuring, see Costs and Fees, 1.

Error in admission of, as ground for new trial, see New Trial, 1.

Use of evidence obtained by illegal search, see Search and Seizure, 1.

Striking out, see Trial, 7.

Judicial notice.

1. Judicial notice cannot be taken of the result of a local-option election to determine whether or not intoxicating liquors shall be sold in a particular locality. People v. Mueller, **L.R.A.1915B, 788,** 143 Pac. 748, — Cal. —. (Annotated)

Presumptions and burden of proof.

2. A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him. McLaughlin v. Sovereign Camp, W. of W. **L.R.A.1915B, 756,** 149 N. W. 112, — Neb. —.

3. There is no presumption that the death of an absentee whose death is presumed from his unexplained absence for seven years, occurred at any particular time during said period. McLaughlin v. Sovereign Camp, W. of W. **L.R.A.1915B, 756,** 149 N. W. 112, — Neb. —. (Annotated)

4. An insurer when sued upon a contract of insurance on the life of an absentee whose death is presumed from his unexplained absence for seven years cannot avoid its contract of insurance because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted, since there is no presumption that he was then living. McLaughlin v. Sovereign Camp, W. of W. **L.R.A.1915B, 756,** 149 N. W. 112, — Neb. —.

5. To raise a presumption of death of one from seven years' absence, inquiry must be made at the last known domicil of the absentee, and where he has become estranged from his family and removes to a town different from its place of residence, inquiry at the latter place is not sufficient. Marquet v. Ætna L. Ins. Co. **L.R.A.1915B, 749,** 159 S. W. 733, — Tenn. —. (Annotated)

6. The presumption of death is one that generally is applied only to those who are absentees from their home but does not authorize such absent person or persons to presume that any one of those remaining at the place which he or they have left has died, especially is this true in the case of the separation of two brothers during their boyhood days. Modern Woodmen of America v. Ghromley, **L.R.A.1915B, 728,** 139 Pac. 306, — Okla. —. (Annotated)

7. There is no presumption of the death of a younger brother arising from an absence unheard from for a period of seven years, where an elder brother, when very young, left home and his younger brother, an inmate of an orphans' home, and after several years returned to his former home and spent three days trying to get word of his brother but failed, but learned that the year previous to his return yellow fever had visited the locality of the orphans' home, causing a number of deaths, where it is not shown that the brothers had ever corresponded with each other or that the younger knew of the elder's whereabouts, nor is it shown for what length of time the younger brother remained in the orphans' home or whether he was an inmate thereof on the visit of the pestilence, nor is it shown of whom inquiry was made or the extent thereof. Modern Woodmen of America v. Ghromley, **L.R.A.1915B, 728,** 139 Pac. 306, — Okla. —.

8. The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death. Coe v. National Council, K. & L. of S. **L.R.A.1915B, 744,** 147 N. W. 112, 96 Neb. 130. (Annotated)

9. Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise a presumption of death, without regard to the duration of such absence. Coe v. National Council, K. & L. of S. **L.R.A.1915B, 744,** 147 N. W. 112, 96 Neb. 130.

10. Proof of theft from the berth of a passenger in a sleeping car in the night raises a presumption of negligence on the part of the company, and places upon it the burden of rebutting such presumption, failure to do which will justify a verdict holding it liable for the loss. Robinson v. Southern R. Co. **L.R.A.1915B, 621,** 40 App. D. C. 549.

11. Geese are not within the operation of a statute making the killing of "any cattle or other live stock" on a railroad track prima facie evidence of negligence. James v. Atlantic C. L. R. Co. **L.R.A.1915B, 163,** 82 S. E. 1026, 166 N. C. 572.

12. That a person unloading coal from a wagon near the top of a decline placed a

piece where it could roll down the decline may be inferred from the fact that it did so roll down to the injury of a person at the foot of the decline, where no other cause was apparent. Furkovich v. Bingham Coal & Lumber Co. **L.R.A.1915B, 426,** 143 Pac. 121, — Utah, —.

13. A purchaser of a heating apparatus, who resists payment of the purchase price because of alleged breach of warranty that it would heat the building to a certain degree if properly operated, has the burden of establishing proper operation and failure to furnish the required degree of heat. Waterman-Waterbury Co. v. School Dist. No. 2, **L.R.A.1915B, 626,** 148 N. W. 673, — Mich. —.

14. The presumption that title to an unindorsed note payable to order is in the payee is not overcome by the fact that it is in possession of another. Escamilla v. Pingree, **L.R.A.1915B, 475,** 141 Pac. 103, — Utah, —.

15. It is a presumption of law that a person dying intestate has left heirs capable of succeeding to his estate. Modern Woodmen of America v. Ghromley, **L.R.A.1915B, 728,** 139 Pac. 306, — Okla. —.

16. The government, when proceeding to condemn, under the pure food and drugs act of June 30, 1906, § 10, an article of food which it claims is adulterated under § 7, subdiv. 5, of that act, because it contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," is charged with the burden of proving that the added poisonous or deleterious substance is such as may render such article dangerous to health. United States v. Lexington Mill & Elevator Co. **L.R.A.1915B, 774,** 58 L. ed. 658, 34 Sup. Ct. Rep. 337, 232 U. S. 399.

Documentary evidence.

17. The record of a former suit which was dismissed is not evidence in a subsequent suit between the same parties, for the same cause. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

18. A copy of a writing not shown to have emanated in any manner from the defendants is not admissible in evidence to affect them. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

Parol and extrinsic evidence concerning writings.

19. An order for machinery containing the parties, consideration, time, subject-matter, and mutual assent, and properly signed, is not subject to modification or enlargement by parol evidence on the theory that it is a mere skeleton. Fairbanks Steam Shovel Co. v. Holt, **L.R.A.1915B, 477,** 140 Pac. 394, 79 Wash. 361.

20. Parol evidence of a conversation at the time of entering into a written contract is inadmissible to vary the terms of the contract. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108.

21. A written contract does not come into existence as such until its utterance is final and complete; and parol evidence to establish or refute such utterance, as by showing it was delivered upon a condition precedent, is admissible. Rutherford v. Holbert, **L.R.A.1915B, 221,** 142 Pac. 1099, — Okla. —.

22. Where a written obligation to pay a specified sum of money recites that the same is null and void if full amount is not "subscribed," and after defendant, who is the second subscriber, has signed and set opposite his name thereto the amount of his subscription, eight other persons sign the same and each sets opposite his name the amount of his subscription, so that the ten several sums subscribed amount to said specified sum, such expression in writing of such condition precedent to the finality of the execution and delivery of such writing does not exclude oral proof of other conditions precedent, not wholly repugnant thereto, upon which defendant signed and delivered such writing. Rutherford v. Holbert, **L.R.A.1915B, 221,** 142 Pac. 1099, — Okla. —.

Opinions and conclusions.

23. A witness who testified that he had had experience in firing shells of a given description, and had observed the impression made upon objects struck by shots fired from shells of that character, and who had also examined and probed the wound of a person alleged to have been murdered, is competent to state as his opinion that the wound upon the deceased was made by the discharge of a shell of the character referred to. Byrd v. State, **L.R.A.1915B, 1143,** 83 S. E. 513, — Ga. —. (Annotated)

24. In an action for false representations and malicious prosecution by defendants of one who they claimed infringed a patent held by them, evidence that the plaintiff did not intend to infringe any patent of the defendants, and believed he was not doing so, is inadmissible. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 141 N. W. 930, 123 Minn. 17.

Hearsay; declarations; res gestæ.

25. The statement contained in a telegram sent by a bank on which a check is drawn, to its correspondent bank, which has sent the check for collection, denouncing the drawer of the check as a fraud who had never had an account in its bank, and requesting that he be apprehended, is not admissible in a prosecution of the drawer of the check for obtaining money under false pretenses. Rogers v. State, **L.R.A.1915B, 1125,** 149 N. W. 318, — Neb. —. (Annotated)

26. Before the declarations of an agent are admissible, it must appear that the declarant was the agent of his principal at the time, and also had authority to make the admissions, or that they were made in the course of the transaction, so as to be a part of the *res gestæ*. National Bank of Tifton v. Smith, **L.R.A.1915B, 1116,** 83 S. E. 526, — Ga. —.

Relevancy and materiality.

Review of discretionary rulings, see Appeal and Error, 7.

Evidence of reputation to discredit witness, see Witnesses, 2.

27. In an action for false representations and malicious prosecution of the plaintiff for infringement of a patent claimed by the defendant, evidence as to the prices for which the patented articles were sold by the defendant is inadmissible. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

28. Upon trial of a police officer for taking bribes to protect a gambling house, where it is shown that the house was transferred from one police precinct to another, and that the one paying for protection was notified that accused would collect the money after the transfer in place of the one who formerly did so, evidence is admissible of collections made by the predecessor and by accused from other persons, as tending to show that the collection charged was one of a continued series of events the prior ones of which served to explain and illuminate the one charged. People v. Duffy, **L.R.A.1915B, 103,** 105 N. E. 839, 212 N. Y. 57.

29. Upon trial of a police officer for taking a bribe from a gambler for police protection, and in which the only direct evidence is that of the one who gave the bribe, who is an accomplice, evidence of payments by other persons to accused and another officer, who surrendered the taking of the collection to accused, is admissible as tending to show the purpose for which the collection charged was made. People v. Duffy, **L.R.A.1915B, 103,** 105 N. E. 839, 212 N. Y. 57. (Annotated)

30. Upon trial of a police officer for collecting bribes from gamblers for police protection, where the offense charged is one of a series of similar offenses, evidence is admissible of a collection made later than that on which the indictment is founded. People v. Duffy, **L.R.A.1915B, 103,** 105 N. E. 839, 212 N. Y. 57.

31. Upon the trial of one accused of larceny of an animal, the claimant of the animal alleged to have been stolen may testify as to where and by whom the animal was raised. Jones v. State, **L.R.A.1915B, 71,** 59 So. 892, 64 Fla. 92.

32. One who installs a heating apparatus under a guaranty that it will heat the building if properly operated may show in support of his claim of improper operation, when breach of warranty is set up to defeat payment of the purchase price, that apparatus similar in character to that installed when properly operated satisfactorily heated the building in which it was placed. Waterman-Waterbury Co. v. School Dist. No. 2, **L.R.A.1915B, 626,** 148 N. W. 673, — Mich. —. (Annotated)

33. An exclusive sales contract existing between joint defendants in an action of malicious prosecution at the time of the act complained of is admissible to show the relation existing between them at such time, but prior contracts are not admissible. Virtue v. Creamery Package Mfg. Co. **L.R.A. 1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

Weight, effect, and sufficiency.

Review of facts on appeal, see Appeal and Error, 9–12.

Insufficiency of, as ground for new trial, see New Trial, 2.

34. The finding of a jury that a frame building in a municipality is a public nuisance is sustained by evidence that the building was on one of the principal business streets, that it had caught fire several times just prior to the date of its removal, and that it had been in bad condition for more than two years prior to the time of its removal, leaning about 18 inches over the sidewalk, with glass windows out and doors standing open, the front door being in such a condition that it could not be closed, the floor uneven, the boards in the upper part of the building decaying and the side wall against the adjoining building decayed from dampness. Cummings v. Lobsitz, **L.R.A.1915B, 415,** 142 Pac. 993, — Okla. —.

35. One who seeks to recover the proceeds of a benefit certificate as a dependent upon the deceased member, upon the theory that at the time of death the decedent had no legal heirs, cannot recover in the absence of proof that there were no legal heirs. Modern Woodmen of America v. Ghromley, **L.R.A.1915B, 728,** 139 Pac. 306, — Okla. —.

36. An admission by the accused in open court of facts showing venue is sufficient proof thereof. Jones v. State, **L.R.A.1915B, 71,** 59 So. 892, 64 Fla. 92.

EXCHANGE OF PROPERTY.

Time as essence of option agreement for, see Contracts, 4.

EXECUTION.

A delay of eight months in issuing execution on a judgment is not unreasonable. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

EXECUTIVE DEPARTMENT.

Relation of, to courts, see Courts, 2.

EXECUTORS AND ADMINSTRATORS.

Authority of administrator to waive bar of statute of limitations, see Limitation of Actions, 5.

Power of administrator to acknowledge or promise to pay debt so as to take it out of the statute of limitations, see Limitation of Actions, 11.

1. The estate of a deceased stockholder is liable upon stock held and owned by him, in the same way and to the same extent that he was liable in his lifetime. Douglass v. Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

2. The limitation of time for presenting claims against decedent's estate does not apply to claims founded on liability as stockholder in a corporation until the claim has been reduced to judgment. Douglass v.

Loftus, **L.R.A.1915B, 797,** 119 Pac. 74, 85 Kan. 720.

EXEMPLARY DAMAGES.
See Damages, 1.

EXPERT TESTIMONY.
In general, see Evidence, 23.

EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS.
Injury or death of insured by, see Insurance, 8.

EXTORTION.
Sending a letter threatening a trespasser with prosecution unless he compensates the sender for the injury done is not within the operation of a statute providing that every person who sends a letter threatening to accuse a person of crime, or to do an injury to him with a view to extort money, shall be guilty of an attempt to rob. State v. Ricks, **L.R.A.1915B, 1140,** 66 So. 281, — Miss. —. (Annotated)

FALLING OBJECTS.
Presumption of negligence as to, see Evidence, 11.
Negligence as to, generally, see Negligence, 1, 2.

FALSE IMPRISONMENT.
Question for jury as to, see Trial, 6.

1. An officer is not liable for false imprisonment in acting upon a warrant fair on its face, although it is based on a complaint on information and belief unsupported by witnesses. Brown v. Hadwin, **L.R.A.1915B, 505,** 148 N. W. 693, — Mich. —. (Annotated)

2. An officer is not liable for false imprisonment in arresting and confining one for illegally selling liquor, because neither the complaint, warrant, nor commitment stated to whom the sale was made, which rendered the complaint void on direct attack. Brown v. Hadwin, **L.R.A.1915B, 505,** 148 N. W. 693, — Mich. —.

FALSE PRETENSES.
Evidence as to acts and declarations of third persons, generally, see Evidence, 25.

FEDERAL COURTS.
In general, see Courts, 9.

FEDERAL QUESTION.
Jurisdiction of, see Courts, 9.

FEES.
In general, see Costs and Fees.
Exaction of fee for filing candidate's nomination, see Elections, 6.

FENCES.
Effect of permitting highway to be inclosed by fences, see Estoppel, 2.

FICTITIOUS SUIT.
Inciting institution of, as contempt, see Contempt, 1.
Obstructing justice by inciting institution of, see Obstructing Justice, 2.

FILING.
Exaction of fee for filing candidate's nomination, see Elections, 6.

FIRE INSURANCE.
See Insurance.

FIRES.
Liability of bailee for, see Bailment, 1.

FITNESS.
Warranty of, see Sale, 4–7.

FIXTURES.
Right of contractor of street pavement to remove it on refusal of city to pay therefor, see Injunction; Public Improvements.

FLAG.
Forbidding carrying of red flag in parade, see Constitutional Law, 14; Parades.

FOOD.
Presumption and burden of proof as to adulteration, see Evidence, 16.

1. The addition of poisonous substances to an article of food in such minute quantities that the health of consumers cannot possibly be injured is not condemned by the provisions of the food and drugs act of June 30, 1906, § 7, subdiv. 5, that for the purposes of the act an article shall be deemed to be adulterated "if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." United States v. Lexington Mill & Elevator Co. **L.R.A.1915B, 774,** 58 L. ed. 658, 34 Sup. Ct. Rep. 337, 232 U. S. 399. (Annotated)

2. There is no implied warranty of the quality of food furnished by a restaurant keeper to a customer for immediate consumption, since the transaction does not constitute a sale, but a rendition of service. Merrill v. Hodson, **L.R.A.1915B, 481,** 91 Atl. 533, 88 Conn. 314. (Annotated)

FOREIGN CORPORATIONS.
See Corporations, 3.

FOREIGN JUDGMENT.
See Judgment, 8, 9.

FORFEITURE.
Of lease, see Landlord and Tenant, 1.

FORGERY.
Payment by bank of forged paper, see Banks, 14–18.

FRAUD AND DECEIT.
Evidence in action for false representation, see Evidence, 24, 27.
See also Duress, 2.

GARBAGE.
Criminal liability of garbage reduction company for nuisance, see Nuisance, 3.

GASOLENE.
Lien for, see Mechanics' Liens, 2.

GEESE.
Killing of, on railroad track, see Evidence, 11; Railroads, 4–6.

GIFT.
Acknowledgment of, see Acknowledgment.
By will, see Wills.

1. Where a daughter alleges that money drawn from the account of her mother was intended as a manual gift, it must be made to appear by convincing evidence that at the time the money was withdrawn the money was intended by the mother to be a donation to her daughter, as nothing will be left to intendment and construction, to support the allegation of the daughter that the money was intended as a manual donation. Re Housknecht, **L.R.A.1915B, 396,** 66 So. 233, — La. —.

2. A document reading: "To the Commercial-Germania Trust and Savings Bank, . . . I hereby authorize Mrs. Josephine Connell to withdraw any money she may wish from my account in the Commercial-Germania Trust and Savings Bank at any and all times. Account Mrs. Meyers,"— is merely an authorization to Mrs. Connell to draw money from the account of Mrs. Meyers, and is not evidence of a manual gift of the money which was formerly in the bank and withdrawn by Mrs. Connell. Re Housknecht, **L.R.A.1915B, 396,** 66 So. 233, — La. —. (Annotated)

GOOD BEHAVIOR.
Deduction from sentence for, see Criminal Law, 2.

GOVERNOR.
Interference of court with, see Courts, 2.
Power to establish martial law, see Martial Law.
Power to call out militia, see Militia.

GRAND JURY.
Removing books and papers from jurisdiction of court to avoid producing them before grand jury, see Obstructing Justice, 1.

GUARANTY INSURANCE.
See Insurance, 13.

GUARDIAN AND WARD.
Effect of bequest in will to cancel debt by mother to her children as guardian, see Wills.

HABEAS CORPUS.
Original jurisdiction of supreme court, see Courts, 7.

One sentenced to imprisonment by a court-martial will not be released on habeas corpus if he is charged with aiding an insurrection, but will be remanded to be dealt with according to law, although the sentence is invalid. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

HARMLESS ERROR.
See Appeal and Error, 13–18.

HEALTH.
Police power as to, see Constitutional Law, 16, 17.

HEARSAY.
Evidence of, see Evidence, 25, 26.

HEIRS.
Liability of, for debts of ancestors, see Descent and Distribution.
Presumption that person dying intestate has left heirs, see Evidence, 15.
Right of heirs of deceased entryman on public land, see Public Lands, 1–3.

HERDING.
Statute as to herding of young calves, see Constitutional Law, 19.
Indictment for violation of statute as to holding of young calves in herding, see Indictment, etc., 3.

HIGH WATER.
Condition in insurance policy against liability for loss caused by, see Insurance, 7.

HIGHWAYS.
Estoppel to claim highway, see Estoppel, 2.
Liability of landlord for injuries to employer by ice on sidewalk, see also Landlord and Tenant, 8, 9.
Across railroad property, see Railroads, 2.
Improvements, generally, see Public Improvements.

1. A railroad company cannot be punished for blocking a street crossing under an ordinance forbidding any railroad company or engineer to block a crossing, and providing that any engineer of any locomotive of any railroad violating the ordinance shall be fined. State v. Norfolk S. R. Co. **L.R.A.1915B,** 329, 82 S. E. 963, — N. C. —. (Annotated)

2. A property owner who places a sidewalk in the street in front of his property, which is not accepted by the municipality because not on the established grade, does not lose title to the materials so as to justify their appropriation by one who has contracted with the municipality to replace the walk on the proper grade. Guth-

rie v. McMurren, **L.R.A.1915B, 187,** 149 N. W. 71. — Iowa, —. (Annotated)

3. A tenant who by requirement of a municipal ordinance attempts to remove from the sidewalk in front of the leased property ice which has formed from water dripping from a roof of the leased building cannot hold the property owner liable for injuries caused by his falling upon the walk, on the theory that he was entitled to the rights of a traveler. Valin v. Jewell, **L.R.A.1915B, 324,** 90 Atl. 36, 88 Conn. 151.

HOMICIDE.

Opinion evidence in prosecution for, see Evidence, 23.

Instruction on trial for, see Trial, 10.

The mere fact that one who shoots another who seems to be about to make a murderous assault upon him was willing to enter into a fight with decedent with deadly weapons does not destroy his right to rely on self-defense as justification for the killing, if he acted solely for the protection of his own life, and not to inflict harm upon his adversary. State v. Pollard, **L.R.A.1915B, 529,** 83 S. E. 167, — N. C. —.

HORSES.

Change of location of insured horses, see Insurance, 5.

Liability of master for injuries to servant by vicious horse, see Master and Servant, 2–4.

Breach of warranty on sale of stallion, see Sale, 11.

HOTELS.

See Innkeepers.

HUSBAND AND WIFE.

As to divorce or separation, see Divorce and Separation.

Right of mother to maintain action for mutilation of corpse of child, see Parties, 1.

Requiring incomes of husband and wife to be added together in determining taxable income of husband, see Taxes, 3.

One who contracts with the payee of an accommodation note executed by a married woman, that on the faith of its security he will indorse a note for the payee for discount at a bank, and receives her note with full knowledge of all the facts, enters into an arrangement to make the married woman ultimately liable to pay the debt of another; and such a transaction will fall within the law's condemnation of contracts of suretyship by a married woman. National Bank of Tifton v. Smith, **L.R.A. 1915B, 1116,** 83 S. E. 526, — Ga. —. (Annotated)

ICE.

On street or sidewalk, liability for injury by, see Highways, 3.

Manufacture of ice by town as public purpose for which taxing power may be exercised, see Taxes, 1.

IDEM SONANS.

See Constitutional Law, 15; Writ and Process.

IMITATION.

Of trademarks, see Trademarks.

IMPAIRMENT OF OBLIGATIONS

See Constitutional Law, 20–22.

IMPLIED AGREEMENTS.

See Contracts, 1.

IMPLIED TRUSTS.

See Trusts.

IMPOTENCY.

As defense to charge of assault with intent to rape, see Rape.

IMPRISONMENT FOR DEBT.

A statute providing a fine for failure to pay wages in cash violates the constitutional provision against imprisonment for debt, if failure to pay the fine will result in imprisonment. State v. Prudential Coal Co. **L.R.A.1915B, 645,** 170 S. W. 56, — Tenn. —. (Annotated)

IMPROVEMENTS.

Public Improvements, see Public Improvements.

IMPUTED NEGLIGENCE.

See Negligence, 4.

IMPUTED NOTICE.

See Notice.

INCOME TAX.

See Taxes, 2–9.

INCOMPETENT PERSONS.

Validity of contract made while intoxicated, see Drunkenness.

Condition of right to recover property conveyed by incompetent, see Contracts, 13.

INDEMNITY.

See Contribution and Indemnity.

INDEMNITY INSURANCE.

See Insurance.

INDICTMENT, INFORMATION AND COMPLAINT.

Prejudicial error in rulings on, see Appeal and Error, 15.

Verification.

1. A justice of the peace has no jurisdiction to issue a warrant of arrest upon a complaint upon information and belief not supported by witnesses having knowledge of the facts. Brown v. Hadwin, **L.R.A. 1915B, 505,** 148 N. W. 693, — Mich. —.

2. An information charging the commission of a misdemeanor, filed by a state's attorney in a Federal court, need not be

verified or supported by an affidavit showing personal knowledge or probable cause, the provision of the Federal Constitution that warrants shall not be issued but upon probable cause supported by oath or affirmation not applying to the institution of a prosecution. Weeks v. United States, **L.R.A.1915B, 651**, 216 Fed. 292, — C. C. A. —. (Annotated)

Description of offense.

3. An indictment charging a violation of § 1, c. 23, N. Mex. S. L. 1901, making it unlawful to hold under herd calves of neat cattle less than seven months old, except such animals be accompanied by their mothers, which, after alleging that defendant held under herd calves unaccompanied by their mothers, proceeds, "the said calves being then and there under the age of seven months," is not subject to attack on the ground that the calves are not directly and positively alleged to be under seven months of age. State v. Brooken, **L.R.A.1915B, 213**, 143 Pac. 479, — N. M. —.

4. Charging failure to provide a washhouse in violation of a statute requiring its erection and maintenance is sufficient. Booth v. State, **L.R.A.1915B**, 420, 100 N. E. 563, 179 Ind. 405.

5. A description of stolen property as "one female animal of the bovine species, nearly two years old," alleges with sufficient accuracy that the animal was a cow or heifer, and satisfies Florida Gen. Stat. 1906, § 3299. Jones v. State, **L.R.A.1915B, 71**, 59 So. 892, 64 Fla. 92. (Annotated)

6. An information for receiving stolen property does not state facts constituting an offense, where the property is described only as "the personal property of John Lightfoot, of the value of $48, then lately before stolen." Korab v. State, **L.R.A. 1915B, 83**, 139 N. W. 717, 93 Neb. 66. (Annotated)

INDORSEMENT.

Forgery of, see Banks, 14–18.

INFANTS.

Review on appeal of decree as to custody of children in divorce suit, see Appeal and Error, 11.

Kidnapping of child by parent, see Abduction and Kidnapping.

Contributory negligence of infant, see Carriers, 8.

Who may maintain action for mutilation of corpse of child, see Parties, 1.

INFORMATION.

For criminal offense, see Indictment, etc.

INFRINGEMENT.

Of trademarks, see Trademarks.

INHERITANCE.

See Descent and Distribution.

L.R.A.1915B.

INITIATIVE, REFERENDUM, AND RECALL.

Mandamus to control discretion of clerk in determining sufficiency of recall petition, see Mandamus, 2.

Effect of statute rejected on referendum after passage by legislature to repeal prior statutes, see Statutes, 16.

1. A provision inserted in a city charter, under its power to frame its own charter, for the recall of municipal officers, is not in conflict with a constitutional provision that the governor and other elective state officers shall be subject to impeachment for certain offenses, and that all elective officers not liable to impeachment shall be subject to removal from office in such a manner and for such causes as may be provided by law, and that the legislature shall pass such laws as are necessary for carrying into effect the provisions of such article. Dunham v. Ardery, **L.R.A.1915B, 232**, 143 Pac. 331, — Okla. —.

2. A city charter enacted by a city in Oklahoma, under constitutional power to frame its own charter, containing a provision for the recall of officers, is not in conflict with a constitutional provision that all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to the Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state until they expire by their own limitation, or are altered or repealed by law. Dunham v. Ardery, **L.R.A.1915B, 232**, 143 Pac. 331, — Okla. —.

3. The term "voters' register," as used in article 8, § 1, of the charter of the city of Guthrie, providing that when a petition for a recall election is filed with the city clerk he shall examine it and, from the voters' register, ascertain whether the petition is signed by the requisite number of qualified electors, has reference to the precinct books required by Okla. Rev. Laws 1910, § 3172, to be furnished by the state election board to the county election board, wherein the inspectors of elections are required to transcribe the names of all electors registered in the precincts, arranged in alphabetical order, and to fill the blanks after such names with the age, the street number, the post-office address, the politics, and the color of each elector, as stated in his registration certificate. Dunham v. Ardery, **L.R.A.1915B, 232**, 143 Pac. 331, — Okla. —.

INJUNCTION.

Jurisdiction of injunction suit, see Courts, 4–6, 9.

Original jurisdiction of appellate court, see Courts, 5, 6.

Sufficiency of petition, see Pleading, 6.

Injury or inconvenience to defendant.

1. That the practice of a physician who takes another into partnership under an agreement that if the contract is terminated because of the latter's violation of it, he

will refrain for three years from practising his profession in the municipality where the firm is located, is so large that he cannot cope with it alone, and that the enforcement of the restrictive covenant will interfere with the other partner's means of livelihood, will not prevent the granting of an injunction against violation of it. Marvel v. Jonah (N. J. Err. & App.) **L.R.A.1915B, 206,** 90 Atl. 1004, — N. J. —. (Annotated)

Illegal or tortious acts; crimes.

2. Injunction lies to prevent a municipal corporation from interfering with the removal of a pavement by a street contractor who has not been paid for his work because it did not comply with the contract. Snouffer v. Tipton, **L.R.A.1915B, 173,** 142 N. W. 97, 161 Iowa, 223.

3. A benevolent corporation is entitled to an injunction against the unfair and misleading use of a corporate name by another corporation engaged in similar enterprises, although it is not carrying on any trade or industrial or financial business which can be injuriously affected by such use of the name. Benevolent & Protective O. of E. v. Improved Benev. & P. O. of E. of W. **L.R.A. 1915B, 1074,** 98 N. E. 756, 205 N. Y. 459.

4. The Benevolent & Protective Order of Elks is entitled to an injunction against the use by another corporation of the name Improved Benevolent & Protective Order of Elks of the World, or any name of which the word "Elks" is a part, where the members of the latter company have never been members of the former so as to gain a right to the use of the word. Benevolent & Protective O. of E. v. Improved Benev. & P. O. of E. of W. **L.R.A.1915B, 1074,** 98 N. E. 756, 205 N. Y. 459.

5. A benevolent association has no right to an injunction against the use by a similar order of the same titles for its officers as those used by the officers of the former, or the general use of the colors of the order. Benevolent & Protective O. of E. v. Improved Benev. & P. O. of E. of W. **L.R.A. 1915B, 1074,** 98 N. E. 756, 205 N. Y. 459.

Against legal proceedings.

6. While, as a general rule, a court of equity (or one exercising equitable jurisdiction) will not enjoin a proceeding before a recorder of a city, instituted for the purpose of punishing the violation of a penal ordinance, yet in certain cases a court having equitable jurisdiction may intervene to protect property or property rights from irreparable damage by wrongful conduct of municipal officers, although repeated prosecutions in the recorder's court, or threats thereof, may be used as a means of consummating the wrong. Cutsinger v. Atlanta, **L.R.A.1915B, 1097,** 83 S. E. 263, — Ga. —.

Preliminary and interlocutory injunction.

7. A temporary injunction, granted without notice, to prevent a city from interfering with the removal of a pavement by a contractor who has not been paid for his work, should be dissolved where the improvement has been a subject of contention before the courts for years, and the contractor has not established his right to remove it. Snouffer v. Tipton, **L.R.A.1915B, 173,** 142 N. W. 97, 161 Iowa, 223.

INNKEEPERS.

Police power as to, see Constitutional Law, 18.

Liability of one who lets hotel with defective elevator for injuries to guest, see Landlord and Tenant, 6.

Construction of act empowering municipality to license, see Statute, 9, 10.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

As to receivers, see Receivers.

INSPECTION.

Liability of cattle inspector for injury to animal during inspection, see Officers, 3.

In general, see Discovery and Inspection.

INSTALMENT CONTRACT.

Liability on instalment contract of partner who retires during term of contract, see Partnership.

INSTRUCTIONS.

Prejudicial error as to, see Appeal and Error, 18.

In general, see Trial, 8–10.

INSULT.

To passenger, see Carriers, 7; Damages, 1.

INSURANCE.

Effect on right to recover on policy on life of one whose death is presumed from absence, of by-law adopted during such absence, see Evidence, 4.

Presumptions and burden of proof in action on policy, see Evidence, 2–9.

Defense in action on policy on life of absentee whose death is presumed, see Evidence, 4.

Sufficiency of evidence in insurance action, see Evidence, 35.

Pleading in action on policy, see Pleading, 5.

Right and manner of doing business.

Estoppel of state to enforce insurance laws, see Estoppel, 3.

Effect of contemporaneous construction of insurance laws, by insurance commissioner, see Statute, 12.

1. The business of selling certificates guarantying burial to the holders is insurance, and one attempting to transact it must comply with the insurance laws. State ex rel. Fishback v. Globe Casket & Undertaking Co. **L.R.A.1915B, 976,** 143 Pac. 878, — Wash. —.

Dissolution; forfeiture; insolvency.

2. That a corporation which has been issuing certificates guarantying burial also

has authority to transact other legitimate business will not prevent the courts requiring its liquidation, if it has not attempted to transact such business, and has no authority to issue such certificates, and the liquidation of the burial certificates is necessary to protect holders. State ex rel. Fishback v. Globe Casket & Undertaking Co. **L.R.A.1915B, 976,** 143 Pac. 878, — Wash. —.

3. The charter of a corporation which has undertaken illegally to issue certificates guarantying burial may be forfeited, although it has authority to transact legitimate business, since the transaction of the illegal business may result in injury to the public. State ex rel. Fishback v. Globe Casket & Undertaking Co. **L.R.A.1915B, 976,** 143 Pac. 878, — Wash. —.

Warranties; representations; conditions.

4. Vacancy of premises from Saturday to the following Monday pending change of tenants does not avoid a five-year policy of insurance thereon which provides that insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit. Farmers' Mut. Equity Ins. Soc. v. Smith, **L.R.A.1915B, 844,** 165 S. W. 675, 158 Ky. 459. (Annotated)

5. Liability under a form of insurance policy prescribed by statute upon horses while in a designated building, and not elsewhere, does not attach in case they are destroyed while in another building to which they have been temporarily removed while the building designated in the policy is undergoing repairs. Rosenthal v. Insurance Co. of N. A. **L.R.A.1915B, 361,** 149 N. W. 155, 158 Wis. 550.

Waiver or estoppel.

6. An insurer who advises a beneficiary upon the disappearance of insured that it is customary to pay claims after an absence of seven years, and who accepts dues from her for that period without notifying her of a change of by-laws postponing the time for payment, is estopped to rely upon the change. Keith v. Modern Woodmen of America, **L.R.A.1915B, 793,** 149 N. W. 225, — Iowa, — (Annotated)

Risks and causes of loss, injury, or death.

7. A policy insuring against direct loss or damage by tornado, windstorm, or cyclone, except that there shall be no liability for loss occasioned directly or indirectly by high water or overflow, does not cover a loss caused by the wind driving against the building waves of the water of a river which had overflowed its banks and surrounded the insured building. National Union F. Ins. Co. v. Crutchfield, **L.R.A.1915B, 1094,** 170 S. W. 187, — Ky. —. (Annotated)

8. A policy insuring against injuries effected through external, violent, and accidental means alone does not cover death from meningitis resulting from a violent snuffing of a nasal douche, which caused infection to pass into the middle ear and thence through the mastoid process into the brain, where the snuffing was no harder than was intended. Smith v. Travelers' Ins. Co. **L.R.A.1915B, 872,** 106 N. E. 607, 219 Mass. 147.

Interest in proceeds.

9. That the wife, who is beneficiary in a renewable term insurance policy upon the life of her husband, has been divorced from him when the time arrives for renewing the policy, does not render the policy void for lack of insurable interest, if it is not in fact renewed, but merely continued for an additional term by attaching a rider thereto, because the surplus accumulated during the first term is sufficient to carry the policy at the old premium rate for the next period. Marquet v. Ætna L. Ins. Co. **L.R.A.1915B, 749,** 159 S. W. 733, — Tenn. —.

Apportionment or contribution.

10. A policy of insurance for $2,000 on "two three-story frame building tin roof, and its additions and foundation walls, while occupied as a dwellings, Nos. 69 and 71 East Twelfth street, . . . and being $1,000 on each building," is, in its legal effect, a specific policy of $1,000 on No. 69 East Twelfth street, and $1,000 on No. 71 East Twelfth street, and is not a blanket policy on both Nos. 69 and 71. Grollimund v. Germania F. Ins. Co. (N. J. Err. & App.) **L.R.A.1915B, 509,** 83 Atl. 1108, 82 N. J. L. 618.

11. A policy of insurance for "$2,000 upon the three-story frame building and its additions adjoining and communicating, including gas and water pipes, heating apparatus, and all permanent fixtures, while occupied as a dwelling house and situated Nos. 69 and 71 East Twelfth street. . . ." is not a specific policy on No. 69 and No. 71, but is a blanket policy on both, and covers to its full amount of $2,000 both Nos. 69 and 71. Grollimund v. Germania F. Ins. Co. (N. J. Err. & App.) **L.R.A.1915B, 509,** 83 Atl. 1108, 82 N. J. L. 618.

12. In distributing the loss upon two parts of a building under one roof, each part capable of being described and insured by street numbers, between an insurance policy covering both parts for a gross sum and a policy specifically liable on each part, both of which policies grant permission to "effect other insurance," and provide that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policy should be regarded as insuring each part to the entire amount unappropriated when it is reached, making the adjustment part by part in the order of the greater loss, if that will work substantial equity and justice to all concerned, and deducting the sum appropriated to the part as it is adjusted and passed. Grollimund v. Germania F. Ins. Co. (N. J. Err. & App.) **L.R.A.1915B, 509,** 83 Atl. 1108, 82 N. J. L. 618. (Annotated)

Theft insurance.

13. A policy insuring the owner of an automobile against loss by theft does not cover a loss caused by an accident to the car while it is in possession of employees of a

shop to which it had been taken for repairs, who had taken it from the shop, after working hours, for a joy ride, intending to return it to the shop when they were through with it. Valley Mercantile Co. v. St. Paul F. & M. Ins. Co. **L.R.A.1915B, 327,** 143 Pac. 559, 49 Mont. 430.

INSURRECTION.

Review by courts of governor's action in case of, see Courts, 2.

Habeas corpus to release from imprisonment one charged with aiding, see Habeas Corpus.

Calling out militia to suppress, see Militia.

INTEREST.

Provision for higher rate after maturity of note, see Bills and Notes, 4.

Interest as element of damages for conversion, see Damages, 5.

1. The surplus of a voluntary bankrupt's estate remaining after the payment of all proved claims and interest thereon to the date of the filing of the petition should be applied first to the payment of the interest accruing on the claims subsequently to the filing of the petition, and the remainder only returned to the bankrupt. Johnson v. Norris, **L.R.A.1915B, 884,** 190 Fed. 459, 111 C. C. A. 291. (Annotated)

2. Interest should be allowed on the amount which a tenant in common should contribute toward taxes and other expenses paid for the benefit of the estate only from the entry of the judgment when, at the time the payments were made, the one making them was claiming exclusive title to the property and seeking to disaffirm the claim of the cotenant. Willmon v. Kover, **L.R.A. 1915B, 961,** 143 Pac. 694, — Cal. —.

INTERURBAN RAILROADS.

Right to compel continued operation of, see Carriers, 1, 2.

Discontinuance of, see Carriers, 1–3.

INTOXICATING LIQUORS.

Judicial notice of result of local option election, see Evidence, 1.

A transaction in which a person assuming to do business as a wholesale liquor dealer, in a prohibition parish, sells to another who assumes to be doing a retail liquor business in such parish, is a sale at retail, and subjects the wholesaler to the penalty for selling at retail without having previously obtained a license, there being no such thing within the meaning of the law as a dealer for resale in a parish where the sale of liquor at retail is prohibited. State v. Cunningham, **L.R.A.1915B, 389,** 58 So. 558, 130 La. 749. (Annotated)

INTOXICATION.

See Drunkenness.

JOINT ADVENTURE.

Trust in secret profits made by one party to joint adventure, see Trusts.

JOINT CREDITORS AND DEBTORS.

Contribution between, see Contribution and Indemnity.

Evidence in action against joint defendants for malicious prosecution, see Evidence, 33.

Grant of new trial as to one defendant and refusal as to another, see New Trial, 1.

1. A plaintiff may prevail against one of two joint tort feasors though he fails to prove a joint tort. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

2. A joint tort may be committed without the existence of any conspiracy or combination in restraint of trade. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

3. In an action against joint defendants who are closely connected in a business way as to a certain patented article about which the controversy arose, for false representations and malicious prosecution, in which the false representations were all on the part of one defendant, and the malicious prosecution on the part of the other, the liability of both defendants for both classes of acts may be submitted to the jury under the principle that all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done, are jointly and severally liable therefor, even though they act independently and without concert of action or common purpose, providing their several acts concur in tending to produce one resulting event. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

4. Each obligor may be sued separately for such portion as he owes the obligee in a joint obligation of several obligors to pay the obligee a specified sum of money, where the obligation also shows that, as between such obligors, each is a principal debtor for a specified portion of the whole sum, and a surety as to all the remaining portions thereof, especially under a statute providing that where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several. Rutherford v. Holbert, **L.R.A.1915B,** 221, 142 Pac. 1099, — Okla. —.

(Annotated)

JOINT TENANTS.

In general, see Cotenancy.

JOINT TORT FEASORS.

See Joint Creditors and Debtors.

JUDGMENT.
On appeal, see Appeal and Error, 19–24.
As contract within provision against impairing obligation of, see Constitutional Law, 20.
Revivor of judgment against corporation as condition precedent to suit against stockholder, see Corporations, 1.
Execution on, see Execution.

Jurisdiction.

Effect of mistake in name of party in writ, see Writ and Process.

1. A decree is ineffectual for any purpose as against defendants who are not served with process, and who do not appear to the cause. Dunn v. Bank of Union, **L.R.A.1915B, 168,** 82 S. E. 758, — W. Va. —.

2. A personal decree against nonresident defendants not served otherwise than by publication, and not appearing to the proceeding, is erroneous. Grant v. Swank, **L.R.A.1915B, 881,** 81 S. E. 967, — W. Va. —.

Effect and conclusiveness.

Collateral attack on judgment because of mistake in name in constructive service of process, see Constitutional Law, 15.

3. Where a court has jurisdiction of the subject-matter and the parties, in an action in partition, and orders a sale,—a judgment which it has jurisdiction to enter where the facts pleaded and proved warrant, it,—such judgment, though erroneous under the pleadings and proof in the case at bar, on account of a statutory provision that no sale shall be ordered where the liens exceed the value of the property, or where it appears probable that the property will not sell for an amount equal to the amount of the liens, is not void, and cannot be attacked collaterally. Ordean v. Grannis, **L.R.A.1915B, 1149,** 136 N. W. 575, 1026, 118 Minn. 117.

4. A judgment for defendants in a prior action in the Federal courts to recover treble damages for an alleged combination in restraint of trade, in violation of the Sherman anti-trust act (act July 2, 1890, chap. 647, 26 Stat. at L. 209 (U. S. Comp. Stat. 1901, p. 3200), is not *res judicata* of plaintiffs' right to maintain a common-law action for interference with their business by false representations, threats, and malicious prosecution. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

5. A judgment denying the right of a contractor to recover for a street pavement is not conclusive against the right of the contractor to remove his material from the street. Snouffer v. Tipton, **L.R.A.1915B, 173,** 142 N. W. 97, 161 Iowa, 223.

6. A judgment for defendant in an action to enjoin the making of a deed under a foreclosure sale, in which the want of notice of sale was made an issue, precludes plaintiff from setting up that fact in defense of an action to recover possession of the land from him. Ferebee v. Sawyer. **L.R.A.1915B, 640,** 83 S. E. 17, — N. C. —.

The lien.

7. The interest of a vendee in the possession of real estate under a contract of purchase, the legal title being in the vendor, is a vested interest within the meaning of a statute subjecting to the payment of debts, and making liable to be taken on execution and sold, "lands and tenements, including vested interests therein;" and such interest is bound for the satisfaction of a judgment against the vendee under the provisions of a statute making a judgment a lien upon real estate of the debtor. First Nat. Bank v. Logue, **L.R.A.1915B, 340,** 106 N. E. 21, 89 Ohio St. 288. (Annotated)

Foreign judgments.

8. A judgment of a court of one state awarding the custody of minor children in a divorce proceeding is not *res judicata* in a proceeding before a court of another state, except as to facts and conditions before the court upon the rendition of the foreign decree. Mylius v. Cargill, **L.R.A.1915B, 154,** 142 Pac. 918, — N. M. —. (Annotated)

9. A judgment for alimony in a court of one state will not be enforced by the courts of another state, where it was rendered in an action for divorce and alimony which had been begun about twenty years before, and which after a judgment rendered at that time granting the divorce and reserving the question of alimony, was allowed to lapse so that it became a stale action under the rules of court, in which no further step could be taken unless the person proposing to take the step should first give reasonable notice in writing to the other party or his attorney, and where the only notice upon which the judgment sought to be enforced was founded was a notice to the attorney who had represented the defendant twenty years before. Underwood v. Underwood, **L.R.A.1915B, 674,** 83 S. E. 208, — Ga. —. (Annotated)

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL POWER.

Encroachment on, see Constitutional Law, 4.

JURISDICTION.

In general, see Courts.
Of equity, see Equity.
To enter judgment, see Judgment, 1, 2.

JURY.

Power of governor to establish martial law authorizing conviction for crime without trial by jury, see Martial Law.

JUSTICE.

Obstruction of, see Obstructing Justice.

JUSTICE OF THE PEACE.

Jurisdiction to issue warrant of arrest upon complaint upon information and belief, see Indictment, etc. 1.

KIDNAPPING.

See Abduction and Kidnapping.

KNOWLEDGE.

Master's knowledge of vicious propensities of horse furnished servant, see Master and Servant, 4.

LABORERS.

Liens of, see Mechanics' Liens.

LACHES.

Estoppel by, see Estoppel, 4.
In issuing execution, see Execution.
In applying for benefit of bequest, see Wills, 3.
In general, see Limitation of Actions.

LANDLORD AND TENANT.

Lease of mine, see Mines.
Effect of acceptance of lease by mortgagor from mortgagee to cut off right of redemption, see Mortgage, 5.

Termination of lease; forfeiture.

1. A lessor waives the right to declare a forfeiture of the lease because the rent is in arrear, by asking the court to require a receiver of the property of the tenant to elect whether he will adopt or reject the lease. Durand & Co. v. Howard & Co. **L.R.A. 1915B, 998,** 216 Fed. 585, — C. C. A. —. (Annotated)

Assignment.

2. A covenant against assignment of a lease is not broken by the appointment of a receiver for the property of the lessee. Durand & Co. v. Howard & Co. **L.R.A1915B, 998,** 216 Fed. 585, — C. C. A. —.

Use of wall for advertising.

3. The owner of a building who while carrying on business on the second floor leases the ground floor, has no prior right to use the front outside wall of the lower story adjoining the stairway leading to his place of business, for advertising purposes, which will enable him to prevent the lessee from placing a sign there. Snyder v. Kulesh, **L.R.A.1915B, 1057,** 144 N. W. 306, — Iowa, —. (Annotated)

Defective or dangerous premises.

Liability of landlord for injury to tenant while attempting to remove from sidewalk ice formed from water dripping from roof, see also Highways, 3.
Proximate cause of injury resulting from nuisance, see Proximate cause, 1.
Question for jury as to negligence, see Trial, 5.

4. A landlord who retains control of an unlighted back stairway leading from a second-story landing which furnishes access to portions of the building rented to tenants is not bound to keep the door leading thereto locked to avoid liability for injury to one who, using the landing for the purpose of transacting business with the tenant, opens the door and falls down the stairway. Morong v. Spofford, **L.R.A.1915B, 387,** 105 N. E. 454, 218 Mass. 50. (Annotated)

5. That a lessee will sometimes leave a defective elevator open and unguarded, to the injury of one attempting to use it, should be anticipated by the lessor, who lets it in a defective condition, so as to charge him with liability for the injury. Colorado Mortg. & Invest. Co. v. Giacomini, **L.R.A.1915B, 364,** 136 Pac. 1039, 55 Colo. 540.

6. One who lets a hotel with an insufficiently lighted elevator which creeps when not in use, because of defective machinery, which is not repaired prior to the accident, and is intended for general use of the guests of the hotel in going to and from their rooms, is liable for injury to a paying guest who, in attempting to use the elevator, falls into the well because the car had moved from the place where it was left, on the theory that it is a nuisance in a semipublic place,—especially if he has undertaken to bear a portion of the expenses of repairing it and of insuring against accidents because of it. Colorado Mortg. & Invest. Co. v. Giacomini, **L.R.A.1915B, 364,** 136 Pac. 1039, 55 Colo. 540. (Annotated)

7. The mere fact that tenants have divided the use of the floor of a porch or landing in an outside stairway used by, and intended for the use of, the different tenants of the building, and connected with the common hall way, for the purpose of keeping some of their household effects separate, is not sufficient to show that half of the porch is in the possession of one tenant and half in the other, so as to relieve the landlord of liability for the care of the porch. Hinthorn v. Benfer, **L.R.A.1915B, 98,** 136 Pac. 247, 90 Kan. 731.

8. A tenant cannot hold his landlord liable for injury due to a fall on the sidewalk in front of the property which was made slippery by ice formed by water dripping from a roof of the leased building, on the theory that the walk was a common passageway which the landlord was bound to keep in repair. Valin v. Jewell, **L.R.A. 1915B, 324,** 90 Atl. 36, 88 Conn. 151.

9. A tenant cannot hold his landlord liable for injury due to a fall on ice accumulated on the sidewalk from water dripping from a roof of the leased property because of absence of devices to care for it, where the condition was obvious when the lease was made and the landlord did not undertake to repair it. Valin v. Jewell, **L.R.A. 1915B, 324,** 90 Atl. 36, 88 Conn. 151.

10. A narrow porch or landing in an outside stairway used by, and intended for the use of, different tenants of a building, and connected with a common hall way, is part of the stairway itself, and necessarily in the possession and control of the landlord, and he is bound to exercise reasonable care to render it safe for the use which he invites others to make of it. Hinthorn v. Benfer, **L.R.A.1915B, 98,** 136 Pac. 247, 90 Kan. 731. (Annotated)

LARCENY.
From passenger on sleeping car, see Carriers, 11, 12; Evidence, 10.
Police regulations to prevent larceny of young animals, see Constitutional Law, 19.
Existence of trust in property stolen, see Equity, 1, 2.
Relevancy of evidence, generally, see Evidence, 31.
Indictment for, see Indictment, etc., 5.
Insurance against loss by theft, see Insurance, 13.

LEASE.
Of mine, see Mines.
Effect of acceptance of lease by mortgagor from mortgagee to cut off right of redemption, see Mortgage, 5.
In general, see Landlord and Tenant.

LEAVE OF COURT.
For suit against receiver, see Receivers.

LEGAL PROCEEDINGS.
Injunction against, see Injunction, 6.

LEGISLATURE.
Authority from, to maintain nuisance, see Nuisance, 1, 3.
Power to authorize an appeal to the court from county board of equalization, see Courts, 3.
Power to grant suffrage to women, see Elections, 3–5.

LENDING CREDIT.
By municipality, see Public Moneys.

LICENSE.
Delegation of power as to, see Constitutional Law, 3.
Discrimination against nonresident or alien in grant of, see Constitutional Law, 6–8.
Due process of law as to, see Constitutional Law, 13.
Police power as to, see Constitutional Law, 18.
Validity of contract by unlicensed person, see Contracts, 8.
Injury to licensee by electricity, see Electricity, 2.
For sale of liquor, see Intoxicating Liquors.
Contributory negligence of licensee, see Railroads, 7.
Construing act empowering municipality to license, so as to sustain act, see Statute, 9, 10.

LIENS.
Of judgment, see Judgment, 7.
Mechanics' liens, see Mechanics' Liens.
Of vendor, see Vendor and Purchaser.

The amount which a cotenant should contribute toward expenses paid by the other cotenant for the benefit of the property may be made a lien on the share awarded him in partition. Willmon v. Koyer, **L.R.A.1915B, 961,** 143 Pac. 694, — Cal. —.

LIFE INSURANCE.
See Insurance.

LIFE TENANTS.

A tenant for life cannot avoid liability for selling timber from the property merely by showing that he made repairs equal in value to that of the timber removed. Thomas v. Thomas, **L.R.A.1915B, 219,** 82 S. E. 1032, 166 N. C. 627.

LIMITATION OF ACTIONS.

Adverse possession, see Adverse Possession.

Laches.
Estoppel by laches, see Estoppel, 4.
Delay in issuing execution, see Execution.

1. Street paving contractors cannot be charged with laches in failing to attempt to remove a pavement for which they have not been paid until the termination of litigation in which they are attempting to enforce payment for the work. Snouffer v. Tipton, **L.R.A.1915B, 173,** 142 N. W. 97, 161 Iowa, 223.

When statute runs.

2. The statute of limitations begins to run against a claim by a tenant in common who has attempted to exclude his cotenant from the property and repudiate the cotenancy to contribution toward taxes, assessments, and attorneys' fees paid in protection of the property, at the time the payments are made. Willmon v. Koyer, **L.R.A. 1915B, 961,** 143 Pac. 694, — Cal. —.

3. The statute of limitations does not run against the right of a street contractor to remove a pavement for which he has not been paid, while he is endeavoring to recover payment for his work. Snuffer v. Tipton, **L.R.A.1915B, 173,** 142 N. W. 97, 161 Iowa, 223.

4. The statute of limitations, as to a valid contract novating an existing one between the same parties, commences to run only from the inception of the substituted agreement. Morecraft v. Allen (N. J. Err. & App.) **L.R.A.1915B, 1,** 75 Atl. 920, 78 N. J. L. 729.

5. An administrator has no power or authority to waive the bar of the statute of limitations, so as to set a new date from which the statute would begin to run, under statutes providing that no claim must be allowed by the administrator which was barred by limitations at decedent's death, that the time during which there shall be a vacancy in the administration must not be included in any prescribed limitations, that every administrator must, immediately upon appointment, give notice in a newspaper, requiring all persons having claims against the estate to present them, as prescribed by law, that the time that shall be expressed in the notice shall be ten months after it is first published when the estate exceeds a specified sum, and four months

when it does not exceed that sum, and that all claims not presented within the time prescribed by the notice shall be "barred forever." Dern v. Olsen, **L.R.A.1915B, 1016,** 110 Pac. 164, 18 Idaho, 358. (Annotated)

When action is barred.

6. A claim for malicious prosecution of a civil action is ruled by Minn. Rev. Laws 1905, § 4076, subd. 5, allowing six years for commencement of an action for any injury to person or rights not arising on contract, and not by § 4078, limiting actions for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury, to two years. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

Interruption of statute.

7. An adjudication in bankruptcy, under act July 1, 1898, chap. 541, 30 Stat. at L. 544, as amended, does not suspend the running of the general state statute of limitations as to provable claims, for the reason that such adjudication does not put the creditor under a "legal disability," within the meaning of § 4658, Rev. Laws, 1910, and does not relieve him from filing his suit before the statute operates as a bar. Simpson v. Tootle, W. & M. Mercantile Co. **L.R.A. 1915B, 1221,** 141 Pac. 448, — Okla. —. (Annotated)

8. The payment to a creditor by a trustee of a bankrupt debtor, of dividends ordered paid by a court of bankruptcy, is not such a voluntary part payment by the debtor as will establish a new point from which the statute of limitations will run, under § 4663, Rev. Laws 1910. Simpson v. Tootle, W. & M. Mercantile Co. **L.R.A.1915B, 1221,** 141 Pac. 448, — Okla. —.

9. Under a statute providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the statute of limitations unless in writing, signed by the party to be charged thereby, a clear and definite acknowledgment of the existence of a contract, and liability which has not at the time been barred by limitations, whether coupled with a direct promise to pay or not, carries with it an implied promise to pay the debt, and fixes a new date from which the statute begins to run. Dern v. Olsen, **L.R.A.1915B, 1016,** 110 Pac. 164, 18 Idaho, 358.

10. A letter from one owing an overdue note and mortgage, not barred by the statute of limitations, to the creditor, telling him of a prospective sale of mining property, and saying: "Now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property," constitutes an acknowledgment of a continuing contract, within the meaning of a statute providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the statute of limitations unless in writing, signed by the party to be charged thereby, and sets a new date from which the statute begins to run, the quoted words constituting a condition that the debtor proposed to place upon the sale of the property, and demand from the purchaser, rather than a condition as to the payment of his debt to the creditor, and not negativing an implied promise to pay at some time if the sale should not be made. Dern v. Olsen, **L.R.A.1915B, 1016,** 110 Pac. 164, 18 Idaho, 358.

11. An administrator cannot acknowledge or promise to pay a new or continuing contract, under a statute providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take a case out of the statute of limitations, unless in writing, signed by the party to be charged thereby, so as to remove it from the operation of the statute, and bind the estate, since the debt is the obligation of the estate, and would not be the debt of the party making the acknowledgment or promise, and "to be charged thereby." Dern v. Olsen, **L.R.A.1915B, 1016,** 110 Pac. 164, 18 Idaho, 358.

LIMITATION OF LIABILITY.
For loss of baggage, see Carriers, 13, 16.
By telegraph companies, see Telegraphs.

LIQUIDATED DAMAGES.
See Damages, 3.

LOANS.
Failure of money lender to comply with statute as invalidating loan, see Contracts, 6–8.
Lending money to competitor of covenantee as breach of covenant not to engage in business, see Contracts, 12.
Duress in demanding premium for acceptance of sum due and release of security, see Duress, 1.
Of credit by municipality, see Public Moneys.

LOCAL IMPROVEMENTS.
See Public Improvements.

LOCAL OPTION.
Judicial notice of result of local option election, see Evidence, 1.

LODGING HOUSES.
Police power as to, see Constitutional Law, 18.
Pleading in action by lodging housekeeper to enjoin interference with her business by city officers, see Pleading, 6.
Construction of act empowering municipality to license, see Statute, 9, 10.

LUBRICANTS.
Lien for, see Mechanics' Liens, 2.

MACHINERY.
Warranty on sale of, see Sale, 4.
Breach of warranty on sale of, see Sale, 10.
Damages for breach of warranty of, see Damages, 2.

MALICE.

Question for jury as to, see Trial, 2, 3.

MALICIOUS PROSECUTION.

Measure of damages for, see Damages, 4.

Evidence in action for, see Evidence, 24, 27, 33.

Joint liability for, see Joint Creditors and Debtors, 3.

Conclusiveness in action for, of judgment in prior action between same parties to recover treble damages under Sherman anti-trust act, see Judgment, 4.

When action for, is barred, see Limitation of Actions, 6.

Question for jury, see Trial, 2, 3.

1. Representations of one defendant in an action for malicious prosecution, that an article manufactured by the plaintiff was an infringement of the patent held by him, are not rendered harmless by the fact that the article was afterwards found to infringe a different patent owned by another defendant. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

2. An action will lie for malicious prosecution upon proof of malice and want of probable cause, although there is no interference with the personal property of the person sued. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

3. Unless it is made to appear beyond a reasonable doubt to the holder of a patent that his patent is void, such patent furnishes probable cause for the prosecution of an infringement thereof. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

4. An action for malicious prosecution will not lie where the suit on which it is based has proceeded to an interlocutory decree in favor of the defendant in the malicious prosecution suit as to a substantial matter, although as to other matters the finding is in favor of the plaintiff in the malicious prosecution suit. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

MANDAMUS.

1. A writ of mandamus may not lawfully issue to review, reverse, or correct the erroneous decision of a ministerial officer who is required to exercise his discretion and judgment, nor to control such decision, even though there may be no other method of review or correction provided by law, in the absence of a showing that he acted arbitrarily or fraudulently, or that no facts were presented calling for the exercise of judgment. Dunham v. Ardery, **L.R.A.1915B, 232,** 143 Pac. 331, — Okla. —.

2. A constitutional provision that the petition for a recall election shall be signed by electors entitled to vote for a successor to the incumbent sought to be removed, and that it shall be the duty of the city clerk to examine the petition and, from the voters' register, ascertain whether it is signed by the requisite number of qualified electors, and to attach to the petition his certificate showing the result of such examination, vests in the city clerk a quasi judicial power, the exercise of which cannot be controlled by mandamus, where it is apparent from the constitutional provision that the voters' register was not intended to be the only means by which the clerk should determine whether or not the requisite number of legal voters had signed the petition. Dunham v. Ardery, **L.R.A.1915B, 232,** 143 Pac. 331, — Okla. —.

MARK.

Signature to deed by, see Deeds.

MARRIAGE.

Breach of promise, see Breach of Promise.

Divorce or separation, see Divorce and Separation.

MARRIED WOMEN.

See Husband and Wife.

MARTIAL LAW.

See also Militia.

Constitutional power to the governor to call out the militia to suppress insurrections does not include power to establish martial law, which will authorize the conviction of a civilian for crime without trial by jury. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

MASTER AND SERVANT.

Objection that statute requiring washhouses for employees fails to indicate time of compliance therewith, see Action or Suit.

Denial of equal protection of the law or due process of law by statute requiring washhouses for employees, see Constitutional Law, 11.

Sufficiency of indictment for violation of statute requiring maintenance of washhouses for employees, see Indictment, etc. 4.

Title of statute requiring maintenance of washhouses for employees, see Statute, 6.

Delegation of power to employee, see Constitutional Law, 2.

Assignment of future wages, see Constitutional Law, 10.

Due process of law as to wages, see Constitutional Law, 12.

Right of employees compensated on basis of percentage of sales to itemized statements of accounts and copies of correspondence, see Discovery and Inspection.

Right of employees whose compensation is based on a percentage of sales to seek accounting in equity, see Equity, 3.

Existence of trust in property stolen by employee, see Equity.
Statute providing fine for failure to pay wages in cash, see Imprisonment for Debt.
Liability of city for acts of its officers or agents, see Municipal Corporations, 3, 4.

1. Coal miners may, without compensation, be required to maintain washhouses for their employees. Booth v. State, **L.R.A. 1915B, 420,** 100 N. E. 563, 170 Ind. 405. (Annotated)

Duty as to place and appliances.

As to injury of servant of third person by electricity, see Electricity, 2.

2. An express company may be found to be negligent in directing a delivery man to drive single a country horse which has not been broken to city streets, after using it a couple of days as part of a team, during all of which time it behaved badly. Nooney v. Pacific Exp. Co. **L.R.A.1915B, 433,** 208 Fed. 274, 125 C. C. A. 474. (Annotated)

3. An express company is not relieved from liability for injury to a delivery man by the kick of a horse furnished him for use in the business, by the fact that it did not know of the propensities of the horse to kick, if it brought the horse without training from the country to the terrifying environment of the city; but liability is governed by its duty to use reasonable care to furnish the servant with a reasonably safe instrumentality with which to perform his work. Nooney v. Pacific Exp. Co. **L.R.A. 1915B, 433,** 208 Fed. 274, 125 C. C. A. 474.

Servant's assumption of risks.

4. The driver of an express wagon does not assume the risk of injury in obeying the direction of his employer to drive a country horse which has not been broken to city streets a second day, after reporting its bad behavior on the first day of trial. Nooney v. Pacific Exp. Co. **L.R.A.1915B, 433,** 208 Fed. 274, 125 C. C. A. 474.

MATERIALITY.

Of evidence, see Evidence, 27–32.

MATERIALS.

Lien for, see Mechanics' Liens, 2.

MAXIMS.

1. Caveat emptor. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —; Valin v. Jewell, **L.R.A.1915B, 324,** 90 Atl. 36, 88 Conn. 151.

2. De minimis non curat lex. Finch Bros. v. Michael, **L.R.A.1915B, 1204,** 83 S. E. 458, — N. C. —.

3. Expressum facit cessare tacitum. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

4. He who comes into equity must come with clean hands. Ely v. King-Richardson Co. **L.R.A.1915B, 1052,** 106 N. E. 619, 265 Ill. 148.

5. He who seeks equity must do equity. L.R.A.1915B, Martyn v. Olson, **L.R.A.1915B, 681,** 148 N. W. 834, — N. D. —.

6. Interest reipublicæ ut sit finis litium. Morecraft v. Allen (N. J. Err. & App.) **L.R.A.1915B, 1,** 75 Atl. 920, 78 N. J. L. 729.

7. Maledicta est expositio quæ corrumpit textum. State v. Norfolk S. R. Co. **L.R.A.1915B, 329,** 82 S. E. 963, — N. C. —.

8. Novatio non præsumitur. Morecraft v. Allen (N. J. Err. & App.) **L.R.A.1915B, 1,** 75 Atl. 920, 78 N. J. L. 729.

9. Once a mortgage always a mortgage. Holden Land & Live Stock Co. v. Interstate Trading Co. **L.R.A.1915B, 492,** 123 Pac. 733, 87 Kan. 221.

10. Salus populi, supreme lex. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454; Cutsinger v. Atlanta, **L.R.A. 1915B, 1097,** 83 S. E. 263, — Ga. —.

11. Sic utere tuo ut alienum non lædas. Union Ice & Coal Co. v. Ruston, **L.R.A. 1915B, 859,** 66 So. 262, — La. —.

12. Stabitur præsumptioni donec probetur in contrarium. Marquet v. Ætna L. Ins. Co. **L.R.A.1915B, 749,** 159 S. W. 733, — Tenn. —.

13. When one of two innocent persons must suffer by the fraud of a third the loss must rest where it falls. Quincy Mut. F. Ins. Co. v. International Trust Co. **L.R.A. 1915B, 725,** 104 N. E. 845, 217 Mass. 370.

MECHANICS' LIENS.

1. Supplies for, and repairs to and parts of, excavating machinery of contractors used in excavating for the erection of a building, are not lienable, since they are merely contributions to the personal property of the contractors. Johnson v. Starret, **L.R.A. 1915B, 708,** 149 N. W. 6, 127 Minn. 138.

2. Coal and gasolene for generation of power, dynamite for blasting, lubricant, lighting materials and supplies, and materials for erection of a tool house, furnished excavating contractors, are lienable under Minn. Gen. Stat. 1913, § 7020, providing that whoever contributes to the improvement of real estate by performing labor or furnishing skill, material, or machinery for the erection of any building or for excavating the same, shall have a lien upon the land for the price or value of such contribution. Johnson v. Starret, **L.R.A.1915B, 708,** 149 N. W. 6, 127 Minn. 138.

3. Materials furnished in good faith for the improvement of realty may be lienable, though not actually used in the work. Johnson v. Starret, **L.R.A.1915B, 708,** 149 N. W. 6, 127 Minn. 138.

MEETINGS.

Of stockholders, see Corporations, 2.

MENINGITIS.

Death from meningitis resulting from snuffing a nasal douche as accident, see Insurance, 8.

MENTAL ANGUISH.

Damages for, see Damages, 6, 7.

MILITIA.

Interference by court with action of governor in calling out militia, see Courts, 2.

1. Under the constitutional power of the governor to call out the militia to suppress an insurrection, the military officers may arrest leaders of the insurrection and hold them in custody until it is safe to turn them over to the courts for trial. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

2. The local authorities have no power to question the necessity of the exercise by the governor of his constitutional power to call out the militia to suppress an insurrection. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

MINES.

Requiring washhouses for employees in, see Action or Suit; Constitutional Law, 2, 11; Indictment, etc. 4; Master and Servant, 1; Statute, 6.

1. In a mining lease for a term of ninety-nine years, in consideration of $1 and of failure to mine, there is an implied covethe payment to the lessor of 3 cents per ton of coal and other minerals mined and shipped, but containing no provision for payment of minimum royalties in the event nant by the lessee to begin mining within a reasonable time, and if he does not do so he will be presumed to have abandoned his rights, and a court of equity will, at the suit of the lessor, cancel the lease as constituting a cloud on his title. Chandler v. French, **L.R.A.1915B, 561,** 81 S. E. 825, — W. Va. —. (Annotated)

2. A mining lease for a term of ninety nine years, in consideration of $1 and the payment to the lessor of 3 cents per ton of coal and other minerals mined and shipped, containing no covenant by the lessee to commence mining at any certain time, does not vest title in the lessee to the mineral in place. Chandler v. French, **L.R.A. 1915B, 561,** 81 S. E. 825, — W. Va. —.

3. The fact that a mining lease for a term of ninety-nine years, in consideration of a royalty upon coal and other minerals mined and shipped, is upon land so remote from a railroad that shipment of the coal was impracticable at the date of the lease, does not affect the question of the reasonableness of the time within which the lessee must begin operation, when it does not appear that the parties contracted with reference to any particular railroad which would afford shipping facilities, the building of which was then contemplated and has since been completed. Chandler v. French, **L.R.A. 1915B, 561,** 81 S. E. 825, — W. Va. —.

4. The failure of a lessee under a mining lease for a term of ninety-nine years, in consideration of the payment of a royalty for coal and other minerals mined and shipped, containing no covenant by the lessee to commence mining at any certain time, nor any provision for payment of minimum royalties in the event of failure to mine, for more than twenty-five years to mine coal, establishes an intention to abandon his right, so as to make of the lease a mere option which either party can terminate at his election. Chandler v. French, **L.R.A.1915B, 561,** 81 S. E. 825, — W. Va. —.

MINISTERIAL ACT.

Mandamus to compel, see Mandamus, 1.

MISTAKE.

In bill rendered consumer of electric power, estoppel by, see Estoppel, 1.

MONEY.

As to public money, see Public Moneys.

MONEY LENDERS.

Effect of failure to comply with statute on validity of contract of loan, see Contracts, 6, 7.

MONOPOLY AND COMBINATIONS.

Grant of monopoly by carrier to transfer company, see Carrier, 14, 15.

Conclusiveness of judgment for defendants in action to recover treble damages, in subsequent common-law action for interference with business by threats, etc., see Judgment, 4.

MOOT QUESTION.

See Courts, 1.

MORTGAGE.

Validity of agreement by mortgagor to forfeit all interest in property on failure to pay debt within fixed time, see Contracts, 9.

Mortgage executed by entryman who dies before final proof, see Public Lands, 2.

Conveyance absolute in form.

1. Where a party asks a court to declare a deed to be in effect a mortgage, he may be required, as a condition to receiving such equitable relief, to forego the advantage of any statutory penalties for the exaction of usury, and submit to a charge of the principal of the debt and legal interest. Holden Land & Live Stock Co. v. Interstate Trading Co. **L.R.A.1915B, 492,** 123 Pac. 733, 87 Kan. 221.

2. Where, by the agreement of the mortgagor and mortgagee, the note secured and a deed for the mortgaged property from the mortgagor to the mortgagee are deposited in escrow, both to be delivered to the mortgagor if he pays his debt by a certain date, otherwise the note to be delivered to him and the deed to the mortgagee, the delivery of the deed in accordance with the agreement does not devest the mortgagor's title. Holden Land & Live Stock Co. v. Interstate Trading Co. **L.R.A.1915B, 492,** 123 Pac. 733, 87 Kan. 221. (Annotated)

Sale.
Conclusiveness of judgment for defendant in action to enjoin making of deed because of want of notice of sale, see Judgment, 6.

3. A sale under mortgage foreclosure may be postponed without the necessity of giving an entirely new notice of the time of postponement. Ferebee v. Sawyer, **L.R.A. 1915B, 640,** 83 S. E. 17, — N. C. —.

(Annotated)

4. A notice of postponement of a mortgage foreclosure sale is not sufficient where the sale is postponed four times, and the only notice is by notation at the foot of one of the posted notices of sale and by proclamation at only part of the postponements, with few persons present. Ferebee v. Sawyer, **L.R.A.1915B, 640,** 83 S. E. 17, — N. C. —.

Redemption.

5. When a deed has been given under such circumstances that it amounts to a mortgage, the fact that the grantor accepts and signs a lease of the property from the grantee does not preclude him from asserting his right to redeem. Holden Land & Live Stock Co. v. Interstate Trading Co. **L.R.A.1915B, 492,** 123 Pac. 733, 87 Kan. 221.

MOTIONS AND ORDERS.

Error in overruling motion in arrest of judgment, see Appeal and Error, 15.
Cost of procuring evidence under motion, see Costs and Fees, 1.

MUNICIPAL CORPORATIONS.

Validity of charter provision for preferential voting in election of city commissioners, see Elections, 1.
Provision in charter for recall of officers, see Initiative, Referendum and Recall.
Estoppel of, see Estoppel, 1, 2.
Injunction to prevent municipality from interfering with removal of pavement by street contractor where pavement is rejected by city, see Injunction, 2, 7.
Construction of tunnel by, with option to railroad company to purchase it, see Public Moneys.
Contract for public improvements, see Public Improvements.
For what purposes taxes may be levied by town, see Taxes, 1.

Power as to nuisances.
Criminal liability of railroad company obstructing street crossing in violation of ordinance, see Highways, 1.
Injunction against proceeding for violation of penal ordinance, see Injunction, 6.

1. At common law a municipal corporation has the power to cause the abatement of public nuisance, and, if it cannot otherwise be abated, to destroy the thing which constitutes the nuisance. Cummings v. Lobsitz, **L.R.A.1915B, 415,** 142 Pac. 993, — Okla. —.

2. Not only has a municipal corporation the power, under the common law, to abate a public nuisance, but chapter 7, Okla. Comp. Laws 1909, gives the municipal corporation full power to abate public nuisances, and when it becomes necessary, it may remove or destroy the building which constitutes the nuisance, even though the nuisance consists in the building being in such a condition that it endangers the public safety or the safety of adjacent property. Cummings v. Lobsitz, **L.R.A.1915B, 415,** 142 Pac. 993, — Okla. —.

Liability for damages.

3. No liability is created against a municipal corporation by acts of its officers, done under an unconstitutional or void resolution enacted in the exercise of governmental powers, and the fact that the council passed, and the street commissioner enforced, such void resolution does not make the city liable. Cummings v. Lobsitz, **L.R.A.1915B, 415,** 142 Pac. 993, — Okla. —.

4. Where a street commissioner of a city of the first class removes a frame building which constitutes a public nuisance, he does not do so as the agent or representative of the municipality, but the acts of such officer is in the interest of the public generally and for public purposes in the enforcement of the police regulations, and the abatement and removal of the frame building in the instant case by such street commissioner was an act which was essentially governmental in its character, and the municipality is immune from liability for the act of such officer in abating such nuisance. Cummings v. Lobsitz, **L.R.A. 1915B, 415,** 142 Pac. 993, — Okla. —.

MUTILATION OF CORPSE.

Who may maintain action for, see Parties, 1.

MUTUALITY.

Of contracts, see Contracts, 3.

NAME.

Mistake in name of party in service by publication, see Constitutional Law, 15.
Idem sonans, see Constitutional Law, 15.
Injunction to restrain unfair use of corporate name, see Injunction, 3, 4.
Of party in writ, see Writ and Process.

NASAL DOUCHE.

Death resulting from violent snuffing of, as accident, see Insurance, 8.

NATIONAL BANKS.

See Banks.

NEGLIGENCE.

Of carrier or passenger, see Carriers.
Of municipal corporation, see Municipal Corporations, 3, 4.

Presumption and burden of proof as to, see Evidence, 10–12.
Liability for serving unfit food, see Food, 2
As to highways, see Highways, 3.
Liability of landlord, see Landlord and Tenant, 4–10.
New trial in action for, see New Trial, 2, 4.
Proximate cause of injury by, see Proximate Cause.
Liability for injuries to person on, or near track, see Railroads, 3.
Limitation of liability for, see Telegraphs.
Question for jury as to, see Trial, 4, 5.
Instructions as to, see Trial, 8.

1. One who shovels coal from a wagon to the ground, near the unprotected edge of a steep decline at the bottom of which are dwelling houses, without exercising any care to prevent it from going over the edge, is liable for injury to a person while at work near a house, by a piece of coal which goes over the edge and rolls down the decline. Furkovich v. Bingham Coal & Lumber Co. **L.R.A.1915B, 426,** 143 Pac. 121, — Utah, —.

2. To render one who permits coal to roll down a mountain side to the injury of one dwelling at the foot, liable for the injury, it is not necessary that he should have foreseen that such injury would happen, if the injury was the natural and probable consequence of his act. Furkovich v. Bingham Coal & Lumber Co. **L.R.A.1915B, 426,** 143 Pac. 121, — Utah, —.
(Annotated)

Contributory; imputed.
Negligence of boy in riding on steps of railroad car, see Carriers, 8.
On railroad track or right of way, see Railroads, 7.

3. An automobilist who attempts to run after dark with only a dim oil light, which does not comply with the statute, along a little used section line trail with which he is not familiar, is so negligent that, in case the machine runs into an unguarded excavation made by a railroad company across the trail, he cannot hold the railroad company liable for the resulting injuries. Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. **L.R.A.1915B, 953,** 216 Fed. 503, — C. C. A. —.

4. A guest who consents to stay in an automobile when the driver attempts to run it after dark without light, along a road with which no one in the car is familiar, is so negligent that he cannot hold the one responsible for an unguarded excavation in the road liable for injury caused by the machine falling into it. Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. **L.R.A.1915B, 953,** 216 Fed 503, — C. C. A. —.
(Annotated)

NEGOTIABILITY.
Of notes, see Bills and Notes, 3, 4.

NEGOTIABLE INSTRUMENTS.
See Bills and Notes; Checks.
L.R.A.1915B.

NEWLY DISCOVERED EVIDENCE.
New trial for, see New Trial, 4.

NEW PROMISE.
To interrupt running of statute of limitations, see Limitation of Actions, 9–11.

NEW TRIAL.
Review of discretion as to, on appeal, see Appeal and Error, 8.
Grounds for, on appeal, see Appeal and Error, 20–22.

1. Where incompetent evidence relating solely to one of two defendants was admitted upon the trial, and the evidence authorized (if it did not require) a verdict in favor of the other, a new trial may be refused as to the latter, and granted as to the former. National Bank of Tifton v. Smith, **L.R.A.1915B, 1116,** 83 S. E. 526, — Ga. —.

2. A verdict for plaintiff in an action to recover damages for injuries arising out of a collision at a railroad crossing, in which plaintiff relies on absence of signal and lookout by the railroad company, will be set aside where the testimony of plaintiff, who was familiar with the crossing and knew the train was due, as to looking and listening, is incredible from the fact that the train could have been seen had he looked, or heard had he listened. McCarthy v. Bangor & A. R. Co. **L.R.A. 1915B, 140,** 90 Atl. 490, — Me. —.
(Annotated)

3. The surreptitious inspection by a juror of a calf and a cow alleged to be its dam, in an action to recover possession of the calf, in which the question of its maternity is an important element, is ground for new trial, although he states that his decision was not influenced by his act. Driscoll v. Gatcomb, **L.R.A.1915B, 702,** 92 Atl. 39, — Me. —. (Annotated)

4. A new trial of an action to recover damages for personal injuries in which the damages were assessed on testimony to the effect that plaintiff was physically wrecked and able to do but little, if any, manual labor, may be granted for newly discovered evidence that soon after the trial he went on a hunting trip, engaged in heavy work, and danced. Southard v. Bangor & A. R. Co. **L.R.A.1915B, 243,** 91 Atl. 948, — Me. —.
(Annotated)

NOMINATIONS.
To office, see Elections, 6

NONRESIDENTS.
Equal protection and privileges as to, see Constitutional Law, 5–8.

NOTICE.
On appeal, see Appeal and Error, 3.
Publication of notice of designation of term of court at which trial was had, see Appeal and Error, 13.
To bank on which check is drawn of intended misappropriation of funds, see Banks, 6, 8, 12.

Of rights of third person in note taken by assignment, see Bills and Notes, 6.
Mailing of, within time limited in contract as satisfying requirement of notice, see Contracts, 4.
Of abandonment of option contract, see Contracts, 4.
Filing of designations of additional terms of court, see Courts, 8.
Of postponement of mortgage sale, see Mortgage, 3, 4.
By partner of retirement from firm, see Partnership.

1. The knowledge of the financier of a local society of a fraternal lodge, of his own forgeries, is not binding upon the grand lodge. Grand Lodge, A. O. U. W. v. State Bank, **L.R.A.1915B, 815,** 142 Pac. 974, 92 Kan. 876.

2. That the president of a bank owns all its stock and transacts all its business does not charge the bank with notice of his attempt to pay his individual debt out of assets of the bank, so that its failure to object will estop it to contest the validity of the payment, at least if he has pledged stock to another as collateral security. Bebaca v. Higgins, **L.R.A.1915B, 1091,** 143 Pac. 832, — Colo —.

NOVATION.

When limitations begin to run against rights under novation contract, see Limitation of Actions, 4.

1. The renewal of bank deposit certificates does not operate as a novation of the original indebtedness. Dunn v. Bank of Union, **L.R.A.1915B,** 168, 82 S. E. 758, — W. Va. —.

2. A valid novation is effected by an agreement that a fixed sum shall be paid in settlement of the unliquidated amount due under an existing contract whereby one party had agreed to furnish a home for and support another for life, in consideration of receiving the rents from certain property owned by the latter, and the property itself, upon the death of such owner, where the agreement is entered into with the intention of terminating the mutual obligations and the rights of both parties under the old contract. Morecraft v. Allen (N. J. Err. & App.) **L.R.A.1915B, 1,** 75 Atl. 920, 78 N. J. L. 729.

NUISANCES.

Sufficiency of evidence as to, see Evidence, 34.
Liability of landlord, see Landlord and Tenant, 5, 6.
Power of municipality to abatement of nuisance, see Municipal Corporations, 1, 2.
Liability of city for act of officer in destroying building to abate nuisance, see Municipal Corporations, 4.

1. A "public nuisance" arises out of the violation of public rights, or the doing of unlawful acts; and if the legislature, by a law passed within its legislative power, authorizes an act to be done which, in the absence of the statute, would be a public nuisance, such act ceases to be legally a nuisance so far as the public is concerned. Toledo Disposal Co. v. State, **L.R.A.1915B, 1207,** 106 N. E. 6, 89 Ohio St. 230. (Annotated)

2. A railroad company is not subject to indictment for the maintenance of a nuisance because a municipality has raised the grade of a street passing under one of its trestles which when constructed was sufficiently elevated to accommodate traffic, so as to diminish the space and obstruct the free use of the road. Southern R. Co. v. State, **L.R.A.1915B, 766,** 169 S. W. 1173, — Tenn. —. (Annotated)

3. The state cannot maintain a criminal prosecution against a garbage reduction company for conducting a plant and business located, constructed, and operated under an express contract with a municipality, made under legislative authority, where the plant is conducted with care and skill, and in such manner as to produce the least possible annoyance, and for the purpose of conserving the health and safety of the public. Toledo Disposal Co. v. State, **L.R.A. 1915B, 1207,** 106 N. E. 6, 89 Ohio St. 230.

OATH.

Verification of information, see Indictment, etc., 1, 2.

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 5.

OBSTRUCTING JUSTICE.

1. A corporation which removes its books and papers from the jurisdiction of the court to avoid producing them before the grand jury in a threatened investigation is liable for obstructing justice although no subpœna has yet been issued requiring their production and they may tend to incriminate it, since it is not entitled to the constitutional protection against self-incrimination. Com. v. Southern Exp. Co. **L.R.A. 1915B, 913,** 169 S. W. 517, — Ky. —.

2. A physician who incites the institution of an action to recover damages for personal injuries which do not exist is guilty of obstructing justice. Melton v. Com. **L.R.A.1915B, 689,** 170 S. W. 37, — Ky. —.

OCCUPANCY.

Of insured premises, see Insurance, 4.

OFFER.

In general, see Contracts, 4.

OFFICERS.

Of banks, see Banks, 3–5.
Of corporations, see Corporations.
Mandamus to, see Mandamus, 1.
Of church, see Religious Societies.
Recall of, see Initiative, Referendum and Recall.

Liability for false imprisonment, see False Imprisonment.

1. The office of collector created by a statute inaugurating a new system of taxation upon incomes falls within a constitutional provision that the legislature may provide for the appointment of officers whose offices are thereafter created by law. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

2. The office of assessor of incomes is neither a county, city, town, nor village office within the meaning of a constitutional provision that incumbents of such offices shall be elected by local electors. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

3. Public cattle inspectors engaged in the work of eradicating disease among cattle of the state are not liable for injury to an animal during inspection, in the absence of carelessness or negligence on their part. Mitchell v. Hopper, **L.R.A.1915B, 1013,** 170 S. W. 231, — Ark. —. (Annotated)

OPINION.

As evidence, see Evidence, 23, 24.

OPTION.

Option contracts, generally, see Contracts, 4.

ORDINANCES.

In general, see Municipal Corporations.

ORIGINAL JURISDICTION.

Of appellate court, see Courts, 5–7.

PARADES.

Infringement of constitutional right of liberty by forbidding carrying of red flag in parade, see Constitutional Law, 14.

1. Placing an inscription on a red flag does not take it out of the operation of a statute forbidding the carrying of red flags in parade. Com. v. Karvonen, **L.R.A.1915B, 706,** 106 N. E. 556, 219 Mass. 30.

2. That a flag is the regular banner of a political society does not take it out of the operation of a statute forbidding the carrying of a red flag in parade. Com. v. Karvonen, **L.R.A.1915B, 706,** 106 N. E. 556, 219 Mass. 30.

PARENT AND CHILD.

Kidnapping of child by parent, see Abduction and Kidnapping.

Gift of bank deposit by parent to child, see Gift, 1.

Who may maintain action for mutilation of corpse of child, see Parties, 1.

Effect of bequest in will to cancel debt by mother to her children as guardian, see Wills.

PARI MATERIA.

Construction of statutes in pari materia, see Statute, 11.

PAROL EVIDENCE.

As to writing, see Evidence, 19–22.

PARTIAL INVALIDITY.

Of statute, see Statutes, 2–4.

PARTIES.

Description of party in writ, see Writ and Process.

1. The father, and not the mother, is the proper party to sue for damages for mental anguish for the wrongful mutilation of the dead body of their child, where, by statute, he is entitled to its personal effects. Floyd v. Atlantic C. L. R. Co. **L.R.A.1915B, 519,** 83 S. E. 12, — N. C. —. (Annotated)

2. Individuals cannot raise the question of the violation by railroad companies of a constitutional provision prohibiting their consolidation. Day v. Tacoma R. & Power Co. **L.R.A.1915B, 547,** 141 Pac. 347, 80 Wash. 161.

PARTITION.

Collateral attack on judgment in partition, see Judgment, 3.

Lien on share awarded cotenant in partition, for amount which he should contribute towards expenses paid by the other cotenant, see Liens.

PARTNERSHIP.

Liability of a partner on a contract for supplies to be delivered in monthly instalments for a year is not affected by written notice during the term that he has withdrawn from the firm, and that the remaining partner will carry on the business, pay the debts, and collect the bills. Clinchfield Fuel Co. v. Lundy, **L.R.A.1915B, 418,** 169 S. W. 563, — Tenn. —.

PASSENGER CARRIERS.

See Carriers.

PATENTS.

Right of action for injury to business by threats of suit for infringement and false representations, see Case, 3, 4.

Measure of damages in action for malicious prosecution of suit for alleged infringement, see Damages, 4.

Action for malicious prosecution for alleged infringement, see Malicious Prosecution, 1, 3.

Evidence in action for malicious prosecution for infringement of patent, see Evidence, 24, 27.

Joint liability for malicious prosecution for alleged infringement, see Joint Creditors and Debtors, 3.

PAVEMENT.

In general, see Public Improvements.

PAWNBROKERS.

Validity of contracts by pawnbroker who fails to comply with municipal regulations, see Contracts, 7.

PAYMENT.
As effecting limitation of actions, see Limitation of Actions, 8.
Novation, see Novation.

PENALTIES.
Distinguished from liquidated damages, see Damages, 3.

PERFORMANCE.
Of contract, generally, see Contracts, 11.

PERSONAL INJURIES.
To passenger, see Carriers.
Inciting institution of fictitious suit for, as contempt, see Contempt, 1.
New trial in action for, see New Trial, 2, 4.
Proximate cause of, see Proximate Cause.
On railroad right of way, see Railroads.
Instructions in action for, see Trial, 8.

PERSONAL PROPERTY.
Sale of, see Sale.

PETITION.
For recall election, see Initiative, Referendum and Recall, 3; Mandamus, 2.
Of plaintiff, see Pleading, 2, 3.

PHYSICIANS AND SURGEONS.
Refusal of carrier to transport physician on detoured train, see Carriers, 5.
Contempt of physician in inciting institution of fictitious suit, see Contempt, 1.
Injunction against breach of contract by physician not to engage in competition with another, see Injunction, 1.
Liability of physician who incites fictitious suit for obstructing justice, see Obstructing Justice, 2.

PLAINTIFF.
Parties plaintiff, see Parties.

PLATFORM.
Compelling passenger to ride on, see Carrier, 7.

PLEADING.
Prejudicial error as to striking out, see Appeal and Error, 14.
In criminal prosecution, see Indictment, etc.

Relief under pleadings.

1. Upon a bill stating facts warranting general, but not special, relief, though praying both, the court may, upon proof deemed sufficient, grant only the general relief, provided it be not inconsistent with that specifically prayed. Grant v. Swank, **L.R.A. 1915B, 881,** 81 S. E. 967, — W. Va. —.

Declaration or complaint.

2. That the treasurer of a corporation had no right to draw its checks to his own order is not charged by an allegation in a complaint that he had no authority to draw upon the account of the corporation except for the purposes of its business. Havana C. R. Co. v. Knickerbocker Trust Co. **L.R.A.1915B, 720,** 92 N. E. 12, 198 N. Y. 422.

Pleas and answers.

3. In an action by an automobile dealer against a distributing company to recover an advance payment made under an agreement between the dealer and the company whereby the dealer is given the exclusive right to sell automobiles in a number of counties upon his order for a number of cars and the making of an advance payment on each car, which advance it is stipulated in the agreement is to be retained by the company as liquidated damages in case of the failure of the dealer to take and pay for the cars ordered, it is not incumbent upon the distributing company to allege an offer to deliver the cars to the dealer under the contract. Gile v. Interstate Motor Car Co. **L.R.A.1915B, 109,** 145 N. W. 732, 27 N. D. 108.

4. A plea in abatement has power to raise the question whether or not a foreign corporation can maintain an action to enforce a contract when it has not complied with the local prerequisites to its doing business in the state. Model Heating Co. v. Magarity, **L.R.A.1915B, 665,** 81 Atl. 394, 2 Boyce (Del.) 459.

Reply.

5. An unnecessary reply attempting to set up an estoppel in an action upon a life insurance policy in which a demurrer to defendant's answer of change of by-laws, so that the amount is not due, has been sustained, may be treated as part of the petition if it is permitted to remain in the record. Keith v. Modern Woodmen of America, **L.R.A.1915B, 793,** 149 N. W. 225, — Iowa, —.

Demurrer.

6. A petition in an action by a lodging house keeper to enjoin the city officials from interfering with the operation of her business, or proceeding with quasi criminal prosecutions against her for violation of a municipal ordinance requiring a license for the operation of a lodging house, which alleges oppressive conduct on the part of the chief of police in an unsuccessful attempt to find some violation of the law or ordinance on the part of the plaintiff or her lodgers, arbitrary action on the part of the city officials based on no reason or investigation, and amounting to no real exercise of discretion, threats to stop her from doing business by constant prosecutions in the recorder's court, and danger of irreparable injury to property rights, is sufficient to withstand a general demurrer. Cutsinger v. Atlanta, **L.R.A. 1915B, 1097,** 83 S. E. 263, — Ga. —.

7. An allegation in an action for a breach of warranty in the sale of an article, which states the defects in the article in the alternative, is subject to special demurrer. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

8. An opening general statement of the defects in an article, for a breach of warranty in a sale of which an action is brought, which statement, standing alone, would be too general, does not render the paragraph containing it subject to demurrer if the defects are otherwise sufficiently alleged. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

9. An allegation in the petition in an action for breach of warranty in a sale of wire for electrical transmission, "that petitioner has sold it as such (that is, the wire as junk copper), realizing therefrom the sum of $98,839.05, which was its only value," is subject to special demurrer on the ground that it is not shown that the sum realized was the market value of the copper at the time and place of delivery as contemplated and fixed by the contract of sale. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

10. An allegation in a petition in an action for breach of warranty in a sale by a manufacturer of wire for electrical transmission, which is vague, indefinite, and uncertain, and fails to state with sufficient definiteness the time, character, or amount of expenditures, of the stoppages of business, and the losses resulting therefrom, is subject to special demurrer. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A. 1915B, 900,** 83 S. E. 138, — Ga. —.

POLICE.
Evidence of other crimes in prosecution of police officer for taking bribe, see Evidence, 28–30.
Protection against misconduct of, in making illegal search of, see Search and Seizure, 2.

POLICE POWER.
See Constitutional Law, 16–19.

PORCH.
Liability of landlord for defective condition of, see Landlord and Tenant, 7, 10.

POSTING RATES.
See Carriers, 16.

POSTPONEMENT.
Of sale under foreclosure, see Mortgage, 3, 4.

PREFERENTIAL VOTING.
See Elections, 1, 2.

PREJUDICIAL ERROR.
See Appeal and Error, 13–18.

PRELIMINARY INJUNCTION.
See Injunction, 7.

PRESUMPTIONS.
In general, see Evidence, 2–16.

PRINCIPAL AND AGENT.
Bank as agent of depositor to pass on validity of checks, see Banks, 6, 8, 9.
Powers of agent of bank, see Banks, 3–5.
Contract for automobile agency, see Contracts, 1–3.
Provision for liquidated damages in contract for automobile agency, see Damages, 3.
Pleading in action on automobile distribution contract, see Pleading, 3.
Proof of agent's declarations, see Evidence, 26.
Imputing notice of agent's wrong to principal, see Notice.

PRINCIPAL AND SURETY.
As to bonds generally, see Bonds.
Wife as surety, see Husband and Wife.

A surety on a bond for the faithful performance by the contractor of a building contract, is absolutely discharged from liability when the obligee fails to retain not less than 15 per cent of the value of all work performed and material furnished in the performance of said contract, in accordance with the terms of said bond; said surety not having consented to such alteration. Morgan v. Salmon, **L.R.A.1915B, 407,** 135 Pac. 553, — N. M. —. (Annotated)

PRIORITY.
As between claims against estate of bankrupt, see Bankruptcy, 1, 2.

PRIVATE ACTION.
To enforce public right generally, see Parties, 2.

PROBABLE CAUSE.
Want of, for prosecution, see Malicious Prosecution, 2, 3.
As question for jury, see Trial, 3.

PROCESS.
See Writ and Process.

PROPERTY.
Condemnation of, see Eminent Domain.

PROXIMATE CAUSE.
1. The unsafe condition of an elevator, due to the negligence of the owner, which creeps when not in use, is a proximate cause of injury to one who falls down the shaft when attempting to use it, because it had moved away from the open door, although there was also negligence on the part of the lessee in whose possession it was, in not keeping the entrance closed or guarded. Colorado Mortg. & Invest. Co. v. Giacomini, **L.R.A.1915B, 364,** 136 Pac. 1039, 55 Colo. 540.

2. The negligence of the servants of a street car company operating an electrically propelled street car, in running against a horse and buggy being driven across the street car track at a street intersection, hurling the horse against a person in the

street and injuring him, will be deemed the proximate cause of the injury of such person. Columbus R. Co. v. Newsome, **L.R.A. 1915B, 1111**, 83 S. E. 506, —— Ga. —. (Annotated)

PUBLICATION.

By Secretary of State of appointments of judges to hold additional terms of court, see Courts, 8.

Of notice on mortgage foreclosure, see Mortgage, 3, 4.

PUBLIC IMPROVEMENTS.

Improvements by abutting owner, see Highways, 2.

Injunction against interference with removal by contractor of pavement rejected because not complying with contract, see Injunction, 2, 7.

Effect of judgment denying right of contractor to recover for street pavement on his right to remove his material from the street, see Judgment, 5.

Running of limitation against right of contractor to remove payment for which he has not been paid, see Limitation of Actions, 3.

Laches of paving contractors in attempting to remove pavement for which they have not been paid, see Limitation of Actions, 3.

A contractor for a street pavement who has not been guilty of fraud or wilful wrong may, upon the refusal of the city to pay for the work because it does not comply with the contract, remove his material if he can do so without serious inconvenience or injury to the municipality or abutting property owners. Snouffer v. Tipton, **L.R.A.1915B, 173**, 142 N. W. 97, 161 Iowa, 223. (Annotated)

PUBLIC LANDS.

1. Though the heirs of a deceased entryman, who homestead or commute land, under the provisions of §§ 2291, 2301, Fed. Stat. Anno. have preferred rights as new entrymen or homesteaders, and in making proof are allowed to credit the improvements and period of residence of their ancestor, such heirs take directly from the government by donation or purchase, rather than by inheritance. Martyn v. Olson, **L.R.A.1915B, 681**, 148 N. W. 834, — N. D. —.

2. A mortgage which has been executed by an entryman, who dies before making final or commutation proof, or before he has done the things prerequisite and necessary thereto, is not a lien on such real estate, and is not assumed by his heirs who enter upon and take said land under the provisions of §§ 2291, 2301, Fed. Stat. Ann. Martyn v. Olson, **L.R.A.1915B, 681**, 148 N. W. 834, — N. D. —. (Annotated)

3. Until the issuance of a final patent, or until the doing of all things by the entryman upon government land which are prerequisite thereto, such entryman has no complete title in the land, either legal or equitable, nor has his estate after his decease. Martyn v. Olson, **L.R.A.1915B, 681**, 148 N. W. 834, — N. D. —.

PUBLIC MONEYS.

Jurisdiction of suit to enjoin expenditure, see Courts, 4, 5.

For what purposes taxes may be levied generally, see Taxes, 1.

A scheme by which a municipal corporation is to issue bonds for the major part of the cost of a tunnel the title to which it is to retain, but which is to be used by a railroad company which is to pay the remainder of the cost and have an option to purchase the improvement, contravenes a constitutional prohibition against its lending its credit to any corporation or having joint ownership with it, although it is to have free perpetual use of the tunnel as a conduit for water and electricity, and the right to all minerals discovered in its construction, and the right to subject the railway tracks to the use of other companies. Lord v. Denver, **L.R.A.1915B, 306**, 143 Pac. 284, — Colo. —. (Annotated)

PUBLIC NUISANCE.

See Nuisance.

PUBLIC POLICY.

As affecting contracts, see Contracts, 9, 10.

PUBLIC RIGHT.

Who may bring action to protect, see Parties, 2.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railways; Telegraphs.

PUBLIC UTILITIES.

See Public Service Corporations.

PUNITIVE DAMAGES.

See Damages, 1.

RAILROADS.

As carriers, see Carriers.

Validity of speculative contract between company and individual for laying out of town sites at points where stations will be located, see Contracts, 10.

Requiring railroad company to widen span of bridge as a taking of property without compensation, see Eminent Domain.

Indictment of railroad company for maintenance of nuisance resulting from change by municipality of grade of street passing under trestle, see Nuisance, 2.

Right of individual to raise question of violation of provision against consolidation of railroads, see Parties, 2.

1. A statute requiring a railroad to enlarge its bridge crossing a stream upon

the line of which a drainage ditch is located, where the span is not sufficient to accommodate the natural flow of the stream, does not require the enlargement of a bridge span over a stream to accommodate the flow of a river which is to be turned into the channel. People ex rel. Peeler v. Chicago & E. I. R. Co. **L.R.A.1915B, 486,** 104 N. E. 831, 262 Ill. 492.

2. Municipal authority to maintain electric wires along a public highway does not include the right to carry them along the line of the street over an intersecting railroad upon the relocation of the street so as to pass under the railroad tracks under statutory authority to abolish the grade crossing. New York, C. & H. R. R. Co. v. Central Massachusetts Electric Co. **L.R.A. 1915B, 822,** 106 N. E. 566, 219 Mass. 85. (Annotated)

Operation.

Attorneys' fees as element of costs in action for injured cattle, see Costs and Fees, 2.

Presumption and burden of proof as to negligence, see Evidence, 11.

Criminal liability of railroad company for obstructing street crossing, see Highways, 1.

New trial in action for injuries at crossing, see New Trial, 2.

Question for jury as to negligence as to cattle guards, see Trial, 4.

3. The implied invitation to anyone having business with a railroad company, to go upon the premises where it transacts such business with the public, does not extend to portions of the premises which are obviously not adapted to, or used or necessary for, the transaction of the business for which such person is on the premises; and if he goes to such places he puts himself outside of the protection of his invitation, and the railroad is not responsible for injuries he may receive, unless it inflicts them purposely or wantonly. Price v. Pecos Valley & N. E. R. Co. **L.R.A.1915B, 827,** 110 Pac. 565, 15 N. M. 348. (Annotated)

4. Negligence on the part of a railroad company in killing geese on the track is not shown merely by evidence that the whistle was not blown or the bell rung at the time and place of the accident. James v. Atlantic C. L. R. Co. **L.R.A.1915B, 163,** 82 S. E. 1026, 166 N. C. 572.

5. A railroad company is not liable for killing geese on the track because of failure to sound an alarm, unless they could have been seen by keeping a reasonable lookout, in time to avoid the injury, and the engineer failed to sound an alarm which was the proximate cause of the injury. James v. Atlantic C. L. R. Co. **L.R.A.1915B, 163,** 82 S. E. 1026, 166 N. C. 572.

6. It is the duty of a railway company to exercise reasonable or ordinary care to keep its cattle guards from becoming so filled with snow and ice as to make it possible for animals to cross them, and for negligent failure in this respect the company is L.R.A.1915B. liable for injuries to animals thus getting upon its right of way. Martin v. Atchison, T. & S. F. R. Co. **L.R.A.1915B, 134,** 141 Pac. 599, 92 Kan. 595. (Annotated)

Contributory negligence.

7. where the negligence of one who, having business with a railroad company, went upon the railroad premises where he was injured, contributed to the injury he received, in the absence of evidence of any more than ordinary negligence on the part of the railroad company, from which the injured person would not have suffered if he had exercised ordinary care, he is precluded from the recovery of damages against the railroad company. Price v. Pecas Valley & N. E. R. Co. **L.R.A.1915B, 827,** 110 Pac. 565, 15 N. M. 348.

RAPE.

Cross-examination of accused on prosecution with assault with intent to rape, see Witnesses, 1.

Liability of bishop for rape by priest, see Religious Societies.

Impotency because of senility is no defense to a charge of assault with intent to commit rape. Hunt v. State, **L.R.A. 1915B, 131,** 169 S. W. 773, — Ark. —. (Annotated)

RATES.

Of carriers, see Carriers, 16.

RATIFICATION.

Of contract made while intoxicated, see Bills and Notes, 1; Drunkenness, 2, 3.

REAL PROPERTY.

Deeds of, see Deeds.

Duress of real property, see Duress, 1.

Conclusiveness of judgment affecting, see Judgment, 6.

Life estates in, see Life Tenants.

Matters as to landlord and tenant, see Landlord and Tenant.

Mortgage on, see Mortgage.

As to public lands, see Public Lands.

Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

Devise of, see Wills.

RECALL.

Of officer, see Initiative, Referendum and Recall.

RECEIVERS.

Appointment of receiver for property of lessee as breach of covenant against assignment of lease, see Landlord and Tenant, 2.

A court which has appointed a receiver for the property of lessees will not permit a suit to be brought against him by the landlord in another court to recover possession of the leasehold if from the facts stated it is apparent that the landlord has no right to such possession. Durand & Co. v. Howard & Co. **L.R.A.1915B, 998,** 216 Fed. 585, — C. C. A. —.

RECEIVING STOLEN PROPERTY.
Indictment for, see Indictment, etc., 6.

RECORDS AND RECORDING LAW.
Unrecorded deed as color of title, see Adverse Possession.
Records as evidence, generally, see Evidence, 17.

REDEMPTION.
From mortgage sale, see Mortgage, 5.

RED FLAG.
Forbidding carrying of, in parade, see Parades.

RELEASE.
Of surety, see Sureties.

RELEVANCY.
Of evidence, see Evidence, 27–32.

RELIGIOUS SOCIETIES.
A bishop who places in charge of a parish a priest whom he knows to be of bad character, whose appointment will likely result in attempts to debauch female parishioners, is not liable in damages as a corporation sole for a rape committed by the priest upon a member of the parish. Carini v. Beaven, **L.R.A.1915B, 825,** 106 N. E. 589, 219 Mass. 117. (Annotated)

REMAINDERMEN.
See Life Tenants.

REMEDIES.
Election of, see Election of Remedies.

RENUNCIATION.
Of devise or legacy, see Wills, 3.

REPEAL.
Of statute, see Statutes, 16.

REPLY.
See Pleading, 5.

REPRESENTATIONS.
By insured, see Insurance, 4, 5.

RESCISSION.
Of contracts, see Contracts, 13.

RETIRING PARTNER.
Liability of, see Partnership.

REVERSIBLE ERROR.
See Appeal and Error, 13–18.

ROBBERY.
Statute providing that person making threats with view to extort money shall be guilty of attempt to rob, see Extortion.

ROOMING HOUSE.
Police power as to, see Constitutional Law, 18.
Construction of act empowering municipality to license, see Statutes, 9, 10.

SALE.
On foreclosure, see Mortgage, 3, 4.
Of land, generally, see Vendor and Purchaser.

Passing of title; delivery.
1. Where a contract for the sale of personal property specifically provides for the manner and method of delivery, the seller has no right or authority to impose other or further conditions precedent to delivery than those named in the contract. Petersburg Fire, Brick, & Tile Co. v. American Clay Mach. Co. **L.R.A. 1915B, 536,** 106 N. E. 33, 89 Ohio St. 365.

2. Delivery of personal property to a common carrier, the bill of lading being taken in the name of the seller, and forwarded to a bank in a city other than the purchaser's place of business, with the demand upon the purchaser that he execute and deliver to this bank for the seller, notes covering the entire purchase price, before the bill of of lading will be delivered to him, does not constitute a delivery or a sufficient tender of delivery under a contract of sale of personal property which provides for delivery f. o. b. cars at shipping point for shipment to the purchaser, and which further provides for the payment of one fourth of the purchase price within thirty days after the arrival of the property on the cars at its destination, the residue thereof to be paid in four, eight, and twelve months, respectively, deferred payments to be evidenced by notes of even date with the bill of lading. Petersburg Fire, Brick, & Tile Co. v. American Clay Mach. Co. **L.R.A.1915B, 536,** 106 N. E. 33, 89 Ohio St. 365. (Annotated)

Acceptance; retention.
3. A provision in a contract of sale of cement that it is subject to specified tests is not a warranty collateral to the contract, but a condition of the contract, so that acceptance of the cement tendered satisfies the obligation of the vendor. Hurley-Mason Co. v. Stebbins, Walker & Spinning, **L.R.A. 1915B, 1131,** 140 Pac. 381, 79 Wash. 366. (Annotated)

Warranty.
Damages for breach of warranty, see Damages, 2.
Implied warranty of quality of food furnished to customer at restaurant, see Food, 2.

4. An agreement to overhaul a second-hand machine which is the subject-matter of sale, and put it in first-class shape, is a warranty that the machinery is reasonably certain, when properly handled, to do the work intended which is known to the vendor, and is free from structural defects. Fairbanks Steam Shovel Co. v. Holt, **L.R.A. 1915B, 477,** 140 Pac. 394, 79 Wash. 361. (Annotated)

5. There is no implied warranty in a contract of sale by a manufacturer of wire for electrical transmission, to a company engaged in transmitting electrical power, of copper wire of a specified diameter, for use in the business of the purchaser, to the knowledge of the vendor, that the wire will

accomplish all that is expected of it or intended by the purchaser, where the contract contains an express warranty that the wire shall not vary in guage over a stated per cent, nor have a conductivity of less than a stated per cent of that of pure copper, but there is an implied warranty that the wire is properly constructed copper wire of the size and kind specified, and reasonably fitted for use as such. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

6. A warranty in a contract of sale by a manufacturer of wire for electrical transmission, to a company engaged in transmitting electrical power, of copper wire of a specified diameter for use in the business of the purchaser to the knowledge of the vendor, that "the wire [is] not to vary in guage over 1 per cent above or below diameters given, and to have a conductivity of not less than 97 per cent of that of pure copper," does not exclude an implied warranty on the part of the manufacturer that the wire is so constructed as to be properly adapted for use in transmitting electricity, and that it is free from latent defects rendering it unsuited to that purpose. John A. Roebling's Sons Co. v. Southern Power Co. **L.R.A.1915B, 900,** 83 S. E. 138, — Ga. —.

7. A contract by a dealer to sell, subject to specified tests, cement for the concrete work of a building, does not include an implied warranty that the material will be fit for the use intended, if there are no latent defects not discoverable by the application of the tests specified. Hurley-Mason Co. v. Stebbins, Walker & Spinning, **L.R.A. 1915B, 1131,** 140 Pac. 381, 79 Wash. 366.

Rights and remedies of parties.

Entirety of contract of sale, see Contracts, 5.

Right of seller to recover on incomplete performance of contract, see Contracts, 11.

Damages for breach of warranty, see Damages, 2.

Presumption and burden of proof as to breach of warranty, see Evidence, 13.

Relevancy of evidence, generally, as to breach of warranty, see Evidence, 32.

Pleading in action for breach of warranty, see Pleadings, 7–10.

Right of contractor of street pavement to remove it on refusal of city to pay therefor, see Public Improvements.

8. A contractor purchasing cement from a dealer subject to specified tests of architects appointed by the owner of buildings, which his contract with the owner stipulates shall be made by persons appointed by the architect, either at the mill or at the site of the building, is bound to make the tests, and cannot throw the burden on the dealer. Hurley-Mason Co. v. Stebbins, Walker, & Spinning, **L.R.A.1915B, 1131,** 140 Pac. 381, 79 Wash. 366.

9. One contracting for cement which is to conform to certain specified tests may select the place for making the tests, but if the place of delivery is selected, they must be made within a reasonable time after delivery. Hurley-Mason Co. v. Stebbins, Walker & Spinning, **L.R.A.1915B, 1131,** 140 Pac. 381, 79 Wash. 366.

10. The rotten condition of the inside of the boom stick of a dredge which causes a break after five and one-half months' use is a breach of warranty that the machine is in first-class condition, if the defect could have been discovered by reasonable tests. Fairbanks Steam Shovel Co. v. Holt, **L.R.A. 1915B, 477,** 140 Pac. 394, 79 Wash. 361.

11. A guaranty in the contract of sale of a horse, that "if the above-named stallion does not get 60 per cent of the producing mares with foal with proper care and handling, we agree to replace him with another stallion of the same price and quality, upon delivery to us of said stallion in as sound and good condition as he is at present," does not obligate the purchasers to accept another horse in case of breach of such warranty, but, upon a breach of the same, they have the option either to accept another, or retain the horse and sue for damages sustained by the breach, or return him and rescind the contract. Bracken v. Fidelity Trust Co. **L.R.A.1915B, 1216,** 141 Pac. 6, — Okla. —.

SEARCH AND SEIZURE.

1. The immunity from unreasonable searches and seizures afforded by U. S. Const., 4th Amend., has been denied the accused in a criminal prosecution in a Federal district court where that court has refused the accused's seasonable application for the return of his letters and private documents seized in his house in his absence, by a United States marshal holding no warrant for his arrest and none for the search of his premises, and has permitted their use in evidence at the trial. Weeks v. United States, **L.R.A.1915B, 834,** 58 L. ed. 652, 34 Sup. Ct. Rep. 341, 232 U. S. 383. (Annotated)

2. Protection against individual misconduct of municipal police officers not acting under any claim of Federal authority is not afforded by the guaranty of U. S. Const., 4th Amend., of immunity from unreasonable searches and seizures, but the limitations of such amendment reach only the Federal government and its agents. Weeks v. United States, **L.R.A.1915B, 834,** 58 L. ed. 652, 34 Sup. Ct. Rep. 341, 232 U. S. 383.

SCIENTER.

Master's knowledge of vicious propensities of horse furnished servant, see Master and Servant, 4.

SECRETARY OF STATE.

Publication by, of appointments of judges to hold additional trial terms of court, see Courts, 8.

SECRET PROFITS.

Impressing with trust for benefit of joint adventure, see Trusts.

SECURITIES.
Special deposit of, see Banks, 11.

SEIZURE.
See Search and Seizure.

SELF-DEFENSE.
Commission of homicide in, see Homicide.

SENTENCE.
For crime, see Criminal Law, 2.

SEPARATION.
Of powers, see Constitutional Law, 4.
Of husband and wife, see Divorce and Separation.

SETTLEMENT.
See Compromise and Settlement.

SEVERABILITY.
Of contracts, generally, see Contracts, 5.

SEXUAL INTERCOURSE.
Refusal of, as ground for divorce, see Divorce and Separation, 1.

SHIPPING.
As to towage, see Towage.

SHOES.
Stock of shoes stored in bank as a "special deposit," see Banks, 10.

SIGNATURE.
To deeds, see Deeds.
Of attesting witness, see Wills, 1.

SIGNS.
Right of tenant to use walls of building for, see Landlord and Tenant, 3.

SILENCE.
Estoppel by, see Estoppel, 2.

SLEEPING CAR COMPANY.
Liability for refusal to provide passenger with berth, see Carriers, 4.
Liability for theft from passenger, see Carriers, 11.
Presumption and burden of proof as to negligence of, see Evidence, 10.

SNUFFING DOUCHE.
Death resulting from violent snuffing of nasal douche as an accident, see Insurance, 8.

SPECIAL DEPOSIT.
See Banks, 10, 11.

STAIRWAY.
Liability of landlord for condition of, see Landlord and Tenant, 4, 10.

STALLION.
Breach of warranty on sale of, see Sale, 11.

STARE DECISIS.
See Courts, 10.

STATE.
Estoppel of, see Estoppel, 3.

STATE COURTS.
Jurisdiction of, see Courts, 4–8.

STATE MILITIA.
See Militia.

STATIONS.
Validity of speculative contract between company and individual for laying out of town sites at points where stations will be located, see Contracts, 10.

STATUTE OF LIMITATIONS.
See Limitation of Actions.

STATUTES.
Enactment.

1. A statute without an enacting clause is void where the Constitution provides a form of law which includes such clause. Com. v. Illinois C. R. Co. **L.R.A.1915B, 1060,** 170 S. W. 171, — Ky. —. (Annotated)

Partial invalidity.

2. An entire law is not rendered unconstitutional because of the unconstitutionality of a certain section thereof, if the objectionable part may be properly separated from the other without impairing the force and effect of that which remains, and if the legislative purpose as expressed in such section can be accomplished and given effect independently of the void section, and if, when the entire act is taken into consideration, it cannot be said that the legislature would not have passed the sections retained had it been known that the void section must fail. State v. Brooken, **L.R.A.1915B, 213,** 143 Pac. 479, — N. M. —.

3. The constitutionality of that portion of a tax law affecting nonresidents will not be considered by the court where the rights of nonresidents are not directly involved, if the invalidity of such provision will not nullify the entire statute, because it can be separated from the balance thereof. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

4. That, in conferring the privilege of suffrage upon women, the legislature exceeded its constitutional power in some particulars, does not destroy the act *in toto*, but such matters may be segregated, and the statute upheld so far as it applies to offices, the privilege of voting for which might legally be conferred upon women. Scown v. Czarnecki, **L.R.A.1915B, 247,** 106 N. E. 276, 264 Ill. 305.

Entitling: expression of subject.

5. A statute providing that sentences to imprisonment in criminal prosecutions shall mean imprisonment with labor, and regulating the employment of such prisoners, and repealing all laws in conflict therewith, is sufficiently covered by a title reciting that it is "An Act to Provide That in All Criminal Prosecutions, Sentences to Imprisonment . . . Shall Mean Imprisonment With Labor; Regulate the Employ-

ment of Such Prisoners; and to Repeal All Laws in Conflict Herewith." State v. Cunningham, **L.R.A. 1915B, 389,** 58 So. 558, 130 La. 749.

6. A title, "An Act Requiring the Owners or Operators of Coal Mines" to maintain washhouses, is broad enough to cover a requirement that such houses shall be maintained by mine superintendents, under penalty for neglect. Booth v. State, **L.R.A. 1915B, 420,** 100 N. E. 563, 179 Ind. 405.

Plurality of subjects.

7. A statute providing that sentences to imprisonment in all criminal prosecutions shall mean imprisonment with labor is not void on the ground that it contains two distinct objects, although it further regulates the employment of such prisoners, and repeals all laws in conflict therewith. State v. Cunningham, **L.R.A. 1915B, 389,** 58 So. 558, 130 La. 749.

Construction; operation; effect.

8. Where an act of the legislature is susceptible of two constructions, under one of which it would be unconstitutional and under the other constitutional, the latter is to be preferred. Cutsinger v. Atlanta, **L.R.A. 1915B, 1097,** 83 S. E. 263, — Ga. —.

9. A provision in an act empowering a municipality to license hotels, lodging houses, or rooming houses, that the action of the city officials in granting or refusing a license shall be final, will not be construed as conferring arbitrary power upon such officials and denying the right to resort to the courts for relief even in case of arbitrary or capricious action, but will be interpreted to mean that the municipal officers may exercise a reasonable administrative discretion, and that their action shall be final in the sense that no appeal shall lie to any other body or court to review it. Cutsinger v. Atlanta, **L.R.A.1915B, 197,** 83 S. E. 263, — Ga. —.

10. The conferring by the legislature in general terms upon a municipality, of the power to grant or refuse licenses for the business of keeping a hotel, lodging house, or rooming house, in the discretion of the municipal council, without prescribing the bounds of such discretion, will not *ipso facto* render the grant of power void as being an effort to confer arbitrary power, but will be treated as authorizing the municipal authorities to exercise a reasonable discretion in the grant or refusal of such a license. Cutsinger v. Atlanta, **L.R.A.1915B, 1097,** 83 S. E. 263, — Ga. —.

11. Chapter 87, par. 173, Okla. Sess. Laws 1910, and chap. 152, Sess. Laws 1910–11, dealing with the same subject-matter, must be construed together in so far as they are not inconsistent. Hopper v. Oklahoma County, **L.R.A.1915B, 875,** 143 Pac. 4, — Okla. —.

12. The assumption for two years by the insurance commissioner, that the business of issuing certificates guarantying burial is not within the insurance laws of the state, will not, if the statute is plain, prevent the stopping of the business for failure to comply with the insurance laws, on the theory of contemporaneous construction. State ex rel. Fishback v. Globe Casket & Undertaking Co. **L.R.A.1915B, 976,** 143 Pac. 878, — Wash. —.

13. The construction of a statute adopted from another state or country, put upon such statute by the courts of such state or country previously to its adoption, will usually be followed by the courts of the adopting state. Rose v. Public Service Commission, **L.R.A.1915B, 358,** 83 S. E. 85, — W. Va. —.

Repeal; amendment.

14. A statute providing that in all criminal prosecutions a sentence to imprisonment shall mean an imprisonment with labor, and further providing that every person so sentenced who is not put to work under the provisions of an act referred to shall be required to work in a certain manner, is not void as an attempt to amend the criminal statutes of the state and municipal ordinances of municipalities without re-enacting and publishing them at length, since the act does not purport to revive or amend any statute, but is a piece of independent legislation. State v. Cunningham, **L.R.A.1915B, 389,** 58 So. 558, 130 La. 749.

15. A statute extending to women the privilege of suffrage is not an amendment of the existing election law, which conferred the privilege upon men only, so as to come within the operation of a constitutional provision requiring the statute amended to be inserted in the amending one. Scown v. Czarnecki, **L.R.A.1915B, 247,** 106 N. E. 276, 264 Ill. 305.

16. A statute rejected by the people on referendum after passage by the legislature has no force even to repeal prior statutes. Ex parte McDonald, **L.R.A.1915B, 988,** 143 Pac. 947, 49 Mont. 454.

STIPULATED DAMAGES.
See Damages, 3.

STOCKHOLDERS.
Of bank, see Banks, 1, 2.
Liability of, see Corporations, 1.
Meetings of, see Corporations, 2.

STREET RAILWAYS.
As carriers, see Carriers.
Proximate cause of injury, see Proximate Cause, 2.

STREETS.
See Highways.

STRIKING OUT.
Of evidence, see Trial, 7.

SUBPŒNA DUCES TECUM.
Failing to produce papers in response to, as contempt, see Contempt, 2.

SUPPORT.
Novation of contract for, see Novation, 2.

Lien on property conveyed in consideration of, to enforce performance of consideration, see Vendor and Purchaser, 1, 2.

SURETIES.
Generally, see Principal and Surety.

SURPLUS.
Of bankrupt's estate, see Interest, 1.

TAXES.
Delegation of power to tax commissioners, see Constitutional Law, 1.
Conferring judicial power on board of equalization, see Constitutional Law, 4.
Appointment or election of tax officers, see Officers, 1, 2.
Appeal to courts from Board of Equalization, see Courts, 3.
Equal protection and privileges as to, see Constitutional Law, 5, 9, 10.
Liability of cotenant for, see Cotenancy.
Power of court as to, see Courts, 3.
Partial invalidity of tax law, see Statutes, 3.

For what purpose or use.
1. The manufacture of ice by a town and its distribution among the inhabitants is not within the permissive operation of a constitutional provision allowing the taxing power to be exercised only for purposes strictly public in their nature. Union Ice & Coal Co. v. Ruston, **L.R.A.1915B, 859,** 66 So. 262, — La. —.

Income tax.
Equal protection and privileges as to, see Constitutional Law, 9, 10.
Appointment or election of assessor of incomes, see Officers, 2.
Delegation of power to appoint assessors of incomes and to fix their salaries, see Constitutional Law, 1.
Appointment of collector of income tax, see Officers, 1.

2. The legislature may provide that the rental value of residence property occupied by the owner shall be considered in determining the amount of his income for the purposes of taxation. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

3. The legislature may require the incomes of husband and wife living together, and their children under eighteen years of age living with them, to be added together in determining the taxable income of the husband. People ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

4. An income tax is not void because it includes all incomes from the beginning of the year in which it is passed, and from the sale of real estate purchased within three years previously. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

5. An income tax law is not unconstitutional because not specifically exempting national banks, or naming the officers whose salaries shall be exempt. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

6. There is no unconstitutional discrimination in allowing exemptions in the taxation of the income of individuals, while denying them in case of incomes of partnerships. State ex rel. Bolens v. Frear, **L.R.A. 1915B, 569,** 134 N. W. 673, 148 Wis. 456.

7. An exemption from income tax of life insurance to the amount of $10,000, in favor of persons legally dependent on insured, is not unreasonable. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456.

8. Allowing a deduction from an income tax of taxes paid within the year upon personal property is not an unjust discrimination. State ex rel. Bolens v. Frear, **L.R.A. 1915B, 569,** 134 N. W. 673, 148 Wis. 456.

9. The legislature may provide for the taxing of the incomes of individuals and of corporations at different rates. State ex rel. Bolens v. Frear, **L.R.A.1915B, 569,** 134 N. W. 673, 148 Wis. 456. (Annotated)

TELEGRAPHS.
Recover for mental anguish for delay in delivery of telegram, see Damages, 7.

Where by statute telegraph messages may be classified and a different rate charged for each class, a condition made part of the contract for transmission, that the company will be liable for mistakes or delays in nonrepeated messages only to the amount paid for their transmission, is valid and enforceable against the sendee. Western U. Teleg. Co. v. Dant, **L.R.A.1915B, 685,** 42 App. D. C. 398. (Annotated)

TELEPHONES.
As to uses and dangers of electricity, see Electricity, 2.

TEMPORARY INJUNCTION.
See Injunction, 7.

TENANCY IN COMMON.
See Cotenancy.

TENANTS.
In general, see Landlord and Tenant.

TERMINATION.
Of malicious prosecution, see Malicious Prosecution, 4.
Of mining lease, see Mines, 4.

TERMS.
Of courts, see Courts, 8.

THEATERS.
Damages for mental anguish to one requested to be quiet or leave theater, see Damages, 6.

1. The superintendent of a theater is justified in summoning a police officer to quiet a patron who, when he was politely requested to be quiet by the superintendent,

followed the latter back to his place in the foyer, provoked a disturbance with him, and persisted in loud talking. Russo v. Orpheum Theater & Realty Co. **L.R.A.1915B, 1119,** 66 So. 385, — La. —.

2. The superintendent of a theater is justified in requesting a patron who he has good reason to believe is guilty of an improper disturbance, to be quiet, provided it is done quietly and politely, and without causing unnecessary humiliation. Russo v. Orpheum Theater & Realty Co. **L.R.A.1915B, 1119,** 66 So. 385, — La. —.

THEFT.

See Larceny.

THREATS.

Threat of prosecution as extortion, see Extortion.

Question for jury whether threats by corporate officers or agents were within scope of authority, see Trial, 1.

TIMBER.

Right of tenant for life to sell timber from property, see Life Tenants.

TIME.

As essence of contract, see Contracts, 4.

Presumption as to time of death of person presumed to be dead because of unexplained absence, see Evidence, 3.

Of issuing execution, see Execution.

To present claim against decedent's estate, see Executors and Administrators, 2.

TITLE.

Presumption as to title to unindorsed note payable to order, see Evidence, 19.

To material placed by abutting owner in sidewalk which is not accepted by municipality, see Highways, 2.

Of personal property, passing of, see Sale, 1, 2.

Of statutes, see Statutes, 5, 6.

TORTS.

Action for, see Case.

Judgment for damages for, as contract within provision against inpairing obligation of, see Constitutional Law, 20.

Joint liability for, see Joint Creditors and Debtors.

Bar of statute of limitations, see Limitation of Actions, 6.

Matters as to negligence generally, see Negligence.

TOWAGE.

A contract to pay for towage service necessary to take a vessel from her anchorage to the wharf where her cargo is to be discharged does not include the cost of breaking ice necessary to make the towage possible. M. P. Smith & Sons Co. v. Trexler Lumber Co. **L.R.A.1915B, 1086,** 216 Fed. 134, — C. C. A. —. (Annotated)

TOWNS.

Legal effect of check payable to order of treasurer of, see Checks, 2.

For what purposes taxes may be levied by town, see Taxes, 1.

TOWN SITES.

Validity of speculative contract between company and individual for laying out of town sites at points where stations will be located, see Contracts, 10.

TRADE INDUCEMENTS.

See Trading Stamps.

TRADEMARKS.

The placing upon a sign intended to designate the proprietor of the business conducted at the place where the sign is placed, of a symbol which another had adopted as a trademark to designate the product of his manufacture, is not an infringement of such trademark. Diederich v. W. Schneider Wholesale Wine & Liquor Co. **L.R.A.1915B, 889,** 195 Fed. 35, 115 C. C. A. 37. (Annotated)

TRADING STAMPS.

License tax on use of, see Constitutional Law, 13.

TRANSFER COMPANIES.

Discrimination by carrier as to, see Carrier, 14, 15.

TRESPASS.

Judgment for damages for, as contract within provision against impairing obligation of, see Constitutional Law, 20.

Threatening trespasser with prosecution unless he makes compensation for injury done as extortion, see Extortion.

TRIAL.

New trial, see New Trial.

Questions of law and fact.

1. Evidence that the officers and agents of a corporation made statements and threats of prosecution against a competitor in selling the goods of their principal is sufficient to raise a jury question as to whether or not the statements and threats were made in the scope of their agency. Virtue v. Creamery Package Mfg. Co. **L.R.A. 1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

2. It is for the jury to say whether a suit for the infringement of a patent which was adjudged void was malicious where the evidence shows that the officers of the defendant corporation at various times stated that the defendant did not have the money to defend the suit and they did, and could keep the matter in court so long that the defendant would not have money enough left to build the patented article. Virtue

v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

3. It is for the jury to say whether the advice of counsel in beginning a suit is a defense to an action for malicious prosecution based thereon where it does not conclusively appear that the plaintiffs, in beginning the suit, were acting in good faith, in reliance on the advice of counsel, furnished after a full and fair statement of all the facts within his knowledge, or which, by reasonable diligence, he might have learned. Virtue v. Creamery Package Mfg. Co. **L.R.A.1915B, 1179,** 142 N. W. 930, 123 Minn. 17.

4. The question whether there is negligence on the part of a railway company which has erected and maintained good and lawful fences and sufficient cattle guards to prevent stock from getting on its right of way, in failing to keep such cattle guards from becoming so filled with snow and ice as to make it possible for animals to cross the same, depends upon the facts and circumstances of each case, and is a question for the jury to determine under proper instructions. Martin v. Atchison, T. & S. F. R. Co. **L.R.A.1915B, 134,** 141 Pac. 599, 92 Kan. 595.

5. In an action by a tenant against the landlord for injuries suffered through the breaking of the railing on a porch, which the landlord was bound to repair, although the plaintiff's petition alleges that the defective condition of the railing was unknown to himself or his wife, who was injured, and that it was not apparent from an examination of the railing, and in addition the plaintiff testifies that the defective condition could be discovered only by such an examination as required the railing to be lifted up, the question as to whether the landlord was guilty of negligence in failing to discover the defective condition of the railing is a question of fact which the plaintiff is entitled to have submitted to the jury. Hinthorn v. Benfer, **L.R.A.1915B, 98,** 136 Pac. 247, 90 Kan. 731.

6. No question for the jury as to whether or not an officer had a warrant when making arrests exists where there is positive testimony that he had one, with no positive or direct testimony to the contrary. Brown v. Hadwin, **L.R.A.1915B, 505,** 148 N. W. 693, — Mich. —.

Taking case from jury.

7. A statute requiring the court to deny a motion for a directed verdict where the adverse party objects thereto, and to submit the issue or issues to the jury, does not deprive the court of the power to strike out immaterial evidence, nor require it to submit to the jury questions having no bearing on the outcome of the suit. Matz v. Martinson, **L.R.A.1915B, 1121,** 149 N. W. 370, 127 Minn. 262.

Instructions.

Prejudicial error as to instructions, see Appeal and Error, 18.

8. Failure to give to the jury an instruction that one charged with negligently injuring another was bound to exercise only reasonable or ordinary care, with nothing to show the relation of such terms to the facts of the case, is not error. Furkovich v. Bingham Coal & Lumber Co. **L.R.A.1915B, 426,** 143 Pac. 121, — Utah, —.

9. Instructions to the jury in an action upon an instrument in writing, in which the defense of nondelivery is raised, to the effect that the verdict should be for the plaintiff unless defendant was induced by fraud or trickery to sign the writing sued on, or unless he signed the same thinking he was signing a blank paper, when he could not by reasonable diligence have ascertained that he was signing more, are erroneous since they take from the jury the right to determine whether such writing was completely executed and finally delivered. Rutherford v. Holbert, **L.R.A.1915B, 221,** 142 Pac. 1099, — Okla. —.

10. Upon the trial of one of two persons jointly indicted for homicide, in which the accused testified that he fired the fatal shot to prevent the deceased from shooting and killing him, an instruction that "justifiable homicide, as applicable to the defense set up in this case, means killing in self-defense, or in defense of person against one who manifestly intends by violence or surprise to commit a felony on the person killing," does not erroneously limit the meaning of "justifiable homicide," where the issue with reference to which this charge was given was as to whether the accused or the deceased was the aggressor. Byrd v. State, **L.R.A.1915B, 1143,** 83 S. E. 513, — Ga. —.

TRIAL TERMS.

Designations of additional trial terms, see Courts, 8.

TROVER.

Measure of damages for conversion, see Damages, 5.

TRUSTS.

General equitable jurisdiction over, see Equity, 1, 2.

Existence of trust in property stolen or embezzled, see Equity, 1, 2.

If one of two persons who have undertaken to produce a play on joint account, sharing profits and losses and paying author's royalties, has secured a secret interest in the royalties, equity may impress upon that interest a trust for the benefit of the joint adventure, even in the absence of estoppel, against a stranger to whom an interest in the coadventurer's share had been assigned. Selwyn & Co. v. Waller, **L.R.A.1915B, 160,** 106 N. E. 321, 212 N. Y. 507.

TWO-THIRDS VOTE.

At stockholders' meeting, see Corporations, 2.

UNCONSCIOUS PERSON.

Signature made by hand of, see Deeds.

UNFAIR COMPETITION.
Jurisdiction of Federal court of suit to restrain, see Courts, 9.

UNIFORMITY.
In taxation, see Taxes, 5–9.

UNREASONABLE SEARCHES.
Use of evidence obtained by illegal search, see Search and Seizure, 1.

UNREPEATED MESSAGE.
Stipulation as to liability for, see Telegraphs.

VACANCY.
Of insured property, see Insurance, 4.

VENDOR AND PURCHASER.
Deeds, see Deeds.
Subjecting to judgment lien interest of vendee in possession under executory contract of purchase, see Judgment, 7.

1. No implied equitable lien exists upon real estate conveyed in consideration of support to be furnished the grantor to enforce performance of the consideration. Lee v. McMorries, **L.R.A.1915B, 1069,** 66 So. 278, — Miss. —.

2. A recital that grantees "agree to care for and support" grantors "with money and other necessaries for their support their natural life," though such agreement was the sole consideration for the grant, will not alone create a lien or charge on the land conveyed, but, to operate as such, an intent to impose such burden must definitely appear, or be directly inferable from the grant when properly construed. Grant v. Swank, **L.R.A.1915B, 881,** 81 S. E. 967, — W. Va. —.

VENUE.
Sufficiency of proof as to, see Evidence, 36.

VERDICT.
Review of, on appeal, see Appeal and Error, 9–11.
Direction of, see Trial, 7.

VERIFICATION.
Of information or complaint, see Indictment, etc., 1, 2.

VESTED INTEREST.
What is a vested interest subject to lien of judgment, see Judgment, 7.

VIEW.
New trial because of surreptitious view by juror, see New Trial, 3.

VOTERS AND ELECTIONS.
See Elections.

WAIVER.
Of breach of promise to marry, see Breach of Promise, 2.
Of forfeiture of lease, see Landlord and Tenant, 1.

WARRANTY.
In insurance contract, see Insurance, 4, 5.
On sale of personalty, see Sale, 4–7, 10, 11.

WASH HOUSES.
Requiring wash houses for use of mine employees, see Action or Suit; Constitutional Law, 2, 11; Master and Servant, 1.
Sufficiency of indictment for violation of statute requiring maintenance of wash houses for employees, see Indictment, etc., 4.
Title of statute requiring maintenance of wash houses for employees, see Statute, 6.

WASTE.
By life tenants, see Life Tenants.

WIDOW.
Rights of, in life insurance, see Insurance, 9.

WILLS.
Attestation.
1. Requesting witnesses to sign a paper designated as testator's will, the signature on which is concealed, is not sufficient to render their signatures a proper attestation and validate the will. Nunn v. Ehlert, **L.R.A.1915B, 87,** 106 N. E. 163, 218 Mass. 471. (Annotated)

Deduction.
2. A debt by a mother to two of her children as guardian for a fund which she collected for them is not canceled by a bequest in their favor in her will of an amount greatly in excess of the amount due, so that, unless the debt is canceled, they will receive a much larger portion of the estate than the other children of testatrix, where the bequest is placed in trust for future payment, and may be defeated by their dying without issue. Fidelity Trust Co. v. Martin, **L.R.A.1915B, 1156,** 165 S. W. 665, 158 Ky. 522. (Annotated)

Renunciation.
3. The marriage of a young woman, and her delay for a period of five years to apply for the benefit of a bequest of a sum by her mother for the completion of her education, do not forfeit her right to the fund. Fidelity Trust Co. v. Martin, **L.R.A.1915B, 1156,** 165 S. W. 665, 158 Ky. 522.

WINDSTORM.
Insurance against loss by, see Insurance, 7.

WITNESSES.
New trial because of incredibility of testimony, see New Trial, 2.

1. One accused of assault with intent to rape may, in case he takes the stand as a witness, be asked on cross-examination

whether or not he had been convicted of a similar offense, and whether or not he was guilty of it, for the purpose of affecting his credibility, and the provisions of the statute with respect to impeachment of a witness are not applicable. Hunt v. State, **L.R.A.1915B, 131,** 169 S. W. 773, — Ark. —.

2. A witness may testify to the general reputation for veracity of another, although he does not live in the community with such other, but has knowledge of the general reputation for truth and veracity of the other in his home community. State v. Cunningham, **L.R.A.1915B, 389,** 58 So. 558, 130 La. 749.

WOMAN SUFFRAGE.

See Elections, 3-5; Statutes, 15.

WOMEN.

Right to vote, see Elections, 3-5.

Partial invalidity of statute conferring suffrage upon women, see Statutes, 4.

Statute extending suffrage to women as amendment of existing law, see Statutes, 16.

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WRIT AND PROCESS.

Effect of mistake in name in constructive service as denial of due process of law, see Constitutional Law, 15.

Effect of failure to appoint agent on whom process may be served on right of corporation to enforce contracts, see Corporations, 3.

Necessity of service to support judgment, see Judgment, 1, 2.

Necessity of personal service upon nonresident, or appearance by, see Judgment, 2.

Where service is had by publication in an action in partition, and a defendant whose true name is "Albert B. Geilfuss, assignee," is named in the published notice as "Albert Guilfuss, assignee," the court, on such service, acquired jurisdiction to render judgment by default against such defendant, valid as against a collateral attack, since the names, though not strictly *idem sonans,* when printed look substantially alike, and it appears that neither defendant nor those who knew him could be misled by the difference. Ordean v. Grannis, **L.R.A.1915B, 1149,** 136 N. W. 575, 1026, 118 Minn. 117. (Annotated)